

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0677

JUAN ANASTASIO RODRIGUEZ,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Elizabeth Best, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly denied Rodriguez PCR absent a hearing.

STATEMENT OF THE CASE

In December 2017, Rodriguez was convicted of felony sexual intercourse without consent that he committed in 2003 against then 15-year-old J.S. *State v. Rodriguez*, 2021 MT 65, ¶¶ 4-11, 403 Mont. 360, 483 P.3d 1080. This Court affirmed Rodriguez’s conviction. *Id.* ¶¶ 14-38.

Rodriguez petitioned for postconviction relief (PCR) in July 2022, raising 63 claims.¹ (DV-Doc. 3 (Petition).) The court found both that the Petition was untimely and that the ineffective assistance of counsel claims (IAC) lacked merit. (DV-Doc. 17.) Following Rodriguez’s motion, the court issued an amended order on November 17, 2023, finding the Petition was timely and denying his claims on the merits. (DV-Docs. 18, 20, 21.)

¹Citations to the PCR proceeding will be “DV-Doc.” and citations to the underlying criminal case will be “Doc.”

STATEMENT OF THE FACTS

I. Criminal proceedings

A. Offense and investigation

In the fall of 2014, J.S. finally spoke publicly about Rodriguez anally raping her in 2003. (Trial Transcript (Tr.) 335-37; Tr-Ex. 3.) J.S. turned 15 years old in the fall of 2002, and met and became friends with Jennifer Hahn. (*Id.* 315-20, 344-48, 368-79.) Jennifer had a crush on Eric Stephens, Rodriguez's roommate. (*Id.* 527-45.) In the spring of 2003, Jennifer and J.S. spent time with Eric and Rodriguez at their dorm and the Flamingo parking lot. (*Id.* 528-45.) During one of these dorm hangouts, the couples drank and Rodriguez asked J.S. to shower with him, which J.S. ultimately agreed to, but nothing sexual happened. (*Id.* 320-21.)

Another night, Jennifer and J.S. met Rodriguez and Eric at the Flamingo. (Tr. 318-23, 351, 373, 379.) J.S.'s parents were religious and very strict so J.S. did not want to stay out too late. (*Id.*) Jennifer said she wanted to stay so Rodriguez offered to give J.S. a ride home. (*Id.*) J.S. agreed and they left in Rodriguez's silver Honda Civic, which she described as "sporty" with extra lights. (*Id.*) Rodriguez did not take J.S. home and instead drove out of town, explaining he wanted to show her how fast his car was. (*Id.* 321-22.) Rodriguez said it would only take a few minutes, so J.S. agreed. (*Id.*) Instead of showing off the speed of his car, Rodriguez turned onto a remote dirt road. (*Id.*)

Once parked, Rodriguez grabbed J.S. her by the shoulder, twisting her around until her face was pressed against the car seat. (Tr. 322-24.) Rodriguez pinned J.S.'s neck with his arm so she could not move and pulled down the back of her pants and anally raped her. (*Id.*) J.S. "kept telling [her]self that it would be over soon, like to just hang on, it was almost . . . over so [she] could go home." (*Id.*) Rodriguez ejaculated and then drove J.S. home in silence, leaving her violated, frightened, ashamed, in pain, and bleeding from her anus. (*Id.*) J.S. did not tell her religiously strict parents because "they would think it was my fault . . . [and] I would be just in so much trouble." (*Id.* at 316-17, 324-25.)

Over two years later, in December 2005, J.S. received a call from a man who said he had not seen her in a while and he was going to stop by. J.S. recognized the voice but could not place it. (Tr. 325-29, 358-61.) When the man arrived in a Honda Prelude, J.S. went outside and discovered it was Rodriguez. (*Id.*) J.S. screamed when Rodriguez reached out to her and snapped a photo of him before he drove off. (*Id.*; Tr-Ex. 1.)

Seeing Rodriguez brought back the trauma of the rape, causing J.S. anxiety and sleeplessness to the point she went to her doctor. (Tr. 329-31.) Over the next of couple of years, Rodriguez continued to call J.S. (*Id.*) Once, when J.S. confronted him about the rape and challenged why he kept calling her, Rodriguez

laughed and told her, “Well, it wouldn’t have been so bad if we would have had some lube.” (*Id.* 330.)

J.S. also encountered Rodriguez in public. One New Year’s Eve, Rodriguez hugged J.S. from behind and, when she realized it was him, she panicked, pulled away, and told her friend, Alexis Evans, they needed to leave immediately. (Tr. 330-31, 384-86.) Seeing J.S. shaking and crying and visibly “[d]istraught, scared, surprised [and] [v]ery upset,” Alexis asked what was wrong and J.S. told her about being raped by Rodriguez. (*Id.* 385.)

J.S. moved but Rodriguez found her again. (Tr. 331-35, 361.) J.S. saw Rodriguez parked outside her apartment in a black truck with his roofing business logo, looking towards her apartment. (*Id.*) Alexis also saw the black truck with Rodriguez’s logo parked at their apartment two or three different times.

(*Id.* 386-89.) Out of fear and the belief that nothing could be done because she had not told anyone right after she was raped, J.S. did not go to the police. (*Id.* 335.)

J.S. continued to suffer situational stress, severe anxiety, sleeplessness, panic attacks, and agoraphobia. (Tr. 329, 407-08, 424-26, 574, 612.) In 2011, J.S. eventually told her family nurse practitioner, LaDonna Maxwell, that she had been raped when she was 15. (*Id.* 334, 337-43, 360-61, 405-08.) Maxwell referred J.S. for counseling with licensed clinical professional counselor Barb Bottomly. (*Id.* 574, 577, 581-82.)

Bottomly met with J.S. six times in 2011 and once in 2015. (Tr. 573-617.) Bottomly focused on helping J.S. with anxiety and panic disorder. (*Id.*) Many parts of Bottomly's session notes corroborated J.S.'s description of the rape and Rodriguez's continued efforts to contact her. (*Id.*)

Finally, in 2014, when J.S. saw a Facebook post referencing Rodriguez and his roofing and siding business, she decided to disclose Rodriguez had raped her. (Tr. 335-37.) J.S.'s post was brought to the attention of Great Falls Police Department Detective Jesse Slaughter, who interviewed J.S. (*Id.* 337, 620-21.) Detective Slaughter also interviewed Jennifer, Alexis, Eric, and others, who confirmed and corroborated many of the facts J.S. had reported. (*Id.* 622-41.) A speeding ticket Rodriguez was given in September 2003 confirmed his address on the air force base and that he drove a silver Civic. (*Id.*) The base confirmed that Rodriguez also drove a Prelude, which was the type of vehicle Rodriguez drove to J.S.'s house in December 2005. (*Id.*) J.S. also gave the detective the photograph she had taken of Rodriguez. (*Id.*)

After the State filed charges, Detective Slaughter arrested Rodriguez. (Tr. 629-33.) Rodriguez did not question why he was being arrested for rape. (*Id.*) He only denied knowing J.S. (*Id.*) During his bail reduction hearing, the State reviewed Rodriguez's extensive criminal history, which included pleading guilty to witness tampering. (2/26/15 Tr.)

Rodriguez was initially placed in the K-pod at the Cascade County Detention Center (CCDC), where Robert Paliga was also being held. (Tr. 477-94.) Paliga spoke to Rodriguez daily. (*Id.*) Paliga recalled Rodriguez telling him he had given a girl a ride and instead of taking her home, he drove to the outskirts of town. (*Id.*) Rodriguez said he made sexual advances towards her and when she denied him “things went a little farther than they should have.” (*Id.* 481.) Rodriguez bragged that there was “no way that he would ever be[] found guilty” because there was no DNA or physical evidence. (*Id.*)

Paliga sent a kite to Detective Slaughter asking to speak to him about Rodriguez. (Tr. 484-94, 632.) Paliga relayed their conversation and asked about getting something in return for his information, but he was told the State would not provide any compensation or reduction in sentences/charges. (*Id.*)

B. Pretrial proceedings

The State submitted several pretrial motions/notices, including its intent to introduce 404(b) evidence should Rodriguez open the door. (Docs. 29, 32.) The State also filed a motion in limine to keep Rodriguez from trying to introduce evidence of J.S.’s prior sexual history as prohibited by the rape shield provision. (Doc. 31.)

Before the court ruled on these motions, the parties entered into a plea agreement to resolve the matter and Rodriguez’s pending revocation. (Docs. 35,

37.) However, at the July 23, 2015 change of plea hearing, Rodriguez withdrew from the agreement and his counsel, Ken Olson, asked the court to set a trial date. (7/23/15 Tr.)

On April 14, 2016, the court considered the outstanding pretrial motions and released Rodriguez from pretrial detention so DOC could transfer him to a DOC facility,² but ordered he be returned a month before his trial. (Docs. 44, 66, 67.) The court granted the State’s rape shield motion and ordered it would reconsider its ruling should new evidence be presented. (*Id.*) The court reserved its ruling on prior bad acts and bad character evidence, but noted the defense was on notice such evidence might be admitted. (*Id.*)

In June 2016, the court permitted Olson to withdraw as Rodriguez’s attorney and public defender Vincent van der Hagen was appointed on September 1, 2016. (Docs. 68-70, 73-74, 77-78; 8/11/16 Tr. 6-11.) Meanwhile, Rodriguez filed an *ex parte* Notice claiming prosecutorial misconduct for allegedly recording, monitoring, and listening to Rodriguez’s phone calls with his attorney. (Doc. 75.) The prosecutor immediately informed the court that the allegation was “absolutely false.” (Doc. 76.)

² Rodriguez’s probationary sentence for burglary and witness tampering had been revoked. *State v. Rodriguez*, 2018 MT 241N, ¶ 3; *see also* Docs. 29, 194.

The district court promptly addressed this issue on September 8, 2016, and advised Rodriguez to discuss it with his attorney. (9/8/16 Tr.) Van der Hagen's appointment ended in November 2016, after he moved to withdraw due to a conflict of interest. (Doc. 80.) Shari Lennon replaced van der Hagen, but within a month, she was replaced by James Gardner. (Docs. 81-87; 11/17/16 Tr.; 1/26/17 Tr.)

In July 2017, Rodriguez requested new counsel. (Docs. 112, 114-117.1; 8/1/17 Tr.) Rodriguez alleged that Gardner had been ineffective in several respects, including not looking into the alleged prosecutorial misconduct that the court had already determined was meritless and failing to hire a psychology expert to testify about "the mental capacity of the alleged victim and her truth." (*Id.* 7.) The court admonished Rodriguez that it would not permit an expert to testify about the mental capacity of the victim and explained that while a defendant is entitled to a "full and fair defense," he is "not entitled to control the lawyer's every movement." (*Id.* at 11.)

