IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0646

MARK KAPPS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Sixteenth Judicial District Court,
Fallon County, The Honorable Nickolas C. Murnion, Presiding

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STATEMENT OF THE ISSUES

1. Was trial counsel's cross-examination of an officer deficient when trial counsel questioned the officer about his belief that the defendant was guilty to challenge that conclusion where the officer's opinion of Kapps's guilt had already been demonstrated by the State's playing of Kapps's interview with law enforcement?

2. If counsel's cross-examination of the officer was deficient, was Kapps prejudiced by counsel's performance when the victim's allegations were corroborated by DNA evidence, the victim's brother's eyewitness testimony, and other testimony?

STATEMENT OF THE CASE

The State charged Appellant Mark Kapps in March 2015 with sexual intercourse without consent and sexual assault. (Trial Doc. 3.)[1] The State alleged that the victim, M.C., was under the age of 12 and that Kapps was 4 or more years older than she. *Id*. The jury convicted Kapps of both counts. (Trial Doc. 76.) Kapps's convictions were affirmed on appeal. *State v. Kapps*, 2017 MT 207N.

[1] The documents from the underlying criminal case, DC-15-01, are cited as "Trial Doc." The documents from the postconviction case, DV-2022-20, are cited as "PCR Doc."

In a postconviction proceeding, Kapps filed an Amended Petition for Postconviction Relief (Amended Petition) raising two ineffective assistance of counsel (IAC) claims and a claim of cumulative error. (PCR Doc. 19.) While the postconviction proceeding was pending, Kapps's trial counsel, David Freedman, was disbarred. *In re Freedman*, No. PR 18-0516, Order (Mont. June 18, 2019). Freedman could not be located, and he did not respond to Kapps's allegations. The court concluded that the claims in the Amended Petition were procedurally barred and also denied the claims on the merits. (PCR Doc. 47, available at Appellant's App. A).

On appeal, Kapps challenges the denial of only one of the IAC claims raised in the Amended Petition.

STATEMENT OF THE FACTS

I. The offenses

In 2011, Kapps started dating Miranda Thomas. (Trial Tr. at 348.)[2] Eventually, Kapps purchased a house in Plevna that they both lived in. (*Id*. at 350.) They had a baby together and considered getting married. (*Id*. at 350-51.)

[2] The transcript from the trial, held February 9-12, 2016, is cited throughout this brief as "Trial Tr." All other hearings are referenced using the date of the hearing.

Miranda worked at the Sagebrush Inn in Baker, which her sister, Stephanie, managed. (Trial Tr. at 291, 297.) Stephanie, her husband, her two sons, Z.C. and C.C., and her daughter, M.C., lived in a house attached to the Sagebrush Inn. (*Id*. at 291.) Because Miranda did not have a driver's license, Kapps drove Miranda to work at the Sagebrush Inn. (*Id*. at 815-16, 371.) On weekends, he would sometimes spend the day at Stephanie and M.C.'s home while Miranda was working. (*Id*. at 305, 371-72.)

On several occasions, Kapps put his hand down M.C.'s pants and showed her his penis. On August 3, 2015, when M.C. was seven years old, M.C.'s older brother, C.C., saw Kapps stick his hand down M.C.'s pants while M.C. was sitting on a couch in their living room. (Trial Tr. at 239-40, 246-48, 272, 291-92.) Kapps spent that Sunday in M.C.'s home with his and Miranda's baby while Miranda and Stephanie were working at the hotel. (*Id*. at 251, 856-900.) The next day, M.C. told C.C. that Kapps had molested her. (*Id*. at 239, 244.)

C.C. ran to the hotel and told Miranda what M.C. had reported. (Trial Tr. at 244, 357.) Miranda was shocked, and went into the house to ask M.C. about the disclosure. (*Id*. at 358.) When she located M.C. inside the house, M.C. was lying on the couch, was upset, and she had her head buried in a pillow. (*Id*. at 358-59.) Miranda asked M.C. if the touching was just an accident, and M.C. shook her head no. (*Id*. at 359.) Miranda told Stephanie's husband that he needed to contact her.

(*Id*. at 360.) Stephanie came home and talked to M.C., who reported to Stephanie that Kapps had molested her. (*Id*. at 298.) M.C. told Stephanie that one of the first times the abuse occurred was after Christmas in 2013. (*Id*. at 321.) Stephanie and her husband contacted law enforcement to report the abuse. (*Id*. at 298.)

An officer came to the house and spoke with Stephanie. (Trial Tr. at 301, 454-55.) Later that day, multiple officers came and seized items that they believed might contain DNA evidence. (*Id*. at 302, 457.) The items seized included the clothes M.C. had been wearing the day before and a blanket and couch cushions from the living room. (*Id*. at 302, 458-59.) A few days later, M.C. noticed that there was still a Toy Story blanket at her house that Kapps had used to cover them up when he had molested her on August 3, 2014. (*Id*. at 308-10, 324-25.) Stephanie notified law enforcement, and they seized the blanket. (*Id*. at 308-10, 518-19, 703.)

