

In the Supreme Court of the State of Montana

DA 18-0372

CONNIE CRITES, in her capacity as the
Personal Representative of the Estate of John Michael Crites,

Petitioner and Appellant,

v.

LEWIS AND CLARK COUNTY, by and through its County Attorney,

Respondent and Appellee.

On Appeal from the Montana First Judicial District Court
Lewis and Clark County
BDV-2018-193
Honorable Michael F. McMahon

OPENING BRIEF OF PETITIONER/APPELLANT

Jesse Kodadek
WORDEN THANE P.C.
321 W. Broadway, Ste. 300
Missoula, MT 59802
jkodadek@wordenthane.com

Attorney for Petitioner/Appellant

Leo Gallagher, County Attorney
Melissa Broch, Deputy
County Attorney's Office
228 Broadway
Helena, MT 59601
lgallagher@lccountymt.gov
mbroch@lccountymt.gov

Attorneys for Respondent/Appellee

TABLE OF CONTENTS

Table of Authorities.....	ii
Introduction.....	1
Issue for Review	4
Statement of the Case	5
Statement of Facts	5
Standard of Review	16
Summary of the Argument	17
Argument.....	18
I. The district court misconstrued the CCJI statute because a prosecutor’s decision about releasing CCJI without court authorization under § 44–5–303(2) is entirely separate from a private citizen’s petition under § 44–5–303(6), which requires court authorization.	21
II. The Estate is authorized by law to receive the criminal justice information and the district court erred by failing to undertake the required balancing test.	24
Conclusion	27
Certificate of Compliance.....	29

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. City of Billings</i> , 239 Mont. 321, 780 P.2d 186 (1989)	18
<i>Bozeman Daily Chronicle v. City of Bozeman Police Dep’t</i> , 260 Mont. 218, 859 P.2d 435 (1993)	16, 18, 24, 25
<i>Flora v. Clearman</i> , 2016 MT 290, 385 Mont. 341, 384 P.3d 448	7, 9
<i>Havre Daily News, LLC v. City of Havre</i> , 2006 MT 215, 333 Mont. 331, 142 P.3d 864	27
<i>Montana State Fund v. Simms</i> , 2012 MT 22, 364 Mont. 14, 270 P.3d 64	18, 23
<i>State v. Tapson</i> , 2001 MT 292, 307 Mont. 428, 41 P.3d 305	26

Statutes

Section 44–5–303, Montana Code Annotated	<i>passim</i>
--	---------------

Constitutional Provisions

Article II, § 9 of the Montana Constitution	5, 23, 26
Article II, § 10 of the Montana Constitution	24

INTRODUCTION

Mike Crites disappeared 2011. His dismembered remains were found zip-tied together in plastic garbage bags off MacDonald Pass. His skull was found separately, on the other side of the Continental Divide. The murder remains uncharged.

Meanwhile, for the past six years, Mike's Estate has been defending a lawsuit filed against Mike just weeks before he disappeared. The Plaintiffs in that case, a married couple named John Mehan and Katy Wessel, were Mike's rural neighbors. The relationship between Mehan/Wessel and Mike was dangerously contentious. Before Mike was murdered, the County charged Mehan with a felony for pointing a rifle while Wessel watched, holding a rifle of her own. After Mike's death, the County charged Mehan with another felony, this time for tampering with evidence in the murder investigation. The County has served multiple search warrants on the Mehan/Wessel property during the murder investigation.

Another married couple with established animus towards Mike is Leon and Debbie Ford. Leon was the last known person to see Mike alive. Immediately following his disappearance, the Fords lied repeatedly to law enforcement about what they were doing the day Mike disappeared.

This information—all publicly disclosed by Lewis and Clark County—sketches the contours of substantial evidence in the County's

possession that would, without question, help the Estate defend itself in the ongoing lawsuit. There is also a real possibility that the evidence is sufficient for the Estate to bring a wrongful death case before the statute of limitation runs out.

But the County refuses to share any information with the Estate or its counsel. Recently, the County even tried to keep the Estate from acquiring Mike's autopsy report, despite the Estate's statutory entitlement to it. The autopsy reveals that the County knows many undisclosed facts that would be of enormous benefit to the Estate's legal position.