In response to Rodriguez's complaint that Gardner had not challenged the State's second set of pretrial motions, Gardner explained there were no contrary arguments to be made, particularly regarding the rape shield motion and the State's intent to offer 404(b) evidence should the door be opened. (8/1/17 Tr. 15-24.) In its order relieving Gardner of his appointment, the court noted that Rodriguez had not presented any credible evidence to support his claims against Gardner. (Doc. 119.)

On August 23, 2017, Teal Mittelstadt and Scott Owens (Defense Counsel) filed notices of appearance. (Docs. 122-123.) Rodriguez was transported from MSP to CCDC on December 6, 2017. (Doc. 147.) The court granted Rodriguez's motions to permit additional witnesses (Sharlene Rodriguez, John Marion, Dr. Bowman Smelko) and to allow the jury to view a 1999 Honda Civic. (Docs. 128-129, 131, 133, 143, 147, 147.1.) Defense Counsel also filed a motion in limine to exclude several pieces of information, including J.S.'s statements to her physician and counselor and evidence of Rodriguez's criminal history or prior bad acts. (Docs. 148-149.) The court granted most of Rodriguez's requests and reserved ruling on others until trial. (Doc. 153.)

While Rodriguez had not disclosed any information to the State about what the three named witnesses would testify to, Sharlene had told law enforcement in 2014 that she had information related to J.S.'s allegation. (Doc. 151.) At the December 5, 2017 pretrial conference, Defense Counsel advised they had been unable to contact Marion and did not intend to call him or Sharlene to testify. (12/5/17 Tr.) The court granted Defense Counsels' request to allow Dr. Smelko to listen to the State's blind expert, Jean McCallister, as he might be called as a rebuttal witness. (*Id.*) Defense Counsel further explained that, other than Dr. Smelko, the only defense witness might be Rodriguez, if he decided to testify. (*Id.*)

C. Trial

During cross-examination, Defense Counsel impeached J.S. with her initial statements to Detective Slaughter. (Tr. 347-50.) For instance, J.S. had told the detective that when Rodriguez asked her to shower with him, nothing further happened. (*Id.*) J.S. clarified that she had meant nothing sexual happened. (*Id.*) Defense Counsel also challenged J.S.'s testimony that she was assaulted in late summer or early fall of 2003, and she admitted she may have said it happened in the spring. (*Id.* 353-54.) Defense Counsel asked why she was changing her story, and J.S. replied, "I don't want to say I am changing my story. What I meant by that is this was a really long time ago." (*Id.*) J.S. added she was certain it happened in 2003 and, while she did not know the exact date, she remembered the weather was neither cold nor hot, but warm. (*Id.*)

J.S. admitted she felt comfortable getting into Rodriguez's vehicle and was not scared when he drove out of town to show her how fast his car was. (Tr. 352-57.) Defense Counsel also questioned J.S.'s testimony that she was raped in Rodriguez's Civic, highlighting details she did not know such as whether it was a manual or automatic or whether it had two or four doors. (*Id.*) J.S. described the interior as "regular-sized." (*Id.*) J.S. believed she had been wearing low-rise jeans and probably thong underwear. (*Id.*) J.S. stated that Rodriguez had not reclined the

passenger seat when he attacked her. (*Id.*) J.S. described one of her knees being on the seat when Rodriguez pulled her pants down, but not off. (*Id.*)

During Jennifer's cross-examination, Defense Counsel narrowed the date of the rape to between March and June 2003. (Tr. 376-77.) On her cross-examination, Alexis admitted she never saw Rodriguez's face at the bar or in the truck allegedly parked by their apartments. (*Id.* 389-97.) Alexis also admitted there were businesses nearby, including a hardware store. (*Id.*)

Eric testified that he and Rodriguez became roommates on the base in February 2003 when Rodriguez arrived. (Tr. 529-45.) Eric remembered Jennifer and recalled J.S. coming with her to his dorm room. (*Id.*) Eric remembered that Rodriguez drove a silver Civic and had not registered it when he first got it. (*Id.*) During cross-examination, Eric stated the Civic was a two-door vehicle with a standard transmission. (*Id.*) Eric described the interior as "not too big" and explained that the car was "street-legal," meaning it was configured for racing. (*Id.*)

Eric recalled being at the Flamingo with Rodriguez one night when Jennifer and J.S. joined them. (Tr. 529-45.) However, contrary to J.S. and Jennifer, Eric believed the girls had come inside and watched him and Rodriguez play poker. (*Id.*) Eric recalled that Rodriguez, who had told Eric he liked J.S., gave her a ride home that night. (*Id.*)

Prior to Paliga's testimony, the parties discussed the parameters of his cross-examination regarding his conviction history. (Tr. 409-14.) The court concluded that the fact Paliga was facing a criminal sentence was relevant, but his underlying offenses were not. (*Id.*) The court explained it was unaware of any case that allowed specific discussion about convictions and sentences regarding a motive to testify unless there was a plea agreement in exchange for testimony. (*Id.*) Ultimately, however, the court explained it would give the defense some latitude when cross-examining Paliga given that he initiated the discussion with Detective Slaughter in hopes of getting a plea deal. (*Id.*)

Paliga agreed he had hoped for some consideration on his pending charges when he disclosed Rodriguez's incriminating statements, but he received none. (Tr. 484-87.) Paliga recalled that when he met with the prosecutor, he was told he should testify "as a good citizen," and explained that he was willing to testify despite the likelihood he would be bullied for being a "snitch." (*Id.*) Detective Slaughter agreed Paliga had hoped for some compensation, but also recalled Paliga came forward because he was a father. (*Id.* 648.)

When asked if Rodriguez talked about the chances he would be convicted of rape, Paliga explained Rodriguez thought there was no way he would be found guilty and "had bragged about who his attorney was at the time, Kenneth Olson, and that he had beaten . . . several felonies prior to that." (Tr. 481-82.) Defense

Counsel objected to Paliga's reference to Rodriguez's prior charges. (*Id.*) The court struck the statement, told the jury to disregard it, and, upon the State's request, also gave a 404(b) instruction. (*Id.* 483-84.)

The State presented registration records for Rodriguez's vehicles, but not their purchase dates. (Tr. 519-26; Tr-Ex. 12.) Rodriguez registered a silver 1999 Honda Civic on June 27, 2003, and a blue 1995 Honda Prelude in 2004-2007. (*Id.*) Rodriguez registered a black 1999 GMC Sierra truck in April 2009. (*Id.*)

On cross-examination, Detective Slaughter testified that in some sexual assault cases medical evaluations of the victim produce evidence. (Tr. 638-41.) When asked if scarring would be evidence of trauma, the detective responded, "Possibly." (*Id.* at 639.) Defense Counsel then asked whether Detective Slaughter believed there would be any physical evidence of trauma. (*Id.* at 639-41.) The detective explained that, based on his years of experience, it was highly unlikely there would be any scars, but agreed he did not ask J.S. to undergo an exam. (*Id.*)

At the close of the State's case, the court denied Rodriguez's oral motion to dismiss for insufficient evidence. (Tr. 659-61.) Defense Counsel had advised the court that they were unable to procure a similar Civic for the jury to view and would not be calling Dr. Smelko in rebuttal. (*Id.* 416-17, 561.) Defense Counsel did not present any witnesses or submit any evidence. (*Id.* 659.)

D. Posttrial

Rodriguez filed a motion for a new trial, arguing the State failed to prove he owned the car in which J.S. said she was raped and alleging outside influence upon jury deliberations. (Docs. 176-177.) The court denied Rodriguez's motion. (Docs. 181-182.)

Shortly before sentencing, Rodriguez filed a complaint against Defense Counsel with the Office of Disciplinary Counsel (ODC). (Pet. at 191-205.)³ Thus, at the start of his sentencing hearing, the court inquired with Rodriguez and Defense Counsel. (3/30/18 Tr. (Hr'g); Doc. 195.)

Rodriguez complained about the limited time his attorneys had to prepare for trial, asserted that they did not meet with him enough, and alleged the case had not been properly investigated or tried. (Hr'g 12-17.) Defense Counsel did not address the specific IAC claims but explained they did not believe communications had broken down to a point where Rodriguez felt uncomfortable with them representing him at sentencing. (*Id.* 19-20.) Noting that Rodriguez had not asked for substitute counsel and finding that it did not "think that we have an ineffective assistance of counsel issue here under the law," the court proceeded to sentencing with Defense Counsel remaining as Rodriguez's attorneys. (*Id.* at 20-29.) In

³The State uses the Petition's page numbers as estimated by Rodriguez. (Br., App. 6.)

support of its 75-year sentence, the court pointed to the impact the rape had on J.S., and explained it “found her testimony to be very credible and impactful.” (*Id.* 105-06, 108-09.)

II. Direct appeal

Rodriguez raised three claims on appeal: (1) whether the court erred by allowing the presentation of combined expert and lay testimony without providing a cautionary instruction or notice to counsel; (2) whether the court violated Rodriguez’s due process rights by failing to exclude the prosecutor from a hearing regarding defense counsels’ representation; and (3) whether there was record-based evidence of two IAC claims. *Rodriguez, supra.*

This Court affirmed Rodriguez’s conviction. *Rodriguez*, ¶¶ 17-29. This Court did not address Rodriguez’s IAC claims, but observed the likely reason Defense Counsel had not offered statistics on false reports was based on this Court’s clear precedent that such testimony was not permissible. *Id.* ¶¶ 30-36.

III. PCR

Rodriguez executed several PCR-related documents on July 13, 2022, including an Affidavit of Inability to Pay Filing Fees and a PCR petition with accompanying documentation, and mailed them to the Eighth Judicial District

Court. (DV-Docs. 1, 3.) The clerk of court docketed Rodriguez's fee waiver affidavit on July 18, 2022, but did not docket his PCR petition until the court approved Rodriguez's request to proceed *in forma pauperis* on July 26, 2022. (DV-Docs. 2, 3.)

The State filed its response after Defense Counsel submitted a combined affidavit. (DV-Docs. 16 (Aff.) at 15.) The State argued Rodriguez's Petition was untimely and lacked merit. (*Id.*)

On August 23, 2023, the court denied Rodriguez's Petition, finding it was filed a week past the deadline of July 19, 2022. (DV-Doc. 17.) The court further concluded Defense Counsels' performance had "exceeded all standards and was not deficient," noting that it had observed them at trial and reviewed their affidavit. (*Id.* at 6.)

