IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0270

STATE OF MONTANA, Plaintiff and Appellee, vs. GEORGE HUDON, Defendant and Appellant.	)

OPENING BRIEF OF THE APPELLANT

ON APPEAL FROM THE DISTRICT COURT
TWENTY FIRST JUDICIAL DISTRICT OF
THE STATE OF MONTANA, RAVALLI COUNTY
Hon. Jeffrey Langton, Presiding

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STATEMENT OF THE CASE

Appellant Hudon was convicted by Jury of DUI, in violation of M.C.A. § 61-8-401 on April 10, 2018. (D.C. Doc 68). Prior to his conviction, Hudon filed a motion to exclude evidence based upon the State's refusal to disclose blood testing results to the defense via discovery. (D.C. Doc 24). The basis of the motion was that the Defendant had issued a written discovery request to the prosecution office

specifically requesting discovery disclosure of actual crime lab blood testing results, i.e., chromatograms to the defense, which were refused by the prosecution. (D.C. Doc 24). After briefing as well as a Motion to reconsider, the district court denied the motion. (D.C. Doc 32). The Appellant appeals from this Order.

Prior to jury trial, the district court held a preliminary pretrial conference at which the parties exchanged proposed trial exhibits to be utilized at jury trial, which was memorialized in separate filing on February 21, 2018. (D.C. Doc 49). At the conference and memorialized as State's Exhibit 1 was a DVD that was ordered to be redacted to prevent the jury from viewing evidence that was stipulated to be excluded. (D.C. Doc 49). The State did not produce a redacted video as a proposed trial exhibit, it produced the full video containing excluded evidence, and did not produce a partially redacted DVD until the morning of jury trial in chambers which the defense objected to. (Tr. at 13-20). The district court denied the defense objection to the untimely production of the trial exhibit. (Tr. at 20-21). Appellant appeals from this Order.

Four (4) days before the jury trial was to begin, the State filed a Motion for leave to file an Amended information amending the original information of Count I: DUI, in violation of M.C.A. § 61-8-401, to Count I: DUI and in the alternative, Count I: Driving with a BAC of .08 or more in violation of M.C.A. § 61-8-406. (D.C. Doc 57). The defense objected to the filing of the information less than five

days prior to trial as a prohibited substantive amendment under statute. (Tr. at 9-12). The district court denied the defense objection and allowed the amendment to go to the trial jury. (Tr. at 12). Appellant appeals from this Order.

Just prior to trial, the State filed a motion *in limine* to prohibit the defense from commenting to the jury that the state had failed to provide the defense testing results from the crime lab. (D.C. Doc 56). The defense filed a response. (D.C. Doc 60). The district court granted the State's motion *in limine*. (D.C. Doc 64). The district court then expanded the scope of the order *in limine* during closing arguments disallowed the defense to comment upon the nature of the state's evidence presented to the jury to justify the elements of their burden of proof. (Tr. at 247-248). Appellant appeals from this district court decision.

STATEMENT OF FACTS

On August 28, 2017 the Appellant issued a written discovery request to the Ravalli County Attorney's Office, specifically requesting production of (in relevant part of blood testing):

- Curriculum Vitae of any medical professional AND State Crime Lab witness involved with the handling of the accused's blood sample(s) in this case, as well as any notes or reports pertaining to this case from each witness;
- Copy of the actual Chromatogram(s) of the accused's testing results;
- Copy of any Toxicology Worksheet(s) from the Forensic Science Division;
- Copy of any Toxicology Worksheet Notes Report from the Forensic Science Division;

(D.C. Doc 24).

After the prosecution refused to produce the information requested, the Appellant filed a motion to exclude the blood testing evidence not produced via discovery by the State. (D.C. Doc 24). The State asserted in response that the State has no duty to produce via criminal discovery the raw and actual testing data from the Montana Forensic Science Division to the accused, even after written discovery request. (D.C. Doc 29). The district court denied the motion, holding that because this information is available to either party upon Subpoena, the State has no legal obligation to produce it to the accused via discovery. (D.C. Doc 32). Instead of producing actual testing results, the State produced a one-page summary from the Forensic Science Division as proposed Exhibit 3. (D.C. Doc 24) (During the trial, Crystal Everett testified on behalf of the Montana Forensic Science Division and testified about the proposed 1 page Exhibit:

> Q. Okay. And in the exhibit, there's some information in there. There's kind of a limited amount of information in there. But this is a report, isn't it true, that you created on a personal computer and you generate all the information on that report; is that correct?
> A. I do create it within our database on my computer, yes.
> Q. So I guess my question was, this isn't something that comes out of the chromatograph, correct? This is --
> A. That is correct.
> Q. Sorry. That's something you create and you simply print out; correct?
> A. Yes, that is true. (Tr. at 179-80)

> Q. Okay. And in regards to what's actually contained in this document, this document is actually your interpretation of what comes out of a chromatograph; correct?

