IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0747

ROBERT DANIEL MAXIN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable Rienne McElyea, Presiding

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STATEMENT OF THE ISSUES

1. Appellant Robert Maxin's postconviction relief (PCR) counsel was ineffective.

2. Maxin had a statutory and constitutional right to effective assistance of PCR counsel.

3. Alternatively, PCR counsel's conflict of interest violated Maxin's right to due process.

STATEMENT OF THE CASE

Information	01/04/2016	(DC Doc. 3.)
Appearance of counsel J. Mayo Ashley	01/29/2016	(DC Doc. 13.)
Plea agreement	08/19/2016	(DC Doc. 34, Ex. 1.)
Guilty plea	08/23/2016	(DC Doc. 34.)
Order of protection (OOP)	09/01/2016	(*See* DC Doc. 40.)
Notice of OOP violation	12/09/2016	(DC Doc. 40.)
Motion to withdraw guilty plea	12/11/2016	(DC Doc. 42.)
Motion to withdraw as counsel	12/11/2016	(DC Doc. 44.)
Order granting withdrawal of counsel	01/03/2017	(DC Doc. 47.)
Appearance of counsel Brandon Hartford	01/13/2017	(DC Doc. 52.)
Hearing on motion to withdraw guilty plea	08/23/2017	(DC Doc. 88.)
Admission of attorney Ashley's emails	11/20/2017	(DC Docs. 96–97.)
Order denying withdrawal of guilty plea	05/24/2018	(DC Doc. 106.)
Sentencing hearing	07/30/2018	(DC Doc. 108.)
Sentencing order	07/30/2018	(DC Doc. 110.)
Anders brief	05/15/2020	DA 19-0186
Order granting withdrawal of counsel and dismissing appeal	08/04/2020	DA 19-0186
Postconviction relief (PCR) petition	06/09/2021	(PCR Doc. 4.)

Order for written response	06/30/2021	(PCR Doc. 7.)
Order appointing counsel	10/14/2021	(PCR Doc. 14.)
Appearance of counsel Penelope Strong	11/29/2021	(PCR Doc. 19.)
Amended PCR petition	03/07/2022	(PCR Doc. 30.)
Motion to withdraw as counsel due to conflict of interest	04/03/2023	(PCR Doc. 67.)
Order granting withdrawal of counsel	04/03/2023	(PCR Doc. 68.)
Appearance of counsel Benjamin Darrow	06/08/2023	(PCR Doc. 71.)
PCR hearing	03/29/2024	(PCR Doc. 90.)
Order denying PCR petition	10/25/2024	(PCR Doc. 96.)

STATEMENT OF THE FACTS

While representing Maxin on his sexual assault charge, Maxin's first trial attorney, J. Mayo Ashley, advised him that he could continue residing across the street from the victim, even though an order of protection (OOP) prohibited Maxin from being within 300 feet of her residence. (DC Doc. 97, Ashley Emails, *admitted* DC Doc. 96; Hr'g to Withdraw Guilty Plea at 33:3–14 (Aug. 23, 2017).) Ashley admitted he gave Maxin this absurd advice and explained his reasons for doing so *on the record* in Maxin's sexual assault case. (Ashley Emails; Hr'g to Withdraw at 33:3–14.) Following Ashley's advice, Maxin violated the OOP by residing within 300 feet of the victim. (DC Doc. 40, Ex. B, Aff. of Probable Cause (Dec. 6, 2016).)

Because of the OOP violation, the State withdrew from Maxin's

10-year-suspended plea agreement and instead sought 40 years with 10 suspended. (DC Doc. 40; Sentencing Hr'g at 65:25–66:2 (July 30, 2018).) At Maxin's sentencing hearing, the State argued, and the court agreed, that Maxin's OOP violation demonstrated a lack of empathy, remorse, and accountability, as well as a danger to society. (*See generally* Sentencing Hr'g.) But Maxin's new attorney, Brandon Hartford, failed to counter those assertions or to argue that Maxin inadvertently violated the OOP because of Ashley's faulty advice. (*See id.* at 78:21–84:13.) Because the Judge believed that Maxin intentionally violated the OOP, she sentenced him to the Montana State Prison (MSP) for 40 years, with 10 suspended, disregarding the psychosexual report's recommendation of community placement. (*Id.* at 91:16–98:8.)

No court has properly reviewed these fatal errors, and Maxin is stuck serving a 40-year sentence because Ashley admittedly misinformed him about the law. (*See generally* Ord., *State v. Maxin*, DA 19-0186 (Aug. 4, 2020); PCR Doc. 96.)

Guilty Plea

In January 2016, Maxin paid a California law firm, Imhoff &

Associates, $22,500.00 to represent him on his sexual assault case in Gallatin County. (PCR Ex. J, Imhoff Agmt., *admitted* PCR Hr'g at 131:2 (Mar. 29, 2024).) Pursuant to the agreement, the sum was "earned" by the firm upon receipt. (*Id.*) The firm assigned Ashley to represent Maxin. (PCR Hr'g at 131:2–21; DC Doc. 13.)

Maxin pleaded guilty to sexual assault on August 23, 2016. (DC Doc. 34.) The State agreed to recommend a ten-year suspended sentence, if a "psychosexual offender evaluation report" concluded that Maxin was "at low risk to reoffend and should be designated a level 1 sex offender." (PCR Ex. 2, Plea Agmt., *admitted* PCR Hr'g at 80:13.) Additionally, the plea agreement included a standard condition that Maxin remain law abiding throughout the pendency of his case. (*Id.*)

Order of Protection Violation

The victim's family subsequently obtained two orders of protection (together "OOP") against Maxin—one for the victim's mother, and one for her father—on September 1, 2016. (Aff. of Probable Cause, ¶ 5.) The OOP required Maxin to stay 300 feet away from the victim's residence. (*Id.* ¶¶ 3–6.) The court made the OOP permanent on October 24, 2016. (*Id.* ¶ 10.)

Because Maxin lived well within the 300-foot restriction, he sought Ashley's advice on whether he needed to relocate. (Ashley Emails.) Maxin and Ashley had several telephonic conferences in September and October 2016. (DC Doc. 94, Ex. A, Ashley Phone Logs, *admitted* DC Doc. 93.) They agreed that during one of those conversations, Maxin asked Ashley if he needed to move due to the OOP's 300-foot restriction, and Ashley advised him that he did not. (Ashley Emails; Hr'g to Withdraw at 33:3–14; Sentencing Hr'g at 50:6–51:2.) Following Ashley's advice, Maxin did not relocate—he continued residing across the street from the victim's family. (Sentencing Hr'g at 50:6–51:2.)

On December 6, 2016, the State charged Maxin with two counts of violating an OOP—one for each of the victim's parents—under Montana Code Annotated § 45-5-626, for "residing within 300 feet" of the victim's residence between September 1 and October 24, 2016. (*See* Aff. of Probable Cause.) Maxin moved out of his house after learning that he had violated the OOP. (Sentencing Hr'g at 41:11–42:8.) A jury found Maxin guilty of violating the OOP specifically by residing within 300 feet of the victim's family. (Sentencing Hr'g, Ex. 3, Verdict.)