Citing Mont. R. Civ P. 59(e), Rodriguez filed a Motion to Alter or Amend Judgment, arguing that his Petition had been received by the district court on July 18, 2022, and was therefore timely. (DV-Doc. 18.) Rodriguez asked the court to amend its order to reflect the correct date his Petition was received and "reverse its decision to dismiss/deny" his Petition. (*Id.*)

The State agreed that Rodriguez's Petition was not untimely. (DV-Doc. 20.) However, the State reiterated that the Petition lacked merit as the court had also found in its first order. (*Id.*)

On November 17, 2023, the district court granted Rodriguez's motion and issued an amended order finding the Petition had been timely filed. (DV-Doc. 21.)

The court then addressed the merits of Rodriguez's Petition, concluding that he was still not entitled to relief and an evidentiary hearing was unnecessary. (*Id.*)

The court found that Defense Counsel had:

provided detailed affidavits (Doc. 16) responding to Rodriguez's claims and describing their trial strategy and reasoning behind their trial decisions. The Court has thoroughly reviewed the affidavits. The Court also observed counsels' performance during the trial. In the Court's observation, their performance exceeded the quality often observed during criminal trials and was exemplary. The Court finds and concludes that their representation of Rodriguez exceeded all standards and was not deficient, and their representation of Rodriguez was effective, measured by *Strickland* and its progeny.

(*Id.* at 6.)

On November 21, 2023, the district court received notice that Rodriguez had filed a notice of appeal that this Court docketed on November 16, 2023.

(DV-Docs. 22, 23.)

STANDARD OF REVIEW

This Court reviews whether a court has subject matter jurisdiction *de novo*. *State v. Zielie*, 2025 MT 90, ¶ 12, 421 Mont. 452, 568 P.3d 516.

Claims of IAC present mixed questions of law and fact that this Court reviews *de novo*. *Oliphant v. State*, 2023 MT 43, ¶ 29, 411 Mont. 250, 525 P.3d

1214. This Court reviews an order denying PCR to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Id.*

A court's order declining to conduct a PCR evidentiary hearing is reviewed for abuse of discretion. *Main v. State*, 2024 MT 215, ¶ 14, 418 Mont. 159, 556 P.3d 940.

SUMMARY OF THE ARGUMENT

The district court did not lack authority to enter the amended order denying PCR. Not only was the order issued pursuant to Rodriguez's motion to amend, it was not issued beyond the trigger date for filing an appeal. Nevertheless, the court's initial order also denied Rodriguez's claims on the merits, which this Court may affirm if it does not consider the amended order.

Many of Rodriguez's claims on appeal are procedurally barred under general principles of waiver/statutory bars, or not preserved for appeal. Of the remaining viable claims, Rodriguez has not met his heavy burden to establish the court's findings were clearly erroneous or that the court's application of *Strickland* was incorrect.

The court correctly applied the strong presumption that Defense Counsel performed within the wide range of reasonable professional conduct throughout the

trial. Defense Counsel exercised objectively reasonable judgment in holding the State to its burden and attacking the vague, inconsistent timeline of events J.S. and the other witnesses provided. Rodriguez cannot establish that Defense Counsels' performance fell below an objective standard of reasonableness in light of the strong presumption their trial strategy decisions fell within the wide range of reasonable professional decisions. Nor has Rodriguez demonstrated prejudice as a result of Defense Counsels' alleged errors that amounted to a reasonable probability of a different outcome.

The district court did not abuse its discretion when it determined an evidentiary hearing was not necessary. Nor did this determination deny Rodriguez access to the courts. Given the significant record from Rodriguez's criminal proceedings—that the same judge presided over—and the conclusory and unsupported nature of Rodriguez's claims, the court did not act arbitrarily when it did not conduct an evidentiary hearing.

ARGUMENT

I. The district court had authority to issue the amended order.

Rodriguez makes two contradictory assertions about the court's amended order. (Appellant's Brief (Br.) 34-35.) Rodriguez argues the court lacked authority to issue the amended order because this Court had docketed his notice of appeal

the day before. Yet, Rodriguez also asserts the court did not err in issuing the amended order to correct a “clerical error” (*e.g.*, the date his petition was filed/received by the clerk of court). These arguments are neither compelling nor consistent.

First, the district court’s amended order did not simply correct a “clerical error.” *See Zielie*, ¶ 28 (“Clerical mistakes and errors are those errors which misrepresent the court’s original intention.”). The court’s amended order included additional findings and a completely opposite legal conclusion, including its rejection of Rodriguez’s legal theory relying on the “mailbox rule.” Thus, the amended order was not issued to correct a clerical error.

Second, the court did not act outside its authority when it issued the amended order. Whether a district court has jurisdiction is a question of law that this Court reviews “to determine whether the district court had authority to act. A court exceeds its jurisdiction through acts which exceed the defined power of a court, whether that power be defined by constitutional provisions, express statutes, or rules developed by the courts.” *Zielie*, ¶ 12.

The Case Register establishes the court had no knowledge that Rodriguez had filed a notice of appeal. Rodriguez’s notice of appeal was not docketed with the court until November 21, 2023—four days after its amended order was issued. On that day, the court received two documents from this Court: a copy of

Rodriguez's notice of appeal that this Court had file stamped on November 16, 2023, and this Court's Notice of Filing issued November 16, 2023.

In addition to not having any notice that Rodriguez had mailed a notice of appeal on or about November 9, 2023, the district court had no reason to believe the time limit to file an appeal had even been triggered. First, the time to file an appeal from an order denying a PCR petition is 60 days, not 30. *See* § 46-21-203, MCA.

Second, the 60-day "deemed denied" deadline under Mont. R. Civ. P. 59(f) was not November 6, 2023. Rodriguez filed his Rule 59(e) motion on September 7, 2023, within the 28-day deadline. Rule 59(f) provides that if no order is issued on a motion to amend judgment "within 60 days from its filing date, the motion must be deemed denied." Relying on Rule 59(f) and using September 7, 2023 as the filing date, Rodriguez argues that his motion to amend was "deemed denied" as of November 6, 2023.

However, pursuant to the Eighth Judicial District Court's Local Rule No. 7(B) (L.R. 7(B)), once the time for filing pleadings in a contested matter has passed, "at least one party shall file a 'Notice of Issue'" alerting the court the motion is ready for ruling. "Until a Notice has been filed and served, the motion(s) shall not be deemed submitted." L.R. 7(B). Because this local rule "enlarges" the time determining when a matter is deemed submitted, it is reasonable that the court

would not have considered Rodriguez’s motion as submitted until his October 11, 2023 letter (DV-Doc-19). *See* Mont. R. Civ. P. 6(a). A district court’s discretion in controlling the administration of litigation, including “such things as post-trial motions and similar rulings,” is broad. *Southwest Mont. Bldg. Indus. Ass’n v. City of Bozeman*, 2018 MT 62, ¶ 48, 391 Mont. 55, 414 P.3d 761.

Sixty days from October 11, 2023, was December 11, 2023. The court’s November 16, 2023 amended order was issued prior to the “deemed denied” deadline. Thus, Rodriguez’s November 16, 2023 notice of appeal was premature. Mont. R. App. P. 4(5)(a)(v)(C); *In re Marriage of Grounds*, 256 Mont. 397, 399, 846 P.2d 1034, 1035 (1993) (“If a notice of appeal is filed before the [Rule 59] motion is disposed of, the notice of appeal shall have no effect.”).

When the district court’s local rules are considered along with the fact the court had not received timely notification that Rodriguez had appealed, the district court did not act without authority when it issued the amended order. As this Court has explained, Rule 59(e) “provides a time prescription; it does not involve the District Court’s power to hear the case.” *Southwest*, ¶ 31.

Moreover, a district court has broad discretion in controlling the administration of litigation. *Southwest*, ¶ 48. Rodriguez’s motion included additional facts, thereby effectively reopening the PCR proceeding. *See Patton v. Patton*, 2015 MT 7, ¶ 30, 378 Mont. 22, 340 P.3d 1242.

Rodriguez has not established that the court's amended order should be nullified as having been issued outside the court's authority to act. Moreover, when presented with unique procedural circumstances, such as this matter, this Court possesses the authority to suspend its own rules "[i]n the interest of expediting decision . . . or for other good cause shown." See *Durden v. Hydro Flame Corp.*, 1998 MT 47, ¶¶ 17-18, 288 Mont. 1, 955 P.2d 160 (likelihood of subsequent appeal, judicial economy supported reaching appellate issues); *Garza v. Peppard*, 213 Mont. 25, 689 P.2d 279 (1984) (procedural violation would not affect the validity of the appeal). Thus, this Court may exercise its authority under Mont. R. App. P. 29 to find that, although it docketed Rodriguez's Notice of Appeal on November 16, 2023, the district court was not precluded from issuing its amended order the next day.

Nevertheless, should this Court find the district court lacked the authority to issue the amended order, that order would be set aside and the previous order would be reinstated. *Thomas v. Thomas*, 189 Mont. 547, 552, 617 P.2d 133, 136 (1980). Under that procedural determination, Rodriguez would be appealing from

the court's August 23, 2023 order denying his PCR petition.⁴ Regardless of which order this Court deems as the order from which this appeal stems, Rodriguez is not entitled to relief.

II. Unpreserved claims and application of procedural bars

Before reaching the merits of alleged postconviction claims, courts must determine whether the claims are properly raised or procedurally barred. *Hagen v. State*, 1999 MT 8, ¶ 11, 293 Mont. 60, 973 P.2d 233.

This Court applies the statutory bar “in order to prevent the abuse of postconviction relief by criminal defendants who would substitute those proceedings for direct appeal and in order to preserve the integrity of the trial and direct appeal.” *Watson v. State*, 2002 MT 329, ¶ 11, 313 Mont. 209, 61 P.3d 759. This Court will not review issues that were not presented for appeal in the district court. *Herman v. State*, 2006 MT 7, ¶¶ 54-55, 330 Mont. 267, 127 P.3d 422. Nor will this Court address unsupported arguments or develop and articulate arguments for parties on appeal. *Herman*, ¶ 22. Any claim not specifically raised in

⁴Should this Court determine either the original or amended order lacks sufficient findings or analysis, the appropriate remedy is not to grant Rodriguez's Petition. Rather, the matter would be remanded with instructions to make further findings and conclusions. *Heath v. State*, 2009 MT 7, ¶ 26, 348 Mont. 361, 202 P.3d 118.

Rodriguez’s Opening Brief has been abandoned and may not be considered.

Ford v. State, 2005 MT 151, ¶ 35, 327 Mont. 378, 114 P.3d 244.