A. This is after technical review, because this is also included in that technical review process. So yes, everything that came out of that chromatograph is then calculated and then placed into this report, which is then technically reviewed.
Q. I believe your testimony was what comes out of a chromatograph, which is the headspace analyzer, which is the actual testing results for ethanol in blood, that's called a chromatogram; correct?
A. I guess I'm not sure. (Tr. at 180-181)

Q. Okay. What comes out on a chromatogram is, as you testified to, peaks that will figure out certain substances that are detected in the columns; correct?
A. Yes, that is correct.
Q. In each sample that you're testing, there's actually two different tests done in two different columns; correct?
A. Yes, that is true.
Q. So Exhibit 3 doesn't have two results, does it?
A. No, it does not.
Q. In fact, Exhibit 3 is your interpretation of two different results that are actually averaged; right?
A. Yes, that is true.
Q. And you have introduced potentially human error by looking at the interpretation from a chromatogram, doing math, and then putting that average number into Exhibit 3. Isn't that the process?
A. We do take two different results, and we can average those out, and then we do report that average.
(Tr. at 181-182)

Q. Okay. So now we've got software interpreting a peak; right? That comes out on a chromatogram. And then as a result of that software interpretation, you interpret two different numbers, and you make an average of those two numbers; right?
A. Yes, we average those two numbers.
Q. So the information contained on Exhibit 3 is not accurate of the two results of the gas chromatograph testing, is it?
A. I wouldn't say that. I believe that my result is accurate for the testing.
Q. But it doesn't match the two numbers, does it?

A. It's the average of the two numbers. And then there's also a range of uncertainty, which covers anything that may have fallen outside of this number.
Q. Sure. But my question was, if we have two different tests -- And we've already established that the gas chromatograph does its job and it comes out in peaks and that that result is interpreted by software. We have two numbers, right, because two different samples are tested? So we should have two different results; right?
A. The same -- Well, it's the same case that's tested twice out of the same tube. And so, yes, there are two results that come out, but that's not what we report according to what's generally accepted in the scientific community.

(Tr. at 183-184)

Q. Can you tell everybody what the process of elution, what that means?
A. Elution refers to when those individual components come out at their own specific time.
Q. Time is a rather important concept in chromatography; right?
A. Yes, that is true.
Q. That's how we determine what the heck the substance is that it's detecting, is how long does it take to elute; right?
A. Yes, that is true.
Q. So knowing what time something elutes is fairly important?
A. Yes.
Q. The exhibit you've talked about, Exhibit 3, doesn't tell us what the elution time is on these samples, does it?
A. No, the report does not tell us that. (Tr. at 192)

Q. Okay. And so after the software interprets it, it gives you some other data, such as the elution time of when these things are found. It also tells you some other stuff, like what else was found in the headspace, right, that's not just ethanol?
A. Yes. If there's anything else found that was volatile, it would show up on there.
Q. It could also tell you if there's problems inside the machine or some maintenance problems inside the column that will show some other peaks that might not be detected; right?
A. I'm sorry. Could you say that one more time.

Q. Sure. Let's just say a column is contaminated and it has other stuff in there that hasn't been cleared out from prior tests. A chromatogram may show some little peaks that aren't necessarily identified that are just sort of remnants of something else; right?
A. It could be something else. It could also be an artifact of blood.
Q. So that would be indicative of a column that needs some maintenance?
A. If there were peaks that were -- we call it integrated, so a number is assigned to it. If those were to come out and they were significant enough to interfere with our results, then, yes, we would have to do maintenance. But there are also peaks that are naturally in people's blood sometimes that are unidentified. (Tr. at 194-195)

Q. All right. Your job is to then look at that data and then interpret it and then create the report that has been introduced as Exhibit 3; correct?
A. Yes, that is true.
Q. Now, isn't it true the policy of the Montana State Crime Lab is when you're doing that interpretation you literally take a pen or a pencil and you write down the two numbers on a piece of paper and you take the average using a calculator?
A. Yes, that is true.
Q. So that introduces human error into potentially finding this average, doesn't it?
A. That would be error that was resulted within the error -- or the uncertainty of measure that's provided on the report.
Q. Sure. But it also introduces the possibility of you just wrote the number down wrong.
A. Yes, but that is also why we go through a technical review process in order to verify that our calculations were done correctly.
Q. Sure. And as you said, you're doing hundreds of these at a time, aren't you?
A. Usually I do about 40 cases in one run, and I sometimes can do up to a hundred in a week, yes.
Q. Is that called a batch?
A. Yes.
Q. So you're running a lot of tests in batches. It is possible that -- You know, we're humans. We all make mistakes. A mistake could be made; right?
A. A mistake could be made, yes. (Tr. at 196-197)

Q. We can't determine if acetone was discovered in Darin's blood without the chromatogram, can we?
A. Yes, that's true. You have to look at the chromatogram.
Q. Okay. We can't tell from Exhibit 3, can we?
A. No, you cannot.
Q. So it's possible there was acetone there?
A. Although I guess it would have -- Sorry. It would have been reported on this report if acetone was present in this sample.
Q. If there were no mistakes made.
A. That's true.
Q. And the only way to check for mistakes is seeing the chromatogram?
A. Yes, that is true. (Tr. at 199-200)

Q. Sure. And it's possible if you guys made a mistake the only way to check it is looking at the actual chromatogram?
A. Yes. (Tr. at 202)

MR. JUDNICH. . . My objection, Judge, was the admissibility under the best evidence rule. (Tr. at 185).

During this examination, the Appellant moved the district court again to disallow State's Exhibit 3 as it was not the best evidence and was simply a summary report of the actual testing data that was not produced to the defense, and because it was not the best evidence, the Exhibit lacked foundation. (Tr. at 185). The district court denied the objection and allowed exhibit 3 to be admitted and published to the jury without requiring actual testing results. (Tr. at 186).