Officers also arranged for M.C. to have a medical exam, which was conducted in Billings on the evening of the disclosure. (Trial Tr. at 306-07, 459-61, 538-549.) One week later, a forensic interview was conducted with M.C. (*Id*. at 311, 462-65.) During the interview, M.C. said that Kapps told her not to tell Miranda. (*Id*. at 470.)

The Baker Police Department sent the clothes that M.C. had been wearing on August 3, 2014, and three blankets to the crime lab to have them tested for the

presence of semen. (Trial Tr. at 472-74.) The crime lab did not locate any evidence on the clothes, but the lab located semen on the Toy Story blanket. (*Id*. at 474-75, 491-92, 565-66, 569, 573.) Although there were two contributors to the DNA profile of the sperm cell fraction, the major component of the DNA profile matched Kapps's DNA profile. (*Id*. at 604.)

Officer Paul Sutter and Sergeant Justin LaCroix from the Baker Police Department interviewed Kapps on August 4, 2014. (Trial Tr. at 618-20, 681; State's Exs. 1a-1b.) The officers started the interview by asking Kapps general questions about his family and his contact with children. (*See generally* State's Ex. 1a, file 16.MPG at 0:00-11:15.) Eventually, the officers confronted Kapps with M.C.'s allegations. (*See id*. at 11:15-14:20, 28:57-29:43; State's Ex. 1a, file 17.MPG.) Kapps repeatedly denied molesting M.C. (State's Exs. 1a-1b; State's Exs. 1a, file 16.MPG at 29:43-end; State's Exs. 1a, file 17.MPG; Trial Tr. at 650.) Officer Sutter repeatedly insisted that a seven-year-old girl could not make up the allegations M.C. had made, "something" had happened, he and Sergeant LaCroix "kind of know when things have happened," "we pretty much have the picture drawn," and "you touched her, Mark." (State's Exs. 1a file 17.MPG at 0:00-3:52, 4:46-4:53, 7:00-7:10, 10:05-10:08, 10:17-10:20.)

At the beginning of the interview, Kapps stated that the last time he had been alone with Stephanie's children was a "few months ago." (State's Ex. 1a, file

16.MPG at 6:54-7:09.) Later in the interview, however, he said he was alone with M.C. for an hour the prior day. (*Id*. at 25:40-26:08.)

II. Trial testimony

At trial, M.C. testified that Kapps "stuck his hand down my pants and he showed me his D.I.C.K." (Trial Tr. at 229.) She stated that it happened "a few times at his house and a lot at my house." (*Id*.) She testified that it happened on the couch at her house, and she told C.C. about it because she "didn't feel comfortable when [Kapps] was doing it." (*Id*. at 230.) M.C. testified that Kapps touched her private area on the outside and inside. (*Id*. at 231.) She also stated that Kapps grabbed her hand and tried to make her touch his private area, which she refused to do. (*Id*.) She stated that "white stuff" came out of his private area, and it went on a blanket. (*Id*.) She did not know the first time that it had happened, but she knew that she was on a couch at her house, and she thought that she was seven years old. (*Id*. at 233.)

M.C.'s brother, C.C., testified that M.C. told him about the molestation on the day he reported it. (Trial Tr. at 239, 244.) He also testified that he saw Kapps put his hands down M.C.'s pants the day before while he was spying on M.C. from a box in the dining room. (*Id*. at 239-40, 246-61.)

Stephanie testified that M.C. had complained multiple times before her disclosure that her private area hurt. (Trial Tr. at 322-23.) Stephanie also testified that Kapps had exhibited unusual behavior at their house. Sometimes Kapps stayed inside while the adults went outside to smoke. (*Id*. at 318.) When they came inside, Kapps would get up and go into the bathroom where he would stay "quite a while and then he'd come out and wash his hands and go back to the living room with the kids." (*Id*. at 318-19.) Stephanie thought his behavior was odd because he would not flush the toilet and there was no sign that he had gone to the bathroom. (*Id*. at 319.) Stephanie also testified that her children never took their blankets to Kapps's home and that she washed the blankets every week. (*Id*. at 312.) Stephanie and Miranda testified that M.C. stopped wanting to go to Miranda and Kapps's home, as she had before. (*Id*. at 335, 368.)

Miranda testified that she saw Kapps sitting next to M.C. on the couch on August 3, 2014, and they were covered by a blanket. (Trial Tr. at 369.) Kapps jumped up when she walked in the house. (*Id*.) Miranda testified that she did not have intercourse with Kapps while she was pregnant, and there was no reason for Kapps's semen to be on M.C.'s blanket. (*Id*. at 365, 991-92.) She specifically testified that she never gave Kapps a hand job at Stephanie's house, contradicting his testimony. (*Id*. at 991-92.)

The State presented testimony from a blind expert, Paula Samms, about sexual abuse victims. (Trial Tr. at 397-451.) She testified that most victims do not disclose immediately, and many disclosures are done piecemeal over time. (*Id*. at 405, 409.) She also testified about the process of victimization. (*Id*. at 414-16.)

Kapps also presented testimony from a blind expert, Dr. Bowman Smelko. (Trial Tr. at 776-77.) Dr. Smelko testified that there are not any characteristics that identify who has been a victim of sexual abuse or who will be an offender. (*Id*. at 793-95, 801, 805.)