On December 9, the State notified the district court that Maxin breached the condition of his plea agreement to "obey all state, local and federal laws" by violating the OOP. (DC Doc. 40 at 1.) The State asserted that it was "no longer bound by any of the contingent sentencing recommendations set forth in the" plea agreement. (*Id.* at 2–3.) The State thus withdrew from Maxin's plea agreement, including its promise to recommend ten years suspended. (*Id.*)

Attorney Ashley's Testimony & Emails

Two days after the State reported Maxin's plea agreement violation to the court, Ashley moved to withdraw as counsel and to withdraw Maxin's guilty plea. (DC Docs. 42, 44.) The court granted Ashley's motion to withdraw as counsel. (DC Doc. 47.) The same firm, Imhoff & Associates, assigned Hartford to represent Maxin. (DC Doc. 52; PCR Hr'g at 19:2–19.)

The court held an evidentiary hearing on Maxin's motion to withdraw his guilty plea. (DC Doc. 88.) Ashley testified that he advised Maxin, "[Y]ou can continue living there," despite the OOP. (Hr'g to Withdraw at 33:6–11.) The State moved to supplement the evidentiary record with Ashley's phone logs and emails. (DC Doc. 91 at 3.) The court

granted the motion and ordered Ashley to supplement the record. (DC Docs. 93, 96.) Ashley produced his phone logs and emails, which became part of the district court record. (DC Docs. 94, 97.) Included in Ashley's production was a March 7, 2017 email to Maxin, in which Ashley attempted to explain the OOP advice he had given him in the fall of 2016. (Ashley Emails.) In the email, Ashley again admitted that he advised Maxin to continue residing in his home and that he believed the victim's family did not object to Maxin living across the street despite the OOP. (*Id.*)

Psychosexual Risk Assessment

Dr. Boman Smelko prepared a psychosexual risk assessment report on Maxin in December 2016. (DC Doc. 46, PSR (Dec. 9, 2016).) He concluded that Maxin was a "low risk individual" and "should be deemed a Tier 1 offender." (*Id.* at 8.) The only potential "risk" Dr. Smelko identified "revolve[d] around [Maxin's] lack of compliance with no contact orders," having considered Maxin's OOP violation. (*Id.*) Nonetheless, he recommended community-based treatment. (*Id.*)

Sentencing

The State made the OOP violation the focal point of Maxin's

sentencing hearing. (*See generally* Sentencing Hr'g.) Having withdrawn from the agreed-upon 10-year suspended recommendation, the State recommended 40 years with 10 suspended. (*Id.* at 66:1–2.) The State relied upon the OOP violation to argue that Maxin harassed the victim's family, lacked remorse, refused accountability, and was likely to re-offend. (*Id.* at 61:19–62:14, 64:4–65:5.) The State offered evidence of Maxin's OOP violation into the record. (*Id.* at 33:4–22.) The prosecutor questioned Maxin's spouse about their decision not to sell their home and relocate after the OOP: "Did it seem at all unusual to you or maybe uncomfortable that you would continue to live across from them?" (*Id.* at 39:20–22.) The prosecutor similarly questioned Maxin: "[D]id it ever cross your mind that that was not a good thing to remain in that close proximity?" (*Id.* at 53:11–14.)

The prosecutor argued that Maxin was "lawfully convicted [of the OOP violation] . . . based on his harassment of [the victim's family]," adding that it is "of serious concern" to the family "and to the public." (*Id.* at 61:19–24.) The prosecutor suggested that the OOP violation demonstrated "a lack of concern for others" and "a lack of empathy." (*Id.* at 62:2–14, 64:4–10.) The prosecutor argued, "[W]hen you receive a

court order under these circumstances, when you're living across the street from a sex assault victim and her parents, his violations of the [OOP] speak volumes in terms of the sentence that he should receive." (*Id.* at 64:24–65:5.)

The victim's father testified as to the impact the OOP violation had on his family. (*Id.* at 22:8–25:23.) He said that Maxin would "be out there, smiling, [and] smoking," even though "[h]e was supposed to leave his residence." (*Id.* at 22:18–22.) He said, "The fact that he chose not to respect our boundaries and not respect this family . . . I'd like to see him sentenced as long as you can possibly sentence him." (*Id.* at 31:17–24.) He later added, "He deserves to serve prison time, especially for spitting in our face after he had a plea agreement." (*Id.* at 32:15–19.)

Hartford did nothing to soften the blow of the OOP violation at sentencing. He failed to argue that the OOP violation resulted from Ashley's faulty advice. (*See id.* at 78:21–84:13.) Hartford did not use Ashley's emails or testimony as evidence. (*See* Ashley Emails; Hr'g to Withdraw at 33:6–11.) On the contrary, Hartford threw his client under the bus and blatantly told the court that he had "concerns" about Maxin's "failure to take responsibility." (Sentencing Hr'g at 83:2–4.)

Hartford also attempted to blame Maxin for the OOP violation:

> [Hartford:] Now, Mr. Maxin, we had a discussion about previous attorneys and advice; is that correct?
>
> [Maxin:] Yes, sir.
>
> [Hartford:] And after some discussion, you and I came to the understanding that those violations of the [OOP] were your responsibility; is that correct?
>
> [Maxin:] Yes, sir.
>
> [Hartford:] So, Mr. Maxin, to that end, why did you move out of the—of your house when you did?
>
> [Maxin:] I didn't—it's going to be a long explanation. The first [OOP], the minute I got it, I called my attorney at that time, read it off to him. He had just received a copy of it via email, so he had a copy he was reading. And I asked him if that meant that I had to leave my house. And basically, he told me, and I was on the speaker phone, and my wife heard it, that unless the officers told me I had to leave the house, they weren't enforcing that part of the [OOP]. So, I stayed in my house.

(Sentencing Hr'g at 50:6–51:2.)

The court sentenced Maxin to MSP for 40 years with 10 suspended. (*Id.* at 98:4–8.) The court deviated from Dr. Smelko's recommendation because of Maxin's OOP violation:

> Dr. Smelko found Defendant's overall level of risk is considered low . . .
>
> Dr. Smelko further found that Defendant should be deemed a Tier 1 offender. Dr. Smelko found that Defendant

> could be treated in a community-based sex offender program. However, Dr. Smelko was concerned with Defendant's failure to abide by the [OOP] and felt Defendant should be monitored.

(*Id.* at 91:6–19.) Explaining the grounds for its sentence, the court made the following references to the OOP: "Defendant often settled himself in front of his garage and watched the [victim's family]"; "The [c]ourt also notes the Exhibit 1 that was entered into the court record . . . That was the Sentencing Order out of Judge Brown's court on the violation of the [OOP]"; "It is this court's responsibility . . . to assure the victim that the Defendant will not have contact with her or her family." (*Id.* at 93:12–14, 94:3–7, 96:1–6.)

Direct Appeal

On appeal, Maxin's appellate counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1967). Although appellate counsel discussed ineffective assistance of counsel (IAC) generally, she did not inform the Court that Ashley's emails had been admitted in the District Court, nor did she discuss how Ashley's and Hartford's deficient performances prejudiced him at his sentencing hearing. *Anders* Br. at 37–40, *State v. Maxin*, DA 19-0186 (May 15, 2020). This Court subsequently dismissed Maxin's appeal. Ord., *Maxin*, DA 19-0186 (Aug. 4, 2020).

