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STATE OF MONTANA,

Plaintiff and Appellee,

v.

EDMUND ALVIN ADAMS,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Twenty-First Judicial District Court,  
Ravalli County,  
The Honorable Jennifer B. Lint, Presiding

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### **Statement of the issues**

1. Whether the court erroneously allowed the State to reference and elicit testimony regarding uncharged and unsubstantiated, 28 to 33-year-old allegations that Walks sexually abused another minor child in his care.

2. Whether trial counsel's failure to ensure the jury was properly and timely cautioned before being exposed to inherently prejudicial "other acts" evidence constituted ineffective assistance.

### **Statement of the case**

Edmund Alvin Adams (Adams) was charged by Amended Information with Counts I-III, incest, felonies, in violation of Mont. Code Ann. § 45-5-507(1) & (5) and Counts IV-V, sexual intercourse without consent, felonies, in violation of Mont. Code Ann. § 45-5-503(4)(a). (D.C. Doc. 49.)

Regarding Counts I-III, the State alleged Adams, on or about or between September 23, 2020, and April 11, 20, 2022, knowingly had sexual intercourse by penile penetration of the vulva, digital penetration of the vulva, and penile penetration of the mouth, with his adopted daughter, R.A. R.A. was eight and nine years old and Adams

was 70 and 71 years old at the time of the alleged offenses. (D.C. Doc. 49 at 2.)

Regarding Counts IV-V, the State alleged Adams, on or about or between September 23, 2016, and April 11, 2022, knowingly had sexual intercourse by penile penetration of the anus and penile penetration of the mouth, with R.A. R.A. was four and nine years old and Adams was 66 and 71 years old at the time of the alleged offenses. (D.C. Doc. 49 at 2-3.)

Adams moved *in limine* to exclude, *inter alia*, “prior bad acts” evidence regarding Adams’ alleged internet search history and allegations of previous sexual abuse regarding a prior foster daughter, A.P. (D.C. Doc. 37.) The court denied Adams’ motion to exclude the foregoing evidence. (D.C. Doc. 68 at 3-10.)

Adams’ counsel submitted proposed jury instructions with citations, including a cautionary instruction derived from MCJI 1-120 (2022), “Evidence of Other Acts.” (D.C. Doc. 41 at Instruction No. 19, attached hereto as Exhibit B.) The court ultimately gave Adams’ proposed Instruction No. 19 as Instruction No. 21. (D.C. Doc. 78 at Instruction No. 21.) Although the court properly cautioned the jury

pursuant to Instruction No. 21 as part of its general charge to the jury, it did *not* so caution the jury before the State presented evidence of Adams' alleged internet search history or evidence of A.P.'s allegations of previous sexual abuse. (Trial at 387, 405, 598.)

Following a four-day trial, a jury found Adams guilty of all five Counts of the Amended Information. (Trial at 646-51; D.C. Doc. 80.) The court imposed consecutive 100-year sentences pursuant to Counts I-V, with a parole restriction of 25 years regarding each Count. (Sent. at 12-14; D.C. Doc. 92, attached hereto as Exhibit A.) It is from this Judgment Adams now appeals.

### **Statement of facts**

#### **State's opening:**

Pursuant to its opening, the State previewed the evidence regarding Adams' alleged internet search history, *i.e.*, "voluminous searches . . . that are consistent with what [R.A.] has reported the defendant doing to her and that articulate what the defendant's sexual desires are and show how the defendant thought about [R.A.] and then acted out on [R.A.]" (Trial at 190-91.)

The State concluded its opening by previewing the evidence regarding A.P.'s allegations. (Trial at 191-92.) "[S]tarting at the age of nine until she was about thirteen the defendant sexually abused her." (Trial at 191.) Although law enforcement was contacted, A.P. "knew nothing was going to happen in that regard but was confident that the defendant wouldn't do it to anybody else." (Trial at 192.) A.P. was "shocked" upon learning of R.A.'s allegations. (Trial at 192.)

**Adams' opening:**

Adams' counsel also addressed the evidence of his alleged internet search history: "The [S]tate wants you to look at [Adams'] pornography history and pornography preferences, and they're going to ask you to convict him on that." (Trial at 195.) She maintained, however, "[t]here's no allegation in the case that what was looked at was illegal child pornography." (Trial at 195.) Although the alleged internet search themes were "really ugly," and would make a "sailor blush," counsel reiterated, "that doesn't mean that we're talking about child porn here." (Trial at 196.)

Adams' counsel also addressed A.P.'s allegations. (Trial at 199.) She explained: "[Adams] will tell you that he was shocked to hear that

[A.P.] is a witness in this case because [A.P.] came to live with [Adams and his wife] as an adult,” and “when she needed something, she came and asked for something, and she took from him and his family.” (Trial at 199.)

**Leigh McCombs:**

Child protection specialist Leigh McCombs (McCombs) confirmed R.A. was born on September 23, 2012. (Trial at 221-22.) Adams and his wife, Michele, adopted R.A. on September 13, 2017, but McCombs noted R.A. had been living with Adams and Michele since July 23, 2015. (Trial at 220-21, 231, 245.) A CFS caseworker would have visited Adams’ and Michele’s home on a monthly basis prior to R.A.’s formal adoption. (Trial at 230-31.)

R.A. was seeing a counselor prior to her removal, as well as a counselor at her school. (Trial at 241.) R.A. was also under the care of various specialty doctors. (Trial at 241-42.)

**R.A.:**

R.A. lived with Adams and Michele in Stevensville, and referred to them as “Mom and Dad.” (Trial at 253.) Michele worked weekdays at the hospital in Hamilton, and Adams was primarily responsible for

picking R.A. up from school. (Trial at 254.) Michele would usually get home from work after R.A. and Adams got home from school. (Trial at 254.) R.A. no longer lived with Adams and Michele, “[b]ecause I wasn’t safe there . . . I’ve been sexed.” (Trial at 255.) By “sexed,” R.A. alleged, “I’ve been hurt a lot . . . My front part.” (Trial at 255.)

R.A. alleged the abuse started when she was four years old. (Trial at 255.) Regarding the first incident, R.A. asked Michele for permission to accompany Adams to get ice cream from a freezer in his detached shop. (Trial at 255-56.) Adams allegedly asked R.A. to “[s]uck on his private part” in exchange for getting ice cream, and told her not to tell Michele. (Trial at 256-57.) R.A. complied, got the ice cream, and they walked back to the house. (Trial at 258.)

R.A. alleged the foregoing happened on more than one occasion: “I remember that I always get doing ice creams. But then he always, like, made me do this first to get the—like suck his private part to get the ice cream.” (Trial at 258-59.) R.A. was “nervous and scared,” explaining, “I felt like that I was the only one—I feel like I never done this before and I don’t know if I was the only child who did it.” (Trial at 259.) Adams asked her to “suck on his private part” every time they went to his

shop—"It's been a lot of times." (Trial at 265, 269.) R.A. alleged the "mouth part" also happened a couple times on the couch and in the hot tub room. (Trial at 270-71.)