On April 5, 2018 the State filed a motion for leave to file an Amended Information where the charges would change from: Count I: DUI, in violation of M.C.A. § 61-8-401, to: Count I: DUI, in violation of M.C.A. § 61-8-401 and in the alternative, Count I: Operation of a motor vehicle with a BAC of .08 or more, in

violation of M.C.A. § 61-8-406. (D.C. Doc 59). The first day of jury trial began on April 9, 2018, less than five days from the date of the filing of the State's motion for leave to file. (D.C. Doc 63). In chambers, just before the jury trial was to begin, the defense objected to the untimely filing; the defense argued that the Amended Information was a substantive amendment to the charges which was not allowed with less than 5 days before trial under statute. (Tr. at 9-12). The district court denied the defense objection and allowed the amendment to go to the trial jury. (Tr. at 12). The jury ultimately convicted the Appellant of Count I: DUI. (D.C. Doc 68).

On April 4, 2018 (five days prior to trial), the State filed a motion *in limine* to prohibit the defense from commenting to the jury that the state had failed to provide the defense testing results from the crime lab. (D.C. Doc 56). The defense filed a response. (D.C. Doc 60). The district court granted the State's motion *in limine*. (D.C. Doc 64). Specifically, the district court ordered "Defendant and defense counsel are precluded from presenting any testimony or argument at trial that accuses or suggests the State failed to provide Defendant with requested discovery or violated evidentiary or procedural rules." (D.C. Doc 64). The district court then exceeded the scope of the order *in limine* during closing arguments of the Appellant before the jury, when the State made an objection mid-argument and the district court disallowed the defense to comment upon the nature of the state's evidence

presented to the jury to justify the elements of their burden of proof. (Tr. at 247-248). The following closing argument was commencing at the time to the jury:

> MR. HULLING: Let's move on to the blood test. The blood test is probably the most incomplete, inconsistent piece of evidence that you received here yesterday. You received one piece of paper. One. You heard testimony from Ms. Everett about how complicated that procedure was; how many times they test each sample; the method that they have to take to ensure the machine is working correctly; how technical that machine is; the review process that takes place; how that machine prints out a report with spikes, with a graph that details exactly what Mr. Hudon or anyone else's blood, for that matter, what their blood alcohol concentration was. She explained how mistakes could be made. But you didn't get to hold those reports in your hand. The state did not go through that result, the actual result in detail with Ms. Everett. Ask yourself why not. Why didn't they go through that level of detail to prove this case?
> MS. WETZSTEON: Objection, Judge. It's the subject of a pretrial ruling.
> THE COURT: Sustained. (Tr. at 247-248)

The State relied upon jury instruction #14 containing the following inference based upon blood testing: "If there was at the time and alcohol concentration of 0.08 or more, you are permitted, but not required to infer that the Defendant was under the influence of alcohol. (D.C. Doc 67). The jury convicted the Appellant of DUI based upon this evidence. (D.C. Doc 68).

On October 25, 2017 the district court filed its jury trial preparation order. (D.C. Doc 25) Page 3 of the Order addresses trial exhibits. (*Id*). The district court's order requires an original and three (3) copies of all Exhibits to be presented to the Court and opposing counsel at the preliminary pretrial conference. (*Id*) Subsection C(1) of the Exhibit Order, states that the exhibits provided to the Court and opposing

counsel as of the preliminary pretrial conference "shall be the official exhibits used by witnesses during the trial and made part of the official trial record for appeal purposes."(*Id*).

The district court held a preliminary pretrial conference at which the parties exchanged proposed trial exhibits to be utilized at jury trial, which was memorialized in separate filing on February 21, 2018. (D.C. Doc 49). The district court previously ruled that portions of the DVD video were excluded from evidence. (D.C. Doc 32). The prosecution never produced a redacted video or DVD to the defense, when the State provided the defense their proposed trial exhibits at the preliminary pretrial conference. (D.C. Doc 49). The first morning of jury trial (April 9, 2018), in chambers, the State asked the defense if they had received the purportedly newly redacted DVD, State's proposed exhibit 1:

> MS. WETZSTEON: I'm sorry. Did Julie give you a copy of the edited video this morning when she came up?
> MR. JUDNICH: No. (Tr. at 4).

In chambers the defense objected to the untimely disclosure of a new trial exhibit that had not been previously disclosed at the preliminary pretrial hearing where proposed trial exhibits were to be exchanged. (Tr. at 13-20). In chambers, the Appellant objected to the State's late disclosure of a trial exhibit:

> [MR. JUDNICH] Defense's last issue is Exhibit Number -- the DVD, Judge. For the record, it's state's proposed Exhibit 1, which we have not

stipulated to. Judge, at this point, instead of doing it in front of the jury, I want to do it in chambers. I want to make my objection under due process violations. The state had a ruling against them to exclude certain information from the DVD. I still have not seen this DVD. I have not had the opportunity to review it. I can't check it for authenticity. I have no idea whether the correct things are taken out. This is completely inappropriate that the morning of trial I'm expected to not pay attention to a trial and review a DVD. I think the Court can't admit it because I haven't been provided it. It's been months and months and months the state has had the opportunity to produce this and give us ample time to review it. I think the Court has to exclude it. (Tr. at 13)

MR. JUDNICH: There's a couple things that I don't think are being represented accurately. Number One, I don't think the state can introduce the unredacted version. That was the Court's order, that that stuff was excluded, so the state can't play that. And we can't just fast forward a DVD. That's the whole point of why we made that motion, was to redact that. And it's the state's burden, if they want to produce evidence during a trial, to have evidence that's presented that doesn't have excludable information in it. That's the state's burden. And they can't do that to us on the morning of trial and say, well, this is our piece of evidence for a trial you've known about forever, but you don't get to see it or review it. So that's my objection, is neither can come in, Judge. (Tr. at 15)

At this point, over objection, the district court forced the Appellant to view the new State's Proposed Exhibit 1 that had never been produced to the Appellant prior to that date before jury selection was to take place, and multiple portions of the State's "redacted" exhibit 1, contained evidence subject to exclusion by the district court order. (Tr. at 16). The parties then returned to chambers:

THE COURT: We're back in chambers.
MS. WETZSTEON: I just wanted to readdress the video, Judge. It sounds like -- They watched it. There were a couple more references that they thought were objectionable, one of which I disagree but I just cut it out anyway.