PCR Proceedings

Maxin filed a pro se petition for PCR, (PCR Doc. 4), and the District Court ordered the State to respond, (PCR Doc. 7). The court also ordered the Office of State Public Defender (OPD) to represent Maxin. (PCR Doc. 14.) Attorney Penelope Strong appeared on Maxin's behalf on November 29, 2021. (PCR Doc. 19.) Strong was also representing Hartford in his attorney disciplinary proceedings before the Montana Commission on Practice (COP). (PCR Hr'g at 55:3–11.) Hartford testified that Strong represented him "at the same time" that she represented Maxin and that she told him, "I'm not going to come after you . . . so there's no conflict." (*Id.*)

Strong filed an amended PCR petition, arguing that Ashley was ineffective when he misadvised Maxin regarding the OOP. (PCR Doc. 30 at 10.) But Strong did not argue that Ashley's faulty advice prejudiced Maxin at sentencing. (*See generally* PCR Docs. 30–31.) Instead, she argued that Maxin "would not have entered a guilty plea, but for [Ashley's] deficient performance," even though Maxin pleaded guilty *before* Ashley gave him faulty advice. (PCR Doc. 31 at 5.) Similarly, Strong argued that Hartford was ineffective by failing to argue that

Ashley was ineffective at the guilty plea withdrawal hearing. (PCR Doc. 30 at 11.) But Strong did not raise any issues regarding Hartford's deficient performance at sentencing. (*See generally id.*)

Nearly a year-and-a-half after she began representing Maxin, Strong filed a notice to withdraw as counsel the day before the scheduled PCR hearing because she realized that representing Hartford in his COP complaints while needing to allege IAC against him created a conflict of interest. (*See generally* PCR Doc. 67.) Strong explained that she did not identify the conflict sooner because her "personal attorney" was "ill and unavailable earlier." (*Id.* at 2.)

Following Strong's withdrawal, attorney Benjamin Darrow represented Maxin. (PCR Doc. 71.) At the PCR hearing, Darrow was unfamiliar with the record in Maxin's criminal matter. He advised the court that Ashley's emails had not previously been admitted and then withdrew his proposed exhibit of Ashley's OOP email from evidence. (PCR Hr'g at 134:6–13, 135:12–136:6.) Although the court took judicial notice of Maxin's criminal record, it did not consider Ashley's emails to Maxin as evidence. (*Id.*; PCR Doc. 96 at 1.)

Like Strong, Darrow focused his argument on the denial of

Maxin's motion to withdraw his guilty plea—not on the effect that Ashley's and Hartford's performance had on Maxin's sentencing. (PCR Hr'g at 218:21–220:3.) The State's attorney recognized this error in her closing argument: "I can see how the [OOP] violation did factor into various areas of consideration at sentencing. That being said, what is raised today is [IAC] regarding the Plea Agreement and the Change of Plea Hearing, which all occurred before there was any inkling that there would be an [OOP]." (*Id.* at 258:9–16.)

The District Court denied Maxin's PCR petition because even if Ashley had misadvised Maxin regarding the OOP, the OOP violation had no impact on the voluntariness of his guilty plea because Maxin pleaded guilty *before* entry of the OOP. (PCR Doc. 96 at 8.) Regardless, the court did not consider Ashley's emails in its findings of fact and conclusions of law. (*See generally id.*)

STANDARDS OF REVIEW

IAC claims "present mixed questions of law and fact" that this Court reviews "de novo." *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387. The Court's "review of constitutional questions is

plenary." *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469.

SUMMARY OF THE ARGUMENT

Maxin is entitled to a new PCR proceeding because his PCR counsel was ineffective in three critical ways. First, Strong failed to argue that Ashley's faulty legal advice, coupled with Hartford's lackluster performance at sentencing, caused the court to sentence Maxin to 40 years based on the misunderstanding that Maxin intentionally violated the OOP to harass the victim's family. Strong's argument that Ashley's faulty advice caused Maxin to involuntarily plead guilty constituted deficient performance because Maxin pleaded guilty *before* the family obtained an OOP. Although Ashley's faulty OOP advice was not grounds for reversing Maxin's guilty plea, it was grounds for a new sentencing hearing. Second, Strong failed to raise IAC of appellate counsel, even though trial counsel's deficient performance and the court's misinformation at sentencing were record-based and thus should have been raised on direct appeal. Third, Darrow was so grossly unprepared for the PCR hearing that he incorrectly advised the court that Ashley's email was inadmissible and had not

been admitted in Maxin's criminal matter, before eventually withdrawing the exhibit of Ashley's email.

Maxin had the right to effective PCR counsel. The text, history, and structure of Montana Code Annotated § 46-21-201, as well as common-sense and fairness, create a statutory right to effective assistance of counsel in PCR proceedings, even if there is no corresponding constitutional right to counsel. Additionally, under the Due Process Clause, the statutory entitlement to counsel guarantees an implicit right to *effective* counsel. *See* U.S. Const. amend. XIV; Mont. Const. art. II, § 17.

Finally, regardless whether Maxin had a right to effective assistance of PCR counsel, he had a minimum due process right to conflict-free counsel, which he was denied. Strong had a conflict of interest with Maxin's PCR case because she represented Hartford in his disciplinary proceedings before the COP. Whether viewed as a categorical or waivable conflict, Strong did not obtain written consent from either client. Strong's conflict deprived Maxin of due process and necessitates reversal and remand for a new PCR proceeding.

ARGUMENT

I. Maxin received ineffective assistance of PCR counsel.

IAC occurs when (i) an attorney's performance is "deficient or f[alls] below an objective standard of reasonableness," and (ii) there is a reasonable probability that "but for counsel's errors, the result of the proceeding would have been different." *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Maxin's PCR counsel—both Strong and Darrow—provided ineffective assistance by (1) failing to argue that Ashley's and Hartford's deficient performance resulted in a harsher sentence; (2) failing to raise IAC of appellate counsel for not realizing that Ashley's and Hartford's deficiencies, as well as the sentencing court's misinformation, were record-based; and (3) being so woefully unprepared for Maxin's PCR hearing that they misinformed the PCR court regarding the procedural history of Ashley's emails, thereby failing to admit critical evidence.

A. PCR counsel failed to argue that the court imposed a lengthier sentence because of Ashley's and Hartford's deficient performance.

Maxin's PCR counsel did not adequately raise IAC of Ashley and Hartford in the amended petition or at the PCR hearing because they failed to frame the issues within the context of Maxin's sentencing. Because Maxin pleaded guilty *before* Ashley gave him faulty legal advice, it was incompetent of PCR counsel to allege that Ashley's bad advice caused Maxin to enter the plea agreement involuntarily. (*See* PCR Doc. 31 at 5 ("In short, Petitioner would not have entered a guilty plea, but for [Ashley's] deficient performance, consisting of inadequate legal advice.").) The timeline simply does not support that theory, as the State's attorney pointed out. (PCR Hr'g at 258:9–16 (State's attorney arguing that although "the [OOP] violation did factor into various areas of consideration at sentencing," what "is raised today is ineffective assistance of counsel regarding the plea agreement and the change of plea, which all occurred before there was any inkling that there would be an [OOP]").)

To be sure, Ashley and Hartford were both deficient, and Maxin was prejudiced by their performances. But Ashley was deficient because

he misadvised Maxin regarding the OOP, causing him to breach the plea agreement. And Hartford was deficient at the sentencing hearing because he failed to argue that there was no nefarious intent in Maxin's OOP violation, which occurred only because of Ashley's faulty advice. Both errors prejudiced Maxin: Ashley's erroneous legal advice and Hartford's failure to advocate for his client undermine confidence that Maxin's 40-year sentence was fair and not based on misinformation.