Adams expressed dissatisfaction at times and R.A. alleged he showed her videos on his phone of adults performing oral sex. (Trial at 277-78.) Adams asked her to suck his "private part" to make if "feel good." (Trial at 278.) R.A. alleged one time Adams' "private part" went down her throat, causing her to gag and throw up. (Trial at 278-79.) R.A. claimed a "clear liquid" would come out of Adams' "private part" every time she sucked it and it tasted "really weird." (Trial at 279-80.) She also rubbed Adams' "private part" instead of sucking it—"I don't like sucking on it because there's this thing that comes out and it tastes really weird." (Trial at 281.)

R.A. claimed Adams also, "[o]nce it fitted on the back, like my back private part. It, like, fitted once and it was really bad." (Trial at 262.) She elaborated, "[h]is private part into my—like my poop part." (Trial at 263.) She told Adams to stop and Adams complied, and R.A. went to her room, "checked if I was okay, if I was bleeding or not." (Trial at 263-64.) She alleged the foregoing occurred in Adams'

bedroom. (Trial at 270-71.) R.A. was seven years old when this occurred, and it was an isolated incident. (Trial at 264-65, 271.)

R.A. alleged Adams also, “tried to put it in front, but it didn’t fit, though.” (Trial at 262.) This “happened a lot when we got out of the hot tub room.” (Trial at 264, 271.) R.A. elaborated, “his private spot, was too big. And when he tried to put it in, like the spot on me, like, hurt a lot.” (Trial at 264.) This occurred when R.A. was eight or nine years old. (Trial at 264.) R.A. alleged the foregoing happened on more than one occasion, but later claimed it happened only one time. (Trial at 265, 271.)

Adams also rubbed R.A.’s “private part” with his hand while they were in the hot tub. (Trial at 271-72.) Adams hand went inside her “private part.” (Trial at 272.)

In addition to ice cream, Adams also gifted R.A. toys and stuffed animals in exchange for performing oral sex. (Trial at 260.) Adams would take R.A. to Walmart in Missoula and let her choose a toy. (Trial at 266.) R.A. could not recall a time where she performed oral sex and did not receive a toy or ice cream, and alleged Adams referred to the foregoing as a “reward or prize.” (Trial at 266.) Pursuant to State’s

Exhibits 25-27, R.A. identified various stuffed animals and toys she allegedly received as “rewards.” (Trial at 273-77.)

Adams also provided alcohol to R.A. when Michele was out of town overnight for work or visiting family. (Trial at 266-68.) Adams gave R.A. her own glass of “R&R drink with Pepsi,” and R.A. would have more than one glass. (Trial at 267.) This happened on more than one occasion. (Trial at 267.)

The last instance of alleged abuse occurred when R.A. was nine years old, “[b]ecause I remember that the last time we did it I went to school and I told someone about it and I remembered the last time.” (Trial at 260.) R.A. first disclosed to a friend and said friend acted out some “movements” before asking whether they were similar to what Adams was doing to R.A. (Trial at 260.) R.A. said “yes” and her friend said Adams was “abusing” her. (Trial at 260.) R.A. was “really confused . . . I didn’t know what abusing means.” (Trial at 260.) “Like, in my mind, I didn’t know what abusing means . . . I thought it was, like, hurting someone . . . Like getting beat up.” (Trial at 261.)

R.A. also asked her friend what “sex” means, and said friend explained, “like, parents do in bed.” (Trial at 262.) R.A. alleged, “that’s

what [Adams] did to me.” (Trial at 262.) R.A. and her friend then told a teacher and counselor about R.A.’s allegations. (Trial at 260-61.)

On cross-examination, R.A. alleged all of the sexual abuse occurred while Michele was either in a different building on the property or not home. (Trial at 283-84.) R.A. never made any disclosures to Michele, claiming she did not want to upset Michele. (Trial at 284, 289.)

Regarding the disclosure she ultimately made to her friend, R.A. reiterated her friend acted out “movements of what they do in bed.” (Trial at 286.) Her friend did not show her any videos in that regard. (Trial at 286.) R.A. did use human toys to act out Adams’ alleged sexual abuse for her school counselor, and insisted she demonstrated what she personally saw and experienced. (Trial at 286.)

R.A. had several adults in her life whom she trusted, including Rick and Diane Upton, and her school counselor. (Trial at 287-89.) R.A. shared issues regarding bullying with her school counselor. (Trial at 289.) R.A. did not, however, make any disclosures regarding Adams’ alleged abuse to said counselor. (Trial at 289.)

**Mary Hansen:**

First Step Resource Center clinical supervisor, Mary Hansen (Hansen), confirmed R.A.'s physical examination did not reveal any, "concerning findings that indicated any history of sexual abuse." (Trial at 311, 330.)

**Deputy Emily Hachenberger:**

Deputy Emily Hachenberger (Deputy Hachenberger) created State's Exhibit 31, documenting four categories regarding Adams' alleged internet search history. (Trial at 387.) Over Adams' "403" objection, Exhibit 31 was admitted into evidence. (Trial at 388.) Although Exhibit 31 and Deputy Hachenberger's accompanying testimony would clearly constitute "Evidence of Other Acts," the appropriate cautionary instruction, pursuant to MCJI 1-120 (2022), was neither requested nor given. (Trial at 388.)

The first category of searches were benign, general searches related to Adams' business and church activities. (Trial at 389-90.)

The second category of searches were "incestuous searches" and consistent with R.A.'s disclosures of sexual abuse. (Trial at 390-91, 394.) Said searches included, *inter alia*:

- “dad gives daughter a bath then screws her story;”
- “Old father young daughter sex;”
- “dad makes daughter suck his cock story;”
- “daughter pukes on dad cock story;”
- “quickie with daughter (before wife comes home story);”
- “retired and screwing underage granddaughter story;”
- “cock sucking daughter story;”
- “deep throat daughter;”
- “daughters first blowjob story;”
- “sex with daughter in tub story;”
- “heating up in the hot tub;”
- “teaching daughter to suck cock story;”
- “teaching daughter to suck cock;”
- “deepthroating little daughter video;”
- “deepthroating little daughter;” and

- “making daughter suck my cock.”

(Trial at 390-94.)<sup>1</sup>

The third category of searches contemplated “young girl searches or underage girls,” but were not incestuous. (Trial at 395.) Said searches were consistent with R.A.’s disclosures and included, *inter alia*:

- “Little girls tight pussy [story];”
- “youngest girl you ever had sex with story;”
- “little girls sucking cock;”
- “puking on big dick.”

(Trial at 395.)

The fourth category of searches were “informational” searches consistent with R.A.’s disclosures. (Trial at 395.) Said searches included, *inter alia*:

- “Three year old orgasm;”
- “Kept daughter home from school and screwed her story;”
- “When is pussy to tight;”

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<sup>1</sup> The search terms were taken verbatim from Adams’ search history and included typographical errors. (Trial at 392.)

