

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0602

CHRISTOPHER WAGNER,

Petitioner and Appellant,

vs.

STATE OF MONTANA.

Respondent and Appellee.

ON APPEAL FROM THE ORDER DENYING PETITION FOR
POSTCONVICTION RELIEF ENTERED IN THE EIGHTEENTH JUDICIAL
DISTRICT COURT OF GALLATIN COUNTY IN THE STATE OF MONTANA
BEFORE THE HONORABLE RIENNE H. McELYEA

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I. Statement of the Issues Presented for Review.

Pursuant to M.R.App.P. 12(1)(b) Appellant Christopher Wagner, “Wagner,” states the issues presented for review.

Issue 1: Whether Wagner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when his trial counsel failed to properly challenge the admissibility of Wagner’s prior trial testimony.

Issue 2: Whether Wagner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when his trial counsel failed to object to the State’s improper closing argument.

Issue 3: Whether Wagner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when his Appellate Counsel failed to raise the issues presented in Issue 1 and Issue 2 on appeal.

II. Statement of the Case.

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

Wagner was charged with Attempted Deliberate Homicide, in violation of Section 45-4-103, MCA, in Eighteenth Judicial District Court, Case Number DC-

07-97. *See* Information, APP 36. His case was tried before a jury which found him guilty. *See* Verdict, APP 25. Judgment and sentence was entered against him. *See* Sentencing Order, APP24 Wagner filed a timely notice of appeal, (APP 23) and this court reversed his conviction and remanded his case for a new trial. *See* Opinion and Order, APP22 (*Wagner I*, 2009 MT 256).

At his second trial, Wagner was again tried before a jury for the offenses in the Information (APP 36), and the jury found him guilty. *See* Verdict, APP16. Judgment and sentence was again entered against him, (Sentencing Order, APP 15) from which Wagner filed a timely notice of appeal. APP 14. This Court affirmed the conviction. *See* Opinion and Order, APP13 (*Wagner II*, 2013 MT 47).

April 2014, Wagner filed a *pro se* Petition for Postconviction Relief (“Petition”) pursuant to 46-21-101 et. seq., MCA. *See* APP12 (DV-14-319 Petition). The District Court ordered a response from the State and on July 9, 2014 issued an Order appointing Counsel for the Petitioner. *See* APP11. November 16, 2018 the Court issued a Notice for Failure to Prosecute. *See* APP 10. May 31, 2019 an Amended Petition for Postconviction Relief was filed by Petitioner.

The District Court dismissed the Petition on October 30, 2019 for failing to diligently prosecute his claims. *See* APP 9. Wagner filed a timely Notice of Appeal. APP 8. This Court reversed and remanded. *See* Opinion and Order, APP 7 (*Wagner III*, 2021 MT 50N).

Counsel was reappointed and a hearing¹ on the Petition was conducted on May 22, 2024. The district court issued its Findings of Fact and Conclusions of Law and Order (APP 1), on August 21, 2024, denying the petition. Wagner filed his Notice of Appeal and an Amended Notice of Appeal timely on November 10, 2024, initiating the case herein, DA-24-0602 (*Wagner IV*).

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

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

1. Facts in Support of Wagner’s Claim his Testimony at his First Trial was the Result of a Sixth Amendment Violation.

At Wagner’s first trial, he was represented by Mary B. Kramer, (Kramer) and Casey R. Moore, (Moore). In pretrial proceedings before the first trial, Kramer strategically chose to file a Motion in Limine, (APP 35) which resulted in an order from the district court prohibiting the introduction of any evidence of any crimes allegedly committed by Wagner, charged or uncharged, except for those charged in the Information. *See* Order, APP 33. The district court order provided there was an exception for any crime/accusation for which the defense opened the door. APP 33,

¹ The Transcript of the Hearing on May 22, 2024 titles it “Judge Trial.”

page 2. In sum, Kramer successfully excluded the introduction of other crimes evidence.

In the State's case in chief in the first trial, it called a witness, Melody Lark ("Lark"). The State asked for, and was granted, permission to lead Lark so as to ensure compliance with the Order excluding other crimes evidence (Order, APP 33). *See* Trial Transcript Excerpt, APP 32, at TTx 99:10-100:2. The State successfully complied with the Court Order prohibiting the introduction of other crimes evidence, and no other crimes evidence or bad character evidence was mentioned by Lark on direct. *See Id.*, at TTx 128:11-213:9.

On cross examination of Lark, Kramer elicited the following testimony: (1) Wagner used methamphetamine, associated with people who manufactured methamphetamine, and Lark and Wagner used methamphetamine together. *See Id.*, at TTx 170:24-171:9, 198:24-199:1; (2) Wagner was charged with assault in Colorado, and the assault involved Lark. *See Id.*, at TTx 155:19-156:18; (3) the charges in Colorado were not disposed of in court because Wagner cut off his GPS monitor and committed another crime, Bail Jumping, and fled Colorado, ultimately coming to Montana. *See Id.*, at TTx 158:20-1592; (4) after Wagner's escape from Colorado, the community was gripped with fear, anger and apprehension because Wagner was likely to escape justice and to commit additional crimes. *See Id.*, at TTx 187:21-188:10. On re-direct examination of Lark, without objection from Kramer,

the State elicited additional prejudicial details about the Colorado assault, including (1) Lark was more than “involved” in the assault, she was the victim and was assaulted from behind by Wagner. *See Id.*, at TTx 204:5-204:12, 206:1-208:16; (2) Lark tried to call for help in the course of Wagner’s assault, but Wagner took her phone away. *Id.*; and (3) Lark sustained serious injuries at the hands of Wagner including blunt force trauma, a skull fracture and brain injuries, all of which required her hospitalization. *See APP 32*, at TTx 209:6-209:25. Lark also confirmed and reminded the jury of the facts established on cross by Kramer: Wagner was charged with assault in Colorado, but the charges were not disposed of because he bonded out, cut off his GPS tracker, escaped, and Lark feared he would come after her. *See Id.*, at TTx 210:24-211:14. None of these facts were relevant to whether Wagner committed the offense alleged in the Information and for which he was on trial.

The State also called Sgt. Jason Jarrett (“Jarrett”) for the purpose of introducing a 911 call. Prior to Jarrett’s testimony, the parties reached a stipulation providing the 911 call would be redacted to omit allegations (1) Wagner had a history of violent acts and committing violent crimes; (2) Wagner was wanted by the law for offenses unrelated to those charged in the Information; (3) Wagner tried to kill the 911 caller’s son’s girlfriend; and (4) Wagner ran from the law. *See Trial Transcript Excerpt, APP 31*, at TTx 277:7-278:8. A transcript of the unedited 911

call was admitted as Exhibit 6 and the redacted version made pursuant to the stipulation was admitted as Exhibit 7. *See* Record of Exhibits, APP 26, page 1.