Lastly, Kapps testified that he had a bad relationship with Miranda. He testified that she made him pay for everything and that she wanted him to be with her family rather than his own family or friends. (Trial Tr. at 813-21.) Kapps testified that Miranda would not have sexual intercourse with him while she was pregnant and the most he was able to get from her was a hand job. (*Id*. at 830-31.) He also testified that they engaged in that behavior in the living room, bedrooms, and bathrooms at M.C.'s home. (*Id*. at 833.) Kapps testified that his semen could have been on the Toy Story blanket because sometimes he and Miranda engaged in sexual acts in M.C.'s home, and the blanket would have been the closest thing to use to clean up. (*Id*. at 938-39, 959.) He also testified that they had sexual intercourse on Stephanie's bed one or two weeks before M.C. stated that he had

abused her. (*Id*. at 851.) Kapps testified that Stephanie's home was a mess and the home, including the blankets, were not cleaned often. (*Id*. at 937-43.)

Kapps also testified that he once saw Miranda slam their baby into the crib, and he got angry and threatened to kick her out of the house. (Trial Tr. at 846.) Kapps testified that the relationship was so bad in July that he felt that the relationship was over, and he searched on his phone how to get full custody of his son. (*Id*. at 849-50.) He speculated that it was likely that Miranda saw that search on his phone. (*Id*. at 851-52.) But he also said Miranda would freak out if he told her he wanted to take their child, and she did not say anything about seeing a search on his phone about getting custody. (*Id*. at 962.) Kapps testified in detail about what had occurred on August 3, 2014. (*Id*. at 856-900.) He denied that he ever touched M.C. in a sexual manner and stated that the only time he may have touched her is when he was picking up his baby that she was holding. (*Id*. at 887.)

III. Defense counsel's performance at trial

Kapps was represented at trial by David Freedman. Freedman presented testimony from Dr. Smelko and Kapps. He elicited Kapps's testimony that he was confused and scared that something bad had happened to his son or another family member when law enforcement brought him to the station for questioning without explaining why he was there. (*See* Trial Tr. 906-32.) He said he was shocked

when officers accused him of putting his hands down M.C.'s pants. (*Id*. at 926.) He said he was crying by the end of the interview. (*Id*. at 932.)

Throughout trial, counsel actively cross-examined the State's witnesses. (*See generally* Trial Tr.) Freedman questioned witnesses about inconsistencies in the evidence, and elicited testimony from M.C. that there were not any boxes in the house, contradicting C.C.'s testimony that he spent hours in a box in the dining room. (*Id*. at 235, 246, 260-61, 376-79, 552-54, 726, 944.) Freedman also elicited testimony from C.C. that he had not mentioned boxes in a prior interview, and he had provided a different explanation of how he had seen Kapps touching M.C. (*Id*. at 260-61.)

After the State played the recording of Kapps's interview by law enforcement, Kapps questioned Officer Sutter about the interview. Freedman tried to show that Officer Sutter jumped to the conclusion that Kapps was guilty, even though Kapps persisted in his denial. (*See* Trial Tr. at 644-56.) Freedman elicited Officer Sutter's testimony that officers can lie to suspects by telling them law enforcement has information that they do not have. (*Id*. at 641.) Officer Sutter acknowledged that they "probably did lead him to believe that we knew more than we did." (*Id*. at 642.)

Freedman questioned Officer Sutter about why he believed Kapps committed an offense in the following exchange:

Q. . . . So, is there anything you interpreted from his body language or his statements that you considered a confession?"

A. In a roundabout way, yes.

Q. And what is that?

A. Um, when he mentioned that he did not touch uh, [M.C.] he didn't watch her, he didn't help her get dressed, and he didn't touch her.

Q. And, you interpreted that specifically to indicate what?

A. Um, kind of a um, submind confession.

Q. What's a submind confession?

A. Um, he didn't want to confess to anything but he wanted to get something off his chest.

Q. And, how far into the interview was that approximately?

A. Approximately 13 minutes.

(*Id*. at 644-45.)

Freedman then questioned Officer Sutter about whether he had his "mind made up" that Kapps committed the offense, and Freedman attempted to demonstrate that Officer Sutter made up his mind and would not consider what Kapps said. (*See* Trial Tr. at 647-48.)

Freedman also questioned Officer Sutter to demonstrate that Kapps willingly cooperated and talked to law enforcement. (*Id*. at 650.) But Officer Sutter replied:

A. His . . . answers were very short uh, everything was denial, everything was an excuse. Um, it didn't—it didn't have a flow

> of honesty to it. Um we were trying to get him to open up and talk. We tried to be lighthearted about it. . . . We—I—we tried a lot of different things to get him to open up and talk. Um, he was set on denial and that's where the interview stayed pretty much throughout the whole thing.

(*Id*. at 650-51.)

Freedman asked Officer Sutter if he made up his mind 13 minutes into the interview, or if happened sooner, and Officer Sutter replied, "Um, red flags in my mind." (Trial Tr. at 651.) Officer Sutter followed up, explaining that when he or the other officer asked Kapps about the names of the family members, he left out M.C., who he obviously knew. Then, 13 minutes into the interview, he said "I didn't touch her," even though he had not yet been told that was why he was there. (*Id*. at 651-52.)