1. Ashley was ineffective because his erroneous legal advice caused Maxin to violate the plea agreement, resulting in a significantly harsher sentence.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *State v. Wright*, 2021 MT 239, ¶ 18, 405 Mont. 383, 495 P.3d 435 (citations omitted). "Faulty advice . . . can be grounds for an ineffective assistance of counsel claim." *Chyatte v. State*, 2015 MT 343, ¶ 18, 381 Mont. 534, 362 P.3d 854 (citations omitted). It is well established that "[w]hen a defendant breaches a plea agreement, the State is relieved from offering its sentencing recommendation contained

in the plea agreement." *State v. Claus*, 2023 MT 203, ¶ 16, 413 Mont. 520, 538 P.3d 14.

Pursuant to Ashley's advice, Maxin entered a plea agreement that required him to "obey all state, local, and federal laws" during the pendency of his case. (Plea Agmt. at 2.) The State's offer explicitly warned, "Should your client not obey all laws and court ordered conditions, the State may withdraw from the agreement set forth in this letter." (*Id.*) The State's promise to recommend ten years, all suspended, was therefore contingent on Maxin remaining law abiding.

When the victim's family obtained an OOP one week later, Maxin called Ashley for advice. (Ashley Emails; Hr'g to Withdraw at 33:3–14; Sentencing Hr'g at 50:6–51:2.) Maxin asked Ashley if the OOP required him to relocate, as it prohibited him from being within 300 feet of the victim's residence. (PCR Ex. 1; Ashley Emails; Hr'g to Withdraw at 33:3–14; Sentencing at 50:6–51:2.)

In an email dated March 7, 2017, Ashley summarized the advice he gave Maxin after the OOP was issued:

> When you got the first TRO, you were in your home, and the order was requested by [the victim's family]. You asked me if that meant you had to move. At the time, I was not aware of the deep animosity they had for you. I did tell you that

> restraining orders are just that—orders telling a person (you in this case) not to perform certain acts (such as harassing another, threatening them, etc.). However, all such orders are issued with a caveat . . . that the requesting party . . . is required to report any violations of that order to law enforcement to allow them to enforce the order. Obviously, law enforcement is not obliged to enforce a violation they know nothing about. In this case, there was an order restricting you to 300 feet or less from the [victim's family]. . . . I told you that apparently they were not objecting to your presence . . . I told you (as I viewed the circumstances at that time) that unless a request was made by them for you to move, I saw no problem.
>
> . . .
>
> I suppose you were in technical violation of the TRO, just as you would have been had you threatened them in some manner, but as with any restraining order violation, there is no disregard of that order until a complaint is made to the authorities.

(Ashley Emails.)

When he testified at the hearing on Maxin's motion to withdraw, Ashley was candid about the bad advice he provided: "I told Bob, I said as long as there's a restraining order, I said it requires the person that has the restraining order to contact the Sheriff. I said as long as [the victim's family] don't object, as far as I know, you can continue living there." (Hr'g to Withdraw at 33:6–11.)

Ashley was ignorant of "a point of law that [wa]s fundamental to his case" and "fail[ed] to perform basic research on that point." *Wright*, ¶ 18. "A person commits the offense of violation of an [OOP] if the person, with knowledge of the order, purposely or knowingly violates a provision of . . . an [OOP] under Title 40, Chapter 15." § 45-5-626(1). Violating the distance restrictions in an OOP may result in charges under § 45-5-626(1). *See State v. Thorpe*, 2015 MT 14, ¶ 4, 378 Mont. 62, 342 P.3d 5. A "respondent may face criminal consequences for violating an [OOP]." *State v. Pingree*, 2015 MT 187, ¶ 17, 379 Mont. 521, 352 P.3d 1086.

It was incompetent to advise Maxin that he did not need to move unless the family objected to him living there. The OOP *was* the objection to him living there. Ashley was wrong to advise Maxin that he was not in violation of the OOP "unless a request was made by [the family] for [him] to move." (Ashley Emails); *see Thorpe*, ¶ 4; § 45-5-626(1). Additionally, Ashley admitted in two separate emails to the prosecutor that he suspected the victim's family did not want Maxin living there, so there was no legal or factual basis for advising Maxin

that the family was "not objecting to [his] presence." (*See* Ashley Emails.)

Ashley's faulty legal advice prejudiced Maxin at sentencing. Because of Ashley's advice, Maxin breached the plea agreement, allowing the State to withdraw from it and to file a notice with the court "rescind[ing] the negotiated agreement" between Maxin and the State. (Doc. 40 at 2.) The originally contemplated ten-year suspended sentence was within the court's sentencing parameters because Dr. Smelko, a "qualified sexual offender evaluator," recommended community-based "treatment." *See* Mont. Code Ann. § 46-18-222(6) (exceptions to mandatory minimums); (PSR at 8.) The only reason the State was permitted to withdraw from the plea agreement was because Maxin continued residing across the street from the victim following Ashley's erroneous advice.

At sentencing, the State framed its 40-year recommendation around the OOP violation, even though Dr. Smelko knew of the OOP violation and still designated Maxin a low-risk and "Tier 1" offender. (PSR at 8.) The prosecutor argued that the OOP violation demonstrated "a lack of concern for others" and "a lack of empathy." (Sentencing Hr'g

at 62:2–14, 64:4–10.) He contended that Maxin's OOP violation "sp[oke] volumes in terms of the sentence that he should receive." (*Id.* at 64:24–65:5.) The court specifically disregarded Dr. Smelko's recommendation for community placement because of the OOP violation. (*Id.* at 91:5–19.) The court referenced the OOP violation four times during its oral pronouncement and sentenced Maxin to 40 years with 10 suspended, rather than the 10-year suspended sentence contemplated in the plea agreement. (*Id.* at 98:4–8.)

A first-offense violation of an OOP carries a maximum sentence of a $500 fine and/or six-month imprisonment, but the Court used the fact of Maxin's OOP violation to sentence him to the Montana State Prison for 30 years, in addition to the 10-year suspended sentence for which he bargained. *See* § 45-5-626(3). The only ostensible reason for the 30-year disparity is the OOP violation. Ashley's faulty advice therefore "undermines confidence in the outcome" of Maxin's sentencing hearing. *See Strickland*, 466 U.S. at 694.

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2. Hartford was ineffective because instead of advocating for Maxin at his sentencing hearing, he bolstered the State's theory that the OOP violation was nefarious.

Failing to advise the sentencing court on a point of fact or law that is favorable to the defendant constitutes deficient performance. *See Wright*, ¶ 18. While the State put the OOP violation on display at Maxin's sentencing, Hartford sat idly by, never once explaining that Ashley's faulty advice caused Maxin to violate the order. Hartford should have used Ashley's emails and testimony to show that Maxin violated the OOP based on the erroneous legal advice he received. Instead, Hartford contributed to the State's theory by implying that Maxin was responsible for the violation. (*See* Sentencing Hr'g at 50:6–51:2, 83:2–4 (telling the court that he had "concerns" about Maxin's "failure to take responsibility").)