On cross examination of Jarrett, Kramer elicited testimony that a Gallatin County Sheriff's press release described Wagner as armed and dangerous and should not be approached by other than trained and armed law enforcement officers. *See* APP 31, at TTx 307:2-308:3.

The State also called Michael Peters, ("Peters"), the alleged victim. Peters had earlier been instructed not to discuss Wagner's alleged violent background, but the State requested the restriction be lifted because "...it was all now in the open..." *See* Trial Transcript Excerpt, APP 30, at TTx 315:20-316:10. The trial court agreed and found the Defense had opened the door as well as failed to object to other character evidence which was admitted. *Id.* The prior order, (APP 33), was no longer applicable.

As a result, Peters was allowed to discuss Wagner's violent history and alleged prior crimes in detail. *See* APP 30, at TTx. 316:16-324:9. Kramer objected again, the district court initially sustained the objection and reversed its earlier ruling and excluded the additional other crimes evidence for a second time.

However, upon an offer of proof outside the presence of the jury the district court ruled testimony would be allowed with regard to Peters' state of mind, including other crimes evidence, which would be subject to cross-examination. APP

30 TTx 324:11-337:18. Nevertheless, without further objection, Peters testified about (1) Wagner's prior attack on Lark; (2) Wagner assaulted another man who dated Lark, by stabbing him on a ski slope; (3) Wagner was crazy and, as a result, Peters feared for his life; (4) Wagner tried to kill Lark; (5) Wagner assaulted another one of Lark's boyfriends in Colorado; and (6) Wagner was dangerous and a threat to everyone in the world. *See* APP 30, at TTx 338:15-342:14. All this testimony was contrary to the district court's order of exclusion issued moments prior to the testimony, but Kramer did not object, and did not move for a mistrial *See* APP 30 TTx 309:13-468:14.

Kramer chose to give a Defense Opening Statement at the beginning of the Defense case in chief. Kramer re-stated Wagner was charged with violent crimes in Colorado, including crimes in which Lark was the victim, there was a Colorado warrant for his arrest for doing so, and Wagner had told "lots" of lies about his involvement in the crime for which he was on trial as well as many others. *See* Trial Transcript Excerpt, APP 29, at TTx 692-698.

Kramer called Wagner to the stand to testify in his own defense. Kramer either elicited or failed to object (on cross-examination) to, details Wagner provided regarding (1) the circumstances of the Colorado assault charges; (2) the injuries, including a skull fracture, Wagner allegedly inflicted on Lark; (3) Wagner's flight from court in Colorado; (4) Wagner's use of an alias to avoid capture; and (5)

Wagner's commission of a variety of wrongful and illegal acts not previously admitted. *See* Trial Transcript Excerpt, Wagner's Testimony, APP 28, at TTx 818 – 828, 840-853, 912-938.

Kramer emphasized the other crimes and bad character evidence one last time in her closing argument. *See* Trial Transcript Excerpt, APP 27, at TTx 1049-1053.

Wagner was convicted and sentenced, but his conviction at his first trial was reversed on the grounds of plain error and this error resulted from the prosecutor's repeated comments at trial regarding statements Wagner made after invoking his Miranda Rights. *See* Opinion and Order, APP 22 (*Wagner I*) at ¶¶13, 20-22. The prosecutor was not the only one to comment on the post Miranda invocation statements. Kramer did so also. *See* APP 28, at TTx 908:24-909:12.

Wagner's conviction was reversed and his case remanded for a new trial. *See* APP 22 (*Wagner I*) at ¶22.

2. Wagner's Trial Counsel at his Second Trial Recognized the Importance of Excluding the Testimony from the First Trial.

At Wagner's second trial, Wagner was represented by new counsel: Peter Ohman (Ohman) and Ryan McCarty (McCarty). Ohman filed a motion to exclude the Wagner's testimony at his first trial. *See* Motion to Exclude Prior Testimony, APP 21. Ohman argued the testimony was a fruit of the poisonous tree because it resulted from the wrongful admission of Wagner's post Miranda statements. *Id.* pages 4-5.

Ohman did not argue Kramer provided ineffective assistance of counsel and did not argue Wagner's trial testimony was the result of Sixth Amendment Violation, ineffective assistance of counsel. The Motion was denied, (*see* Decision and Order, APP 20), except the district court excluded the comments this Court held were plain error to admit. *Id.* page 4.

At Wagner's second trial, the State introduced, in their case in chief, the sworn testimony Wagner provided at his first trial, (*see* Trial Transcript Excerpt, December 8, 2010, APP 19, at TTx 60:4-73:11) and Exhibit 55 (audio) Exhibit 56 the redacted transcript of Wagner's testimony were admitted. *See* Record of Exhibits, APP 17.

3. Wagner's Reason for Testifying at the First Trial.

Wagner submitted a sworn affidavit in support of his Petition for Postconviction Relief (APP 12). The oath and jurat are found at the end of the Petition. APP 12, pages 73-74. Wagner stated "...Kramer's actions compelled [Wagner] to testify at the first trial" and, referring to the other crimes evidence and post-Miranda invocation statements and silence, "...Wagner's testimony was compelled by the illegally introduced evidence." *Id.*, page 19. Wagner's reference to the "illegally introduced evidence" was with regard to the other crimes and bad character evidence. *Id.*, pages 20-21. Wagner also stated, "[his] testimony from the first trial was tainted by [a] constitutional violation." *Id.*, page 22.

At the evidentiary hearing on the Petition Wagner further testified regarding his reason for testifying at his first trial. Leading up to the first trial, Wagner was not planning on testifying and he and his counsel did not make any preparations for him to testify. *See* May 22, 2024 Hearing Transcript Excerpt, APP 5, at Tx 109:20-109:25. During the trial, things changed because of the admission of the other crimes, bad acts and bad character:

Q: All right. So, during the trial when the other bad acts evidence was admitted, did that affect your decision to testify, Mr. Wagner?

A: I believe so, yeah. Because I felt like I had to really defense myself against, you know, allegations from Colorado along with the allegations here. So, I basically tried twice in the same trial.

Id. at 110:1-110:8.