I think there's -- I'll let him speak for himself. They're still maintaining their objection. I guess at this point it's the state's position that the video in its entirety was what was labeled as the exhibit. We, of course, have the burden not to introduce evidence that has been ruled inadmissible or is otherwise inadmissible. That's really the state's burden to make sure that evidence doesn't come out in trial. I don't think it's up to the defendant to micromanage how that information is presented. Certainly I'm going to give them a copy with the last two parts taken out. I understand them not wanting to stipulate, pre-stipulate to admit the exhibit. That's fine. The state can introduce it the old-fashioned way. But I do think we'll be able to present the foundation, Judge.

MR. JUDNICH: Here's the defendant's problem with it. So we show up to trial this morning and we have a video that we've never seen before that's purportedly redacted. We then take the time to review the video, and there are still issues with it, so it needs to be reacted additionally. So as of whatever time it is now, 9:30, we still don't have a correct video to introduce into evidence. This isn't a piece of paper, Judge.
This isn't a book or a treatise or something that is easily utilized by the defendant and the state. This is an electronic piece of digital data, and that can be published to the jury in lots of different ways. I understand the state may want to give us a DVD or an email or whatever, but that deprives this defendant of his due process of the ability to utilize this new piece of technology. This is a video. This is a video that I'd like to present in a form I see appropriate for our defense. I can't do that now. I can't get a video the morning of trial, take the time to review it when we're preparing for trial, and be able to use it technologically the way I want to do it.
That's the entire reason we have discovery deadlines, and that's why we have discovery burdens. It is an abuse of the discovery process to show up and sandbag the defendant by giving them a piece of evidence we've never seen before, which you ordered months ago that this piece of evidence needed to be changed and it needed to be produced to us, and it wasn't. That's the basis of my objection. I don't think the Court can let any video in at this point. (Tr. at 17-18).

THE COURT: How soon can you get a version of that to the - -
MS. WETZSTEON: It’s probably ready now. (Tr. at 19).

> THE COURT: Well, I think it's true that you've had access to the entire video. If there were extracts you wanted to develop for the defense, you could have.
>
> MR. JUDNICH: I understand that line of thinking, Judge, but the problem is this is an exhibit. We have not been presented with an exhibit that's usable. We've been presented with an exhibit that is excludable. That's the discovery burden. That's why we have these pretrial binders, right, that we're going to use exhibits at trial?
> That exhibit that the state presented is not in evidence, and it can't be because it has inadmissible evidence on it. So the state's burden then is to produce to the defense, if they want to use the exhibit at trial, something usable that the defense can use and cross-examine and put on the technology we want. That has not occurred in this case, Judge.
> I had no idea how the state wanted to give us this evidence. Was it a DVD? Was it an electronic copy, whatever? We are now under a complete disadvantage. The state wants to recreate a new exhibit the morning of trial without giving us the opportunity to figure out how we're going to play it, what are we going to do, if we need to do anything on our side. That's the due process violation.
> THE COURT: I don't see the due process violation.
>
> (Tr. at 19-20).

The Court admitted the newly produced exhibit at trial over objection. (Tr. at 122).

SUMMARY OF THE ARGUMENT

The Appellant's discovery rights and the State's discovery duties were violated by the district court failing to exclude summary evidence of blood testing results without the actual testing results. Multiple and separate scientific blood testing procedures occurred when the Appellant's blood was tested by the Montana Forensic Science Division. The raw and actual results of the multiple tests were requested via written discovery request by the Appellant to the State. The State flatly refused to

request or produce this information – requiring the accused to procure the information via subpoena from the crime lab. The district court's admission of the summary of results without disclosure of the actual testing results by the crime lab to the defendant in discovery was in error.

The State's amendment to the information, adding an alternative charge of operating a motor vehicle with a BAC of .08 or more was a substantive amendment to the original charge of DUI. Any substantive change to an information must occur not less than five (5) days prior to trial. The State's amendment was substantive, yet occurred less than five (5) days prior to trial and should have been denied by the court.

The district court erred in expanding their pretrial ruling *in limine,* prohibiting the defense from commenting upon the court's denial of the defense's motion to exclude evidence, resulting in shifting the burden of proof to the defendant and violating the Appellant's right to comment upon the nature of the State's evidence before a jury. The district court erred by sustaining a closing argument objection by the State where the defense was arguing to the jury that the State had not met their burden of proof by failing to show the jury the actual testing results of testing. The defense was not commenting upon the court's denial of the Appellant's motion, the accused

was arguing the State failed to meet their burden of proof, and such Order by the district court was in error and lead to a reversible decision from closing arguments.