Left with no other option, the Estate filed an action under § 44-5-303(6), MCA, seeking the release of confidential criminal justice information. The Estate asked the district court to conduct an *in camera* inspection of the confidential criminal justice information related to Mike's murder and weigh the Estate's constitutional right to know against any privacy interests, and then release to the Estate—as appropriate and *under seal*—the criminal justice information that might help the Estate defend itself and maybe even seek the justice that the criminal system has manifestly failed to provide.

The County Attorney objected, asserting that the release of any information would jeopardize the ongoing investigation. Applying a section of § 44-5-303, MCA, not relevant to the Estate's claims, and

despite the Montana Constitution's right to know provision, the district court held that a prosecutor can exercise absolute veto power over a crime victim representative's right to know about the criminal justice information related to the victim's murder.

ISSUE FOR REVIEW

When faced with a judicial petition for the release of criminal justice information, can a prosecutor exercise absolute veto power over a victim's request for that information, or—as this Court has held repeatedly—must a district court review the information and weigh a crime victim's constitutional right to know versus the merits of individual privacy?

STATEMENT OF THE CASE

The Estate of Mike Crites petitioned the First Judicial Court under § 44–5–303(6), MCA, and Article II, § 9 of the Montana Constitution seeking the release—under seal—of confidential criminal justice information related to the uncharged 2011 murder of Mike Crites. (Doc. 4.)

The Lewis and Clark County Attorney’s office objected. It claimed that the release of any CCJI to the Estate would jeopardize the investigation. (Doc. 8.)

The district court held that under § 44–5–303, MCA, if the “prosecutor determines the dissemination would jeopardize the investigation, the statute does not allow the information to be released.” (Doc. 11 at 3.) It therefore declined to conduct an *in camera* review of that information and summarily denied the Estate’s petition. (*Id.* at 3–4.)

The Estate appeals from that order.

STATEMENT OF FACTS

A. Before the murder.

Mike Crites moved to the Birdseye area outside Helena in the 1990s. His only access was via Turk Road. For decades, neither Mike nor anyone else had any issues with access on Turk Road proper because everyone—including the road’s namesake Duane Turk—

understood that the road was open for use by everyone who lived in the area.¹

Mike's house is near the end of Turk Road.² In 2007, Leon and Debbie Ford began preparing to build a house they claimed would be accessed by a certain logging trail across Mike's property. Suffice to say, Mike disagreed with this plan.³ Leon Ford and Mike met for the first time that same year, when Crites reported Ford for trespassing and Ford admitted to cutting a lock on Mike's gate.⁴ Mike alleged Ford pointed a gun at him. While Ford concedes he was holding a loaded handgun, he denies that he pointed it at Crites.⁵ The access dispute between Mike and Ford simmered.

Then, in 2008, Mehan and Wessel moved to the area and everything changed.⁶ Mehan began blocking traffic on Turk Road, claiming that nobody had a right to use it, even if they had long

¹ App. Ex. 2. Turk's Answer in CDV-2011-630.

² App. Ex. 3. Peterson Affidavit in CR-2012-394.

³ The Fords do have an access across Mike's property, but not the one they want.

⁴ App. Ex. 3 at 5.

⁵ App. Ex. 3 at 5.

⁶ App. Ex. 2 at 2.

required and used it for their own access. In fact, there is an express public easement on the road,⁷ and it is the only access for dozens of property owners in the area. Still, Mehan began “to make threats against Crites and others in the neighborhood who[] did not support his views regarding access.”⁸ And, as this Court previously noted, Mehan and Wessel “removed existing road signs, dug a ditch across the road, and blocked the road with debris, dirt, snow, and rudimentary gates and fences.” *Flora v. Clearman*, 2016 MT 290, ¶ 8, 385 Mont. 341, 384 P.3d 448. Mehan also “brandished and fired pistols” as people used Turk Road across his property. *Id.*

In November 2010, Mehan was arrested after pointing a rifle at Mike while Mike was on Turk Road.⁹ During that incident, Wessel was on the opposite side of Turk Road, at Mike’s back, also armed with a rifle.¹⁰ Mehan eventually entered a no contest plea to negligent

⁷ See e.g. Judge Reynolds’ order dated July 12, 2018 *Flora v. Wessel*, DDV-2011-471, Montana First Judicial District, holding that there is an express easement for the benefit of Section 9 and Section 15 property owners over the entire course of Turk Road.