4. Facts in Support of Appellant’s Claim the Prosecution’s Closing Argument was Improper and Amounted to Misconduct at Wagner’s Second Trial.

Appellant submits the prosecutor, without objection, repeatedly and improperly vouched for the credibility of the State’s evidence and witnesses.

In closing, the prosecutor first offered his personal opinion as to the evidence: “I think we all can agree on something just to take it right out of the picture. When

you shoot somebody three times you intend to kill them.” Jury Trial Transcript Excerpt, State’s Closing Arguments, December 9, 2010, APP 18, at TTx 29:17-17:19.

The prosecutor then improperly vouched for Michael Peters’ credibility:

So why believe Michael Peters? Well, why would he lie? If he’s going to lie he should have come up with a better one than that. Why would he tell the police and tell you that he shot the Defendant first? He didn’t have to do that. Why not just say the Defendant shot him first? He didn’t have to do that.

Id. TTx 39:16-39:22.

He continued vouching for Peters’ credibility:

Why else should we believe Michael Peters? Because he sought out law enforcement and the Defendant didn’t? That’s pretty good. Maybe we should look at all the history between the two, Michael Peters, Melody Lark, the Defendant. Seems pretty believable that Michael Peters would be afraid that the defendant would pull a gun on Michael Peters.

Id. TTx 40:3-40:10.

The prosecutor offered his personal opinion again regarding other aspects of the evidence: “You know, I was fairly convinced that the vehicle door was not open.”

Id. TTx 42:16-42:17.

As to the testimony of jailhouse informant Timothy Polly (Polly), the prosecutor vouched for his credibility and righteous motives:

I don't know what to [sic] thought about Tim. His motives in coming forward seem to be genuine ... what strikes me as credible about Tim is he knew things he could only have gotten from the Defendant ... Those specific things kind of gave Mr. Polly some credibility.

Id. TTx 44:21-45:10.

Specifically regarding Polly's credibility, he argued: "His motives in coming forward seem to be genuine ... what strikes me as credible about Tim" *Id.* TTx 44:22-45:3.

In rebuttal, the prosecutor again vouched for the credibility of the State's case: "we've won this one by couple of touchdowns." (APP 18, TTx 92) Finally, the prosecutor offered his personal opinion regarding the nature of Wagner's defense and denigrated it as a sham:

But the way I get the Defense is he didn't do it, he didn't mean to shoot him to kill him, but if he did do it, he was justified. And if he wasn't justified, the cops screwed up the evidence scene and Tim Polly's life. That's kind of what I got from the Defense.

APP 18, at TTx 92:9-92:14.

The prosecutor also made comments regarding his personal belief regarding Wagner's guilt and his lack of credibility. "He makes stuff up. That's what he does. ... I think it shows his state of mind. I think it shows where Mr. Wagner is at." APP 18, at TTx 92:20-93:1.

The prosecutor also declared, or all but called, Wagner a liar and stated “Good luck. It’s not true.” (APP 18, at TTx 93:17), and “The Defendant would have you believe that he was just ironically taking a leisurely stroll on a cold winter’s day ... and he happened upon the ex-boyfriend of his obsession. What a coincidence. Wow. No. We’re smarter than that ...” APP 18, at TTx 94:8-94:14.

Trial Counsel for Wagner did not object to any of the above cited argument.

5. Facts Regarding Strategy, or Lack of Strategy, of Trial Counsel.

a. Kramer’s Strategy at the First Trial.

Kramer’s strategic choice is evidenced by the Motion in limine she filed regarding Wagner’s “other [alleged] offenses,” stating, “we’re, of course wanting to avoid. We want to avoid bad acts, things that would be included within *Just* [sic] notice” Motions Hearing Transcript, May 16, 2008, APP34, at Tx 5:6-5:9. She was successful in doing so and the Court issued an Order granting her Motion. *See* APP 33.

Having successfully excluded the evidence at the first trial, and as described in detail Section III(1) above, Kramer repeatedly introduced and commented upon the alleged other crimes and bad character evidence she had successfully excluded, as well as opened the door to additional other crimes evidence subsequently introduced by the State. (Also described in Section III(1) above).

At the evidentiary hearing on the Petition, Kramer was asked about her strategy, if any, for doing so. She had absolutely no recollection of the trial, or the Wagner matter in any manner whatsoever. *See* May 22, 2024 Transcript Excerpt, APP 2, at Tx 18:5-18:8; 19:12; 22:3-23:13. Kramer also refused to accept the information in the trial transcripts as true or accurate, or otherwise acknowledge their accuracy. *Id.*, at Tx 19:20-20:3. Kramer identified no basis for her refusal.

Kramer identified no strategy or offered any explanation regarding her choice to introduce evidence of other crimes, bad acts and bad character, after having successfully excluding the information.

b. Facts Regarding Trial Counsel’s Strategy at the Second Trial.

i. Exclusion of Wagner’s Testimony Given at the First Trial from the Second Trial.

Ohman moved to exclude Wagner’s testimony at the First Trial, but did not argue the testimony was the product of a Sixth Amendment Violation. *See* Section III(2) above.

Ohman stated under oath that he believed “...[Wagner’s] testimony from the first trial damaged his case in the second trial.” Petition, APP12 at page 83 (Exhibit 4, Affidavit of Peter Ohman, dated October 25, 2011). Ohman was deposed on May 3, 2024 and could not recall “...what my thought process was.” Ohman Deposition Transcript, APP 6, at Tx 12:23-12:24. Ohman further testified “I definitely don’t

remember strategy...” *Id.*, at Tx 22:17-22:18. Ohman did remember one thing: “All I knew is that if his prior testimony was going to come in, it was going to be a problem. And so that is why I filed the motion [at APP 21].” APP 6, at Tx 24:10-24:13.

Ohman identified no strategic reason for not asserting the testimony was inadmissible because it was the product of a Sixth Amendment violation, (ineffective assistance), but did acknowledge it was his strategy to attempt to exclude the testimony at the first trial however that strategic goal might be accomplished.

ii. Failure to Object to the State’s Closing Argument.

McCarty testified he was familiar with the concept and prohibition regarding vouching by a prosecutor. *See* May 22, 2024 Transcript Excerpt, APP 3, at Tx 42:13-42:24; 43:18-43:25. He was of the opinion the comments asserted in Section III(4) amounted to improper vouching or might amount to vouching, and that the State’s closing, as a whole, amounted to improper vouching *Id.*, at Tx 44:1-48:8.