Freedman later asked Officer Sutter about the statement he made during the interview that seven year olds do not make up stories. (Trial Tr. at 669.) Officer Sutter replied, "Um, 7 year olds don't make uh, if they tell a story they don't have details and being as detailed as the—of what we were told isn't a 7 year old—something a 7 year old would have been exposed to." (*Id*. at 670.) Freedman asked Officer Sutter whether he believed M.C.'s statements when he questioned Kapps, or whether he was using them to try to elicit an admission. (*Id*. at 670-71.) Officer Sutter stated that they believed M.C. to be truthful. (*Id*. at 671.) Freedman

demonstrated that law enforcement told Kapps that they knew something had happened, and directed him not to deny it. (*Id*. at 671-72.)

Freedman asked Officer Sutter if he was surprised that Kapps would not provide a DNA sample without a court order. (*Id*. at 673.) Officer Sutter stated, "If you['re] innocent you['re] gonna have to prove your innocence and if that's what you can do to prove your innocence." (*Id*.)

Freedman also elicited Officer Sutter's testimony that officers tried to throw Kapps off his game by telling him that his family knew he had done this. (*Id*. at 680-81.) Freedman asked Officer Sutter why officers did not use other techniques when Kapps did not confess. Officer Sutter explained, Kapps "was pretty shut down. Um, his answers were very [inaudible] I didn't do it, I don't know what you're talking about or he'd ask us the questions over again. Um, he was pretty locked into where he was going to be." (*Id*. at 681.)

Freedman elicited Officer Sutter's acknowledgment that the interview was intimidating. (*Id*. at 682.) Freedman asked Officer Sutter what his response was to how Kapps "seemingly broke down at the end? How did you interpret that?" (*Id*. at 683.) Officer Sutter replied, "Um, my interpretation uh, was he was acting. Um, there was no tears um, per say. Um, he didn't—we couldn't rile him up. We couldn't get him to raise his voice. We couldn't get him to have any emotion. He was just straight flat and um, at the end when he threw his head down . . . he didn't

really throw his head down he—he put it down nicely and his hat fell forward and I mean, there was no emotion to his tantrum that he was attempting to throw. (*Id*. at 684.)

Freedman later asked Officer Sutter whether drawing a conclusion about Kapps's guilt was contrary to his training. Officer Sutter said "there was a lot of . . . red flags that said he was guilty. I think that uh, you have to take the uh, interview of the child and take her word as truthful and you add all the things together uh, if there's no evidence to point you elsewhere then uh, guilt is guilt." (*Id*. at 695.) Freedman followed up with similar questions, and received similar responses. (*Id*. at 695-96.)

Freedman used his cross-examination of Officer Sutter to argue in Kapps's closing argument that Officer Sutter's judgment was clouded because he immediately made up his mind and presumed that Kapps was guilty. (*Id*. at 1091-92.) Freedman pointed out that Kapps never confessed to touching M.C., despite the pressure officers placed on him to do so. (*Id*. at 1090.) Freedman also emphasized inconsistencies in the testimony. (*Id*. at 1095, 1099.)

IV. Direct appeal

Kapps appealed his convictions, raising the following claims: (1) an improper unanimity instruction subjected him to double jeopardy; (2) his trial

counsel rendered ineffective assistance; (3) the prosecutor committed plain error by vouching for witnesses; (4) the district court imposed improper sentencing conditions; and (5) reversal is required by cumulative error. *Kapps*, ¶ 2. One of Kapps's ineffective assistance of counsel claims alleged that Freedman was ineffective when he elicited Officer Sutter's testimony that Kapps gave a "submind confession" and that Kapps's answers "didn't have a flow of honesty [about them.]" (*State v. Kapps*, DA 16-0513, Appellant's Br. at 28-29 (Mont. Jan. 3, 2017).)

This Court affirmed Kapps's convictions in an unpublished opinion on August 22, 2017. *Kapps*. The Court did not rule on the merits of Kapps's ineffective assistance of counsel claims because it was "unclear why Kapps' counsel took or failed to take the actions Kapps alleged as error. Accordingly, such claims cannot be addressed [on direct appeal], but may be raised in a postconviction proceeding." *Kapps*, ¶ 12. The Court denied the remaining claims on the merits. *Kapps*, ¶¶ 9-11, 15.

V. Postconviction relief

The attorneys who represented Kapps on direct appeal, Brianna E. Kottke and Abigail Rogers, filed a timely Petition for Postconviction Relief, a brief in support, and an affidavit. (PCR Docs. 2-4.) Kottke and Rogers subsequently

withdrew and requested the appointment of the Office of the Public Defender. (PCR Docs. 7-8.)

Joseph P. Howard was appointed to represent Kapps. (PCR Doc. 13.) Howard filed an Amended Petition and a brief in support on Kapps's behalf. (PCR Docs. 19, 22.) He argued that (1) Kapps received the ineffective assistance of trial counsel when counsel failed to effectively challenge M.C.'s competency as a witness or subject her to effective cross-examination, (2) he received the ineffective assistance of counsel where counsel forced Officer Sutter to comment on the credibility of other witnesses and Kapps's guilt, and (3) cumulative errors prejudiced Kapps's right to a fair trial. (PCR Doc. 19 at 18.) Kapps argued in his brief that Freedman was ineffective in his cross-examination of Officer Sutter because he elicited Officer Sutter's opinion on Kapps's guilt. (PCR Doc. 22 at 30-47.)