The district court erred by allowing the State to utilize a trial exhibit that the State failed to disclose pursuant to the Court's pretrial order and disclosure procedure. The Appellant's Due Process rights were violated when the district court allowed the State to produce for the first time a DVD video that was incorrectly redacted the morning of trial, then re-redacted the morning of trial, and admitted over objection by the Appellant. The Appellant was placed in a disadvantage by the State producing an excludable exhibit during exhibit exchange, and never producing a separate exhibit that complied with the district court's exclusion order until the morning of jury trial.

STANDARD OF REVIEW

This Court's review of a motion to suppress evidence is limited to whether the court's findings of fact are clearly erroneous and whether the court's interpretation and application of the law are correct. *State v. Minett*, 2014 MT 225, ¶ 7, 376 Mont. 260, 332 P.3d 235. Suppression motions based on due process are reviewed for "whether the findings of fact are clearly erroneous and whether the court correctly interpreted the law and applied it to those facts." *State v. Haldane*, 2013 MT 32, ¶ 15, 368 Mont. 396, 300 P.3d 657 (citations omitted).

This Court reviews a district court's evidentiary ruling for an abuse of discretion. *State v. Hicks* (2013), 369 Mont. 165, ¶14, 296 P.3d 1149 ¶14. District courts have broad discretion to determine the admissibility of evidence. *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142 (citing *State v. Spottedbear*, 2016 MT 243, ¶ 9, 385 Mont. 68, 380 P.3d 810). Evidentiary rulings are reviewed for an abuse of discretion, which occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Id.* Evidentiary errors by the trial court which rise to the level of violating a defendant's constitutional rights should be reviewed *de novo*. *United States v. Pineda-Doval*, 614 F.3d 1019, 1032-1033 (9th Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO EXCLUDE BLOOD TESTING RESULTS INTENTIONALLY NOT PRODUCED BY THE STATE.

The Appellant issued a written discovery request to the prosecution with specific requests for certain blood testing evidence; specifically the actual testing results of the blood testing performed via a Gas Chromatograph called a Chromatogram. When a blood test is performed at the Forensic Science Division, the blood test is injected into a Gas Chromatograph and that sample is split and run through two different columns in an attempt to detect ethanol alcohol. The splitting of the sample will result in two different results, which are the actual testing findings

that printed out on separate chromatograms. (Tr. at 181-182). The Appellant specifically requested the State produce these chromatograms. (D.C. Doc 24).

The State flatly refused to produce the actual testing results via discovery from the chromatograph and insisted in only producing a one (1) page report, State's Exhibit 3, that was created by the lab tech to the defense. (Tr. at 180). At trial, the Appellant established that Exhibit 3 was not the best evidence of the testing results, because Exhibit 3 is not reflective of the actual testing results. The Gas Chromatograph creates two separate alcohol detection reports via chromatograms, with potentially two different results. The State's one page summary exhibit does not list the actual results of either of the two separate results were, nor any other pertinent information surrounding the test results themselves. Further, the only way to determine if testing errors, contamination, lab errors or the like occurred, is to actually view the chromatogram, not Exhibit 3. Forensic Science Division lab tech Crystal Everett testified:

> Q. And the only way to check for mistakes is seeing the chromatogram?
> A. Yes, that is true. (Tr. at 200)
>
> Q. Sure. And it's possible if you guys made a mistake the only way to check it is looking at the actual chromatogram?
> A. Yes. (Tr. at 202)

The State's failure to produce material scientific evidence to an accused via discovery following written request, violated the Defendant's right to substantive

due process and the right to a fair trial. It is undisputed that the State bears significant duties to produce evidence to an accused. In a DUI allegation, the results of blood testing performed by the Forensic Science Division in Montana is highly scientific evidence that a jury will heavily rely on in determining guilt. The prosecutor's duties to disclose evidence extends not only to the prosecutor but to material and information in the possession or control of members of the prosecutor's staff and of any other person who have participated in the investigation or evaluation of the case. *See* M.C.A. § 46-15-322(4). The Forensic Science Division is an agency of the State of Montana and actively participates and investigation of criminal cases.

This Court addressed the duties of criminal discovery by the prosecution in great detail in *State v. Stewart* (2000), 303 Mont. 507, 16 P.3d 391. Montana has adopted a statutory scheme that places affirmative duties on both the State and a defendant. To that end, M.C.A. §46-15-322(1)(d) provides:

> **Disclosure by prosecution**. (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:
>
> (d) all papers documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; ...

Montana's statutory requirements do not hinge on whether the evidence is exculpatory or inculpatory. The plain language of M.C.A. § 46-15-327 simply

mandates that the State disclose all additional information or material within the State's possession. *State v. Licht* (1994), 266 Mont. 123, 128–29, 879 P.2d 670, 673–74 (clarifying *State v. Shaver* (1988), 233 Mont. 438, 760 P.2d 1230). The Forensic Science Division participated in the investigation and testing of blood in the Defendant's prosecution, and the results of their testing are therefore subject to the State's Discovery obligations under M.C.A. § 46-15-322(4).

The State's argument, and district court's Order that it is the accused's obligation to obtain the actual testing data and results from the Forensic Science Division via Subpoena is in error. The State does produce the summary report (Exhibit 3) to the Defense, and that document is from the Forensic Science Division (FSD). The State thus produces some, but not all information from the FSD to the defense via discovery. Such a policy is in error, and the district court clearly errored in ordering the State not be required to provide this information to the defense via discovery. Because the Forensic Science Division is an agency of the State of Montana and participates in the investigation into the criminal case, the State is duty bound to disclose this information, particularly after a written discovery request specifically requesting said information.