McCarty agreed he did not object to the vouching when, in his opinion, it occurred. *Id.*, at Tx 48:6-48:8. Looking back on it, McCarty opined that “...I think [the comments] were objectionable. And if I had to do it over again and could go back in time, you know, I think a contemporaneous objection would have been appropriate.” *Id.*, at Tx 48:9-48:21. McCarty identified no strategic reason for failing to object.

iii. Appellate Counsel’s Strategy on Appeal from the Second Trial.

Wagner was represented by Lisa Korchinski, (Korchinski), on the appeal from the second trial (*Wagner II*). Korchinski would not recall whether she identified the claims in the Petition and this appeal as possible grounds for appeal in *Wagner II*. Korchinski testified “I’m assuming it was strategic if it wasn’t presented.” May 22, 2024 Transcript Excerpt, APP 4, at Tx 61:18-61:19. If there was a strategic reason for not raising the issue, Korchinski did not know what it might have been, and nor did she affirmatively assert she made a strategic decision not to raise the issues presented in Wagner’s petition on appeal.

IV. Statement of the Standard of Review.

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

1. Issue 1 and Issue 2: Standard of Review Applicable to Whether Wagner was Denied the Effective Assistance of Counsel at Trial.

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

“To prevail on an IAC claim, a petitioner must show that counsel’s performance was deficient and that the deficient performance prejudiced the

defense.” *Rose v. State*, 2013 MT 161, ¶15, 370 Mont. 398, 304 P.3d 387 (citations omitted).

2. Issue 3: Standard of Review Applicable to Whether Wagner was Denied the Effective Assistance of Counsel on Appeal.

The same standard applies to claims against both trial and appellate counsel, *Rose, supra*, but in the context of a claim against appellate counsel, this court has characterized the standard as “...whether there is a reasonable probability that, but for counsel’s unprofessional errors, the petitioner would have prevailed on appeal.” *DuBray v. State*, 2008 MT 121, ¶31, 342 Mont. 520, 182 P.3d 753, (citations omitted).

V. Argument.

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

1. Summary of Argument.

Trial counsel Kramer’s performance during the first trial was deficient. Kramer successfully excluded prior crimes, charged and uncharged, prior bad acts, and Wagner’s alleged violent character and tendencies from evidence. For reasons which Kramer did not articulate as strategic, and which Kramer could not otherwise explain, Kramer then introduced this inadmissible evidence on cross examination of State’s witnesses, Defense Opening and during the testimony of Wagner at the first

trial and allowed the State to do the same. No reasonable or competent criminal defense lawyer would have done the same.

Ohman's performance was deficient in one respect, he failed to move to exclude Wagner's prior trial testimony on the grounds it was the result of a Sixth Amendment Violation, Kramer's ineffective assistance of counsel. Ohman/McCarty recognized the damaging nature of the testimony, wanted it excluded, but failed to argue ineffective assistance of counsel and the Sixth Amendment as a grounds for exclusion.

Trial counsel McCarty was deficient at the second trial in one respect, during the State's closing argument he failed to object to improper vouching.

Appellate counsel's performance was only deficient if this Court concludes one or both claims of ineffective assistance were record-based and necessary to bring on direct appeal in *Wagner II*. Wagner contends all claims of ineffective assistance are non-record based and therefore proper for postconviction relief, but to the extent he is incorrect, appellate counsel's failure to raise these issues in *Wagner II* creates a reasonable probability Wagner would have prevailed on appeal.

2. Argument.

a. Claims Appropriate for Review in a Postconviction Petition.

Record-based ineffective claims must be reviewed on direct appeal and non-record-based claims must be raised in a post-conviction petition. "A claim is record-

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

A claim which, by its nature, can never be raised on direct appeal, and which is therefore not barred by the doctrine of *res judicata* or 46-21-105(2), MCA, is ineffective assistance of appellate counsel. See *Hagen* at ¶39 and ¶42. See Also, *Miller v. State*, 2012 MT 131, ¶11, 365 Mont. 264, 280 P.3d 272. To the extent any claim against trial counsel is record-based, Wagner raises it in Issue 3, Section V(2)(c) below, as a claim of ineffectiveness of appellate counsel.

b. Considerations Applicable to Claims of Ineffective Assistance.

Regarding claims of ineffective assistance against both trial and appellate counsel, “[t]he concept of prejudice is defined in different ways depending on the

context in which it appears. In the ordinary *Strickland* case, prejudice means ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a ‘mechanical’ fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on ‘the fundamental fairness of the proceeding.’ *Ibid.*” *Weaver v. Massachusetts*, 582 U.S. 286, 300, (2017) quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Wagner asserts claims of ineffective assistance based on omissions or failures to act by trial counsel. *White* held “counsel’s failure to adequately investigate, or failure to prepare a defense, or failure to familiarize him or herself with critical areas of the applicable law...” are usually a non-record-based area of representation. *White*, ¶18, citing *Hagen*, ¶21. Similarly, “[A] claim based on an omission which does not appear of record could not be raised on direct appeal and properly would be brought in a postconviction proceeding.” *Hagen*, ¶21.

Wagner submits his claims of ineffective assistance are based on omissions and the basis for the omissions do not appear on the record and could not have been raised on direct appeal.

c. Wagner was Denied the Effective Assistance of Counsel at his Second Trial.

i. Issue 1: Trial Counsel at the Second Trial was Ineffective Because they Failed to Attempt to Exclude Wagner’s Testimony at the First Trial Based on the Grounds it was the Product of a Sixth Amendment Violation, the Ineffective Assistance of Counsel.

1. Counsel’s Performance was Deficient.

In *People v. Duncan*, 527 N.E.2d 1060, 173 Ill.App.3d 554 (Ill. App. 1988), defendant was tried for murder and, at trial, testified in his own defense. The jury returned a verdict of guilty and the conviction was affirmed on appeal, but the conviction was subsequently vacated on federal habeas. *United States ex. Rel. Duncan v. O’Leary*, 806 F.2d 1307 (7th Cir. 1986). The *Duncan* defendant made a claim of ineffective assistance of counsel on habeas, and direct appeal, based on a conflict of interest. *Id.* at 1312. The Seventh Circuit held counsel was ineffective because he labored under a conflict of interest. *Id.* at 1313. The Appellate Court of Illinois interpreted the Seventh Circuit opinion as holding the first trial was “tainted.” *Duncan*, 527 N.E.2d at 1060, 173 Ill.App.3d. at 555.