In its response, the State argued that the claims were procedurally barred and the claims failed on the merits. (PCR Doc. 27.) The State distinguished the case Kapps relied on and explained that Freedman's cross-examination of Officer Sutter was designed to demonstrate that Officer Sutter was inexperienced and jumped to the conclusion that Kapps was guilty early in the interview. (*Id*. at 21-23.) The State pointed out that Freedmen later relied on his cross-examination of Officer Sutter to argue in his closing argument that Officer Sutter's presumption that Kapps was guilty clouded his investigation. (*Id*. at 23.)

The court scheduled an evidentiary hearing and ordered the State to use its best efforts to locate and serve Freedman with an updated *Gilham* order. (PCR Docs. 32.1, 33.) The Court issued an Amended *Gilham* Order directing Freedman to respond to the allegations in the petition. (PCR Doc. 34.)

The State filed a notice detailing efforts that an agent with the Montana Division of Criminal Investigation made to locate Freedman. (PCR Doc. 35.) The State explained that it was unable to obtain an address for Freedman at which it could serve him. (*Id*.) The State spoke to him on the phone, but he was not willing to provide his address. (*Id*.)

An evidentiary hearing was held June 13, 2023. (6/13/23 Tr.) The court took judicial notice of the record from the criminal trial. (6/13/23 Tr. at 4.) Kapps also admitted two exhibits, which had been admitted at the criminal trial. (*Id*. at 5.)

The parties arguments focused primarily on the first issue, which has not been raised on appeal. (*See* 6/13/23 Tr. at 9-14, 19-22, 26-27.) Kapps also argued that Freedman's cross-examination of Officer Sutter allowed Officer Sutter to vouch for M.C.'s credibility and was not objectively reasonable. (*Id*. at 27.)

The State recounted its efforts to locate Freedman, which had been provided in the prior notice. (*Id*. at 16-17.) The State also argued that Kapps failed to support his Amended Petition by an affidavit because he attached an affidavit to his original Petition, but not the Amended Petition. (*Id*. at 22-23.)

The court asked whether it was in the same position as the Montana Supreme Court was on direct appeal because there still was not any information from Freedman. (*Id*. at 27.) Kapps disagreed with that position. (*Id*. at 27-28.)

After receiving proposed findings of fact and conclusions of law from both parties, the Court issued its Findings of Fact, Conclusions of Law, and Order Denying Amended Petition for Postconviction Relief. (Appellant's App. A.) The court noted that it did not have any evidence that was not already before the Montana Supreme Court on direct appeal. (*Id*. at 12-13.) Because Kapps did not provide any additional evidence, the court concluded that Kapps was precluded from raising ineffective assistance of counsel claims in his postconviction proceeding. (*Id*. at 29.) The court concluded that Kapps failed to meet his burden to demonstrate by a preponderance of the evidence that Freedman was ineffective. (*Id*. at 13.) The court also stated that neither M.C.'s competency nor Officer Sutter's testimony were addressed on appeal, so he was barred from raising either of these issues in this postconviction proceeding. (*Id*. at 15.)

Although the court stated that the claims were procedurally barred, the court also denied the claims on the merits. Addressing the claim involving Officer Sutter, the court noted that *State v. Hayden*, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091, which Kapps relied on, was distinguishable because in *Hayden* the State called an officer as a rebuttal witness and elicited the officer's testimony that witnesses were

telling the truth. (Appellant's App. A at 25.) The court concluded that the "record makes clear that Freedman's cross-examination was designed to undermine Officer Sutter's conclusion that Kapps was the perpetrator of the crime." (*Id*. at 26.) The court noted that Freedman attempted to obtain a concession that Officer Sutter was inexperienced and reached his decision prematurely; Freedman attempted to obtain Officer Sutter's concession that his mind was made up, so he would not consider Kapps's answers; and Freedman was able to use the answers he obtained from Officer Sutter in his closing argument. (*Id*.) The court concluded that Kapps failed to demonstrate that the cross-examination was deficient or that he did not receive a fair trial. (*Id*.) The court explained that Freedman "was getting a concession that Officer Sutter had 'rushed to judgment[,]'" and Freedman was able to use these concessions in his closing argument. (*Id*. at 30.)

Similarly, the court denied Kapps's claim that Freedman was ineffective when he questioned Officer Sutter about his opinion regarding M.C.'s credibility. The court concluded that Freedman's questions were designed to attack Officer Sutter's credibility—not the credibility of the victim. (*Id*. at 26-27, 30.) The court noted that Freedman used Officer Sutter's testimony that law enforcement presumes that a victim is telling the truth during his closing argument to argue that law enforcement failed to adequately investigate the case and prove its case beyond a reasonable doubt. (*Id*. at 27.)

Finally, the court concluded that none of the claims individually or cumulatively resulted in prejudice to Kapps. (*Id*. at 31.)