- “Teaching daughter to suck cock dads cock;”
- “Lessons on how to suck cock;”
- “Daughters sex reward story;”
- “Teaching daughter to give head story;”
- “How much to charge dad for a blow job story;” and
- “Defined daughter.”

(Trial at 395-97.) Regarding the “[t]hree year old orgasm” search, Deputy Hachenberger confirmed R.A. was three years old at the time Adams allegedly performed said search. (Trial at 396.)

On cross-examination, Deputy Hachenberger confirmed Adams was not charged with possessing child pornography. (Trial at 399.) She opined, however, “the searches most definitely would lead me to believe [Adams] was searching for child porn, yes.” (Trial at 399.)

Nevertheless, she could not prove Adams, “was actively viewing child pornography.” (Trial at 400.)

**A.P.:**

A.P. previously went by S.A. (Trial at 405.) Adams was her uncle and adoptive father, and his ex-wife, Margaret, was her adoptive mother. (Trial at 406.) A.P. started living with Adams and Margaret

when she was two or three years old. (Trial at 408.) Although A.P.’s subsequent allegations of sexual abuse would clearly constitute “Evidence of Other Acts,” the appropriate cautionary instruction, pursuant to MCJI 1-120 (2022), was neither requested nor given. (Trial at 409.)

A.P. alleged Adams started sexually abusing her when she was nine years old, and the abuse continued until she was almost fourteen years old. (Trial at 409.) Adams would wake A.P. up in the middle of the night and have her take a bath in the master bathroom. (Trial at 410.) Adams gave A.P. little bottles of whiskey—“He said, Just shoot them down like a shot so you don’t even taste them”—and she would get very intoxicated. (Trial at 410.) The first sexual assaults occurred in the context of bathing. (Trial at 410.)

A.P. recalled a time where she slept outside in a sleeping bag to avoid Adams; however, she awoke to Adams lying beside her. (Trial at 411.) Adams started to assault A.P., and A.P. protested, “I thought you said you wouldn’t.” (Trial at 411.) Adams allegedly stated: “He used the F word. He said, I haven’t done it to you for a month.” (Trial at 411.)

The sexual assaults included instances of oral sex. (Trial at 411.) Adams also attempted vaginal intercourse when A.P. was younger, “but I cried too much because it was too painful.” (Trial at 412.) The vaginal intercourse became less painful as A.P. got older, around age 13. (Trial at 412.) The sexual assaults also included instances of anal sex, beginning when A.P. was nine years old. (Trial at 412.) Margeret worked out of town and was not home during the assaults. (Trial at 412-13.) A.P. alleged there were times when Adams gave her gifts after the assaults, *e.g.*, money a few times and earrings. (Trial at 415.)

A.P. first told her brother about the sexual assaults, and noted the abuse had already stopped. (Trial at 413.) Adams allegedly apologized for the abuse in 1996, when A.P. was 15 years old. (Trial at 414, 416.) “And he made it sound like he was disgusted by his actions, and I forgave him. I still foregive him, but it’s non-excusable.” (Trial at 414.)

A.P. also disclosed the abuse to her youth group leader. (Trial at 414.) She finally disclosed the abuse to Margeret when she was 16 years old. (Trial at 414.) Margeret reported the abuse to law enforcement, and informed A.P. she had until age 21 to pursue charges,

“and I was seriously considering it.” (Trial at 414-15.) Ultimately, A.P. did not pursue legal action against Adams. (Trial at 415.)

A.P. expressed her feelings upon being contacted by law enforcement regarding the instant matter:

That I wanted to protect someone else, that I had learned that someone else had been affected in the same way I had. And I know that we don't feel like we have a voice when we're assaulted, so I wanted to be a voice for someone.

(Trial at 416.)

**Diane Upton:**

Diane Upton (Diane) routinely babysat R.A., from age three or four until R.A.'s removal from Adams' home. (Trial at 426-27.) R.A. thought of Diane as a grandmother. (Trial at 427.) R.A. frequently disclosed being bullied at school. (Trial at 429.) R.A. did not, however, voice any other complaints or issues. (Trial at 430.) Diane never observed any physical signs of abuse. (Trial at 435.)

**Evie Adams:**

Adams' biological daughter, Evie Adams (Evie), confirmed she is four years older than A.P. (Trial at 449.) She lived with Adams and Margeret during the summer months, and spent a great deal of time with A.P. (Trial at 449-50.) Whether she ever observed any signs

Adams was abusing A.P., Evie averred: “I did not see anything, and I was around her and my two brothers quite a bit. And if she was, she never mentioned anything to me about that.” (Trial at 450.) In fact, Evie was “surprised” and “shock[ed]” by A.P.’s allegations—“nothing was brought up when we were younger.” (Trial at 450.)

**Richard Upton:**

Richard Upton (Richard) confirmed his wife frequently babysat R.A. (Trial at 457.) R.A. referred to Richard as grandpa. (Trial at 457.) Richard picked R.A. up from school on two occasions when his wife was unavailable. (Trial at 458.) On both occasions, R.A. complained about being bullied at school. (Trial at 458.) Richard encouraged R.A. to report the bullying to the principal, which she did. (Trial at 458.) Richard never observed any physical signs R.A. was being abused. (Trial at 459.)

**Courtney Shanahan:**

Family nurse practitioner Courtney Shanahan (Nurse Shanahan) was R.A.’s primary care provider and conducted well-child exams starting at age five. (Trial at 461-62.) She routinely discussed the topic

of inappropriate touching with her patients beginning at age five to six. (Trial at 464-465.)

Nurse Shanahan saw R.A. when she was eight years old for “precocious puberty.” (Trial at 462.) At this visit, Nurse Shanahan specifically asked R.A. whether she had been subjected to any recent inappropriate touching. (Trial at 464.) R.A. said “no.” (Trial at 465.) She inquired whether R.A. had ever been subjected to any inappropriate touching, and R.A. again answered “no.” (Trial at 465-66.) Nurse Shanahan did not ask whether anyone had ever forced R.A. to perform oral sex. (Trial at 474.)

Michele was present during the questioning. (Trial at 473.) Nurse Shanahan explained her usual practice was to stand between the patient and guardian, “so I can just make sure it doesn’t seem awkward or they’re looking for eye contact elsewhere . . . make sure there’s nothing that raises our hackles. In this case, nothing did.” (Trial at 473-74.)

Nurse Shanahan did not have any concerns regarding abuse and did not observe any physical signs of abuse. (Trial at 466-67.)

**Michele Adams:**

Michele and Adams took informal custody of R.A. when R.A. was almost three years old. (Trial at 478.) R.A. loved stuffed animals and they were frequent gifts from friends and family—“Everybody knew how much she liked them.” (Trial at 494.) To Michele’s knowledge, the only time Adams ever took R.A. to buy a stuffed animal occurred when they were shopping for a birthday present for another child. (Trial at 495.)

The hot tub room had numerous windows and Michele never observed anything suspicious between R.A. and Adams in said room. (Trial 498-500.) Michele also had open and unfettered access to the locations wherein R.A. alleged the abuse occurred. (Trial at 501.)