On retrial, *Duncan* moved to exclude the testimony he provided at the first trial. 527 N.E.2d at 1062, 173 Ill.App.3d at 557-558. The trial court ruled the

testimony at the first trial was inadmissible at the second trial (except for impeachment). *Id.* 1062, 557. The Illinois Appellate Court recognized the general rule, a defendant’s earlier trial testimony is admissible against him in a subsequent trial. *Id.* at 1062, 558, citing *Harrison v. United States*, 392 U.S. 219 (2008). However, the Illinois Appellate Court noted an important distinction, the testimony at Duncan’s first trial resulted from a trial in which “...the defendant was denied the effective assistance of counsel, which colored the entire proceeding. Justice suggests the defendant’s statements were not made with any degree of particular advice.”² *Duncan*, 527 N.E.2d at 1062, 173 Ill.App.3d at 558.

In *State ex. rel Mazurek v. District Court of the Twentieth District*, 2000 MT 266, 302 Mont. 39, 22 P.3d 166, this Court cited *Duncan* with approval. *Mazurek* at ¶25. The *Mazurek* Court interpreted *Duncan* to hold the defendant was granted a new trial based on the ineffective assistance of counsel, and, as a result, the trial court ruled the prosecution could not use the defendant’s testimony at the first trial in its case in chief at the second trial. *Id.* at ¶25. *Mazurek* noted “...the lack of effective assistance of counsel ‘colored the entire proceeding’ and ‘suggests that the defendant’s decision to testify—and concomitant waiver of his Fifth Amendment

² Wagner alleges his statements were not made with any degree of particular advice. See Section III(3).

rights—was not made voluntarily and knowingly.” *Id.* at ¶25 quoting *Duncan*, 527 N.E.2d at 1062.

In *Harrison*, the lower court held “...the petitioner had ‘made a conscious decision to seek acquittal by taking the stand after his [illegally obtained] in-custody statements had been let in...’” *Harrison*, 392 U.S. at 223. The *Harrison* Court held “...that observation is beside the point. The question is not *whether* the petitioner made a knowing decision to testify, but *why*.” *Id.* Wagner demonstrates above in his factual statements in Section III(3), his testimony at his first trial was impelled by his trial counsel’s deficient performance and the improper introduction of his post Miranda invocation statements.

Ohman filed a Motion to Exclude his Prior Testimony provided at his former trial. APP 21. The Motion was based on the Fifth Amendment to the United States Constitution, and Ohman cited *Harrison* in support of his argument. Ohman failed to consider and assert the claim now asserted, Wagner’s testimony was the result of a Sixth Amendment violation, ineffective assistance.

Ohman’s rendered ineffective assistance by failing to argue that Wagner’s testimony at his first trial was impelled by Kramer’s deficient performance and fundamentally flawed non-strategic choices. *Harrison* provides the dispositive question is, “not *whether* [Wagner] made a knowing decision to testify, but *why*.” *Harrison*, 392 U.S. at 223 (emphasis in original). The record demonstrates Wagner

was impelled to testify to an array of otherwise inadmissible character and prior “bad acts” evidence *after* Kramer opened the door to such evidence. Wagner was impelled to testify in order to overcome the impact of the character and prior “bad acts” evidence Kramer improperly, and ineffectively introduced. Wagner’s testimony was thus “tainted” by Kramer’s deficient performance and a Sixth Amendment violation. *See Harrison*, 392 U.S. at 224-25. As in *Duncan*, Wagner was denied effective assistance of counsel at his first trial, including his testimony at that trial, and this Sixth Amendment violation “...colored the entire proceeding.” *Duncan*, 527 N.E.2d at 1062. Ohman did not appreciate or consider *Harrison*, (decided in 1968), *Duncan* (decided in 1985), or *Mazurek* (decided in 2000) to the extent they supported this argument. Ohman cited *Mazurek* in his Motion to exclude Wagner’s prior testimony, (APP 21, page 4), but failed to consider ¶25 of *Mazurek* and its identification and interpretation of *Duncan* and its applicability to the objective at hand, to exclude Wagner’s trial testimony from the first trial. Ohman noted in his motion he had “referenced a number of cases where courts ruled that admission of prior trial testimony was not permitted because the testimony was induced by a violation of a constitutional as opposed to evidentiary nature.” (APP 21, page 4, *citing Mazurek*, ¶¶25-26.) The record demonstrates the Illinois Court of Appeal’s decision in *Duncan* was one of these very cases. *Mazurek*, ¶25, *citing Duncan*, 527 N.E.2d at 1060-62. Ohman’s performance was deficient.

2. Wagner was Prejudiced by Trial Counsel’s Deficient Performance.

Wagner need only show a reasonable probability that, but for Ohman’s failure to properly challenge the admissibility of his previous testimony, the result of the proceeding would have been different. *State v. Henderson*, 2004 MT 173, ¶4, 322 Mont. 69, 93 P.3d 1231. Accordingly, “*Strickland* requires only that [Wagner] show ‘a probability sufficient to undermine confidence in the outcome.’” *State v. Rogers*, 2001 MT 165, ¶20, 306 Mont. 130, 32 P.3d 724, quoting *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine the confidence in the outcome, but does not require that [Wagner] demonstrate that he would have been acquitted.” *State v. Kougl*, 2004 MT 243, ¶25, 323 Mont. 6, 97 P.3d 1095, quoting *Rogers*, at ¶14 and *Strickland* 466 U.S. at 694. A “reasonable probability” is a lower standard than a preponderance of the evidence. *Pirtle v. Morgan*, 313 F.3d 1160, 1172, (9th Cir. 2002), quoting *Strickland*, 466 U.S. at 694.

The United States Supreme Court has long recognized: “The risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997) quoting *United States v. Moccia*, 68 F.2d 61, 63 (1st Cir. 1982). By their

very nature, other bad acts are inherently prejudicial. *State v. Croteau*, 248 Mont. 403, 407, 812 P.2d 1251, 1253 (1991). It is not that character evidence is irrelevant, rather, “it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475-476 (1948). The policy of excluding such evidence, despite its admitted probative value, “is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.” *Michelson*, 335 U.S. at 476.