⁸ App. Ex. 3 at 3.

⁹ App. Ex. 3 at 3.

¹⁰ App. Ex. 3 at 3.

endangerment, but as a condition of his sentence, he was ordered to stay 1500 feet away from Crites.¹¹

During that sentence, in April 2011, Mehan and Wessel sued Mike, alleging that he was conducting a “reign of terror” in the neighborhood.¹² The complaint cited no specific conduct.

Also around that time, Mehan and Wessel were pursuing a quiet title action, seeking to extinguish the existing access rights on Turk Road of the federal government, the state, the county, and the public.¹³ Mehan explained the lawsuit’s goal in an email, writing that after the lawsuit, anyone who wanted to use the road would have to purchase an easement from them, which “ought to more than pay for attorney fees and pay for the [horse] riding arena.”¹⁴

But the email also reveals the lawsuit’s more sinister intent: to deny access to Mike. “We will only sell [an easement] to Crites’s successor, did you really think you could buy land so cheap!”¹⁵

¹¹ App. Ex. 4.

¹² App. Ex. 5. Complaint and Demand for Jury Trial in DDV-2011-443.

¹³ App. Ex. 6. Complaint in CDV-2011-630.

¹⁴ App. Ex. 7. 2010-09-16 email from Mehan to Cindy Kaufman.

¹⁵ *Id.*

Before that case was eventually dismissed for failure to join indispensable parties, Judge Seeley granted summary judgment to two of Mike’s neighbors, holding that there was an express public easement on Turk Road across Mehan and Wessel’s property.¹⁶ Mehan and Wessel did not appeal.

Now, Mehan and Wessel claim that Mike was served with the tort lawsuit in late May 2011.¹⁷ If that is true—and there is reason to doubt it¹⁸—then Mike’s answer would have been due less than one week before he disappeared forever.

B. Mike disappears.

Marc and Gloria Flora¹⁹ were friends with Mike and lived near him on Turk Road. Early on Sunday morning June 26, 2011, Mike called Marc Flora and asked him to come to a meeting that Mike was planning to have with Leon Ford around 10:00 a.m. that same day.²⁰ Mike told Flora that the night before, Ford had come to his house, and

¹⁶ App. Ex. 8. Judge Seeley’s Order in CDV-2011-630; *Flora*, ¶ 11.

¹⁷ App. Ex. 9 at 2. Order Setting Aside Default.

¹⁸ *Id.* at 2.

¹⁹ At the advice of local law enforcement and County and State-level prosecutors, the Floras have abandoned their home on Turk Road.

²⁰ App. Ex. 3 at 2.

demanded that Mike remove a gate across an old logging road that Ford claimed was blocking access to his property. Ford said that if Crites failed to remove the gate, he would cut it open.²¹

This matches Ford's account, who acknowledges discussing the gate with Mike on Saturday night. Ford also agrees that he told Mike that he would return the next morning at 10:00 a.m., and expected the gate to be open.²²

Flora did not attend the planned meeting, and he never saw Mike again.

Ford's initial story to law enforcement was that he and his wife returned on Sunday morning to spray weeds on their property, and that when they got to the gate, it was cut open. He explained that he needed to move a steel post to get the sprayer through. He claimed not to have seen Crites that day.²³

On Tuesday, June 28, Marc Flora reported that Mike was missing. Law enforcement began an investigation. Flora maintained a motion-

²¹ App. Ex. 3 at 2.

²² App. Ex. 3 at 4.

²³ App. Ex. 3 at 4–5.

activated camera on his property that covered Turk Road above Mehan and Wessel's property.