SUMMARY OF THE ARGUMENT

The district court correctly denied Kapps's Amended Petition because Kapps failed to demonstrate that Freedman was deficient, and he failed to demonstrate that Freedman's performance prejudiced the outcome of his case. Freedman reasonably questioned Officer Sutter about his belief that Kapps was guilty in order to raise doubt about Officer Sutter's conclusion by showing that he rushed to judgment. The jury was already aware Officer Sutter believed Kapps was guilty and M.C.'s allegations were true because Officer Sutter repeatedly said that in his interview of Kapps that was played for the jury during Officer Sutter's direct examination. Freedman's questions were designed to raise doubt about Officer Sutter's conclusions, which the jury was already aware of. The cross-examination was not constitutionally deficient because it did not fall below an objective standard of reasonableness.

Regardless of whether Freedman's cross-examination was deficient, Kapps cannot demonstrate that he received the ineffective assistance of counsel because he was not prejudiced by the cross-examination. First, the examination was not harmful because the jury was already aware that Officer Sutter believed Kapps was

guilty. The cross-examination raised questions about Officer Sutter's hasty determination of guilt, which supported Freedman's argument that Officer Sutter's judgment was clouded, impacting the quality of the investigation. That benefit outweighed the potential harm of the questions.

Also, even if harmful, the cross-examination did not affect the outcome of the case because M.C.'s allegations were corroborated by compelling evidence, including DNA evidence demonstrating that Kapps's sperm was on a child's blanket, which M.C. said Kapps covered them with when he molested her. Given the strength of the case, there is not a reasonable probability that the jury would have reached a different outcome if Freedman had not asked the challenged questions on cross-examination. Accordingly, the district court correctly denied Kapps's Amended Petition.

ARGUMENT

I. Records from Freedman's disciplinary proceedings, which Kapps attached to his opening brief, should be disregarded because they are not part of the record in this case and are not relevant.

Kapps's appellate counsel has attached the records from Freedman's disciplinary proceedings, labeled as "Supplemental Appendix A-C," including a transcript of a hearing before the Commission on Practice. These records are not appropriately attached because the parties are bound by the district court record,

which includes "the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court." *Brunette v. State*, 2016 MT 128, ¶ 16, 383 Mont. 458, 372 P.3d 476 (quoting M. R. App. P. 8(1)). This Court has stated, "'[w]e strongly condemn this practice by counsel for appellants [of attempting to introduce extraneous evidence by the 'back door' via attachment as appendices to their brief] *and . . . warn other parties to future appeals that this practice will not be tolerated*.'" *Frank v. Harding*, 1998 MT 215, ¶ 7, 290 Mont. 448, 965 P.2d 254 (emphasis and bracketed material in original).

The State acknowledges that Freedman was disbarred, and it is appropriate to cite to this Court's orders in Freedman's disciplinary cases. *In re Freedman*, No. PR 16-0239, Order (Mont. Dec. 6, 2016); *In re Freedman*, No. PR 18-0034, Order (Mont. Oct. 30, 2018); *In re Freedman*, No. PR 18-0516, Order (Mont. June 18, 2019). The remainder of the documents contained in the supplemental appendices should not be considered because they are not part of the appellate record in this case. Also, the opinions and recommendations of the Disciplinary Counsel are not admissible outside of a disciplinary action. Rule 20C of the Rules for Lawyer Disciplinary Enforcement.

Further, these documents are not relevant to the issue raised on appeal. The only issue on appeal is whether Freedman's cross-examination of Officer Sutter

was constitutionally ineffective. Freedman's unrelated disciplinary proceedings are not relevant to that question.

II. Standard of review and applicable law

A. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by IAC claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on IAC claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

B. Law applicable to claims of ineffective assistance of counsel

This Court reviews IAC claims applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the

defense. *Baca*, ¶ 16; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is 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.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689). This highly deferential review of counsel's performance is necessary to "eliminate the distorting effects of hindsight." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

C. Pleading requirements for petitions for postconviction relief

The postconviction statutes are demanding in their pleading requirements. *Ellenburg*, ¶ 12. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2).

A district court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the court may order a response and, after reviewing the response, "dismiss the petition as a matter of law for failure to state a claim for relief or may proceed to determine the issue." Mont. Code Ann. § 46-21-201(1)(a); *Hamilton*, ¶ 12.

III. The district court correctly concluded that Kapps failed to demonstrate that Freedman's cross-examination of Officer Sutter constituted ineffective assistance of counsel.

A. It is unnecessary to rely on the district court's procedural rulings because the district court correctly denied the claim concerning Freedman's cross-examination of Officer Sutter on the merits.

As an initial matter, the State acknowledges that Kapps's claim regarding Freedman's cross-examination of Officer Sutter is not procedurally barred. On direct appeal, Kapps argued, in an abbreviated manner, that Freedman was ineffective in his cross-examination of Officer Sutter. (*State v. Kapps*, DA 16-0513, Appellant's Br. at 28-29 (Mont. Jan. 3, 2017).) This Court declined to rule on the merits, ruling that the claims were not record-based and could instead be raised in a postconviction proceeding. *Kapps*, ¶ 12. That is consistent with this Court's policy that it will not review IAC claims on direct appeal if the record is silent about counsel's reason for their actions. *State v. Rodriguez*, 2021 MT 65, ¶¶ 31-33, 403 Mont. 360, 483 P.3d 1080. Because Kapps's claim could not be reviewed on direct appeal, it is not barred by Mont. Code Ann. § 46-21-105(2).