As a direct result of Ohman’s failure to properly challenge the admissibility of Wagner’s prior testimony, the jury was, again, exposed to all the prior crimes and bad character evidence described in Section III(1) above, including, but not limited to (1) Wagner’s acknowledgement of Lark’s allegation he assaulted her in October of 2006. (APP 28, at TTx 911:18-911:21); (2) Wagner’s acknowledgement that, as Lark alleged, Wagner struck Lark in the back of the head, inflicting “multiple skull fractures.” (*Id.* at TTx 911:22-911:25); (3) Wagner’s acknowledgment he lied to law enforcement and told them Lark sustained her injuries in an auto accident. (*Id.* 912:12-912:20); (4) Wagner’s admission of his pending charges in Colorado, his violation of his conditions of release and his flight from justice. (*Id.* at 912:21-912:23, 913:22-914:13); and (5) Wagner’s admission regarding a series of lies

Wagner told to avoid accountability for the assault on Lark. (*Id.* at TTx 914:23-915:18).

The jury's exposure to the evidence Kramer ineffectively admitted into evidence undermines any confidence in the outcome of Wagner's trial. The record plainly demonstrates the trier of fact was repeatedly and unnecessarily exposed to evidence regarding Wagner's character and "bad acts," pursuant to his previous direct and cross-examination testimony. But for Kramer's ineffective assistance, the testimony and evidence would never have been elicited or created.

Wagner need only establish a reasonable probability that, but for Ohman's failure to challenge the admissibility of Wagner's prior testimony on these grounds, the result of the proceeding would have been different. Pursuant to *Harrison* and *Duncan*, this Court should find there is more than a reasonable probability Wagner's previous testimony would have been excluded had Ohman argued it was impelled by Kramer's ineffective assistance and fundamentally flawed non-strategic actions. In addition, had the testimony been excluded, none of the prejudicial and irrelevant evidence of other crimes and bad character described in Section III(1) would have been considered by the jury at his second trial and there is a reasonable probability the result would have been different.

**ii. Issue 2: Trial Counsel was Ineffective at Wagner’s Second Trial
Because they Failed to Object to the Prosecutor’s Improper
Arguments in Closing.**

Both the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee criminal defendants the right to a fair trial by a jury. A prosecutor’s misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶27, 345 Mont. 252, 190 P.3d 1091, citing *Clausell v. State*, 2005 MT 33, ¶11, 326 Mont. 63, 106 P.3d 1175. This Court, “measures prosecutorial misconduct by reference to established norms of professional conduct.” *State v. Passmore*, 2010 MT 34, ¶48, 355 Mont. 187, 225 P.3d 1229 (citations omitted).

A prosecutor’s role is unique within the criminal justice system. It is not simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy. *See State ex rel. Fletcher v. District Court*, 260 Mont. 410, 415, 859 P.2d 992, 995 (1993) quoting *People v. Trevino*, 39 Cal.3d. 667, 704 P.2d 719, 724-725 (Cal. 1985). *Berger v. United States*, 295 U.S. 78 (1935) articulated this unique position:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose

interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

... while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one...improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

A prosecutor is required to, “execute the duties of his representative office diligently and fairly, avoiding even the appearance of impropriety that might reflect poorly on the state.” *Fletcher*, 260 Mont. at 415, 859 P.2d at 995, *quoting Trevino, supra*. Though he, “must diligently discharge the duty of prosecuting individuals accused of criminal conduct, the prosecutor may not seek victory at the expense of the defendant’s constitutional rights.” *Id.* A prosecutor, “is obligated to respect the defendant’s right to a fair and impartial trial in compliance with due process of law.” *Id.* By making improper comments to a jury, a prosecutor undermines the respect for the criminal justice system. *State v. Criswell*, 2013 MT 177, ¶57, 370 Mont. 511, 305 P.3d 760 (McGrath, C.J., concurring).

Wagner received ineffective assistance because his trial counsel, McCarty, failed to object to the improper statements made by the prosecutor in the state’s closing argument. The prosecutor’s misconduct in closing deprived Wagner of his

rights pursuant to the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution.

1. McCarty Failed to Object to Improper and Unfairly Prejudicial Prosecutorial Comments made During the State’s Closing.

This Court considers, “alleged improper statements during closing argument in the context of the entire argument.” *State v. Makarchuk*, 2009 MT 82, ¶24, 349 Mont. 507, 204 P.3d 1213, *citing State v. Roubideaux*, 2005 MT 324, ¶15, 329 Mont. 521, 125 P.3d 1114. “We will not presume prejudice from the alleged misconduct, rather the defendant must show that the argument violated his substantial rights.” *Makarchuk*, ¶24, *citing Roubideaux*, ¶11.

“Unfortunately, some prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument.” *Criswell*, ¶55 (McGrath, C.J., concurring), *quoting ABA Standards for Criminal Justice, Prosecution Function and Defense Function*, Standard 3-5.8, Comments to ABA standards 107-108, (*citing Berger*). It is well recognized prosecutorial conduct in argument, “is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office, but also because of the fact-finding facilities presumably available to the office.”

ABA Stands. for Crim. Just.: Prosecution Function and Def Function, Standard 3-5.8, Commentary, 107. Although “...‘it is proper for a prosecutor to comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences which may be drawn therefrom.’” “...[i]t is generally improper for the prosecution to offer personal opinions as to the credibility of the accused or the witnesses ...” *State v. Green*, 2009 MT 114, ¶33, 350 Mont. 141, 205 P.3d 798, quoting *State v. Gladue*, 1999 MT 1, ¶15, 293 Mont. 1, 972 P.2d 827 citing *State v. Stringer*, 271 Mont. 367, 380, 897 P.2d 1063, 1071 (1995).

A claim of error by defense counsel for failing to object must demonstrate the failure to object was error and that the defendant was prejudiced by the failure. *State v. Campbell*, 278 Mont. 236, 250, 924 P.2d 1304, 1313 (1996).

2. The Failure to Object to the Vouching Amounted to Deficient Performance.

McCarty testified the comments in question appeared to be vouching and he should have objected. See May 22, 2024 Transcript Excerpt, APP 3, at Tx 42:13-48:21. McCarty exercised no strategic choice to refrain from objecting and the failure to object was error.

No lawyer, prosecutor, defense attorney, or civil attorney, may express their personal opinion about a witness’ credibility or believability. With regard to

prosecutors only, this impropriety carries an implication of official governmental support. *United States v. Weatherspoon*, 410 F.3d 1142, 1148 (9th Cir. 2005).

United States v. Young, 470 U.S. 1 (1985), identified two reasons why prosecutors must not place their personal opinions as to witness credibility before the jury. The *Young* Court observed:

The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Young, 470 U.S. at 18-19, citing *Berger*, 295 U.S. at 88-89.