Adams started experiencing age-related erectile dysfunction approximately six years ago. (Trial at 501.) He tried a course of Cialis, but it was expensive. (Trial at 501.) Adams also tried Viagra, but it gave him severe headaches due to his high blood pressure medication. (Trial at 501.) Adams had difficulty getting and maintaining an erection, and Michele asserted Adams’ libido was not such that he desired sex multiple times a week. (Trial at 502.)

Michele was responsible for helping R.A. with her hygiene needs and never observed any injuries to her genital or anal areas. (Trial at 509.) R.A. saw various counselors, beginning when she first started living with Michele and Adams. (Trial at 511.) During 2022 and before her removal, R.A. was seeing a school counselor on a weekly basis. (Trial at 512.) R.A. also saw a private counselor every other week. (Trial at 513.) Adams was very supportive of R.A. attending counseling. (Trial at 513.)

Michele supported Adams, “[b]ecause I believe he is telling the truth.” (Trial at 515.)

On cross-examination, Michele confirmed she usually worked from 8:00 a.m. to 6:30 p.m., four days a week. (Trial at 517.) She usually babysat her grandchildren in Missoula on Fridays. (Trial at 517-18.) During Covid she occasionally worked five days a week at the hospital. (Trial at 517.) Adams cared for R.A. after school and before Michele got home from work. (Trial at 519.) R.A. attended daycare some summers but was home with Adams during the Covid summers. (Trial at 519.) Adams would occasionally have an R&R with Diet Pepsi in the evenings. (Trial at 520.)

Michele clarified the counseling R.A. received at school was related to R.A.'s education and development. (Trial at 521.) R.A. was also receiving "emotional-type" counseling at school in addition to the private counselor she saw in 2022. (Trial at 521-22.) R.A. had also been paired with a high school mentor, and they spent time together and exchanged letters. (Trial at 522.)

On re-redirect examination, Michele confirmed she never found anything "gross or bad" on the family computer. (Trial at 527.) She did not have the impression R.A. had ever tasted R&R whiskey. (Trial at 527.)

**Pete Seifert:**

The State called pharmacist Pete Seifert (Seifert) pursuant to its rebuttal case. (Trial at 593.) State's Exhibit 32 was a summary of Adams' prescription history for erectile dysfunction medication, from January 2, 2020, to October 18, 2021. (Trial at 594-95.) Adams did not purchase any such medication between October 18, 2021, and June 13, 2022. (Trial at 595.) Adams did not purchase said medication every month. (Trial at 596.)

**State's closing:**

Unsurprisingly, the State highlighted the evidence regarding Adams' alleged internet search history. (Trial at 607.) It encouraged the jurors to consider said evidence in the appropriate context:

The judge has instructed you just now, and you'll get a copy of an instruction that tells you that there's this evidence that exists outside of what happened with [R.A.] . . . what we don't do with that [evidence] is we don't look at that and assume that the defendant is a bad person. We don't assume because he looked at certain things he must have done this to [R.A.] We don't look at that and immediately snap-judge the defendant.

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You're going to be asked to determine that the defendant acted knowingly, that he's aware of his conduct . . . And in this case that search history informs us. This search history illustrates what the defendant's sexual preferences are, what his sexual desires are.

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Part of that search history is particularly relevant. So all of us, I think, are familiar with Google and internet searching . . . When the defendant needed information about how to sexually assault a three-year-old girl, he took to Google to find that out. When the defendant needed instructional information and videos to show [R.A.] how to perform oral sex on him, he took to Google to find that out. The defendant in this case used Google essentially as a how-to to accomplish the crime that he perpetrated.

(Trial at 607-09.)

The State then unsurprisingly highlighted A.P.'s allegations.

(Trial at 609.) It encouraged the jurors to consider said evidence in the appropriate context:

We also have [A.P.], and that same instruction applies to her testimony. The jury does not get to listen to [A.P.] and think, [w]ell, if he's done it before, he must've done it this time. That's not fair, and that's not what the law says . . . But what the jury can do is, again, say, [w]hat motivates the defendant, and was this part of his preparation or plan? When faced with a decision of whether or not to agree to adopt a young female, was it part of the defendant's preparation or plan to, in fact, do that, knowing that he had done it before and that he had benefited from sexually abusing [A.P.]? In this case, the evidence shows that the defendant knew what that was and he knew it was wrong. He apologized to [A.P.], and he told her he wasn't going to do it again. He told her it was gross, or whatever words she used.

This was no mistake. The defendant knew the conduct, knowingly. The defendant had that intent and that motivation to sexually abuse a young girl, and specifically a daughter.

(Trial at 609-10.)

**Adams' closing:**

Adams' counsel made passing reference to his alleged internet search history: "Regardless of how disgusted you might have been reviewing some of the evidence in the case, specifically the pornography

evidence, I think we can all agree in our community that nobody wants children to be hurt.” (Trial at 618.) Later, counsel acknowledged:

Again, the pornography searches and the [A.P.] evidence, I appreciate that the state took time to distinguish for you what you can and cannot do with that evidence. What you cannot do is say, I believe [A.P.’s] testimony, so he must have done this crime against [R.A.] The instructions say, no, you cannot do that.

You cannot say Mr. Adams looks at some disgusting pornography that’s incest related; therefore, he must be guilty. The jury instructions say that’s not allowed.

Those facts, if believed, only go to the limited purpose which the instruction will tell you. And that is intent, motive, common scheme. It’s what the instruction says.

(Trial at 626.) Adams’ counsel later argued: “Your own common sense, the physical evidence in the case, and not [Adams’] first daughter came in and said she was molested so [R.A.] must have been molested too.”

(Trial at 631.)

### **State’s rebuttal:**

The State again highlighted the evidence regarding Adams’ alleged internet search history: “When the defendant is Googling, bribe for giving dad blow job, well, he doesn’t have to think too hard to figure out what’s going to compel [R.A.]” (Trial at 639.)

The State again highlighted the evidence regarding A.P.'s allegations:

And then finally, when talking about [A.P.], Ms. Lockwood said somebody that waited 30 years to report it. Well, she didn't. She told us she didn't wait 30 years . . . [A.P.], formerly [S.A.], told us that she told her brother and then she told her then adoptive mom and she put it in the hands of God, were her words, and she moved on with her life.

It wasn't until Detective Hachenberger called her on the phone cold that she ever talked about it again. And she came here to tell you all about it. So you get to consider her motivations. You get to consider whether [A.P.] seemed motivated to get back at the defendant or do anything to lie or make something up. So you get to assess her credibility. But then remember the context that that testimony fits in. We're not talking about [A.P.] We're talking about the defendant and what motivated him to assault [R.A.]

(Trial at 640.)

### **Summary of the argument**

Unsubstantiated prior bad acts evidence carries danger a jury will penalize the accused simply for his past bad character, and this inherent danger is even more acute when the other bad acts evidence pertains to child molestation. Here, the court's Rule 403 balancing was in error where A.P.'s 28 to 33-year-old allegations were beyond remote,

and their limited probative value was substantially outweighed by the danger of unfair prejudice.