Hartford allowed the court to sentence Maxin based on misinformation—that Maxin had nefarious intent and lacked remorse when he violated the OOP. The facts and evidence available to Hartford showed that Maxin attempted to do the right thing, but Ashley led him astray. As soon as Maxin realized he was violating the OOP, he relocated. (*Id.* at 41:11–42:8.) If the OOP violation was intentional or

nefarious, Maxin would not have sought Ashley's advice on whether he needed to relocate. Although the prosecutor grilled Maxin and his wife at sentencing for not thinking about relocating after the guilty plea, the evidence in the record shows that they *did* consider moving: Maxin specifically asked Ashley if he and his wife needed to relocate to comply with the OOP. (Ashley Emails.)

Instead of bringing these facts to the sentencing court's attention, Hartford threw Maxin under the bus, thereby bolstering the State's theory that Maxin violated the OOP to harass the victim's family. (Sentencing Hr'g at 50:6–51:2, 83:2–4.) Hartford allowed the State, and the court, to attribute to Maxin a nefarious intent when it was clear that the only OOP violation—residing within 300 feet of the victim—was the result of Ashley's incompetence and not Maxin's desire to harm the victim.

Hartford owed a duty of loyalty to Maxin, not to Ashley.[1] Hartford violated his duty to Maxin when he failed to rebut the State's narrative using the undisputed facts available to him—including Ashley's prior

[1] PCR counsel also failed to explore a possible conflict of interest between Hartford and Ashley, both of whom were assigned by Imhoff & Associates. (*See* PCR Hr'g at 13:10–16.)

testimony and emails. It was not objectively reasonable for Hartford to blame Maxin for the OOP violation at the sentencing hearing after the State attacked Maxin and his wife for failing to relocate. Doing so only strengthened the State's accusations that Maxin harassed the victim's family, lacked remorse, refused to accept responsibility, and was likely to re-offend. (*Id.* at 61:19–24, 62:2–14, 64:4–65:5.) Hartford's deficient performance undermines confidence in the outcome of Maxin's sentencing hearing and is therefore prejudicial. *See Strickland*, 466 U.S. at 694.

B. PCR counsel failed to raise IAC of appellate counsel for failing to raise record-based claims on direct appeal.

Because Ashley's and Hartford's deficient performances were documented in the record in Maxin's criminal matter, (DC Docs. 93–97; Ashley Emails; Hr'g to Withdraw at 33:3–14), appellate counsel needed to raise IAC on direct appeal. Additionally, the record shows that the court sentenced Maxin based on misinformation—that he intentionally violated the OOP to harass the victim's family—which appellate counsel should have raised on direct appeal under due process.

A claim of IAC must be raised on direct appeal when an attorney's conduct is record-based—*i.e.*, when "the record on appeal explains 'why'" counsel "did or did not perform as alleged," or when there is "no plausible justification" for counsel's conduct. *Kougl*, ¶¶ 14–15. Claims of IAC are more appropriate for PCR when the allegations "cannot be documented from the record in the underlying case." *Hagen v. State*, 1999 MT 8, ¶ 15, 293 Mont. 60, 973 P.2d 233. "Raising record-based ineffective assistance of counsel claims on direct appeal does not foreclose raising non record-based claims via [PCR]." *Hagen*, ¶ 15.

Ashley's deficient performance was record-based. The record discloses exactly "why" Ashley advised Maxin that he could continue residing in his home: Ashley said that he "was not aware of the deep animosity [the victim's family] had for [Maxin]," and he believed the family was "not objecting to [Maxin's] presence." (Ashley Emails.) But "animosity" is not an element of an OOP violation. *See* § 45-5-626. Ashley's advice was therefore legally erroneous. Regardless, it was unreasonable to assume that the victim's parents did not have "deep animosity" for Maxin and were "not objecting to [his] presence"—the OOP *was* the objection to Maxin's presence. And months after Maxin

was charged with violating the OOP, Ashley admitted that Maxin was "in technical violation of the [OOP]" when he was residing across the street from the victim, thereby admitting that his initial advice was incorrect. (Ashley Emails.) Ashley also testified that he thought Maxin could not violate the distance restrictions in the OOP until the OOP was made permanent—which is also legally erroneous. (Hr'g to Withdraw at 33:11–14.) All of this was documented in the record in Maxin's criminal matter.

Maxin's IAC claim against Hartford was record-based, as well. There is no plausible justification for counsel's failure to correct a sentencing court's mistake of law or fact. *See Wright*, ¶ 18. The court assumed that Maxin's OOP violation evidenced a lack of remorse and accountability, but, in reality, Ashley's faulty advice caused Maxin to violate the order. There is no plausible justification for Hartford's failure to act in his client's best interests. Hartford not only neglected to correct the court's misunderstanding but affirmatively blamed Maxin for violating the OOP. Even if Hartford wanted Maxin to take responsibility for the violation, telling the court, "I have concerns" about Maxin's "failure to take responsibility," is inconsistent with that

approach. (Sentencing Hr'g at 83:2–4.) The record clearly reflects this breach of Hartford's duty of loyalty to Maxin, and there is no objectively reasonable justification for it.

The Due Process Clause "protect[s] a defendant from being sentenced based upon misinformation." *State v. Phillips*, 2007 MT 117, ¶ 17, 337 Mont. 248, 159 P.3d 1078. Appellate counsel needed to raise a due process claim on direct appeal because the undisputed evidence in the record shows that Maxin did not intentionally violate the OOP—he inadvertently misconstrued the distance restrictions because of the faulty advice he received from Ashley. The court's 40-year sentence was therefore premised on misinformation.

Appellate counsel did not identify any of the foregoing grounds for appeal in her *Anders* brief; therefore, this Court did not consider them when it dismissed Maxin's direct appeal. *See generally Anders* Br., *Maxin*, DA 19-0186 (May 15, 2020); Ord., *Maxin*, DA 19-0186 (Aug. 4, 2020). Although appellate counsel briefly discussed IAC as it pertained to the voluntariness of Maxin's guilty plea, she did not identify IAC as it pertained to Maxin's sentencing—*i.e.*, that Ashley's faulty legal advice, and Hartford's failure to address it, resulted in a significantly harsher

sentence. *Anders* Br. at 37–40. Nor did she address a potential due process claim based on misinformation at sentencing. *Id.* Appellate counsel's failure to identify those record-based grounds for appeal constituted IAC, and therefore PCR counsel was obliged to raise IAC of appellate counsel.

C. PCR counsel withdrew Ashley's email exhibit from evidence, even though it was admitted in Maxin's criminal matter.

Maxin's second PCR counsel, Darrow, performed deficiently when he misinformed the court regarding the status of Ashley's emails, failed to get them admitted, and withdrew them from evidence. Darrow's lack of preparedness prejudiced Maxin because Ashley's emails were the strongest evidence of IAC.

Although the District Court took judicial notice of Maxin's criminal record, the Judge was confused about what the record contained. (PCR Doc. 96; PCR Hr'g at 134:6–13.) When Darrow proffered the email exhibit containing Ashley's admission of faulty legal advice, the State objected, and the Judge asked Darrow whether the email had been admitted in the criminal matter. (PCR Hr'g at 133:5–134:19.) Darrow researched the Judge's question during a recess and

then erroneously represented that the email was not part of Maxin's criminal record. (*Id.* at 135:18–136:6.) Capitalizing on Darrow's mistake, the State's attorney said that she could not determine whether the email had been admitted in the criminal matter. (*Id.* at 135:12–16.) Consequently, Darrow withdrew Ashley's email exhibit from evidence. (*Id.* at 136:6.) The State's attorney then argued that there was no evidence pertaining to the faulty OOP advice and that Ashley's email had never been admitted in either his criminal matter or in the PCR proceedings. (*Id.* at 249:7–24.) The court never considered Ashley's email as evidence. (*See generally* PCR Doc. 96.)