A. Non-IAC claims

Of the 63 grounds listed in the Petition, Rodriguez raised 6 prosecutorial misconduct claims (Grounds 29-34), 7 alleged “court errors” (Grounds 36-40, 60, and 62), 1 juror misconduct allegation (Ground-42); and 1 bailiff misconduct allegation (Ground-35).⁵ None of these grounds were raised on direct appeal.

Thus, Rodriguez was procedurally barred from raising them in his Petition.

See §§ 46-21-101(1), -105(2), (3), MCA. This Court “will not consider grounds for postconviction relief that reasonably could have been raised on direct appeal.”

DeShields v. State, 2006 MT 58, ¶ 15, 331 Mont. 329, 132 P.3d 540.

Accordingly, in its amended order, the court correctly denied relief on these grounds because they had not been raised on direct appeal. And, although the court did not address them in its original order, this Court may still affirm the district court’s order denying relief on these procedurally barred grounds as right for the wrong reason. *See Peterson v. State*, 2017 MT 165, ¶ 21, 388 Mont. 122, 398 P.3d 259.

⁵For convenience and clarity, IAC arguments Rodriguez asserted his Petition will be referred to as “Ground-X” while arguments asserted on appeal will be referred to as “Claim-X.”

Moreover, this Court need not address these 15 grounds because Rodriguez has offered no legal arguments or analysis relative to these non-IAC grounds. This Court will “not consider unsupported arguments” or abandoned claims. *Herman*, ¶ 22; *Ford*, ¶ 35.

B. Appellate counsel IAC claims

Of the 63 grounds in the Petition, 18 were IAC complaints against his appellate counsel. Twelve grounds argued counsel was ineffective for not raising certain “record-based” IAC claims on direct appeal. (Grounds 43-44, 46-54, and 57.) Six grounds concerned non-IAC claims. (Grounds 45, 55, 56, 58, 61, and 63.)

On appeal, Rodriguez asserts that appellate counsel’s “performance was only deficient if this Court concludes one or more claims of ineffective assistance were record-based and necessary to bring on direct appeal.” (Br. at 31.)

Since the State does not assert that any of the IAC claims Rodriguez advances on appeal were record-based, none of Rodriguez’s appellate IAC claims require this Court to review them. Moreover, this Court should not consider any appellate counsel IAC claims since Rodriguez fails to present any legal analysis or argument on those claims. *Herman*, ¶ 22.

C. Trial counsel IAC claims

Nearly half of the arguments Rodriguez asserted in his Petition were IAC claims against Mittelstadt and Owens. (*See* Grounds 1-28, 41, and 59.) However,

on appeal, Rodriguez asserts only eleven IAC claims against Defense Counsel (e.g., Claims 1 through 9, 10(a) and 10(b)). (Br. at 41-64.) Any IAC claim not specifically raised and argued has been abandoned and may not be considered. *Ford*, ¶ 35.

Finally, as discussed below, some or parts of the claims asserted on appeal were not articulated in the Petition and have thus been waived. *See State v. Wetzel*, 2005 MT 154, ¶ 13, 327 Mont. 413, 114 P.3d 269 (cannot change theories on appeal); *Sanders v. State*, 2004 MT 374, ¶ 14, 325 Mont. 59, 103 P.3d 1053 (cannot expand claims); *Herman*, ¶¶ 54-55 (Court will not review issues that were not presented to the district court).

III. The district court correctly concluded that Defense Counsel were not ineffective.

“[A] petitioner seeking to reverse a district court’s denial of a petition for postconviction relief . . . bears a heavy burden.” *Whitlow v. State*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861. A petitioner must prove by a preponderance of the evidence that he is entitled to relief and present “more than mere conclusory allegations.” *Ellenburg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 473.

In assessing IAC claims, this Court applies the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Whitlow*, ¶ 10. Petitioners must demonstrate by a preponderance of the evidence that their counsels’ performance

was deficient and that as a result, they suffered prejudice. *Oliphant*, ¶ 38. If an IAC claim can be disposed of for lack of evidence on one *Strickland* prong, the other prong need not be addressed. *Whitlow*, ¶ 11.

An attorney's performance was deficient if their "conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. 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." *Strickland*, 466 U.S. at 689. The petitioner bears a "heavy" burden to overcome this presumption, *Strickland*, 466 U.S. at 713, and "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," *Whitlow*, ¶ 15.

To establish *Strickland*'s second prong, prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. When considering this prong, the court must consider the totality of the evidence. *Strickland*, 466 U.S. at 695. "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).

A. Claim-1 [Grounds-2, 3, 19]

Rodriguez faults Defense Counsel for not doing a more thorough job of “confronting” J.S. and Maxwell to discredit J.S. (Br. at 41-46.) This compound claim criticizes Defense Counsels’ investigation into J.S.’s medical records and asserts Defense Counsel should have conducted more thorough cross-examinations of J.S. and Maxwell. None of Rodriguez’s arguments are compelling.

This Court “accords great deference to [c]ounsel’s exercise of judgment in determining appropriate defenses and trial strategy.” *Oliphant*, ¶ 43. Even if a court determines counsel could have done a “better” or “more thorough” job, potentially causing prejudice to the defendant, that is insufficient to establish IAC under *Strickland*. *Weaver v. State*, 2005 MT 158, ¶ 28, 327 Mont. 441, 114 P.3d 1039.

Courts review attorneys’ decisions regarding investigations for reasonableness in light of all the circumstances of the case, applying great deference to counsel’s judgments. *Strickland*, 466 U.S. at 691. “When defense counsel is accused of failing to investigate adequately, the focus is on whether the information obtained from such an investigation would have produced a different result.” *Heavygun v. State*, 2016 MT 66, ¶ 18, 383 Mont. 28, 368 P.3d 707.

Defense Counsel obtained J.S.'s records from Maxwell and Bottomly. Thus, at most, the only complaints Rodriguez asserts about Defense Counsel's investigation are not subpoenaing Hayden Hendrick or noticing there was a record in which J.S. allegedly said she could not remember her own name. (Br. at 42-43.)

First, it was reasonable not to subpoena Hendrick's records as he had only seen J.S. about family and church issues and had no knowledge about the rape. (Pet. 237.) Second, Defense Counsel did not lose or fail to rely on a record about J.S. not remembering her own name as such a record does not exist. Rather, this allegation is a misinterpretation of Detective Slaughter's narrative of his interview with J.S. when she told him Maxwell had referred her to a counselor, but she forgot the counselor's name. (Doc. 215, attached report at 5.) Rodriguez has not established that Defense Counsel failed to reasonably investigate or that had Defense Counsel brought this information to the jury the outcome would have been different. *Weaver*, ¶ 21; *Riggs v. State*, 2011 MT 239, ¶ 22, 362 Mont. 140, 264 P.3d 693.

Rodriguez also failed to establish that Defense Counsel performed deficiently when cross-examining J.S. and Maxwell.

To the extent that Rodriguez argues Defense Counsel should have elicited testimony about J.S.'s mental health unrelated to possible memory impairments, trial counsel was not ineffective for failing to attempt to introduce evidence they knew

was inadmissible. *Deschon v. State*, 2008 MT 380, ¶¶ 23-26, 347 Mont. 30, 197 P.3d 476. The court correctly admonished Rodriguez when he complained about counsel not hiring an expert to testify about J.S.’s capacity to tell the truth; a court will not “permit[] an expert to testify about the mental capacity of the victim.” (8/1/17 Tr. 7-8.) “Counsel’s decisions relating to presenting her case, including whether to introduce evidence or produce witnesses, generally constitute matters of trial tactics and strategy, and [the Court] will not find ineffective assistance of counsel claim in counsel’s tactical decisions.” *Weaver*, ¶ 25.

Regarding criticisms that Defense Counsel should have pursued possible medical or mental health issues related to memory impairment, Rodriguez has not met his burden. The mere fact that defense counsel failed to assert a particular available defense or take an available defensive action is generally insufficient alone to establish that the performance of counsel was constitutionally ineffective. *State v. Mahoney*, 264 Mont. 89, 101-02, 870 P.2d 65, 73 (1994). Indeed, the *Strickland* standard is not whether counsel did everything the defendant wanted, but rather whether trial “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88.

It was unnecessary for Defense Counsel to inject J.S.’s related mental health symptoms or records because their rigorous cross-examination of J.S. brought out several inconsistencies about the alleged rape itself, including the timing and her

recollection of the vehicle. Defense Counsel also elicited details to suggest it was physically impossible for the rape to have occurred as J.S. described.

Eliciting details about J.S.'s mental health could easily have negatively impacted the defense because on redirect with J.S. and the medical professionals, the State would have tied her mental health struggles to the trauma she suffered from being anally raped when she was 15 years old. "Counsel's decisions related to presenting the case, including whether to introduce evidence or produce witnesses, generally constitute a matter of trial tactics and strategy, and we will not find ineffective assistance of counsel in such tactics." *McGarvey v. State*, 2014 MT 189, ¶ 25, 375 Mont. 495, 329 P.3d 576. Defense Counsel is entitled to "great deference" in the "exercise of judgment in determining appropriate defenses and trial strategy." *Oliphant*, ¶ 43.

Rodriguez also cannot demonstrate a reasonable probability that had Defense Counsel done a "better" or "more thorough" job challenging J.S.'s memory, the outcome would have been different. Defense Counsel did highlight many inconsistencies in J.S.'s testimony. But, as they explained, when she testified about the attack, J.S. was "adamant[]" and "clearly and distinctly remembered Rodriguez raping her." (Aff. 10.) The district court had also found that J.S.'s "testimony [was] very credible and impactful." (Hr'g 105.)

When considering the prejudice prong, the totality of the evidence is considered. *Strickland*, 466 U.S. at 695. Rodriguez has failed to establish that there was a substantial likelihood of a different result. *Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at 112.

B. Claim-2 [Ground-10]

Rodriguez asserts Defense Counsel failed to impeach Alexis and J.S.⁶ with evidence he alleges proved that (1) he did not purchase the black truck until 2009, (2) the logos were not applied until 2011, and (3) he did not change his business name until 2011. (Br. 47.)

Rodriguez has not established that he provided the “Alegra Receipt” for his truck decals or Secretary of State filings to his attorneys, nor does he argue on appeal that Defense Counsel was ineffective for not discovering them.