Stringer, 271 Mont. at 381, 897 P.2d at 1072 held, "[t]his Court has been unequivocal in its admonitions to prosecutors to stop improper comments and we have made clear that we will reverse a case where counsel invades the province of the jury." Statements by a prosecutor regarding his personal opinions are improper for the following reasons:

(1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused; (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative

force of the testimony adduced at the trial the weight of the prosecutor's personal, professional, or official influence.

Stringer, 271 Mont. at 381, 897 P.2d at 1071-72, *citing State v. Campbell*, (1990) 241 Mont. 323, 328-29, 787 P.2d 329, 332-33.

“Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggesting that information not presented to the jury supports the witness’s testimony.” *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993). Even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it places “the prestige of the government behind the witness” by providing “personal assurances of a witness’s veracity.” *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). Vouching of this sort is dangerous precisely because a jury, “may be inclined to give weight to the prosecutor’s opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.” *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985); *See also Young*, 470 U.S. at 18-19. In addition to the above, improper vouching occurs when a prosecutor “express[es] an opinion of the defendant’s guilt, denigrate[s] the defense as a sham, implicitly vouch[es] for a witness’s credibility, or vouch[es] for his own credibility.” *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (internal citations omitted).

In *Hayden*, this Court exercised plain error review and reversed the defendant's conviction based upon multiple errors committed by the prosecutor. *Hayden*, ¶¶31-32. In *Hayden*, the prosecutor, "impinged on the jury's role by offering his own opinion as to witnesses' testimony during his closing argument." *Hayden*, ¶32. Specifically, the prosecutor argued two State's witnesses were "believable" and the jury could "rely on" the investigating officer's testimony. *Hayden*, ¶14. The prosecutor also improperly testified, "by vouching for the efficacy of the search of Hayden's residence and by stating his opinion that a scale found in the residence was used for drugs." *Hayden*, ¶32. The prosecutor also argued the officers did "good work" in conducting the search of Hayden's home. *Hayden*, ¶14. The *Hayden* Court found the prosecutor's argument, "unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶33. It concluded the prosecutor's conduct, "invaded the role of the jury, and ... created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *Hayden*, ¶33.

In *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010), the appellant argued the prosecutor improperly inserted his personal disbelief of his defense and submitted his own testimony to the jury constituted impermissible vouching. *Wright*, 625 F.3d at 610. The *Wright* Court identified the following as the most troubling comment delivered during the prosecutor's closing argument:

Now, I've been handling these cases for a number of years and I've seen where defense-where the defense of it was my roommate has been advanced, and I've seen the defense advanced that it was some sort of hacker or trojan or virus, something along those lines, and then I've also seen, well, somebody did something inappropriately, the interview, this, that, something along those lines.

But never have I seen the trifecta, all three in this same place. This is very-this is unbelievably remarkable that you guys got to witness this. So we're betting on Shawn Dittfurth to win, the FBI to place, and I guess some computer hacker, trojan, virus mystery man to show, but the problem is none of those things ever showed.

...

Of course [Wright's] denying that he said he knew he should not have child pornography on his computer. I'm not sure why he's denying that because *if somebody asked me* should you have child pornography on your server, on your computer, *I would say of course not*, but here he is saying no, no, no, we weren't-there was no child pornography and I never said anything about how I knew I shouldn't have child pornography on this computer.

Wright, 625 F.3d at 610-11 (emphasis in original).

The *Wright* Court held the prosecutor's comments not only gave the jury his impression of the evidence in the case, but they improperly introduced evidence outside the record, i.e., the prosecutor's experience with similar cases-as a means of commenting on the defense's case and Wright's credibility. *Wright*, 625 F.3d at 611. Though the prosecutor's statements might not technically be viewed as improper vouching, it was certainly improper, since it "denigrat[ed] the defense as a sham." *Wright*, 625 F.3d at 611, quoting *United States v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir 1999).

The prosecutor's repeated references regarding how he viewed the evidence were also improper. *Wright*, 625 F.3d at 612. A prosecutor's arguments, "not only must be based on facts in evidence, but should be phrased in such a manner that it is clear to the jury that the prosecutor is summarizing evidence rather than inserting personal knowledge and opinion into the case." *Wright*, 625 F.3d at 612, quoting *Hermanek*, 289 F.3d at 1100.

The prosecutorial statements and arguments in Section III(4) above were improper because they invaded the province of the jury and "impinged on the jury's role by offering [the prosecutor's] own opinion as to witnesses' testimony during his closing argument." *Hayden*, ¶32. The prosecutor's statements are substantially the same as arguments the *Hayden* and *Wright* Courts found improper and a violations of the defendant's fundamental right to a fair trial. *Hayden*, ¶14, *Wright* at 610-611.

The prosecutor's comments also consisted of his personal beliefs regarding Wagner's credibility and guilt. "It is for the jury, not an attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, 132.

While the prosecutor did not proclaim the State's witnesses did "good work" *Hayden*, ¶14, he similarly declared "we've won this one by couple of touchdowns." State's Closing Arguments, APP 18, at TTx 92:4-92:5. As in *Hayden*, the prosecutor "unfairly added the probative force of his own personal, professional, and official

influence to the testimony of the witnesses.” *Hayden*, ¶33. The prosecutor’s conduct, “invaded the role of the jury, and ... created a clear danger that the jurors adopted the prosecutor’s views instead of exercising their own independent judgment.” *Hayden*, ¶33.

As in *Weatherspoon*, this Court should also be mindful of the line between acceptable statements grounded on inferences from the evidence and unacceptable statements representing an improper suggestion of personal opinion. *Weatherspoon*, 410 F.3d at 1147, note 3. This Court should be especially sensitive to the form of prosecutorial statements, and that use of the prefatory phrase “I submit” is preferred to the use of “I think,” because the latter is more likely to lead the jury to give undue credit to the statement that follows. *Weatherspoon*, 410.F.3d at 1147, note 3. Here, the prosecutor used the prefatory phrases “I think,” “I get,” or some similar iteration on no less than seven occasions when arguing to the jury how it should consider the State’s evidence and witnesses. Like, *Weatherspoon*, the prosecutor’s statements fell on the unacceptable side of the line. There was nothing in their form to convey to the jury that the statements were intended only as a submission for its consideration. Rather, the prosecutor’s “I think” and “I get” statements regarding the State’s witnesses and evidence were obviously to be understood by the jury as personal assurances. *Weatherspoon*, 410 F.3d at 1147, note 3.