This Court has articulated strict procedural requirements that must be satisfied before a party may offer evidence of prior acts. Here, this Court should find Adams received ineffective assistance where counsel failed to ensure the jury was properly and timely cautioned before being exposed to inherently prejudicial other acts evidence; specifically, evidence of Adams' alleged internet search history and A.P.'s allegations. No plausible justification exists for counsel's failure in that regard where such a cautionary instruction was necessary to ensure Adams' fundamental rights to a fair trial and due process.

### **Standard of review**

“District courts have broad discretion to determine the admissibility of evidence in accordance with the Montana Rules of Evidence and related statutory and jurisprudential rules.” *State v. Lake*, 2022 MT 28, ¶ 23, 407 Mont. 350, 503 P.3d 274 (citations omitted). A trial court's decision on “whether to admit evidence of other crimes, wrongs[,] or acts under M. R. Evid 404(b)” is “directed to the relevance and admissibility of such evidence,” and thus reviewed for an

abuse of discretion. *Lake*, ¶ 23, citing *State v. Ayers*, 2003 MT 114, ¶ 25, 315 Mont. 395, 68 P.3d 768 (other citations omitted). An abuse of discretion occurs “when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Lake*, ¶ 23, citing *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142. To the extent an evidentiary ruling “is based on an interpretation of an evidentiary rule or statute” this Court’s review is *de novo*. *Lake*, ¶ 23 (citations omitted).

Claims of ineffective assistance that are reviewed on direct appeal present mixed questions of law and fact, which this Court reviews *de novo*. *E.g.*, *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

## Argument

### **I. The court abused its discretion by admitting evidence of A.P.’s unsubstantiated, 28 to 33-year-old allegations.**

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Mont. R. Evid. 404(b). The danger in admitting evidence of prior bad acts is that the jury will “prejudge” the accused and “deny him a fair opportunity to defend against a particular charge.” *State v.*

*Peterson*, 2024 MT 5, ¶ 14, 415 Mont. 34, 541 P.3d 776 (citations omitted).

Prior bad acts may, however, be admissible for non-propensity purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Mont. R. Evid. 404(b). To prevent the permissible uses of Rule 404(b) from overpowering the general rule barring propensity evidence, courts must ensure the use of prior bad acts evidence is “clearly justified and carefully limited.” *Peterson*, ¶ 15 (citations omitted.)

Evidence offered for a valid purpose under Rule 404(b) remains subject to the balancing test prescribed by Rule 403. *Peterson*, ¶ 21 (citations omitted.) Rule 403 provides relevant evidence may be excluded, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Because all relevant evidence is inherently “prejudicial to one side or the other,” otherwise relevant evidence is subject to exclusion under Rule 403 only if the risk of prejudice, confusion, or distraction is

“unfair,” *i.e.*, where it is likely to: (1) provoke jury hostility or sympathy for one side regardless of probative value; (2) unduly confuse, mislead, or distract the jury from the central matters at issue in the case; or (3) cause the jury to give undue importance or emphasis to an extraneous prejudicial matter. *State v. Pelletier*, 2020 MT 249, ¶ 21 (citations omitted). Evidence of a defendant’s prior bad conduct, “may amplify its inherently prejudicial nature by virtue of the manner in which it is presented and used.” *Peterson*, ¶ 24 (citation omitted).

The Court has “repeatedly warned district courts and the State to exercise great caution in the use of prior acts evidence regarding child sexual abuse.” *Peterson*, ¶ 22 (citations omitted). This caution arises from the “highly inflammatory nature of child sexual abuse evidence.” *Peterson*, ¶ 22, *citing United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993) (“no evidence could be more inflammatory or more prejudicial than allegations of child molestation”).

**A. A.P.’s unsubstantiated 28 to 33-year-old allegations were too remote to have any probative value relative to their inherently prejudicial nature.**

Remoteness, which is an issue that bears more on the probative value of the evidence, “should be considered in a Rule 403 analysis.”

*State v. Dist. Ct. of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 56, 358 Mont. 325, 246 P.3d 415 (hereinafter *Salvagni*). Whether an uncharged act is truly too remote in time will depend on the particular purpose for which the evidence is offered and the proponent's theory of logical relevance; and if it has little probative value, relative to its prejudicial effect, it should be excluded on that basis. *Salvagni*, ¶ 56, citing *State v. Stout*, 2010 MT 137, ¶ 101 (Nelson, J., dissenting). While generally going only to the weight of evidence rather than its admissibility, "remoteness in time may nonetheless, depending on the nature of the evidence and purpose offered, diminish the probative value of other acts evidence on Rule 403 balancing." *Pelletier*, ¶ 25, citing *inter alia*, *State v. Ray*, 267 Mont. 128, 133, 882 P.2d 1013, 1016 (1994), *State v. Tecca*, 220 Mont. 168, 172-73, 714 P.2d 136, 138-39 (1986).

In *Ray*, 267 Mont. at 133, 882 P.2d at 1016, the prior acts took place between 16 and 18 years before the conduct charged. There were no "intervening acts" which could constitute a continuing course of conduct between the time of the incidents 16 to 18 years ago, and the charged conduct. Pursuant to the fourth requirement of the modified

*Just* rule, the Court concluded the evidence of other prior acts, “so remote in time, was prejudicial.” *Ray*, 267 Mont. at 133, 882 P.2d at 1016.<sup>2</sup> The Court reasoned, “the prejudicial effect of admitting evidence of an isolated incident that occurred fifteen years prior to the charged crime is likely to result in an emotional response from the jury and because the probative value is in question . . .[.]” *Ray*, 267 Mont. at 134, 882 P.2d at 1016.

In *Tecca*, 220 Mont. at 172, 714 P.2d at 138, the prior acts of defendant testified to by the witnesses went back as far as nine years. The Court agreed that an isolated incident from nine years ago was too remote; however, where there is a continuing pattern of similar conduct, “the remoteness problem is alleviated.” *Tecca*, 220 Mont. at 172, 714 P.2d at 139. The Court found the prior acts testimony showed defendant committed, or attempted to commit, sexual acts with young girls for a period of nine years leading up to the current charged offense. *Tecca*, 220 Mont. at 173, 714 P.2d at 139. Moreover, the probative

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<sup>2</sup> Although *Salvagni* overruled the notice requirements articulated in *Just* and *Matt*, evidence that is offered for a valid purpose under Rule 404(b) remains subject to the balancing test prescribed by Rule 403. *Salvagni*, ¶ 71.

value of the prior acts evidence was not substantially outweighed by the prejudice to defendant. *Tecca*, 220 Mont. at 173, 714 P.2d at 139. The prior acts evidence established a continuing course of conduct by defendant and aided in determining opportunity, intent, and identity. *Tecca*, 220 Mont. at 173, 714 P.2d at 139.