Nevertheless, as Defense Counsel averred, they met with Rodriguez and investigator Scott Swingley and thoroughly reviewed possible defenses and witnesses. (Aff. 3-4.) Additionally, Rodriguez presented no documentation establishing the date he *purchased* the truck (*e.g.*, buy-sell agreements, cancelled

⁶In Ground-10, Rodriguez criticized only his attorneys’ performance relative to Alexis, so Defense Counsels’ affidavit was limited to only that witness. (Aff. 13.) Any argument on appeal relative to J.S. for this issue has been waived. *Wetzel*, ¶ 13; *Sanders*, ¶ 14.

checks, etc.) and the documents entered at trial only demonstrated dates he *registered* his vehicles.⁷

Even if the “Alegra Receipt” and business filings had been admitted at trial, there was no basis upon which to “impeach” Alexis with such documents since she lacked any knowledge of them. Additionally, the “Alegra Receipts” lack any validating business markings and do not describe what the vinyl stickers actually said. Moreover, notifying the Secretary of State that he was changing business names in 2011 does not mean Rodriguez had not yet put business logos on his truck.

Defense Counsel explained their focus with Alexis’ testimony was the fact she never saw Rodriguez at either the bar on New Year’s Eve or in the truck parked at the apartments, which they accomplished. (Aff. 13.) Defense Counsel also elicited testimony that there could have been another reason the truck was there. (*Id.*) It is not for courts to second guess defense counsel’s tactical decisions that were reasonable under the circumstances. *Whitlow*, ¶ 14.

“Counsel’s decisions relating to presenting [the] case, including whether to introduce evidence or produce witnesses, generally constitute matters of trial tactics and strategy[,] and [the Court] will not find [an] ineffective assistance of

⁷Within two months of his arrest, Rodriguez was fully aware he would want to obtain “vehicle ownership records” (*see* 2/26/15 Tr. 10), yet he has not produced any such records.

counsel claim in counsels' tactical decisions.” *Weaver*, ¶ 25. Given the strong presumption that defense counsel's actions were within the wide range of reasonable professional assistance, “[j]udicial scrutiny of counsel's performance must be highly deferential.” *Strickland*, 466 U.S. at 689. Defense Counsel did not perform deficiently.

Rodriguez cannot establish prejudice because their cross-examination effectively undermined the possible impact of Alexis' testimony. Moreover, Rodriguez's presence at the apartment complex was not related to any element of the offense charged. The mere fact that an alleged error by defense counsel may have “had some conceivable effect on the outcome of the proceeding” is insufficient to prove constitutional prejudice. *Strickland*, 466 U.S. at 693.

C. Claim-3 [Grounds-16, 37]

In Claim-3, referencing Grounds 16 and 37, Rodriguez argues Defense Counsel should have confronted J.S. with the “purchase” date of the Civic. (Br. 47-48.) However, that was not what Rodriguez argued below.

In Ground-37, he asserted “court error” for failing to dismiss the matter at the close of the State's case. In Ground-16, he faulted Defense Counsel for not questioning Eric about when he purchased the Civic or having Sharlene testify about the timing of it. “It is well-established that this Court will not address either

an issue raised for the first time on appeal or a party's change in legal theory.”

Wetzel, ¶ 13; *Sanders*, ¶ 14; *Herman*, ¶¶ 54-55.

Even if this Court considers Claim-3, Rodriguez has not established Defense Counsel was ineffective by failing to confront J.S. that he had purchased the Civic after the date she said he raped her. Just like Claim-2, Rodriguez has not provided evidence of the date he *purchased* the Civic. Eric's testimony that Rodriguez possessed the Civic for a period of time before he registered it was unrefuted. Finally, Rodriguez's argument that Sharlene would have established when he bought the car is refuted by the record. Sharlene told law enforcement she had no knowledge relevant to the rape and Defense Counsel thoroughly explained why they did not call Sharlene to testify to establish timing of events. (Aff. 5.)

Zapien v. Martel, 805 F.3d 862, 870 (9th Cir. 2015) (no IAC when chose not to call witness when “risks associated with calling [them] outweighed the potential benefits”). Most critical is that Sharlene told the attorneys that “[s]he had not known Rodriguez at the time of the charged incident,” which conflicted with Rodriguez's statements in his Petition. (Aff. 5.)

Rodriguez fails to appreciate there was no means to impeach J.S. with “evidence” of the purchase date because no evidence was admitted and she lacked any firsthand knowledge of any documentation or evidence. “It is well within the norms of reasonable professional conduct for counsel to limit their

cross-examination to the facts of the case rather than resorting to speculation unsupported by evidence.” *McGarvey*, ¶ 30. Counsel is not ineffective for failing to pursue a meritless strategy or one with an unlikely chance of success based upon the exercise of reasonable judgment, *State v. Hauer*, 2012 MT 120, ¶ 47, 365 Mont. 184, 279 P.3d 149, and/or obligated “to raise every non-frivolous issue” in a client’s defense, *Miller v. State*, 2012 MT 131, ¶ 14, 365 Mont. 264, 280 P.3d 272.

To overcome the presumption of effective assistance of counsel, an IAC claimant must demonstrate that the action not taken by counsel was meritorious and, more probably than not, would have been “clearly stronger” or more effective than the action taken. *Miller*, ¶ 14. Rodriguez cannot meet this burden.

Finally, Rodriguez cannot establish that he was prejudiced by this alleged deficient performance. First, in an attempt to undermine J.S.’s timeline, Rodriguez mischaracterizes the evidence in Detective Slaughter’s report that J.S. had stated the assault occurred in 2002 by not acknowledging his explanation that the 2002 notation was his math error, which he corrected and clarified during his testimony. (Tr. 635, 651-52, 658.) Second, J.S. was thoroughly cross-examined about the timeline and her inconsistencies and lack of details. Defense Counsel exhaustively contrasted her testimony to Jennifer’s, Eric’s, and Detective Slaughter’s testimonies, as well as the documentation showing Rodriguez did not register his Civic until June 2003. Rodriguez has not established there was a “reasonable probability that

. . . the result of the proceeding would have been different” had J.S. been confronted with information of which she had no knowledge. *Strickland*, 466 U.S. at 694.

D. Claim-4 [Ground-15]

1. Court may decline to consider these claims.

Rodriguez alleged in Ground-15 that Defense Counsel was ineffective by not preparing him to testify and adamantly refusing to allow him to testify. (Pet. 12.) However, on appeal, Rodriguez presented a different Claim-4 by amending the IAC claim below and adding an unpreserved constitutional claim not previously raised.

The IAC claim asserted in Claim-4 alleges Defense Counsel failed to follow through on a “promise” during opening statements that the defendant would testify. Rodriguez’s Ground-15 made no mention of comments in the opening statement. The second part of Claim-4 argues Rodriguez was denied the right to testify, which he alleges constituted a structural error and no showing of prejudice is required under an IAC claim. This argument was also not presented below and alleges an independent constitutional claim separate from an IAC claim.⁸ Thus, this Court should decline to address Claim-4 in its entirety. *See Herman*, ¶¶ 54-55 (Court

⁸The Ninth Circuit has recognized that the right to testify may be violated independently of a potential IAC claim. *United States v. Martinez*, 883 F.2d 750, 755 (9th Cir. 1989) (there can be an independent constitutional violation of the right to testify even absent IAC), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991).

will not review unpreserved claim); *Wetzel*, ¶ 13 (cannot change theories on appeal); *Sanders*, ¶ 14 (cannot expand claims on appeal).

Finally, since the basis for Ground-15 (allegation Defense Counsel prevented him from testifying, or possibly advised him it was not his decision) has not been articulated on appeal, this Court may deem it abandoned and not reviewable. *Ford*, ¶ 35.

Nevertheless, should this Court choose to consider the issues raised in Claim-4 or Ground-15, Rodriguez is not entitled to relief.

2. Rodriguez waived any independent “right to testify” claim.

A criminal defendant has a constitutional right to testify on his own behalf, as secured by the Fifth, Sixth, and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). That right is “not without limitation” and “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Id.* at 55.

Although the right may only be waived by the defendant, the waiver need not be explicit, and a trial court has no duty to ensure an on-the-record waiver occurred. *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *State v. Abel*, 2021 MT 293, 406 Mont. 250, 498 P.3d 199. Since a defendant is “presumed to assent to his attorney’s tactical decision not to have him testify,” a waiver “may be inferred from [his] . . . failure to testify or notify the court of his desire to do so.” *Id.* Thus, if “a

defendant remains ‘silent in the face of his attorney’s decision not to call him as a witness,’ he waives the right to testify.” *Id.* (quoting *United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993); *see also United States v. Edwards*, 897 F.2d 445, 446-47 (9th Cir. 1990) (defendant’s silence when counsel fails to call the defendant as a witness constitutes an implied waiver of the right to testify); *Martinez*, 883 F.2d at 752, 760 (defendant waived right by not speaking to the court or discharging lawyer where lawyer admitted he implicitly threatened to withdraw if the defendant chose to testify).⁹ If a defendant wishes to exercise his right to take the stand, he may reject his counsel’s decision by “insisting on testifying, speaking to the court, or discharging his lawyer.” *Joelson*, 7 F.3d at 177.

Accordingly, absent a timely declaration to the court to the contrary, “[a] defendant is ‘presumed to assent to his attorney’s tactical decision not to have him testify.’” *Carter v. Davis*, 946 F.3d 489, 510 (9th Cir. 2019) (citation omitted). “Rather, if the defendant wants to testify, he can reject his attorney’s tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer.” *Joelson*, 7 F.3d at 177.

Here, despite a record replete with Rodriguez having no difficulty making his complaints about counsel known to the court, when Defense Counsel rested

⁹The order that later vacated *Martinez* on other grounds had no impact on the Court’s analysis relative to the right to testify. *See United State v. Pino-Noriega*, 189 F.3d 1089, 1096 (9th Cir. 1999).

without calling him to testify, Rodriguez remained silent. Rodriguez is not entitled to relief even if this Court considers this unpreserved claim.

3. IAC re: opening statement

Rodriguez cannot establish either *Strickland* prong related to Defense Counsels' alleged broken "promise" from the opening remarks when he referred to the case as "He-said, She-said." Defense Counsel did not promise the jury Rodriguez would testify. "He-said, She-said" is a term of art used to describe events known only to a perpetrator and a rape victim. It is not the equivalent of telling the jury: "you will hear from my client." Moreover, the jury did "hear from" Rodriguez through Detective Slaughter's testimony and the audio recording of his arrest.

This Court "accords great deference to counsel's exercise of judgment in determining appropriate defenses and trial strategy." *Oliphant*, ¶ 43. Defense Counsels' performance during opening statements was not deficient and, even if there had been an unfulfilled promise that Rodriguez would testify, this Court has found it would not be sufficiently prejudicial to support an IAC claim. *Hamilton v. State*, 2010 MT 25, ¶¶ 22-23, 355 Mont. 133, 226 P.3d 588.