Because these testing results are the actual results they are the best evidence to be presented to the jury. The district court erred and abused its discretion by allowing the State to only introduce Exhibit 3, the summary report – that averages

the two tests into one number that the lab tech manually does by hand. The Exhibit 3 summary report is ripe for human error, which cannot ever be determined without the disclosure of the actual testing results.

This Court has previously addressed the importance of chromatograms being the best evidence in trial, even back in the 1970's. Although the Court declined to address this issue because another appellant neglected to timely object to the State's failure to use the best evidence in proving the results of a gas chromatograph in a DUI case; this Court discussed that the chromatogram record itself should have been introduced and proof made of the standards utilized by the chemist in interpreting the chromatogram by stating, "The contention has merit, technical though it may be, but the complaint (objection) came too late." *State v. Burtchett* (1974) 165 Mont, 280, 287, 530 P.2d 471, 475. The *Burtchett* case establishes, that when scientific evidence such as a chromatogram result is introduced in an effort to support a criminal conviction, the State must produce the actual testing result (the chromatogram). In this case, not only had the Appellant requested the Chromatogram(s), but the Appellant filed a Motion to exclude the results of blood testing because the State refused to produce the chromatogram to the Defense via discovery. At trial, the Appellant objected to the introduction of the Exhibit 3 summary as not being the best evidence, as discussed in *Burtchett*, and the district court failed to require the State to produce the chromatogram evidence, pretrial nor

during trial to the jury. (Tr. at 185). The State never obtained or attempted to discuss the actual testing results to the jury in this case. The district court abused its discretion in admitting the summary Exhibit 3 report and refusing to require the State to produce actual testing results after written request and providing blood testing results via chromatogram when they are utilizing that evidence in an attempt to obtain a DUI conviction. As a result of this error, the Appellant was convicted upon evidence that was not the best evidence and created reversable error. Appellant requests the Court reverse the district court and remand this case for retrial.

II. THE DISTRICT COURT ERRED BY ALLOWING THE STATE TO MAKE A SUBSTANTIVE AMENDMENT THE INFORMATION IN THIS CASE UNDER FIVE DAYS PRIOR TO TRIAL.

The State filed an Information charging the Appellant on 8/3/17. The criminal case proceeded to Jury trial on April 9, 2018. On April 4, 2018 the State filed a Motion for leave to file an Amended Information adding an alternative charge of Operation of a vehicle with alcohol concentration of .08 or more in violation of M.C.A. § 61-8-406. The Appellant did not even have an opportunity to enter a plea to this proposed amendment prior to the first day of trial. On the morning of April 9, 2018, the Appellant objected to the State's filing of a Motion for leave to file an amended information citing M.C.A. § 45-11-205(1), and that the time for filing a substantive change to the charges is prohibited as it was filed less than five days prior to the trial date.

Montana statutes unequivocally prohibit a court from accepting a substantive amendment within five days of the trial. Section 46–11–205(1), MCA. An amendment is one of form when the same crime is charged, the elements of the crime and the proof required remain the same and the defendant is informed of the charges against him. *City of Red Lodge v. Kennedy* (2002) 309 Mont. 330 ¶11, 46 P.3d 602 (citing *State v. Sor–Lokken* (1991), 247 Mont. 343, 349, 805 P.2d 1367, 1371.) "To differentiate amendments of form and substance, a court must examine whether an amendment to an information or complaint alters the nature of the essential elements of the crime" *Kennedy* ¶14. The *Kennedy* Court held: "By changing the statutory subsection under which the defendant was charged, the amendment charged a wholly new offense. *State v. Brown*, 172 Mont. 41, 45, 560 P.2d 533, 535. Similarly, in *State v. Hallam* (1978), 175 Mont. 492, 500, 575 P.2d 55, 61, substitution of one subsection of the arson statute for another by amendment constituted a change of substance, altering the crime charged as well as the elements, proofs and defenses." *Id*.

Distinguishable authority also exists from this Court holding that alternative charges adding lesser included offenses are not substantive changes. *State v. Adkins* (2009), 249 Mont. 444, 204 P.3d 1. Unlike *Adkins*, in this case, the alternate charge of DUI Per Se, is not a lesser included offense, and should not be treated as change as to form only.

In this case, adding the crime of M.C.A. § 61-8-406 to the original Information charging a violation of M.C.A. § 61-8-401 is a substantive change in charges and elements, requiring the filing to occur more than 5 days prior to trial, which it did not. The substantive elements the State must prove to convict an accused of M.C.A. § 61-8-401 are:

1. The accused was operating a motor vehicle;
2. upon the ways of the state open to the public; and
3. While under the influence of alcohol.

The phrase "under the influence" is defined in Montana to mean that as a result of taking into the body alcohol or drugs, or any combination thereof, a person's ability to safely operate a motor vehicle has been diminished. MCJI 10-401(b).

The substantive elements the State must prove to convict an accused of M.C.A. § 61-8-406 are:

1. The accused was operating a motor vehicle;
2. upon the ways of the state open to the public; and
3. while the alcohol concentration in his blood, breath or urine was 0.08 or more.

The phrase "alcohol concentration" is defined as either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. M.C.A. § 61-8-407.

Clearly, the difference in elements to be proven by the State and potentially defended by an accused is the substantive difference between subjective proof of

being “under the influence of alcohol”, with a specific definition, and a scientific determination of “while the alcohol concentration in his blood, breath or urine was 0.08 or more” with a specific definition. The two definitions for each different phrase are substantially different and require different proof requirements.