D. PCR counsel's deficient performance prejudiced Maxin.

PCR counsel's deficient performance resulted in the denial of Maxin's PCR petition because: (i) PCR counsel's theory that Ashley's bad advice caused Maxin to plead guilty was unworkable and absurd, given the procedural timeline; (ii) PCR counsel did not raise IAC of Hartford for his performance at Maxin's sentencing hearing; (iii) the court never considered IAC of appellate counsel, since PCR counsel never raised it; and (iv) the court did not consider Ashley's emails—arguably the most important evidence—because PCR counsel

misinformed the court and then withdrew the exhibit from evidence. PCR counsel's deficient performance undermines confidence in the outcome of Maxin's PCR hearing. *See Strickland*, 466 U.S. at 694.

II. Maxin had a right to effective assistance of PCR counsel.

Maxin had both a statutory and a constitutional right to effective PCR counsel.

A. The statutory right to counsel in § 46-21-201(2) creates an implicit right to effective representation.

"[W]here a state statute affords an individual . . . the right to counsel, the legislature could not have intended that counsel could be prejudicially ineffective." *Matter of J.S.*, 2017 MT 214, ¶ 14, 388 Mont. 397, 401 P.3d 197. "Absent effective assistance of counsel, the right to counsel is nothing more than a procedural formality." *Avery v. Batista*, 2014 MT 266, ¶ 25, 376 Mont. 404, 336 P.3d 924 (citations omitted).

Montana Code Annotated § 46-21-201(2) provides a conditional but mandatory right to PCR counsel in non-capital cases:

> If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall order the office of state public defender, provided for in 2-15-1029, to assign counsel for a petitioner who qualifies for the assignment of counsel under Title 46, chapter 8, part 1, and the Montana Public Defender Act, Title 47, chapter 1.

The condition that triggers the mandatory right to counsel—the requirement for a hearing—is satisfied only if the pro se "petition and the files and records" do not "conclusively show" that the petitioner is not entitled to relief, and, upon review of the State's response brief, the court is unable to dismiss the petition as a matter of law or pursuant to any of the State's defenses, and an issue of fact remains. *See* § 46-21-201(1)(a). If a pro se PCR petitioner meets those rigorous demands, the court "*shall* order the office of state public defender . . . to assign counsel." § 46-21-201(2) (emphasis added).

Maxin had a statutory right to effective assistance of counsel once the condition—the requirement for a hearing—was met. *See* § 46-21-201(2). The District Court determined that a hearing was required because Maxin's petition survived all threshold levels of review and a fact issue remained. (PCR Docs. 7, 14.) Thus, the court ordered OPD to appoint counsel. (PCR Doc. 14.) Maxin therefore had a statutory right to counsel; and the right to counsel, regardless of the source, necessarily implies the right to *effective* counsel. *See Matter of J.S.*, ¶ 14; *Avery*, ¶ 25.

The statutory entitlement to counsel would be meaningless if such counsel were permitted to be prejudicially deficient; viable PCR challenges like Maxin's would be thwarted, and relief would be denied—especially because the PCR statutes specifically prohibit second or subsequent petitions. *See* Mont. Code Ann. § 46-21-105(1)(b). Eliminating this Court's ability to review PCR counsel's deficient performance on appeal would render PCR futile because without effective representation, there is no guarantee of a fair PCR hearing.

This Court has consistently interpreted the statutory right to counsel as requiring effective representation. The legislature has similarly provided for the appointment of OPD in civil commitment proceedings "[i]f the person is indigent or if in the court's discretion assignment of counsel is in the best interest of justice." Mont. Code Ann. § 53-21-116. In that context, this Court has held that the statutory entitlement to counsel guarantees the right to *effective* counsel, even if no such Sixth Amendment right exists. *Matter of J.S.*, ¶¶ 14–15. "[W]here a state statute affords an individual subject to involuntary commitment with the right to counsel, the legislature could not have

intended that counsel could be prejudicially ineffective." *Matter of J.S.*, ¶ 14.

Similarly, in abuse and neglect proceedings in Montana, "[a]ny party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings." Mont. Code Ann. § 41-3-425(1). Subject to certain exceptions, the "court shall assign counsel for . . . any indigent parent, guardian, or other person having legal custody of a child or youth in a removal [proceeding]." § 41-3-425(2)(a). The Court has held that this statutory right to counsel also "carries with it a concomitant requirement that such counsel be effective." *Matter of I.R.S.*, 2025 MT 139, ¶ 19, 422 Mont. 471, 571 P.3d 635.

The Court further recognizes a right to effective assistance in postconviction sentence review. *Avery*, ¶¶ 24–25. Under Montana Code Annotated § 46-18-904(2), "The person requesting the review may appear and has the right to be represented by counsel." Analyzing whether that statutory right includes the right to effective assistance, this Court has stated, "It is self-evident that the right to counsel carries with it a concomitant requirement that such counsel be effective." *Avery*, ¶ 25. PCR is no different than other proceedings where the

legislature has recognized the value of appointed counsel, and the Court has interpreted that entitlement to counsel as creating a statutory right to effective representation.

This Court would not be alone in recognizing a right to effective assistance for PCR proceedings. The majority of jurisdictions to consider this question allow some form of IAC of PCR counsel. Of the sixteen states[2] with similar provisions (conditional and mandatory) for the appointment of PCR counsel, not one jurisdiction has held that there is *no* right to effective PCR counsel. The majority agree there is a statutory right to effective assistance governed by *Strickland*. *See Gudino v. Comm'r of Corr.*, 214 A.3d 383, 390 (Conn. 2019); *McIntyre v. Kansas*, 403 P.3d 1231, 1235–36 (Kan. Ct. App. 2017); *Turner v. South Carolina*, 682 S.E.2d 792, 794 (S.C. 2009); *Hathaway v. Minnesota*, 741 N.W.2d 875, 880 (Minn. 2007); *Silva v. Colorado*, 156 P.3d 1164, 1168–

[2] Cal. Penal Code § 1172.6 (California); Colo. R. Crim. P. 35 (Colorado); Conn. Gen. Stat. Ann. § 51-296 (Connecticut); 725 Ill. Comp. Stat. Ann. 5/122-4 (Illinois); Kan. Stat. Ann. § 22-4506 (Kansas); Ky. R. Crim. P. 11.42(5) (Kentucky); Md. Code Ann., Crim. P. § 7-108 (Maryland); Minn. Stat. Ann. § 590.05 (Minnesota); Mo. S. Ct. R. 24.035 (Missouri); N.J. S. Ct. R. 3:22-6(a) (New Jersey); Or. Rev. Stat. Ann. § 138.590 (Oregon); 234 Pa. R. Crim. P. 904 (Pennsylvania); S.C. R. Civ. P. 71.1 (South Carolina); Tex. Code Crim. Proc. Ann. art. 64.01 (Texas); Wash. Rev. Code Ann. § 10.73.150 (Washington); Wis. Stat. Ann. §§ 977.05, 809.32(4) (Wisconsin).