4. IAC re: defendant testifying

Rodriguez alleged that Defense Counsel were ineffective for adamantly refusing to let him testify and telling him it was up to them whether he would testify. (Pet. 12, 27.)

In addition to abandoning this argument on appeal by advancing different claims, the Ninth Circuit precludes Rodriguez from asserting an IAC claim related to his alleged desire to testify. When a defendant waived his right to testify by remaining silent at trial, he cannot present a subsequent IAC claim about testifying. *Nohara*, 3 F.3d at 1243 (citing *Edwards*, 897 F.2d at 446-47); *see also Ramirez v. Yates*, 2012 WL 2050430, at *25 (E.D. Cal., June 6, 2012), *subsequently aff'd*, 548 F. App'x 447 (9th Cir. 2013) (federal habeas relief on IAC claim when defendant remained silent at trial with respect to his request to testify); *Gudino v. Madden*, 2023 WL 3063826, at *25 (C.D. Cal., Feb. 27, 2023), *report and recommendation adopted*, 2023 WL 3059860 (C.D. Cal., Apr. 24, 2023) (holding waiver of the right to testify also waives right to claim IAC).

Additionally, even if this Court does not find Ground-15 was waived, Rodriguez has not established both required *Strickland* prongs.

The record refutes Rodriguez's self-serving statements that he was not "allowed" to testify or that he was told it was not his decision. (Aff. 4-6, 15.) Defense Counsels' pretrial statements confirmed the decision to call Rodriguez to testify was a fluid one when they explained that possible defense witnesses "depend[ed] on whether Mr. Rodriguez decides to testify" (12/5/17 Tr. 11), and during *voir dire* when Mittelstadt explained, "Mr. Rodriguez may or may not

testify” (Tr. 281). It was not until Defense Counsel rested that the court and the State knew Rodriguez would not testify.

Defense Counsel unequivocally averred, “We did not prevent Rodriguez from testifying. While the issue was discussed frequently, we all (including Rodriguez) agreed that it would not be in his best interest.” (Aff. 15.) This collective decision was supported by the clear record that, had Rodriguez testified, prejudicial evidence would inevitably have been introduced to the jury. (*See* 2/26/15 Tr. 47-48; Docs. 29, 32, 66, 94, 96-97.)

Moreover, a defendant’s right to testify does not include the right to commit perjury. *Brown v. United States*, 356 U.S. 148, 155 (1958). As Defense Counsel explained, after investigating all the issues Rodriguez requested, they determined his theories were “either unfounded or completely inaccurate.” (Aff. 5-6.) When they discussed these “contradictions” with Rodriguez, “he would generally respond aggressively or deflect any contention of dishonesty based on his upstanding character.” (*Id.*) Thus, Defense Counsel were rightly “concerned that he would respond similarly under cross-examination,” which they explained to Rodriguez multiple times and, as Defense Counsel averred, “Ultimately, we (including Rodriguez) agreed he should not testify at the trial.” (*Id.*)

In contrast to the consistent and credible record showing Defense Counsel did not prevent Rodriguez from testifying, Rodriguez offered only self-serving

statements raised for the first time in his postconviction affidavit. Compounding the substantial delay in accusing Defense Counsel of denying him the right to testify, is the undisputed fact Rodriguez exhibited no problems whatsoever voicing complaints to the court about his assigned counsel before trial.

Moreover, despite submitting a letter to the ODC complaining about Defense Counsel three months after trial, Rodriguez still did not assert that his attorneys “adamantly refused” to let him testify or told him it was their decision, not his. In that letter, Rodriguez confirmed that Defense Counsel believed it was “to [sic] risky and a bad idea” for him to testify and, although Rodriguez stated he “wanted to testify,” he did not assert that his attorneys prevented him from testifying. (Pet. 191-205.)

Rodriguez continued to remain silent about his attorneys’ alleged refusal to allow him to testify at his sentencing hearing when the court asked him to describe any issues he had with Defense Counsels’ performance. (3/30/18 Tr. 10-11, 15-17.) Rodriguez complained they failed to investigate his case, did not “allow” him “to participate in the preparation of” his case, and did not call any witnesses on his behalf. (*Id.*) With the court’s encouragement, Rodriguez was allowed to explain all the complaints he had about his counsel; yet at no time did he assert they did not “allow” him to testify. (*Id.*) It was not until more than four years later, when he filed his PCR petition, that Rodriguez asserted his attorneys had “adamant[ly] refus[ed]” to let him testify and claimed it was not his decision, but theirs. (Pet. 12, 27.)

Rodriguez's delinquent, isolated, and self-serving statements alleging his attorneys denied him the right to testify were not compelling and should be treated as incredulous at best. IAC claims require facts, not merely conclusory allegations. § 46-21-104, MCA. Here, the record lacks any credible evidence that Defense Counsel prevented Rodriguez from testifying.

Rodriguez has not established that his attorney's denied him the opportunity to testify. *Zapien*, 805 F.3d at 870; *Weaver*, ¶ 25. As the court explained, it based its findings of fact and conclusions of law on the pleadings and having presided over Rodriguez's trial. (DV-Doc. 21 at 5.) In prior proceedings, the court had found Rodriguez to not be credible. (See Docs. 118 (court found none of Rodriguez's complaints about Gardner were credible), 182 (court found Rodriguez's claim that he heard bailiff talk to jury was not credible). The criminal and postconviction records support that the court did not err by accepting Defense Counsels' unequivocal affirmations that Rodriguez was not prevented from testifying and thus finding they had not performed deficiently.

Rodriguez has not explained how his proposed testimony would have had more than a conceivable effect on the trial's outcome. *Richter*, 562 U.S. at 112; *Strickland*, 466 U.S. at 693. Rather, as Defense Counsel explained, calling Rodriguez to testify would have had a calamitous impact given his criminal history, which included his admission to tampering with witnesses to evade

criminal liability, and his failed attempt to establish J.S. was part of a conspiracy to get him jailed so others could steal his property. (Docs. 50, 93.) Had Rodriguez testified, he likely would have experienced harsh cross-examination, having opened the door to damaging evidence of prior bad acts and character.

Notably, Rodriguez stated he would have testified that “he did not know [J.S.] nore [sic] did he ever hang out with her at any point in time.” (Pet. 12.) Such a statement would have been patently false given not only that Jennifer and Eric confirmed he had driven J.S. home from the Flamingo, but that J.S. described the unique-looking car Rodriguez drove. Most damning to Rodriguez’s claim he had no idea who J.S. was, was the photograph J.S. took of him in his Prelude when he came to her house two years after he raped her.

Rodriguez has not and cannot demonstrate that his testimony would have improved his defense. In comparison to the fallible and unsupported testimony Rodriguez suggested he would offer, the district court found J.S.’s testimony was “very credible and impactful.” (3/30/18 Tr. 105.) The court did not err when it denied Rodriguez relief under his Ground-15 IAC claim.

5. Alleged structural error

Finally, Rodriguez’s attempt to frame Claim-4 as a structural error requiring automatic reversal is not compelling. (Br. 49-51.) Not only did Rodriguez waive his opportunity to raise a right to testify claim and fail to establish his counsel

performed deficiently, but none of the cases Rodriguez cites suggest that his right-to-testify IAC claim is exempt from the *Strickland* analysis.

Weaver v. Massachusetts, 582 U.S. 286 (2017), demonstrates that if a defendant failed to raise a structural claim on direct review, *Strickland* applies. *See also Parks v. Chapman*, 815 F. App'x 937, 944 (6th Cir. 2020) (applying *Weaver* and “the idea that finality and judicial economy can trump even structural error; so, when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice”). In *McCoy v. Louisiana*, 584 U.S. 414, 426 (2018)—which was a direct appeal case—the Court explained that *Strickland* did not apply when “a client’s autonomy, not counsel’s competence, [was] in issue.” Finally, in *Neder v. United States*, 527 U.S. 1 (1999), which was also a direct appeal case, the Court determined that the court’s failure to give a jury instruction was subject to harmless error analysis.

Rodriguez’s IAC claim about testifying is not a structural error requiring automatic reversal.

E. Claim-5 [Ground-25]

Rodriguez argues that Defense Counsel were ineffective for not objecting to J.S.’s in-court identification. (Br. 53-56.) The case Rodriguez relies upon, *City of Billings v. Nolan*, 2016 MT 266, 385 Mont. 190, 383 P.3d 219, has no

application to the facts here. Unlike the victim/witness in *Nolan*, who could not provide the suspect's name or license plate, J.S. knew Rodriguez's name, nickname, that he was an airman who roomed with Eric, where he lived/worked in 2003, and the cars he drove (Civic and Prelude).

In contrast, the suspect in *Nolan* was a complete stranger to the reporting party. Thus, this Court concluded that in-court identification of Nolan was impermissibly suggestive. *Nolan*, ¶ 25. However, despite that, this Court further held it had not given rise to a "substantial likelihood of misidentification" and was reliable. *Id.*

Nothing about J.S.'s in-court identification was impermissibly suggestive. At the conclusion of J.S.'s direct examination, the State asked if she saw Rodriguez in the courtroom and J.S. responded she did and, while indicating where he was, stated he was "sitting right over there with the white shirt on." (Tr. 343.)

Rodriguez fails to acknowledge that, before she was asked to identify him in court, the photograph J.S. took of Rodriguez when he surprised her by coming to her house in 2005 had been admitted into evidence. (Tr. 327.) Rodriguez's argument that J.S. could not have known he had a white shirt on if he could not see her in the courtroom when she identified him (Pet. 14) not only ignores that J.S. would have seen him as she walked to the stand, but is also refuted by Defense Counsels' affidavit explaining that "any courtroom identification issues were not

accurate.” (Aff. 18.) J.S.’s in-court identification was appropriate and there certainly was no possibility of a “substantial likelihood of an “misidentification.” *Nolan*, ¶ 25.

Rodriguez has not established any legal basis upon which Defense Counsel could have objected to J.S.’s in-court identification, or how he was prejudiced as a result. An accused has no constitutional right to have counsel “raise every non-frivolous issue” in his or her defense. *Miller*, ¶ 14.

Furthermore, J.S. accurately described the unique vehicle Rodriguez drove, which was corroborated by Eric, Jennifer, and the speeding ticket. J.S.’s testimony that it was Rodriguez who offered to drive her home from the Flamingo that night was corroborated by Jennifer and Eric. Thus, even assuming Defense Counsel could have successfully stricken her in-court identification, it would not have changed the outcome. *Strickland*, 466 U.S. at 693.

F. Claim-6 [Ground-24]

Rodriguez argues that Defense Counsel erred by failing to challenge Timothy Underwood as a juror. (Br. 56-57.) This claim is neither compelling nor supported by the record.