Further, it is unnecessary to decide whether the district court correctly ruled that the affidavit Kapps filed in support of his original Petition was not evidence in support of his Amended Petition because it was not attached to his Amended Petition. (*See* Appellant's App. A at 12.) The district court made that conclusion in support of its conclusion that the claims were procedurally barred, and the State

acknowledges that the claim raised on appeal was not procedurally barred. Nothing in the affidavit would have affected the outcome of the court's conclusion on the merits of that claim. (*See* PCR Doc. 4.) Further, if Kapps had information that would have been beneficial to his case, he needed to testify at the evidentiary hearing, which he did not do.

Although the district court's conclusion that the claim was procedurally barred was incorrect, the court's order denying Kapps's Amended Petition should be affirmed because the court correctly concluded that Kapps failed to demonstrate that Freedman's cross-examination of Officer Sutter was ineffective. Both prongs of the *Strickland* test must be met to establish ineffective assistance, and Kapps failed to establish either prong.

B. Kapps did not demonstrate that Freedman's cross-examination of Officer Sutter was deficient.

Freedman's cross-examination of Officer Sutter did not fall below an objective standard of reasonableness. Freedman was faced with the difficult task of defending Kapps in a case where the victim's claim that Kapps molested her was corroborated by the victim's brother's eyewitness testimony and DNA evidence. Although it has not been possible to obtain an affidavit or testimony from Freedman about his strategy, Freedman's strategy is apparent from the record. Freedman highlighted inconsistencies in witnesses' statements and tried to attack the quality of the investigation, which included criticizing the delay in

interviewing C.C. (Trial Tr. 235, 246, 260-61, 376-79, 552-54, 726, 944, 1085-92, 1095-97, 1099-1100.) Freedman argued that these errors created reasonable doubt about Kapps's guilt. (*Id*. at 1093, 1096-98.)

As part of the strategy to attack the investigation, Freedman attempted to demonstrate through his cross-examination of Officer Sutter that law enforcement jumped to the conclusion that M.C.'s allegation was accurate and that Kapps committed the offense. (*See* Trial Tr. at 644-54, 668-72.) Freedman attempted to demonstrate that law enforcement's rush to judgment led law enforcement to inadequately investigate the offense. (*See id*. at 659-60, 664-68.) The district court correctly found that the "record makes clear that Freedman's cross-examination was designed to undermine Officer Sutter's conclusion that Kapps was the perpetrator of the crime." (Appellant's App. A at 26.)

Contrary to Kapps's assertion, eliciting Officer Sutter's testimony that he believed Kapps was guilty was not detrimental to his defense. It was clear from the video of Kapps's interview, which was played during the State's direct examination of Officer Sutter, that law enforcement believed Kapps was guilty. (State's Exs. 1a-1b, played at Trial Tr. 624; Trial Tr. at 1087.) In that interview, Officer Sutter repeatedly told Kapps that a seven-year old would not make up the allegations and that law enforcement knew he had done something to M.C. (State's Exs. 1a file 17.MPG at 0:00-3:52, 4:46-4:53, 7:00-7:10, 10:05-10:08,

10:17-10:20.) Freedman's cross-examination of Officer Sutter addressed the interview, which had just been played for the jury.

By questioning Officer Sutter about his hasty conclusion that Kapps was guilty, Freedman attempted to demonstrate that Officer Sutter's conclusion was based on a rush to judgment, rather than evidence. Freedman attempted to demonstrate that Officer Sutter determined that Kapps was guilty 13 minutes into the interview and maintained that position even though Kapps willingly talked to law enforcement, denied touching M.C., and persisted in that denial even when law enforcement pressured him to admit guilt. (*See* Trial Tr. at 644-54, 682-83, 1087-90.) The jury was already aware from the interview that Officer Sutter believed Kapps was guilty. Freedman's cross-examination was designed to raise doubts about Officer Sutter's conclusion.

Freedman used the testimony he elicited from Officer Sutter in his closing argument to argue that Officer Sutter:

> was focused on Mark's guilt immediately. He had his mind made up at the time of the interview, the interrogation of Mr. Kapps. . . . His mind was made up right off the bat. And even with that prism, everything from his questioning to the way he handled the investigation was from the presumption of guilt. Not to find out what happened. And I submit to you that that clouded his investigation . . . [and] clouded his—his judgment.

(Trial Tr. at 1091-92.)

Defense counsel "possesses a wide latitude in determining what tactics to employ when defending a client." *State v. St. Germain*, 2007 MT 28, ¶ 33, 336 Mont. 17, 153 P.3d 591. Freedman reasonably attempted to undermine Officer Sutter's conclusion that Kapps was guilty, which the jury was already aware of, and to discredit the investigation to attempt to create doubt about the evidence presented. Freedman relied on a reasonable strategy that is within the wide latitude afforded defense counsel.