The video shows a red Chevrolet pickup registered to Ford heading up towards the disputed gate on Mike's property Saturday night.²⁴ This is consistent with what Mike told Flora and what Ford told law enforcement.

On Sunday morning at 10:37 a.m., Ford's truck again appears on the video, but contrary to Ford's claim, it was not pulling a weed sprayer.²⁵ That afternoon, the truck went quickly back down the road. It still was not carrying a weed sprayer.

The next day—Monday—at 2:50 p.m., Ford's truck brought a weed sprayer up the road for the first time. It went back down the road an hour and a half later, but it did “not appear that a significant amount of liquid had been removed from the sprayer.”²⁶ It turns out that the Fords did not even get the weed sprayer from the weed district until Monday June 27, in direct conflict with Leon Ford's initial story.²⁷

²⁴ App. Ex. 3 at 6.

²⁵ App. Ex. 3 at 6.

²⁶ App. Ex. 3 at 7.

²⁷ App. Ex. 3 at 7.

C. After Mike's disappearance.

In October 2011, Forest Service employees discovered garbage bags full of bones and decomposing tissue off of MacDonald pass.²⁸ After noticing that portions of the remains were zip-tied together, they called law enforcement.²⁹

The bones were human, and speculation swirled that they might be the remains of Mike Crites. Whoever it was had been “sawn apart.”³⁰

During the time this discovery was being widely reported in the local media, Mehan and Wessel entered Mike's default in their tort lawsuit against him.

DNA testing eventually revealed that the remains were Mike, though it was also reported that the remains were incomplete. The Estate was opened, and Mehan and Wessel filed creditor claims against it, falsely asserting that they had each received a judgment against the Estate.³¹

²⁸ App. Ex. 3 at 8.

²⁹ App. Ex. 3 at 8.

³⁰ App. Ex. 3 at 8.

³¹ App. Ex. 10. Creditor's Claims of John Mehan and Katy Wessel.

Following the DNA confirmation, Lewis & Clark County detectives interviewed Leon and Debbie Ford in Washington. The interviews were separate, and their stories “differed significantly” from what they said after Mike’s disappearance. After he was presented with information gathered in the investigation, Leon “changed his story yet again to conform to facts provided to him by law enforcement.” The statements made by Leon and Debbie were not consistent with each other. “When confronted with these inconsistencies, both changed their stories. It was apparent to detectives that the Fords were being untruthful in their statements to law enforcement.”³²

In the summer of 2012, Gloria Flora reported to law enforcement that the game cameras had been removed from trees on their property.³³ Despite his awareness that the cameras were being used in the murder investigation, the video shows Mehan walking toward the cameras before the footage stops.³⁴ For this, the State charged Mehan with felony evidence tampering and misdemeanor criminal trespass.³⁵

³² App. Ex. 3 at 9.

³³ App. Ex. 3 at 10.

³⁴ App. Ex. 3 at 10.

³⁵ App. Ex. 3 at 1–2.

During that same summer, Mehan told somebody at a public event in Helena that it would be “impossible” for police to develop a DNA profile from the bones recovered on MacDonald Pass, because they were missing a specific body part.³⁶ At the time, while it had been reported that a complete skeleton was not recovered, “the specific body parts that were missing from the skeleton [were] known only to law enforcement.”³⁷

The missing body part that nobody was supposed to know about? Mehan correctly identified it as Mike’s skull.³⁸ Two months later, it was found near Elliston.³⁹

* * *

The default against the Estate was eventually set aside,⁴⁰ but Mehan and Wessel’s case against the Estate continues. Their home has been searched at least twice in the murder investigation.⁴¹ The Estate believes that the Fords’ Washington home has also been searched.

³⁶ App. Ex. 3 at 11–12.

³⁷ App. Ex. 3 at 12.

³⁸ App. Ex. 11, Deposition of John Mehan in DDV-2011-443 at 205–209.

³⁹ App. Ex. 12, Helena IR article, posted 2012–10–04.

⁴⁰ App. Ex. 9, Order Setting Aside Default in DDV-2011-443.