First, Rodriguez’s assertion that Defense Counsel alone chose which jurors to strike using a peremptory challenge is directly refuted by the attorneys’ affidavit;

Owens and Mittelstadt included Rodriguez “in the entire jury selection” process. (Aff. at 17.) Notably, the attorneys specified that Rodriguez provided input on exercising peremptory challenges and explained that no issue with Underwood had been raised. (*Id.*) In contrast, in his affidavit in support of his Petition, Rodriguez stated he “specifically ordered” Defense Counsel to remove a juror with the same last name as the detective (Pet. 24), but does not mention anything about Underwood or being prevented from participating in exercising peremptory challenges.

Second, and in stark contrast to Rodriguez’s description of *voir dire*, Underwood was not “biased” and did not “indicate strong feelings unfavorable” to Rodriguez that would support a challenge for cause or establish no tactical reason to leave Underwood on the jury. (Br. at 57.)

“If *voir dire* examination raises a serious question about a prospective juror’s ability to be fair and impartial, then dismissal for cause is favored.” *Whitlow*, ¶ 30. Dismissal based on a juror’s supposed prejudice is only required when the juror has “formed fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on evidence presented in court, or when a serious question arises about a juror’s ability to be fair and impartial.” *State v. Russell*, 2018 MT 26, ¶ 14, 390 Mont. 253, 411 P.3d 1260. A PCR petitioner who claims that his counsel’s

representation was deficient for not moving to strike a juror for cause retains the burden to show that the trial court likely would have granted the motion. *Foston v. State*, 2010 MT 281, ¶ 13, 358 Mont. 469, 245 P.3d 1103.

While responding to inquiries from both the State and Defense Counsel, Underwood consistently and unequivocally stated he would not be influenced by having been in two relationships with women who told him they were rape victims. (Tr. 164-69.) Underwood was just as adamant that him being a psychologist who is the first point of contact for people to report sexual assault would not influence his ability to fairly listen to evidence. (*Id.*) Underwood voluntarily contrasted his professional role—to refer people who “feel like something very bad has happened to them” to services—with his understanding of the juror’s role, which was “actually to determine whether that happened” based on the rules and facts presented. (*Id.* at 168.) Underwood volunteered that he did not “actually have any concerns about [his] abilities” to be a juror. (*Id.*)

Unlike the situation in *State v. Chastain*, 285 Mont. 61, 947 P.2d 57 (1997), where defense counsel failed to act upon clear evidence that two jurors were potentially biased, here, no such indisputable evidence existed. Given Underwood’s comments, the record does not support that the court would have granted a challenge for cause. Based on Underwood’s responses, there was not even a reason to rehabilitate him, let alone form a basis to challenge for cause.

In addition to Defense Counsels' explanation that Underwood would be a fair and impartial juror, keeping Underwood on the jury was also supported by his comments about the lack of DNA evidence and the possibility a person would lie about being assaulted and could be influenced by another's comments. (Tr. 202, 260.) As this Court has explained, "When counsel is exercising peremptory challenges, he or she is engaging in a chess game with opposing counsel" and the reasons for exercising peremptory challenges need not be the same as those that prompt a challenge for cause. *State v. Herrman*, 2003 MT 149, ¶ 31, 316 Mont. 198, 70 P.3d 738. Additionally, as this Court has explained, "peremptory challenges are essentially a matter of trial strategy." *Id.*

Thus, the germane issue for Claim-6 is not whether Defense Counsel lacked a tactical reason for not striking Underwood from the jury. Rather, the question is, when considering all the circumstances of *voir dire*, whether Rodriguez established that Defense Counsels' decision not to use a peremptory strike for Underwood "fell outside the wide range of professionally competent assistance." *Whitlow*, ¶ 32. In *Whitlow*, this Court determined that, despite trial counsel offering no tactical explanation for his actions during *voir dire*, given counsel's conduct in light of the purposes of *voir dire* and the circumstances surrounding it, Whitlow failed to meet his burden and show that his counsel's performance was deficient. *Whitlow*, ¶¶ 31, 38.

Rodriguez has also failed to establish prejudice. Establishing prejudice “in the context of juror selection” requires a “showing that, as a result of trial counsel’s failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased.” *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2003). Rodriguez’s argument that “[n]o other potential juror was more worthy of challenge” (Br. 57) is unsupported speculation and he offers no other analysis establishing prejudice. All the jurors agreed to follow the law as given, set aside personal feelings in assessing the evidence, and hold the State to its burden. Juries are presumed to have followed instructions. *State v. Wellknown*, 2022 MT 95, ¶ 25, 408 Mont. 411, 510 P.3d 84.

G. Claim-7 [Ground-25]

On appeal, Rodriguez argues Defense Counsel performed deficiently relative to Paliga’s testimony by failing to: object to the State’s improper vouching by referring to Paliga as a “good citizen;” and cross-examine Paliga with evidence of his lack of good citizenship. (Br. 57-58.) Only the first part of Claim-7 is properly before this Court.

In his Petition, Rodriguez did not argue Defense Counsels’ cross-examination of Paliga was infirm for not confronting him about a “lack of good citizenship.” *Id.* Thus, that part of Claim-7 was not properly preserved for appellate review.

See Wetzel, ¶ 13; *Sanders*, ¶ 14; *Herman*, ¶¶ 54-55. Rather, Rodriguez faulted Defense Counsel for not confronting Paliga with a report describing which pods he and Paliga were housed in. (Pet. at 10.) Rodriguez has abandoned that argument on appeal. *Ford*, ¶ 35.

Even if this Court considers Rodriguez’s criticism of Defense Counsels’ cross-examination of Paliga, he has not demonstrated deficient performance. “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Whitlow*, ¶ 32; *Baca v. State*, 2008 MT 371, ¶ 24, 346 Mont. 474, 197 P.3d 948 (counsel’s decision not to call witness in light of court’s evidentiary ruling that testimony was inadmissible under Rules of Evidence was considered within sound trial strategy and, thus, did not fall below objective standard of reasonableness).

Before trial, the court conducted open-court discussions about the extent to which Paliga’s conviction history would be admissible as relevant to his motive to fabricate. (Tr. 295-98, 409-14.) The court addressed the parameters of the defense’s cross-examination of Paliga, concluding that the fact Paliga was facing a criminal sentence was relevant, but his underlying offenses were not. The court explained it was unaware of any case that allowed specific discussion about convictions and sentences regarding a motive to testify unless there was a plea agreement in exchange for testimony.

Although Defense Counsels' cross-examination was limited by the court's rulings, Owens pushed Paliga about his motivations to fabricate and challenged his description of the feasibility of the two even talking and the timing of such conversations. (Tr. 487-93.) "It is well within the norms of reasonable professional conduct for counsel to limit their cross-examination to the facts of the case rather than resorting to speculation unsupported by evidence." *McGarvey*, ¶ 30.

Finally, Rodriguez has failed to demonstrate how the outcome would have been different had Owens performed differently when cross-examining Paliga. "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must [still] show that they actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. Thus, even if this Court considers the unpreserved part of Claim-7, Rodriguez is not entitled to relief as neither *Strickland* prong was satisfied.

Rodriguez also failed to establish both *Strickland* prongs relative to the State's alleged vouching for Paliga. In the State's closing arguments, the reference to Paliga being a "good citizen" was proper commentary on the evidence about why Paliga agreed to testify despite not getting a deal and possibly being deemed a "snitch." (Tr. 484-87, 648.)

Prosecutors generally “have wide latitude” during trial closing and rebuttal arguments to “comment on and argue for any position or conclusion regarding the nature, quality, or effect of the evidence in relation to the applicable law and the [State’s] burden of proof,” but only if and to an extent “based on the [record] evidence, applicable law as stated in the jury instructions, and his or her analysis of the evidence.” *State v. Miller*, 2022 MT 92, ¶ 22, 408 Mont. 316, 510 P.3d 17. “While expression of direct personal opinions on witness credibility are improper, the prosecutor may nonetheless comment on, suggest, point-out, and argue reasonable inferences that [the] jury may draw from the evidence including, inter alia, comment on the credibility of witnesses as a comment on the evidence based on conflicts and contradictions in testimony.” *Id.* ¶ 27 (emphasis omitted).

Defense Counsel did not perform deficiently by not objecting during the State’s closing arguments that properly commented on the evidence presented at trial. Decisions as to whether and to what extent to object to questionable rulings or prosecutorial conduct generally fall within the broad range of the professional judgment and discretion of counsel regarding defense strategy and tactics. *Whitlow*, ¶ 21.

Moreover, it was likely that such an objection would not have been successful, and instead would have drawn more attention to the matter. A defense attorney’s “use of objections lies within his or her discretion” and “[i]t is also not beyond the realm of reasonableness that defense counsel would not object during

certain times of the trial so as not to confuse the jury or bring undue attention to the prosecution's case." *Clausell v. State*, 2005 MT 33, ¶ 20, 326 Mont. 63, 106 P.3d 1175. It is not unreasonable for counsel to refrain from objecting if they reasonably believe that withholding an objection serves a defense purpose.

When considering the totality of the circumstances, Rodriguez has also failed to demonstrate that, but for Defense Counsel's lack of objection to the State's comments in closing about Paliga, there was a reasonable probability he would have been acquitted. *Strickland*, 466 U.S. at 687; *Riggs*, ¶ 12.

H. Claim-8 [Ground-6]

Rodriguez argues Defense Counsel failed to investigate false claims by J.S. about three alleged sexual abuse events and should have requested an evidentiary hearing under *State ex rel. Mazurek v. Fourth Judicial District Court*, 277 Mont. 349, 922 P.2d 474 (1996). (Br. 59-60.)

A petitioner alleging that his counsel failed to investigate information or use information counsel was aware of must demonstrate that the information would have been admissible and effective. *Hamilton*, ¶ 16. The court's inquiry with such a claim is "what information would have been obtained from such investigation and whether such information would have produced a different result." *Weaver*, ¶ 21.

Hamilton claimed his attorney failed to follow up on allegations that the victim and her mother falsified stalking allegations, the victim came from a family with a long history of sexual misconduct, and evidence of a timecard impeached the timeline of abuse. *Hamilton, supra*. Hamilton’s counsel had not used this “information” because he determined it was either irrelevant or inadmissible. *Hamilton*, ¶ 15. This Court affirmed the denial of the petitioner’s PCR petition without an evidentiary hearing because the petitioner failed to meet the requirements of § 46-21-104(1)(c), MCA. *Hamilton*, ¶ 16.

Just as in *Hamilton*, the alleged “information” Rodriguez argues Defense Counsel failed to investigate was irrelevant and inadmissible.