In *Pelletier*, ¶ 19, the court admitted the state’s cross-examination reference to 15-year-old SIWC allegations for the purpose of rebutting Pelletier’s good character evidence under M. R. Evid. 404(a)(1). Pelletier argued, *inter alia*, the 2003 allegation was too remote in time to have significant probative value relative to its inherently prejudicial nature. *Pelletier*, ¶ 20. The State argued the 2003 allegation was highly probative as Rule 404(a)(1) rebuttal evidence, “and not unduly prejudicial in light of the single question allowed, the limited nature of the question, and the limiting instruction given.” *Pelletier*, ¶ 20.

The Court observed, taking the 2003 allegation as true, *arguendo*, the prior incident occurred when Pelletier was a 15-year-old adolescent rather than the mature 30-year-old adult he was at the time of the charged incident in 2018. *Pelletier*, ¶ 25. The significant difference in maturity level between a 15-year-old adolescent and a 30-year-old adult

at least significantly diminished any probative value the unsubstantiated 2003 allegation might otherwise had, if taken at true, as propensity evidence of Pelletier's character in 2018. *Pelletier*, ¶ 25.

On the other side of the Rule 403 balance, the Court concluded the “inherent danger” the jury would give the prior bad acts evidence undue weight over the actual case-specific evidence of guilt or innocence was particularly acute due to the largely, if not exclusively, he-said/she-said nature of the evidence and the fact the ultimate determination of Pelletier's innocence or guilt thus depended on jury assessment of the relative credibility of the principals' starkly conflicting accounts of the disputed events. *Pelletier*, ¶ 26. Moreover, the limiting instructions could not adequately reduce the risk of prejudice to a fair level because the unsubstantiated 2003 allegation had no probative value for the Rule 404(a)(1) purpose offered and the inherent risk of unfair prejudice was high under the particular circumstances of the case. *Pelletier*, ¶ 28.

In *Peterson*, ¶ 26, the Court found, although the district court did not abuse its discretion in determining defendant's prior acts were admissible to show motive and intent, the State's use of the evidence had a natural tendency to induce the jury's “hostility” toward Peterson,

resulting in unfair prejudice. Moreover, the limiting instruction was not sufficient to protect Peterson from undue prejudice in the face of the State's repeated reminder he committed sex crimes involving multiple other family members for which he served a combined total jail term of 45 days. Repeated reference to the details of Peterson's longstanding unpunished sexual abuse of his nieces made it "more likely the jury would convict because he had done this before and had not learned his lesson,' or 'had simply gotten away with it.'" *Peterson*, ¶ 26 (citation omitted).

Here, the court concluded A.P.'s allegations, "tends to make it more probable that the Defendant acted knowingly because he knowingly engaged in such behavior previously." (D.C. Doc. 68 at 9.) The alleged abuse, "also makes it more probable than it would without the evidence that the Defendant is willing to pursue sexual gratification with his underaged descendants and/or persons in a father-daughter relationship with him." (D.C. Doc. 68 at 9.) A.P.'s allegations were also admissible to establish Adams' conduct was not innocent, innocuous, or accidental; rather, her testimony would show his "motive," his fixation with incestuous underage sex. (D.C. Doc. 68 at 10.) Finally, A.P.'s

anticipated testimony would show Adams' "preparation or plan because of the similarities between [A.P.'s] and the alleged victim's situations, where Defendant adopted a child in need and then groomed and sexually abused them." (D.C. Doc. 68 at 10.)

A.P.'s unsubstantiated allegations were 28 to 33 years old by the time she testified.<sup>3</sup> There is nothing in the record to suggest there were any "intervening acts" which could constitute a continuing course of conduct between the 28 to 33-year-old allegations and the charged conduct. *Ray*, 267 Mont. at 133, 882 P.2d at 1016. Because there was no continuing pattern of similar conduct, it cannot be said "the remoteness problem [was] alleviated." *Tecca*, 220 Mont. at 172, 714 P.2d at 139.

Moreover, the truth of A.P.'s allegations was not ascertainable without conducting a distracting mini-trial for that purpose within the larger trial of the charged offenses. The unsubstantiated 28 to 33-year-old allegations thus had no non-speculative probative value for the

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<sup>3</sup> A.P. alleged Adams apologized for the sexual abuse in 1996, when she was 15 years old. (Trial at 414, 416.) She alleged the sexual abuse began when she was 9 years old and ended shortly before she turned 14. (Trial at 409.)

offered purpose of showing Adams' motive, preparation and plan, or that he acted knowingly. This Court should conclude the 28 to 33-year-old allegations were too remote to have significant probative value relative to their inherently prejudicial nature. *Ray*, 267 Mont. at 133, 882 P.2d at 1015 (passage of 16-18 years), *Tecca*, 220 Mont. at 172, 714 P.2d at 139 (passage of 9 years), *Pelletier*, ¶ 25 (passage of 15 years).

**B. The court's Rule 403 balancing was in error where A.P.'s allegations had little to no probative value relative to the inherently prejudicial nature of the evidence.**

The court summarily concluded A.P.'s unsubstantiated allegations were more probative than prejudicial. (D.C. Doc. 68 at 10.) A.P.'s allegations evidenced a pattern similar to that charged in the instant proceeding, tying "the past and present evidence together through the lens of a common, non-propensity motive that is specific to these instances of alleged sexual abuse, which are particular in their nature: the rape of an adopted daughter." (D.C. Doc. 68 at 10.)

This Court should conclude, because A.P.'s 28 to 33-year-old allegations had little to no probative value for the non-propensity purposes offered, the prejudicial effect of admitting this evidence likely resulted in an emotional response from the jury. *Ray*, 267 Mont. at 134,

882 P.2d at 1016. Here, the inherent danger the jury would give A.P.'s allegations undue weight over the actual case-specific evidence of innocence or guilt was particularly acute due the largely, if not exclusively, he-said/she-said nature of the evidence and the fact the ultimate determination of Adams' innocence or guilt thus depended on jury assessment of the relative credibility of the principals' conflicting accounts of the disputed events. *Pelletier*, ¶ 26.

In addition to the plain lack of probative value, the specific manner and frequency in which the State referenced and elicited A.P.'s allegations confirms the court's Rule 403 balancing was in error. As noted *supra*, "[e]vidence of a defendant's prior bad conduct may amplify its inherently prejudicial nature by virtue of the manner in which it is presented as used." *Peterson*, ¶ 24.

Here, as in *Peterson*, ¶ 25, the State explicitly previewed A.P.'s unsubstantiated allegations in opening, *i.e.*, "[s]tarting at the age of nine until she was about thirteen the defendant sexually abused her," and confirmed Adams' alleged criminal conduct went unprosecuted and unpunished. (Trial at 191-92.)

Moreover, pursuant to its examination of A.P., the State solicited vivid details concerning the alleged abuse. (Trial at 409-12.) A.P. also confirmed Adams was never prosecuted nor punished; rather, she “chose to leave it up to God’s judgment.” (Trial at 415.) Finally, when asked about her feelings upon being contacted to testify, A.P. provided the following emotionally-charged testimony:

That I wanted to protect someone else, that I had learned that someone else had been affected in the same way I had. And I know that we don’t feel like we have a voice when we’re assaulted, so I wanted to be a voice for someone.