⁴¹ App. Ex. 13, Helena IR articles dated 2012–10–04.

Both Mehan and Wessel have suggested that Mike Crites might still be alive, and that the entire murder investigation could be an elaborate hoax.⁴²

D. The County refuses to provide any information to the Estate—even information the Estate had a statutory right to know.

The County Attorney's office has repeatedly refused to provide any information related to the investigation to the Estate or its attorneys, or even to speak to them. Most recently, the County sought to prevent the Estate from obtaining a copy of Mike's autopsy report. The coroner told the Personal Representative that, after he "checked with our County attorney," he was "not able to release this to you at this time." The coroner released it only after the Estate pointed out that it had a statutory entitlement to the autopsy report.⁴³

After reviewing the autopsy report's details, the Estate did what it has done many times, and contacted the County Attorney to see if his office was willing to release to the Estate the CCJI relevant its claims

⁴² App. Ex. 11, Deposition of John Mehan, at 162–63, 204–05, 207; App. Ex. 14, Deposition of Katy Wessel in DDV-2011-443 at 85, 126.

⁴³ App. Ex. 15; citing § 50–21–104.

and defenses. Alternatively, the Estate suggested that it could meet with the County Attorney “to work out a plan to seek judicial guidance on exactly what you could stipulate to releasing to the Estate in a cooperative declaratory judgment action” under § 44–5–303, MCA.⁴⁴

The County Attorney responded with a terse two-paragraph letter, stating “I believe the release of confidential criminal justice information regarding the investigation of Mr. Crites’ homicide should not be placed into the public realm because it would jeopardize the State’s ability to prosecute someone for the homicide and the investigation is ongoing.”⁴⁵ The County suggested no alternative solution, and in any event, it ignored that the Estate has always pledged to keep the information confidential, and has never suggested that the information be placed in the “public realm.”

STANDARD OF REVIEW

This Court reviews a district court’s conclusions of law for correctness. *Bozeman Daily Chronicle v. City of Bozeman Police Dep’t*, 260 Mont. 218, 222, 859 P.2d 435, 437 (1993).

⁴⁴ App. Ex. 16.

⁴⁵ App. Ex. 17.

SUMMARY OF THE ARGUMENT

This Court has repeatedly held that when a party petitions for the release of confidential criminal justice information, a district court is required to conduct an *in camera* review of the information and then balance the right to know versus any asserted privacy interests in the material. It is then required to make written findings about what parts of the information are releasable, and to make redactions as necessary.

Here, the district court erred when it concluded that the prosecutor could exercise veto power over a petition for the release of confidential criminal justice information. That conclusion is based on an erroneous reading of the statute, and it is inconsistent with the Montana Constitution's guarantee that citizens have a fundamental right to know about the workings of government agencies.

That right should be especially broad in a case like this, where a murder victim's Estate is seeking information it needs to defend itself in a case filed by people whose homes have been searched repeatedly in the murder investigation. The right should be subjected to even further scrutiny where, like here, the party seeking the information has asked for the information to be released under seal and for the district court to retain supervision over the matter to provide guidance on how and when the information can be disclosed publicly.

ARGUMENT

The district court's interpretation of the statute is wrong because it conflates two separate parts of the statute. It also ignores the Estate's constitutional right to know, which the Estate acknowledges must be balanced against the right to privacy.

In any event, this Court's previous decisions mandate that when someone files a petition for the release of CCJI, a district court must conduct an *in camera* review to weigh the petitioner's constitutional right to know against any privacy interests that might be implicated by the dissemination of the information.

Most cases addressing whether someone is entitled to criminal justice information have involved inquiries from the press, with the obvious intent to disseminate the information to a wide audience. *See e.g. Bozeman Daily Chronicle*, 260 Mont. 218, 859 P.2d 435. Other cases involved the dissemination of CCJI to parties with interests directly adverse to those with protectable privacy interests in the information, like an insurance company seeking to justify nonpayment of insurance benefits because of the actions of its insured. *Allstate Ins. Co. v. City of Billings*, 239 Mont. 321, 780 P.2d 186 (1989); *Montana State Fund v. Simms*, 2012 MT 22, 364 Mont. 14, 270 P.3d 64.