For example, the substance of §61-8-401 is to establish if a person’s ability to safely operate a motor vehicle was diminished. Whereas, the substance of §61-8-406 is to establish a scientific and numeric value of an alcohol concentration utilizing nothing but measurement. No requirement to prove impairment exists under § 61-8-406. As such, the difference between the two statutes alters the nature of the essential elements of the crime. One is scientific and numerical, the other is a subjective evaluation of the ability to safely operate a motor vehicle, and no scientific and numeric evidence is required. These differences alter the crime charged as well as the elements, burdens of proof, nature of proof and defenses. Those requirements in *Hallam* and *Kennedy* were upheld to constitute substantive changes to the original crime charged. Because the nature of the State’s Amendment was substantive, the State was required to comply with M.C.A. § 46-11-205 and file a timely Motion for leave to file an Amended information, which the State failed to comply with. For these reasons, the district court should have granted the Defendant’s Objection to Amending the Information. Because the Court allowed this amendment to proceed to the jury and prejudice the Appellant at trial, this Court

must reverse the district court and remand this case for retrial, with instructions to disallow the amendment of charges.

III. THE DISTRICT COURT'S GRANTING OF THE STATE'S MOTION IN LIMINE VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 17 OF THE MONTANA CONSTITUTION BY ILLEGALLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT AND DISALLOWING THE DEFENDANT TO RELY UPON THE NATURE OF THE STATE'S EVIDENCE PRESENTED AT TRIAL.

The State requested and was granted by the district court an order prohibiting the defense from commenting upon the nature of the State's evidence against him. The substance of the Court's Order and sustaining of objection during trial illegally shifted the burden of proof onto the Defendant. The district court made a very specific finding in its Order *in limine*: "Defendant and defense counsel are precluded from presenting any testimony or argument at trial that accuses or suggests the State failed to provide Defendant with requested discovery or violated evidentiary or procedural rules." (D.C. Doc 64).

In its Order granting the State's Motion *in Limine*, the Court cited the State's argument contending the failure of the State to provide the defense the actual chromatogram results from the Forensic Science Division's gas chromatograph testing of the accused's blood was "irrelevant", that the defendant would be prohibited from arguing the State was hiding information, and that the effect of the

defense arguing the State never provided the actual alcohol testing results of the accused's blood would be "unfairly prejudicial to the State." The district court's finding of facts and conclusions of law are in error. The district court clearly understood the Appellant's argument by citing it its order that "he [the appellant] believes is relevant out of his continued belief that the State was required to obtain it for him" (D.C. Doc 64).

However, during closing argument during the jury trial, the district court expanded upon the Order *in limine* and prohibited the Appellant in closing argument from commenting upon the nature of the evidence the State presented to support its burden of proof and illegally shifting the burden of proof onto the Defendant. During closing arguments the State objected mid-argument at a time when the Appellant was challenging the nature of the State's evidence. At no time was the Appellant arguing that the State failed to provide the Defense this information – which was prohibited in the Order. At trial the following objection and argument occurred during the defense closing argument:

> MR. HULLING: Let's move on to the blood test. The blood test is probably the most incomplete, inconsistent piece of evidence that you received here yesterday. You received one piece of paper. One. You heard testimony from Ms. Everett about how complicated that procedure was; how many times they test each sample; the method that they have to take to ensure the machine is working correctly; how technical that machine is; the review process that takes place; how that machine prints out a report with spikes, with a graph that details exactly what Mr. Hudon or anyone else's blood, for that matter, what their blood alcohol concentration was.

> She explained how mistakes could be made. But you didn't get to hold those reports in your hand. The state did not go through that result, the actual result in detail with Ms. Everett. Ask yourself why not. Why didn't they go through that level of detail to prove this case?
>
> MS. WETZSTEON: Objection, Judge. It's the subject of a pretrial ruling.
>
> THE COURT: Sustained. (Tr. at 247-248)

Prohibiting the Appellant's counsel from commenting upon the nature of the evidence expressly violates the Appellant's rights under the 5th and 14th Amendment to the United States Constitution and Article II, Section 17 of the Montana State Constitution by restricting the Appellant's ability to comment upon the State's requirement of proof beyond a reasonable doubt. At no point did the district court's Order prohibit the Appellant from commenting upon the fact that the State failed to produce to the jury, satisfactory scientific alcohol blood testing results in a DUI trial. However, the district court prohibited just that, during closing arguments, when that was never ordered precluded. The district court's order had a significant impact upon the closing argument and the constitutional rights of the Appellant, the only remedy for which is reversal and remand.

The transcript is clear that counsel for the Appellant was arguing to the jury that the State did not go through the results of actual blood testing – in a closing argument for a DUI charge that the State attempted to prove via blood testing evidence. Again, the State's only documentary proof in support of the charge, was a

one-page exhibit, that the State's witness, Crystal Everett, admitted was her own summary of her human interpretation of the two (2) computer generated raw results of the blood testing contained upon chromatograms not disclosed to the Appellant. Anyone accused of a DUI is entitled to argue during closing arguments about the nature of the State's evidence, and point out insufficiencies of it.

Further, the State relied on Jury Instruction #14 for the jury to infer guilt of the offense based upon an analysis of a sample of blood to secure a conviction. Because the State was relying upon a jury instruction that allows a jury to "infer" guilt of an accused based upon blood analysis besting of alcohol concentration, then the Appellant is entitled to comment upon the sufficiency of the State's evidence in support of that jury instruction under the 5th and 14th Amendment to the United States Constitution and Article II, Section 17 of the Montana State Constitution. The district court's sustaining of such an objection during closing arguments directly impacted the Appellant's ability to comment upon the nature of the State's evidence, it adversely impacted the ability of the Appellant to challenge the credibility of the testing used in support of the State's jury instruction regarding numeric inferenced for someone being under the influence of alcohol, and reversed the burden of proof onto the Appellant to essentially disprove the State's testimony, without the luxury of the State providing the actual testing results that would enable an accused to do so.