The same is true of Freedman's examination of Officer Sutter about his belief that M.C. was telling the truth. During Kapps's interview, which had just been played, Officer Sutter told Kapps that seven-year-olds do not make up these allegations. (State's Ex. 1a, file 17.MPG at 0-3:52.) When Freedman questioned Officer Sutter about his belief that M.C. was telling the truth, he did not elicit any harmful information that the jury had not already heard. (*See id*.; Trial Tr. at 669.) Freedman elicited Officer Sutter's testimony that he believes allegations of sexual abuse from young children to demonstrate that law enforcement jumped to conclusions and failed to thoroughly investigate the allegations. (*See* Trial Tr. at 669-77.) Because the jury had already heard Officer Sutter's statement that seven-year-olds do not make up these stories, questioning Officer Sutter about that belief in an effort to cast doubt on Officer Sutter's judgment and the evidence presented was not unreasonable.

Kapps's reliance on *State v. Hayden*, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091, is misplaced because in that case a prosecutor improperly elicited an officer's testimony that witnesses were truthful to vouch for the credibility of the witnesses. *Hayden*, ¶ 12. This Court stated that "[a] witness may not comment on the credibility of another witness's testimony." *Hayden*, ¶ 26. Under *Hayden*, the State could not have elicited Officer Sutter's testimony that he found M.C.'s testimony to be credible or found Kapps's testimony not to be credible for the purpose of proving that fact. But that is not what occurred in this case. Freedman cross-examined Officer Sutter about his beliefs to show how those beliefs influenced his interview of Kapps and his investigation. Freedman's questions were posed to attack Officer Sutter's view of the case, which the State had already presented to the jury through the recording of Kapps's interview. *Hayden* is distinguishable and does not demonstrate that Freedman was ineffective.

Kapps has failed to overcome the presumption that Freedman's cross-examination was sound trial strategy and to demonstrate that Freedman's performance fell below an objective standard of reasonableness. Accordingly, he has failed to establish that Freedman's cross-examination of Officer Sutter was deficient.

Kapps's assertion that Freedman's absence and disbarment weigh in favor of finding deficient performance should be rejected. As noted above, Freedman's

strategy is apparent from the questions he asked and by his closing argument. It is unnecessary to have Freedman's response to determine whether Freedman was deficient. Further, there is not any indication that the deficits that led to Freedman's disbarment are related to his cross-examination in this case. *See In re Freedman*, No. PR 18-0516, Order (Mont. June 18, 2019).

C. Kapps has also not demonstrated that Freedman's cross-examination of Officer Sutter prejudiced him.

Kapps has not demonstrated that he was prejudiced because he has not demonstrated a reasonable probability that he would not have been convicted if Freedman had not asked Officer Sutter about his belief that Kapps was guilty and that M.C. was telling the truth. By the time Freedman cross-examined Officer Sutter, the jury had watched law enforcement's interview of Kapps in which Officer Sutter repeatedly told Kapps that seven-year-olds do not make up these allegations and law enforcement knew that he did something inappropriate. Eliciting Officer Sutter's testimony about his opinion on Kapps's guilt did not harm the defense, and it may have helped the defense by showing that Officer Sutter quickly drew the conclusion that Kapps was guilty even without evidence to corroborate M.C.'s allegations. During Freedman's closing argument, he used his examination of Officer Sutter to support his argument that law enforcement used poor judgment. (Trial Tr. at 1091-92.) That argument supported Kapps's defense.

Further, even if the cross-examination of Officer Sutter elicited some answers that were harmful to the defense, there is not a reasonable probability that the cross-examination affected the outcome of the case. Unlike many sexual abuse cases that are based solely on the allegation of the victim, M.C.'s allegations were corroborated by compelling evidence. Most importantly, DNA evidence demonstrated that Kapps sperm was on a blanket that M.C. said he covered them with when he sexually abused her. (Trial Tr. at 308, 475, 491, 569, 573.) Kapps's explanation for how his sperm got onto a child's blanket was not believable and was contradicted by Miranda's testimony. (*See id*. at 938-39, 959, 991-92.) Further, C.C. provided eyewitness testimony when he testified that he saw Kapps put his hand down M.C.'s pants the day before the disclosure. (*Id*. at 239-40.) Stephanie also testified that Kapps exhibited unusual behavior that was consistent with M.C.'s allegations of abuse, and M.C. had complained that her private area hurt. (*Id*. at 318-19, 322-23.) And Stephanie and Miranda both testified that M.C. had stopped wanting to go over to Miranda's house. (*Id*. at 335, 368.) All of this evidence corroborated M.C.'s allegations. Given the strength of the evidence, there is not a reasonable probability that Freedman's cross-examination of Officer Sutter affected the outcome of the case.

Because Kapps was not prejudiced by Freedman's cross-examination of Officer Sutter, the court correctly denied Kapps' Amended Petition, even if this Court finds that Freedman performed deficiently.

CONCLUSION

The district court's denial of Kapps's Amended Petition should be affirmed because Kapps failed to demonstrate that Freedman's cross-examination of Officer Sutter was deficient or that it prejudiced the outcome of the case.

Respectfully submitted this 3rd day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 7,707 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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