(Trial at 416.)

Although the State in closing cautioned the jurors at length to consider A.P.’s allegations in the appropriate non-propensity context, it also explicitly reminded the jurors Adams’ alleged criminal conduct went unprosecuted and unpunished— “[A.P.] put it in the hands of God.” (Trial at 609-10, 640.)

The State’s use of A.P.’s unsubstantiated allegations, “carried significant danger that the jury would find [Adams] guilty because he had committed similar offenses before and had not been adequately punished.” *Peterson*, ¶ 26. The State’s use of A.P.’s allegations also had

a natural tendency to induce the jury's hostility toward Adams, resulting in unfair prejudice. *Peterson*, ¶ 26.

Additionally, the court's limiting instruction, erroneously given only once before closing arguments, was not sufficient to protect Adams from undue prejudice in the face of the State's repeated reminder he allegedly abused another foster daughter for which he was never prosecuted nor punished. *Peterson*, ¶ 26. The trial court could have put limits on the State's use of the prior bad acts evidence to guard against such prejudice. *See, e.g., State v. Pulst*, 2015 MT 184, ¶ 20, 379 Mont. 494, 351 P.3d 687 (prior acts evidence affirmed under Rule 403 because the court limited discussion of defendant's prior sexual assault to the "bare facts of its occurrence and the surrounding circumstances[;]" "was vigilant in enforcing this ruling" during trial; and "gave instructions to the jury on at least three separate occasions reminding it of the limited use to which the evidence could be put.")

Here, the extent of A.P.'s allegations and the manner in which they were presented and used overwhelmed the conduct with which Peterson stood charged. "Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly,

though not necessarily, an emotional one.” *Peterson*, ¶ 26 (citation omitted). Repeated reference to the details of Adams’ longstanding unpunished sexual abuse of A.P., “made it ‘more likely the jury would convict because he had done this before and had not learned his lesson,’ or ‘had simply gotten away with it.’” *Peterson*, ¶ 26 (citation omitted).

**C. Admission of A.P.’s allegations was not harmless.**

Here, the State’s use of 404(b) evidence was a trial error as it occurred during the presentation of evidence. *Peterson*, ¶ 27. Trial error is reviewed qualitatively for prejudice relative to other evidence introduced at trial. *State v. Van Kirk*, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735. If the tainted evidence was admitted to prove an element of the offense, then the State must direct the Court to admissible evidence that proves the same facts as the tainted evidence and demonstrate the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction. *Peterson*, ¶ 28 (citations omitted). Here, A.P.’s allegations were admitted to prove, *inter alia*, Adams knowingly subjected R.A. to incest and SIWC. See Mont. Code Ann. §§ 45-5-507(1) & 45-5-503(1).

This Court should find there is more than a reasonable possibility A.P.'s allegations contributed to Adams' convictions. The State did not present any physical evidence implicating Adams; rather, the jury's determination of Adams' innocence or guilt rested upon its assessment of the he-said/she-said nature of the evidence. Although R.A. was under the care of a myriad of counselors and medical professionals while in Adams' and Michele's care, she made no disclosures to said providers regarding the alleged abuse. Finally, Nurse Shanahan discussed inappropriate touching with R.A., and R.A. explicitly denied ever being subjected to any sexual abuse—"no." (Trial at 464-465.)

Again, the *Van Kirk* test is about the qualitative aspect of the tainted evidence, not the quantitative. *Van Kirk*, ¶¶ 43-44. Here, the State's use of A.P.'s heinous sexual abuse allegations bolstered R.A.'s testimony to the jury. *Peterson*, ¶ 28. The State used A.P.'s testimony to establish Adams abused another adopted daughter some 30 years before. Moreover, A.P.'s averment she was motivated, "to protect someone else . . . I wanted to be a voice for someone," bordered perilously close to improper propensity evidence. (Trial at 416.)

The volume and detail of A.P.'s allegations, combined with the jury's knowledge Adams faced no consequences for his acts, tipped the balance of prejudice when weighed against its probative value.

*Peterson*, ¶ 29. Here, the admission of A.P.'s allegations was unduly prejudicial where the State was permitted to examine her at length in that regard, its questions were not limited in nature, and the lone limiting instruction was not given until the close of evidence. *See Pelletier*, ¶ 20.

Adams submits the State cannot meet its burden to show no reasonable possibility its use of A.P.'s tainted allegations might have contributed to his convictions and, therefore, the error was not harmless.

**II. Counsel's failure to ensure the jury was properly cautioned before being exposed to inherently prejudicial other acts evidence constituted ineffective assistance.**

The Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to assistance of counsel. When analyzing an ineffective assistance claim, this Court applies the two-pronged test of *Strickland v. Washington*,

466 U.S. 668 (1984). *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. A defendant must demonstrate, “(1) counsel’s performance was deficient or fell below an objective standard of reasonableness, and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Kougl*, ¶ 11 (internal quotation marks omitted).

**A. Direct appeal is the proper forum for Adams’ claim of ineffective assistance.**

This Court will consider claims of ineffective assistance on direct appeal where counsel is faced with an obligatory, non-tactical action, or there is no plausible justification for counsel’s actions. *Kougl*, ¶ 15. In those cases, the question is not “why,” but “whether” counsel acted, and if so, if counsel acted adequately. *Kougl*, ¶ 15. “Whether the reasons for defense counsel’s actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did.” *Kougl*, ¶ 15.

This Court should rule on Adams’ claim of ineffective assistance. There is no plausible justification for counsel’s failure to ensure the jury was properly cautioned before being exposed to the inherently

prejudicial evidence of Adams’ alleged internet search history and A.P.’s allegations. *Kougl*, ¶ 15.

In *Kougl*, ¶¶ 15, 20-21, the Court found counsel faced an obligatory, and therefore non-tactical, action, *i.e.*, there was no reason for Kougl’s counsel to not ask for an instruction to view his accomplices’ testimony with suspicion or an instruction such testimony must be corroborated.

Similarly, in *State v. Johnston*, 2010 MT 152, ¶ 16, 357 Mont. 46, 237 P.3d 70, the Court concluded counsel had nothing to lose in seeking a “correct instruction,” and the failure to do so allowed the prosecutor to argue Johnston had essentially confessed to the crime by his testimonial admission he had been dishonest with the officers, thus reducing the State’s burden in proving the crime. Counsel’s representation was deficient and prejudiced Johnston’s case, “such that there is a reasonable probability [the jury] would have arrived at a different outcome.” *Johnston*, ¶ 16 (alteration in original, *citing Kougl*, ¶ 26).

Although *Salvagni*, ¶ 71, overruled *Just* and *Matt*, it did *not* overrule the procedural requirements for the admission of other acts

evidence, *i.e.*: “the trial court *shall* explain to the jury at the time of the introduction of the evidence the limited purpose of such evidence” *and* “[t]he procedural rules further require the court to admonish the jury in its final charge that such evidence has been received only for the limited purposes earlier stated and that the defendant is not being tried, and may not be convicted, for any offense except that presently charged.” *State v. Stearns*, 2008 MT 356, ¶ 17, 346 Mont. 348, 195 P.3d 794 (citations omitted, emphasis added.)