69 (Colo. 2007); *Moore v. Kentucky*, 199 S.W.3d 132, 139 (Ky. 2006); *Stovall v. Maryland*, 800 A.2d 31, 37 (Md. 2002); *New Jersey v. Vanness*, 290 A.3d 209, 221 (N.J. Super. Ct. App. Div. 2023) (citing *New Jersey v. Rue*, 811 A.2d 425, 436–37 (N.J. 2002)); *Pennsylvania v. Priovolos*, 715 A.2d 420, 422 (Pa. 1998); *Wisconsin ex rel. Schmelzer v. Murphy*, 548 N.W.2d 45, 48 (Wis. 1996). The question remains unsettled in only three of the sixteen states. *See California v. Delgadillo*, 521 P.3d 360, 367–68 (Cal. 2022); *In re Yates*, 353 P.3d 1283, 1285 (Wash. 2015); *Ard v. Texas*, 191 S.W.3d 342, 346 (Tex. Ct. App. 2006) (but holding that PCR petitioners have a *due process right* to effective assistance). In the remaining three states, some standard other than *Strickland* applies. *See Lopez v. Nooth*, 403 P.3d 484, 486 (Or. Ct. App. 2017) (petitioners may challenge the "suitability" of counsel); *Carroll v. Missouri*, 131 S.W.3d 907, 909 (Mo. Ct. App. 2004) (petitioners may argue abandonment); *Illinois v. Moore*, 727 N.E.2d 348, 358–59 (Ill. 2000) (petitioners have a right to "a reasonable level of assistance").

What's more, states that provide unconditional mandatory appointment of counsel have recognized a corresponding right to effective representation. *See Ruiz v. Iowa*, 18 N.W.3d 453, 458 (Iowa

2025) (interpreting Iowa Code Ann. § 822.5); *Haraden v. Maine*, 32 A.3d 448, 452 (Me. 2011) (interpreting Me. Rev. Stat. Ann. 15 § 2129(1)(B); Me. R. Crim. P. 69); *Murphy v. Indiana*, 477 N.E.2d 266, 268 (Ind. 1985) (interpreting previous version of Ind. Code Ann. § 33-40-1-2). Other jurisdictions go even further and recognize a constitutional right to effective representation under state constitutional law. *See, e.g.*, *Hawai'i v. Uchima*, 464 P.3d 852, 864 (Haw. 2020); *Deegan v. Minnesota*, 711 N.W.2d 89, 97–98 (Minn. 2006); *Grinols v. Alaska*, 74 P.3d 889, 893–94 (Alaska 2003); *Jackson v. Mississippi*, 732 So. 2d 187, 191 (Miss. 1999), *abrogated on other grounds*, *Ronk v. Mississippi*, 391 So. 3d 785 (Miss. 2024); *Ard*, 191 S.W.3d at 346.

Upon information and belief, only seven state supreme courts have explicitly foreclosed review of PCR counsel's performance, and those states have wildly different statutory schemes. *See Mwinyi v. North Dakota*, 9 N.W.3d 665, 668 (N.D. 2024) (N.D. Cent. Code Ann. § 29-32.1-09(2) explicitly precludes IAC claims); *Asay v. Florida*, 210 So. 3d 1, 28 (Fla. 2016) (appointment of counsel is discretionary); S.D. Codified Laws § 21-27-4 (statute explicitly precludes IAC claims, but IAC was permitted prior to passage of S. 42, S.D. 87th Leg., Reg. Sess.

(S.D. 2012), *see Jackson v. Weber*, 637 N.W.2d 19, 22–23 (S.D. 2001)); *Michigan v. Walters*, 624 N.W.2d 922, 924 (Mich. 2001) (appointment of counsel is discretionary); *House v. Tennessee*, 911 S.W.2d 705, 712 (Tenn. 1995) (discretionary, but there is a right to "conflict-free" counsel, *see McCullough v. Tennessee*, 144 S.W.3d 382, 385 (Tenn. Crim. App. 2003)); *Arizona v. Krum*, 903 P.2d 596, 599 (Ariz. 1995) (no statutory appointment of counsel); *Mayes v. Alabama*, 563 So. 2d 38, 39 (Ala. Crim. App. 1990) (no statutory appointment of counsel).

This Court should follow its precedent recognizing that the right to counsel implicitly guarantees the right to effective representation, as well as the majority of sister jurisdictions, particularly those discussed *supra*, whose PCR statutes are substantively similar to Montana's.

B. The legislature specifically created a mandatory right to counsel, replacing the old discretionary rule.

Prior to 1991, the appointment of counsel in Montana PCR proceedings was discretionary. § 95-1004, R.C.M. 1947 (1969) ("Any court of record *may* assign counsel to defend any defendant, petitioner, or appellant in any postconviction criminal action or proceeding if he desires counsel and is unable to employ counsel." (emphasis added)). *See State v. Lange*, 226 Mont. 9, 12–13, 733 P.2d 846 (1987) ("[T]he

lower court has the discretion to decide whether a particular defendant should be afforded counsel for a post-conviction" proceeding.).

In 1991, the legislature created the mandatory appointment of PCR counsel that exists today by codifying § 46-21-201(2). S. 51, Mont. 52d Leg., Reg. Sess. (1991); *see also* 1991 Mont. Leg. Hist., Ch. 800 at 202.[3] The new statute provided, "If a hearing is required or the interests of justice require, the court *shall* appoint counsel for a petitioner who qualifies for the appointment of counsel under Title 46, chapter 8, part 1." § 46-21-201(2) (1991) (emphasis added). Although the legislature has since amended the statute, the conditional and mandatory language for the appointment of counsel has survived. *Compare* § 46-21-201(2) (1991), *with* § 46-21-201(2) (2025).

The change from a discretionary appointment of counsel to a mandatory one reflects the legislature's judgment that some PCR petitioners have a statutory *right* to counsel under certain conditions—namely, when the petitioner survives the rigid standards of review in § 46-21-201(1)(a). The legislature intended that when those conditions

[3] *Available at* https://archive.org/details/ch.-800-l.-1991/page/n103/mode/2up.

are satisfied, the appointment of PCR counsel cannot be left to the whims of the trial court—there is an entitlement to counsel. The legislative history thus is consistent with a requirement that PCR counsel's performance be subject to IAC review.

C. The Due Process Clause requires that counsel appointed pursuant to § 46-21-201(2) be effective.

Maxin had a constitutional right to effective PCR counsel, under the Due Process Clauses of the federal and Montana Constitutions, because a state statute—§ 46-21-201(2)—required court-appointed counsel to represent him on his PCR case. U.S. Const. amend. XIV; Mont. Const. art. II, § 17; *see also, cf.*, *Matter of J.S.*, ¶ 15 ("The measure of counsel's effectiveness in protecting the guarantee of a fair [civil commitment] trial occurs through the Due Process Clauses of the federal and state Constitutions."). The "process" due depends on "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and the "burdens [of] additional or substitute procedural requirement[s]" on the government. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

The "private interest" affected when a PCR petitioner is deprived effective assistance of counsel is the interest in obtaining a fair collateral review of their conviction, which both Article II, Section 19, of the Montana Constitution, and Montana Code Annotated §§ 46-21-101 et seq. guarantee. *See Mathews*, 424 U.S. at 334–35. But it is also the interest in having effective representation when a petitioner is statutorily guaranteed counsel, as well as the broader liberty interest at stake in PCR proceedings. *See* § 46-21-201(2). The right to counsel is a "bedrock principle in our justice system," and a "prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

Without effective assistance of counsel, there is no guarantee of a fair PCR proceeding, and the risk of erroneous deprivation of a person's right to PCR is substantial. "To present a claim of [IAC] at trial" in a PCR petition, "a prisoner likely needs an effective attorney." *Martinez*, 566 U.S. at 12. This Court has recognized the value of effective representation even in proceedings where there is no Sixth Amendment

right to counsel. *See Matter of J.S.*, ¶¶ 19–20 (applying *Strickland* to involuntary commitment proceedings using the Due Process Clause).