The only “evidence” Rodriguez submitted concerning J.S.’s alleged false accusation against her uncle was an entry in Bottomly’s handwritten session notes that reads: “[J.S.]—victim of sexual assault when 3 yo.” (Pet. at 232.) Nothing in that note remotely suggests J.S. falsely accused her uncle of sexual assault. Defense Counsel followed up with Bottomly and confirmed the same. As Defense Counsel explained in their affidavit, without more evidence that J.S. falsely accused her uncle of assaulting her at age three, there was nothing else that could be done to pursue admission of such an alleged false claim. (Aff. 11.)

Additionally, right before *voir dire*, when the State asked for confirmation that information revealed during discovery, that J.S. had “mention[ed] at one point

she may have been touched by a cousin,” was covered by the rape shield order, Mittelstadt explained that the defense “did discuss it” and had “no intention of bringing that up.” (Tr. 5.) Notably, Gardner had also found no basis to challenge the State’s rape shield motion. (*See* 8/1/17 Tr. 17-18.)

Defense Counsel was bound by the pretrial orders precluding Rodriguez from trying to admit improper evidence under the rape shield provision. (*See* Docs. 31, 66, 95, 99; Tr. 5.) Defense Counsel was not ineffective for not pursuing introduction of inadmissible testimony. *See Deschon*, ¶¶ 23-26.

The other two statements Rodriguez lists (J.S.’s comments about her mother’s alleged sexual history) were not referenced in Ground-6, so they were not properly preserved for appellate review. *See Wetzel*, ¶ 13; *Sanders*, ¶ 14; *Herman*, ¶¶ 54-55.

Even if this Court considers this part of Claim-8, there would have been no reason to investigate the comments further since they were completely irrelevant to whether Rodriguez raped J.S. Trial counsel is not ineffective in failing to offer inadmissible evidence or testimony. *Baca*, ¶ 24. Here, J.S.’s mother’s alleged infidelity was not relevant and any possible probative value would be outweighed by the possible prejudice. *See* Mont. R. Evid. 401, 403; *Deschon*, ¶¶ 23-26.

Moreover, there is no evidence these were *false* claims made by J.S. While a witness’s character for truthfulness may be attacked through opinion or reputation

evidence admissible under Mont. R. Evid. 608, this record lacks any evidence specifically demonstrating that effective and admissible witness testimony was available to attack J.S.’s credibility. Defense Counsel were not ineffective for failing to attempt to introduce evidence they knew was inadmissible.

Rodriguez asserts that J.S.’s statements about her mother undermined her description of being raised in a strict, religious household. This argument is not compelling because there is no evidence that J.S. knew, or had reason to know, of her mother’s alleged infidelity when she was 15 years old. The *Strickland* standard is not whether counsel did everything the defendant wanted, but rather whether trial “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88.

Nevertheless, even if it is presumed Defense Counsel performed deficiently by not further investigating these allegedly false statements, Rodriguez cannot establish “what information would have been obtained from such investigation and whether such information would have produced a different result.” *Weaver*, ¶ 21; *Heavygun*, ¶ 18. Rodriguez has not satisfied *Strickland*’s prejudice prong. *Whitlow*, ¶ 11.

I. Claim-9 [Ground-1]

Rodriguez failed to demonstrate either “structural error” or IAC related to his alleged “constructive denial” of counsel. (Br. 61-63.) The record refutes

Rodriguez’s self-serving allegations that Defense Counsel failed to communicate with him.

Owens and Mittelstadt thoroughly addressed the issue of their contact with their client, including the significant amount of time they spent formulating his defense along with him. (Aff. 3-8.) Defense Counsel consulted with Rodriguez’s prior counsel, hired Swingley, personally met with Rodriguez at the prison, and “generated a list of issues” raised by Rodriguez to investigate. (*Id.* 3-4.)

Significantly, Defense Counsel averred that they made sure “Rodriguez remained completely informed about the status of his case throughout our representation as we conducted multiple-weekly phone calls with him throughout the entirety of his case.” (*Id.* 4 n1.) Defense Counsel “worked closely with Rodriguez and our investigator in determining the best factual and legal defense for Rodriguez under the circumstances.” (*Id.* 4.)

Mittelstadt “met with Rodriguez in person, and spoke with him on the phone on numerous occasions [and] spent ample time investigating, interviewing witnesses, and preparing for trial in this matter.” (Aff. 9.) Owens “dedicated at least 160 hours towards the resolution of this case,” “over 12 hours towards client meetings, client telephone calls, and written communications,” and at least “60 hours investigating, interviewing witnesses, and preparing for trial in this matter.” (*Id.* 9-10.)

Rodriguez’s self-serving claim that his relationship with Defense Counsel was so poor he could not communicate with them, is wholly unsupported. Defense Counsels’ affidavit provided more than sufficient factual basis to conclude they communicated with Rodriguez as much as possible and thoroughly prepared for trial. (Aff. 4-6, 8-10.) Defense Counsel described the difficulty in working with Rodriguez, explaining that when they tried to discuss that his theories were unsupported and inaccurate, Rodriguez responded aggressively and countered any alleged dishonestly with his perceived upstanding character. (*Id.* at 6.)

Rodriguez failed to factually support his claim that Defense Counsel did not consult with him. Rather, just as during his comments prior to sentencing, Rodriguez simply did not think counsel met with him “enough.” (3/30/18 Tr. 17.) Rodriguez’s opinion that his attorneys should have had more face-to-face meetings is insufficient to establish their performance was deficient under the Sixth Amendment.

This Court “accords great deference to [Counsel’s] exercise of judgment in determining appropriate defenses and trial strategy.” *Oliphant*, ¶ 43. Even if a court determines counsel “could have done a ‘better’ or ‘more thorough’ job and that a defendant may have suffered some prejudice as a result is not the equivalent of ineffective assistance of counsel pursuant to *Strickland*.” *Weaver*, ¶ 28.

Moreover, Rodriguez failed to demonstrate that had counsel met with him more there was a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. As Defense Counsel aptly explained:

[we] presented the best defense we could with the evidence available We could not locate a single witness to testify consistent with the set of facts provided by Rodriguez. Conversely, the witnesses that we found and interviewed provided inconsistent information. Based upon the circumstances, our defense theory was the passage of time, lack of evidence/improbability, and the burden of proof.

(Aff. 9.)

J. Claim-10(a) [Ground-23]

Rodriguez complains that Defense Counsel should have objected to Detective Slaughter's testimony about physical scarring or other visitable injuries involved in anal rape. (Br. 63-64.) Rodriguez has failed to offer any substantive legal analysis or authority to facilitate review on appeal. *Herman*, ¶ 22; *Ford*, ¶ 35.

Additionally, this claim fails to recognize that it was *Defense Counsel* who elicited this information from the detective, and reasonable trial tactics and strategy cannot form IAC. *Weaver*, ¶ 25. From their cross-examination, it is apparent that Defense Counsel questioned Detective Slaughter about this topic to highlight the absence of objective, physical evidence to corroborate J.S.'s accusation. Also, the questions allowed Defense Counsel to criticize the investigation and its failure to

try and obtain such evidence. Moreover, as Defense Counsel explained, the line of questioning was not prejudicial to Rodriguez's defense. (Aff. 17.)

K. Claim-10(b)

In Claim-10(b), Rodriguez asserts that Defense Counsel failed to notice the 404(b) instruction was improper. (Br. 63-64.) However, in his Petition, Rodriguez offered no arguments about jury instructions, let alone the 404(b) instruction. Thus, Defense Counsel did not address it in their affidavit and the district court did not address it in its order.

This Court will not review issues that were not presented to the district court. *Herman*, ¶¶ 54-55. Additionally, Rodriguez has failed to offer any substantive legal analysis or authority to make this issue reviewable on appeal. *Herman*, ¶ 22; *Ford*, ¶ 35.

L. No cumulative effect

Since Rodriguez failed to adequately establish either deficient performance or any degree of prejudice from the alleged IAC claims, he cannot claim to have established IAC from the sum of the alleged errors by Defense Counsel.

IV. The district court did not abuse its discretion when it denied the Petition without conducting a hearing.

The postconviction provisions are not designed as a means for fact-gathering. Rather, a defendant is expected to present sufficient facts, not mere conjecture, to the court. §§ 46-21-104(1)(c), -104(2), MCA. Unsupported allegations are insufficient to entitle a petitioner to a hearing. *State v. Finley*, 2002 MT 288, ¶ 9, 312 Mont. 493, 59 P.3d 1132. “Not all circumstances require the district court to hold an evidentiary hearing on a petition for post-conviction relief.” *Heath*, ¶ 21. The appropriate inquiry regarding the sufficiency of a PCR petition turns on whether the evidence and supporting attachments provide the necessary facts to establish the claims. *Herman*, ¶ 17.

The crux of Rodriguez’s complaint about not having a hearing is the court’s order denying his request to compel the DOC to allow him to make copies of “additional” exhibits he wanted to file. (Br. 68-70 (citing DV-Docs. 12, 14).) Rodriguez explained that the “exhibits” were from his case file but did not explain why he could not have attached them to his Petition (when the alleged copying limits did not apply). However, as this Court has astutely explained, “Section 46-21-104(1)(c), MCA, does not require volume; it requires that a petition identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records or other evidence establishing those identified facts.” *Herman*, ¶ 17.

Rodriguez neither appealed the order denying his motion nor sought leave to file an amended petition. Rodriguez's prolific *pro se* filings in both his criminal and postconviction proceedings undermine his claim that he was denied access to the court or that the court abused its discretion by not setting a hearing.

PCR "proceedings are not a discovery device in which a petitioner, through broad allegations in a verified pleading, may establish the right to an evidentiary hearing." *Smith v. State*, 2000 MT 327, ¶ 28, 303 Mont. 47, 15 P.3d 395; *Heath*, ¶ 27 (PCR provisions do not permit petitioners to "conduct a 'fishing expedition' in an attempt to establish the right to an evidentiary hearing").

Here, the criminal record and PCR pleadings contained ample information and evidence to rule on the merits of Rodriguez's IAC claims. Moreover, the same judge presided over the trial and PCR proceedings. Rodriguez has not demonstrated why additional proceedings were necessary as this Court does not need information beyond the record to address his claims. § 46-21-201(1)(a), MCA; *Hamilton*, ¶ 11. The court did not abuse its discretion when it dismissed Rodriguez's Petition absent an evidentiary hearing. *Main*, ¶ 14.

CONCLUSION

This Court should affirm the district court’s order denying Rodriguez’s Petition.

Respectfully submitted this 29th day of August, 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 14,888 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-29-2025:

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