Here, as in *Kougl*, ¶¶ 20-21 and *Johnston*, ¶ 16, there was no reason for counsel’s failure to ensure the jury was properly cautioned pursuant to MCJI 1-120 (2022), before being exposed to the inherently prejudicial other acts evidence at issue. As noted *supra*, Adams’ counsel submitted a cautionary instruction derived from MCJI 1-120 (2022), “Evidence of Other Acts,” which included the Commission Comment that explicitly instructed: “The above instruction *must be given twice*.”

*First*, before the evidence of other acts is presented and *second*, as part of the general charge to the jury.” (Ex. B (emphasis added).)<sup>4</sup>

Based on the foregoing, there can be no question objectively reasonable counsel would have ensured the jury was properly cautioned pursuant to the limiting instruction, MCJI 1-120 (2022), before the admission of the inherently prejudicial other acts evidence at issue.

As in *Johnston*, ¶ 16, Adams’ counsel had “nothing to lose” by ensuring the jury was so instructed. *See also, Kougl*, ¶ 21 (“Trial counsel had nothing to lose in asking for both of these instructions. Her client, however, risked losing his liberty.”). A timely limiting instruction would have only served to benefit Adams and ensure the jury did not consider the other acts evidence for impermissible propensity purposes. *See United States v. Alferahin*, 433 F.3d 1148, 1161 (9th Cir. 2006) (finding deficient performance where, “the defense attorney failed to obtain an instruction on a critical element of the charged crime and thereby abandoned one of his client’s most promising

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<sup>4</sup> Notably, the Commission Comments regarding MCJI 1-120 (2022), as accessed *via* courts.mt.gov, explicitly emphasizes “First” and “second.” (MCJI 1-120 (2022) with Source and Comment, attached as Exhibit C.)

defenses”). The only party with anything to gain by the failure to timely caution the jury regarding the other acts evidence was the State.

There is no plausible justification for counsel’s omission; this Court should review Adams’ claim on direct appeal. *Kougl*, ¶ 22; *Johnston*, ¶ 16.

**B. Adams was denied effective assistance.**

Because there is no plausible justification for counsel’s failure, her performance was deficient, and the first prong of *Strickland* is met. *Kougl*, ¶ 24; *Johnston*, ¶ 16.

Adams’ claim also meets the second prong of *Strickland*, which requires him to establish, “only that there is a reasonable probability that but for counsel’s unprofessional errors the result of the proceeding would have been different.” *State v. Rose*, 1998 MT 342, ¶ 19, 292 Mont. 350, 972 P.2d 321, *citing Strickland*, 466 U.S. at 694. As this Court has repeatedly acknowledged, “A reasonable probability is a probability sufficient to undermine confidence in the outcome,’ but it does not require that a defendant demonstrate that he would have been acquitted.” *State v. Rogers*, 2001 MT 165, ¶ 14, 306 Mont. 130, 32 P.3d 724, *quoting Strickland*, 466 U.S. at 694.

This Court has long recognized adequate limiting instructions under Mont. R. Evid 105 are often sufficient to eliminate, or at least reduce, the risk of unfair prejudice where prior bad acts evidence is both highly relevant and inherently prejudicial. *Lake*, ¶ 43 (citations omitted). Not so, however, when the relative probative value of the evidence is minimal or non-existent, and the relative danger of unfair prejudice is high. *Lake*, ¶ 43.

Of course, as here, where no limiting instruction is given at the time other acts evidence is admitted, it cannot be said the unfair and inherent prejudice associated with such evidence is eliminated or reduced.

Again, this Court has repeatedly warned courts and the State to exercise great caution in the use of prior acts evidence regarding child sexual abuse. *Peterson*, ¶ 22. Here, the State previewed the inherently prejudicial evidence of Adams' alleged internet search history and A.P.'s allegations in opening argument. (Trial at 190-92.) It thereafter solicited evidence and testimony regarding Adams' alleged internet search history. (Trial at 390-97.) It also solicited testimony from A.P.

detailing her allegations of heinous sexual abuse at the hands of Adams, that went unprosecuted and unpunished. (Trial at 409-16.)

Absent a timely limiting instruction, there is more than a reasonable probability the jurors “prejudged” Adams based upon the evidence of his other prior bad acts and, thus, denied him a fair trial and a fair opportunity to defend against R.A.’s allegations in violation of Mont. R. Evid. 404(b). Absent a timely limiting instruction, there can be little doubt the jurors would be tempted, at least on a subconscious level, to penalize Adams for his past misdeeds or to “draw a deadly and decidedly” improper inference from bad act to bad person to guilty person, or person in need of punishment regarding the uncharged conduct. *Stout*, ¶ 84 (Nelson, J., dissenting.)

The error and resulting prejudice was also compounded by trial counsel’s patently incorrect argument in opening, characterizing the State’s use of the other acts evidence for impermissible propensity purposes: “The [S]tate wants you to look at [Adams’] pornography history and pornography preferences, and they’re going to ask you to convict him on that.” (Trial at 195.) Based upon the foregoing improper propensity argument, the jurors were left with no choice but to make

the improper, but logical, inference from bad act to bad person to guilty person.

There is more than a reasonable probability the jury would have arrived at a different conclusion had they been properly instructed; accordingly, Adams was prejudiced by his counsel's deficient performance. *Kougl*, ¶ 26; *Johnston*, ¶ 16; see also *State v. Lunblade*, 191 Mont. 526, 531, 625 P.2d 545, 548 (1981) ("Without a correct statement of the elements of the crime being presented to the jury we cannot say that the defendant received a fair trial."). Here, given the highly inflammatory nature of child molestation evidence, there is more than a reasonable probability Adams was convicted because the jurors considered the other acts evidence for impermissible propensity purposes, *i.e.*, from bad act to bad person to guilty person.

Based on the foregoing, this Court should find both prongs of the *Strickland* test are satisfied. Adams was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution, and his conviction should be reversed.

## **Conclusion**

Adams respectfully requests this Court reverse his convictions, on the grounds the district court abused its discretion by allowing the State to admit testimony and evidence regarding A.P.'s 28 to 33-year-old allegations of sexual abuse. In the alternative, Adams' convictions should be vacated because he received ineffective assistance of counsel.

Respectfully submitted this 22nd day of April 2025.

/s/ Joseph P. Howard  
Joseph P. Howard  
Joseph P. Howard, P.C.

### **Certificate of compliance**

Pursuant to Mont. R. App. P. 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this opening brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 10,000 words (9893), not averaging more than 280 words per page, excluding the certificate of compliance.

*/s/ Joseph P. Howard*  
Joseph P. Howard

Appendix

Judgment ..... Ex. A

Proposed Instruction No. 19 ..... Ex. B

MCJI 1-120 (2022) ..... Ex. C

## CERTIFICATE OF SERVICE

I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-22-2025:

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