The only way to ensure these most fundamental of rights in our jury trial system is to correct this error, and reverse the district court's ruling and remand this case for retrial with instructions to not repeat the violations that occurred in this case.

IV. THE DISTRICT COURT ERRED BY FAILING TO EXCLUDE THE STATE'S TRIAL EXHIBIT 1 WHEN THE STATE STIPULATED TO CREATING A REDACTED EXHIBIT, AND FAILED TO PRODUCE SAID REDACTED EXHIBIT TO THE DEFENDANT IN A REASONABLE AMOUNT OF TIME PRIOR TO TRIAL.

On December 6, 2017 the district court issued its Order partially granting the Appellant's pretrial motion to exclude certain items of evidence, which were partially stipulated to by the State, including any reference to the P.A.S.T. breath test advisory or test; any reference to the Appellant's past DUI conviction, and any prior bad act evidence, including all such references contained upon video recording per *State v. Lozon*, 2012 MT 303 ¶15, 367 Mont 424 ¶15, 291 P.3d 1135. (D.C. Doc 32).

The Ravalli County district court requires that the exhibits provided to the Court and opposing counsel as of the preliminary pretrial conference "shall be the official exhibits used by witnesses during the trial and made part of the official trial record for appeal purposes." On February 21, 2018 the district court held a preliminary pretrial conference at which time the State provided the defense its trial materials including State's proposed Exhibit 1, a DVD video. The proposed Exhibit produced by the State to the Appellant was not a redacted DVD, and thus was an

excludable exhibit. The State never attempted to provide any notice of providing an amended exhibit in conformity with the district court's suppression of evidence until the very morning of trial. Even during the initial in-chambers meeting, the State had failed to deliver an admissible exhibit to the Appellant.

> MS. WETZSTEON: I'm sorry. Did Julie give you a copy of the edited video this morning when she came up?
> MR. JUDNICH: No. (Tr. at 4)

The Appellant objected to the new exhibit, and over objection, the district court forced the Appellant to review the exhibit instead of begin the jury trial. Not surprisingly, the State's proposed DVD exhibit continued to contain evidence that was suppressed by the district court after the initial viewing by the Appellant. At this point, the State agreed, the exhibit was not correctly redacted, but wanted to redact it the morning of trial, and utilize it that day in trial. In this case the district court disregarded the concerns of the defense and disregarded the State's concession that they failed to timely produce a usable exhibit to the accused. The State's prosecutor stated:

> [I]t's the state's position that the video in its entirety was what was labeled as the exhibit. We, of course, have the burden not to introduce evidence that has been ruled inadmissible or is otherwise inadmissible. (Tr. at 17).

The State conceded that it provided the defense with a proposed exhibit that was inadmissible because it contained excluded evidence. That evidence was

excluded from trial on December 6, 2017. The State failed to deliver to the Appellant a newly proposed trial exhibit until the morning of trial, April 9, 2018, over six (6) months later.

The Appellant objected to this exhibit as it was not produced per the district court's pretrial order, and the late disclosure without any prior notice violated the Appellant's Due Process rights. It is fundamentally unfair for the prosecution to withhold trial exhibits that are technical in nature. These exhibits must be played on a technological device, and accommodations have to be made for that. Not producing this type of trial exhibit violates the accused's rights. Forcing the Appellant and his counsel to take time away from day of trial preparation, strategy and focus to newly review a proposed video that the State had never previously provided to the Appellant, not only violated the district court's own scheduling order, but it violated the Appellant's Due Process rights. The entire system of pretrial discovery and exchanging of trial exhibits months before a jury trial begins is to avoid the exact situation that occurred in this case. The Appellant was placed at a huge disadvantage to not only review the State's exhibit for errors, but waste valuable trial time doing so.

Not surprisingly, the State's first attempt at redacting the video was in error as it continued to contain excluded evidence. The State's newly proposed Exhibit 1 continued to contain excluded evidence within it, which the State had to correct and

redact another time, the morning of trial. As argued to the district court, the failure of the state to provide an admissible piece of evidence well before the trial began is the largest violation of due process. Without an admissible DVD, or electronic video, the Appellant is left with nothing more than an inadmissible piece of evidence, that they do not bear the burden of attempting to introduce. As the State conceded to the district court, the State bears the burden of proof of creating, disclosing and attempting to admit trial exhibits – and this process must take place well prior to trial, not the morning of.

Due Process requires a criminal prosecution to provide admissible evidence for trial, or for inadmissible evidence to be excluded. The district court erred by not excluding the State's untimely trial exhibit which was not the inadmissible trial exhibit previously produced to the Appellant.

CONCLUSION

Based on the foregoing arguments and legal authorities, Appellant Hudon respectfully request that this Court reverse the district court's rulings and/or the jury's verdict and remand for a new trial.

DATED this 18th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

This brief is compliant with Rule 11, M.R.App.P.. The document is proportionately spaced in 14 pt. Times New Roman. The number of words as determined by Microsoft Word's processing software is 10,000 words or less, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

*_/s/ Martin Judnich_*
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CERTIFICATE OF SERVICE

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