Like *Wright*, this Court should also conclude the prosecutor's comments gave the jury his impression of the evidence in the case. *Wright*, 625 F.3d at 611. The prosecutor's repeated references as to how he viewed the evidence were improper. *Wright*, 625 F.3d at 612. It cannot be said the prosecutor's arguments were phrased in such a manner that it was clear to the jury he was "summarizing evidence rather than inserting personal knowledge and opinion into the case." *Wright*, 625 F.3d at 612 quoting *Hermanek*, 289 F.3d at 1100.

McCarty's failure to object to the prosecutor's vouching in closing argument cannot be considered within the "wide range" of permissible, professional legal conduct. *Dawson*, ¶105. McCarty's failure to object permitted the prosecutor to impermissibly vouch for the credibility of multiple witnesses and the State's case, and express personal opinions regarding Wagner's credibility and guilt, and permitting this improper conduct resulted in no benefit to Wagner that would justify the failure to object. The failure to object also prevented Wagner from preserving this issue for appellate review. *Gravley v. Mills*, 87 F.3d 779, 786 (6th Cir. 1996).

Because the argument was improper, and because of the harm done by each such comment to Wagner's right to a fair trial, McCarty's failure to object to the above-cited instances of prosecutorial misconduct was objectively unreasonable. The prosecutor's comments were replete with his personal beliefs and opinions as to the truth or falsity of testimony and evidence. His remarks were highly improper and

unacceptable, and intruded on the jury's function. McCarty was correct, he should have objected, (*see* May 22, 2024 Transcript Excerpt, APP 3, Tx 48:17-48:21), and his failure to do so amounted to error and deficient performance.

3. Wagner was Prejudiced by Trial Counsel's Deficient Performance in Failing to Object to the Improper Closing Argument.

As above, Wagner need only show a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that, but for McCarty's failure to object to the closing arguments identified in Section III(4) above, the result of the proceeding would have been different.

Prosecutorial vouching creates the possibility a conviction will not be "attained through a fair and impartial judicial process." *Gravelly* 87 F.3d at 790. Vouching in Wagner's trial created the impression by the jury there was evidence not presented to them, but known to the prosecutor, supporting the charges, as well as compromised Wagner's right to be judged solely on the basis of evidence presented in court and it encouraged the jury to trust the Government's judgment rather than its own view of the evidence. *See Young*, 470 U.S. at 18-19. The vouching placed the prestige of the Government behind the witnesses against Wagner. *See Necochea*, 986 F.2d at 1276.

Last, the prosecutor stated Wagner was a liar and denigrated his defense as a sham. *See Hermanek*, 289 F.3d at 1098. These circumstances create a reasonable probability that, absent vouching, the result would have been different and undermines confidence in the jury’s verdict against Wagner.

iii. Issue 3: If the Claims Presented by Wagner are Record Based Claims of Ineffective Assistance, Wagner Received Ineffective Assistance of Counsel on Appeal in *Wagner II*.

A defendant’s right to effective assistance of counsel, guaranteed by Article II, Section 24 of the Montana Constitution and by the Sixth Amendment to the United States Constitution, extends both to trial counsel and appellate counsel. *Rogers*, ¶7, *citing, in part, Strickland*, 466 U.S. at 686; *State v. Black*, 245 Mont. 39,798 P.2d 530 (1990); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)(“A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.”).

In deciding ineffective assistance of appellate counsel claims, the two-prong approach set forth in *Strickland* is to be used. The standard for ineffective assistance is the same for trial and appellate counsel. *Hagen v. State*, 1999 MT 8, 110, 293 Mont. 60, 97 P.3d 233, *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986) (“[W]e have applied *Strickland’s* two-part test to determine if appellate counsel’s assistance was ineffective.”). In the context of a claim of ineffective assistance of

appellate counsel, a petitioner must show a reasonable probability that, but for his counsel's defective performance, he would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Nelson v. Hall*, 573 S.E.2d 42, 43 (Ga. 2002); *Firestone v. State*, 83 P.3d 279, 281 (Nev. 2004).

However, the merits of the omitted claim do not have to be resolved. Although this analysis necessarily involves an evaluation of the underlying claims, "it does not require a decision on or a determination of these issues. All that is required is a determination that, based on the nature of the underlying claims, there is a 'reasonable probability that, but for counsel's [failings] ... , [the defendant] would have prevailed on his appeal.'" *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004). As noted in *Nelson, supra*, the inquiry does not focus on the projected result on remand or retrial, but whether there is a reasonable probability that the result of the appeal would have been different. *Nelson*, 573 S.E.2d at 43. The *Nelson* Court noted in most cases, "there would be no way for the [reviewing] court to predict the outcome of a second proceeding." *Nelson, Id.* at 44, n. 1.

In analyzing claims of ineffective assistance of counsel raised on direct appeal, this Court first considers whether the trial record is sufficient to determine whether counsel was ineffective. *State v. Daniels*, 2003 MT 247, ¶41, 317 Mont. 331, 77 P.3d 224. A trial record is sufficient for review on direct appeal when it contains two essential components. First, the record must adequately document the

challenged act or omission of defense counsel. *State v. Harris*, 2001 MT 231, ¶21, 306 Mont. 525, 36 P.3d 372. Second, the record must afford sufficient understanding of the reasons for counsel’s act or omission, in order to answer the question of whether the alleged error expressed a trial strategy or tactical decision. *Harris*, ¶21. If the record does not supply the reason for counsel’s act or omission, the claim must be raised in a petition for postconviction relief, where a record can be developed to establish why the challenged act or omission occurred. *Harris*, ¶21.

Wagner submits the record on direct appeal did not establish “why” the above-referenced errors and omissions occurred, and they are thus non-record claims which are appropriate for review on post-conviction petition only. However, should this Court determine otherwise, then Wagner respectfully requests it find he received ineffective assistance of appellate counsel. Wagner has demonstrated a reasonable probability that, but for his appellate counsel’s deficient performance, he would have prevailed on appeal.

VI. Conclusion.

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

Wagner was denied his constitutional right to the effective assistance of counsel.

Wagner requests the following relief: (1) the Sentencing Order and Judgment, be set aside and vacated, and (2) for such other or further relief as the Court deems appropriate.

Respectfully submitted this 20th day of January, 2026.

/s/ Shandor S. Badaruddin

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac version 16.47 is 9,856 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11(4)(d).

So certified this 20th day of January, 2026.

/s/ Shandor S. Badaruddin

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APPENDIX

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

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CERTIFICATE OF SERVICE

I, Shandor Badaruddin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-20-2026:

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