There is no burden on the state in recognizing a right to effective representation because the state already provides counsel to a limited number of qualified PCR petitioners. *See* § 46-21-201(2). Moreover, the class of petitioners affected is extremely narrow because of the very high bar they need to clear—without representation—to unlock the statutory vault that entitles them to a PCR hearing. *See* § 46-21-201(1)(a)–(2).

Conversely, the prejudice to petitioners is substantial. Montana law allows only one amendment to a PCR petition, and it explicitly precludes raising IAC in second or subsequent petitions. *See* §§ 46-21-105(1)(b)–(2), -201(2). Incompetence of PCR counsel could therefore be the final nail in the coffin of a prisoner's right to PCR—wasting the final opportunity to raise IAC of all previous counsel. Indeed, the United States Supreme Court has recognized that lacking effective assistance of counsel in state PCR proceedings is so prejudicial that it can excuse a prisoner's procedural default in a subsequent federal habeas action. *Martinez*, 566 U.S. at 14. If review of court-appointed

PCR counsel were foreclosed entirely, meritorious claims like Maxin's would fall through the cracks all because his first attorney's ineffectiveness has been systematically shielded by subsequent attorneys' ineffectiveness. Due process thus requires that counsel appointed pursuant to § 46-21-201(2) be subject to IAC review.

D. Maxin can raise IAC of PCR counsel on appeal from a denied PCR petition.

The legislature has not barred IAC claims on appeal from a denied PCR petition. Under § 46-21-105(1)(b)–(2),

> The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.
>
> . . .
>
> Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised *in a second or subsequent petition under this part*.

(emphasis added). The legislature passed this amendment in 1997 through HB 222. H. 222, Mont. 55th Leg., Reg. Sess. (1997). The intent was to ensure that petitioners could not bypass the one-petition rule by alleging IAC of PCR counsel in second or subsequent petitions. 1997

Mont. Leg. Hist., Ch. 378 at 18 (explaining that current law "is not sufficiently clear in preventing litigation of issues *in a second post-conviction petition*" (emphasis added)).[4] But the legislature did not comment on the ability to raise IAC on *appeal* from a denied PCR petition. *See generally id.*

The legislature thus prohibited one procedural mechanism for raising IAC but not the one at issue here. The legislature could have foreclosed all possibilities of review, but it chose not to because that was never the intent of § 46-21-105. *See id.*; *see also* Mont. Code Ann. §§ 1-3-233 (Statutory "[i]nterpretation must be reasonable."), -225 ("Particular expressions qualify those which are general."). Therefore, Maxin not only had a right to effective representation, but his claim is properly raised on direct appeal from a denied PCR petition rather than a "second or subsequent petition." *See* § 46-21-105(2).

As a matter of statutory interpretation, due process, common sense, and equity, Maxin had a right to effective representation in his

[4] *Available at* https://archive.org/details/ch.-378-l.-1997/page/n17/mode/2up.

PCR proceeding, and this Court is the proper (and only) forum to review his PCR counsel's deficient performance. Without it, he has no remedy.

III. Regardless whether Maxin had a right to effective assistance of counsel, the Due Process Clause guarantees, at a minimum, conflict-free PCR counsel.

Because § 46-21-201(2) mandated the appointment of counsel in Maxin's case, the minimum "process" he was "due" was conflict-free counsel. *See Mathews*, 424 U.S. at 334–35; Mont. Const. art. II, § 17; U.S. Const. amend. XIV. Strong's representation of Hartford in his COP proceedings deprived Maxin of that right and squandered his only opportunity to amend his petition. *See* § 46-21-105(1). Whether examined as due process or IAC, Strong's conduct was deficient, and this Court presumes prejudice "where an egregious conflict of interest exists" on the record. *See State v. Jones*, 278 Mont. 121, 133, 923 P.2d 560, 567 (1996) (vacating conviction due to conflict of interest).

"[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person." Mont. R. Prof'l Conduct 1.7(a)(2). Such a conflict is nonwaivable if the representation "involve[s] the assertion of a claim by

one client against another client." Rule 1.7(b)(3). But even a waivable conflict requires written consent of "each affected client." Rule 1.7(b)(4). Similarly, an attorney "shall not" represent a "person in the same or substantially related matter in which that person's interests are materially adverse to the interests of [a] former client, unless the former client gives informed consent, confirmed in writing." Rule 1.9(a).

Strong had a conflict of interest that prevented her from representing Maxin in his PCR petition because she represented Hartford in his COP proceedings while needing to raise IAC claims against him in Maxin's PCR case. As Hartford testified:

> Ms. Strong was engaged to represent me on my [COP] matters the same time that she took Mr. Maxin's case in. And the conversation that she had with me was, "I'm not going to come after you, Mr. Hartford, we're just looking at what Mr. Ashley did, so there's no conflict." Because I raised the issue of conflict quite pointedly with Ms. Strong.

(PCR Hr'g at 55:3–11.)

Whether viewed as a contemporaneous conflict or a conflict with a former client, Strong was not permitted to represent Maxin. Strong's conflict of interest was nonwaivable because it involved IAC claims by one client, Maxin, against another client, Hartford. *See* Rule 1.7(b)(3). And Maxin's interests were "materially adverse" to Hartford's because

Maxin needed to uncover all the ways in which Hartford was ineffective, which was substantially related to Hartford's ethical proceedings. *See* Rule 1.9(a).

Even if the conflict were waivable, in theory, Strong failed to obtain written consent from either Maxin or Hartford, as required under Rules 1.7(b)(4) and 1.9(a). Strong's statement to Hartford that she was "not going to come after [him]" was itself a breach of her ethical duties because, as Maxin's attorney, she needed to explore all avenues for relief, even if that meant accusing Hartford of IAC. Although Strong raised some allegations of IAC against Hartford, she did not exhaust all the ways in which he was deficient—including his lackluster performance at Maxin's sentencing hearing. Regardless, the conflict of interest was so egregious that prejudice should be presumed. *See Jones*, 278 Mont. at 133, 923 P.2d at 567.

The denial of conflict-free counsel deprived Maxin of his right to due process and substantially undermined the fundamental fairness of his PCR proceedings. Maxin had only one opportunity to amend his petition with assistance of counsel, and Strong assumed that representation while representing an adverse party. Maxin did not

therefore receive a meaningful opportunity to amend his PCR petition with assistance of counsel.

CONCLUSION

The dreadful legal representation that Maxin received—in all phases of his criminal and PCR cases—cannot be overstated. But equally troubling is the fact that no court has thus far reviewed his attorneys' deficiencies. It cannot be the law that one attorney's ineffectiveness can be perpetually shielded by subsequent attorneys' ineffectiveness. Maxin is entitled to amend his PCR petition with assistance of conflict-free and minimally competent counsel.

Respectfully submitted this 27th day of February, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,959, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

Findings of Fact & Conclusions of Law .....App. A

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