This case is something different—and something that does not interface cleanly with the statute for two distinct reasons. First, the Court has apparently not faced a situation in which the *victim* sought

information on an uncharged crime but the county attorney refused to provide it.

Second, the Estate is not seeking information for purposes of public disclosure. Indeed, the Estate's petition requests that if the district court concludes that it is entitled to some information, that the information should only be released to the Estate *under seal*, and that the Court should retain supervision over the matter so it can make further determinations about how and when the Estate can use that information to defend itself in the ongoing litigation. This is expressly contemplated by § 44–5–303(3) (“Unless otherwise ordered by a court, a person *** that accepts confidential criminal justice information assumes equal responsibility for the security of the information with the originating agency.”)

To be sure, the Estate wants nothing more than to see those responsible for Mike's death brought to justice through the criminal system. But after more than seven years, the chances of that seem increasingly remote.

There is another oddity to this case. As explained in the sealed affidavits filed in the district court, the Estate believes it has information that would help the criminal investigation. Yet even after sharing that information with law enforcement, nobody has ever

bothered to follow up on it.⁴⁶ Likewise, there are several instances in which the County failed to take advantage of singular investigative opportunities—opportunities which have now passed, never to return.⁴⁷ These facts make the County’s refusal to work with the Estate even more curious.

At any rate, the district court’s failure to conduct an *in camera* inspection of the CCJI and then make any findings about whether any of it should be released to the Estate—or why not—hinders the Estate’s ability to address the error in a substantive manner. For now, all the Estate can do is point out that this Court has required district courts to apply a specific test when weighing a request for the release of CCJI. The Estate passes that test, and so the district court erred when it refused to conduct an *in camera* review of the CCJI. Beyond that, this case is unique, and after concluding that the district court must conduct that review, the Court should direct the district court to apply a more deferential standard of review because the Estate is seeking information about the decedent it represents, and especially because the Estate has no intention to turn around and release the information to the public.

⁴⁶ Sealed Affidavit of Kodadek, ¶¶ 8–10 (Doc. 6.)

⁴⁷ Sealed Affidavit of Kodadek, ¶¶ 21–33. (Doc. 6.)

I. The district court misconstrued the CCJI statute because a prosecutor’s decision about releasing CCJI without court authorization under § 44–5–303(2) is entirely separate from a private citizen’s petition under § 44–5–303(6), which requires court authorization.

Section 44–5–303, MCA provides for the release of confidential criminal justice information (CCJI) under several scenarios, some of which require the involvement of a court and some of which do not.

This is clear from the plain language of the statute, because subsection (1) states that “[e]xcept as provided in subsections (2) through (4), dissemination of [CCJI] is restricted to criminal justice agencies, to those authorized by law to receive it, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.” Section 44–5–303(1).

First, § 44–5–303(2), MCA, provides that a county attorney’s office may, *without involving a district court*, release CCJI “to the victim of the offense” so long as the prosecutor believes it would not jeopardize a pending investigation. This happens all the time, especially when a case involves both civil and criminal liability. For example, after a county attorney has already provided information to a criminal defendant in discovery, there is no chance that providing the same information to the victim or victim’s representative could compromise the investigation. And so this section of the statute is the most permissive from a

prosecutor's perspective, and this is why the release of CCJI does not require court approval in these circumstances.

Subsections (3) and (4) do not address the process of releasing CCJI to private parties, and therefore the explanation of how the statute works in subsection (1) is not relevant to those subsections. But subsection (1) is relevant to subsections (5) and (6), both of which contemplate dissemination only after court approval.

Section § 44–5–303(5), MCA, allows for a prosecutor-initiated approval process. It states that if a prosecutor receives a written request for CCJI related to a case that they will either not prosecute or is fully adjudicated, the prosecutor may file a declaratory judgment action asking a district court to conduct an *in camera* review of the information. The court must then weigh the merits of public disclosure versus individual privacy, and then direct the release “of whatever portion of the investigative information or edited version of the information the court determines appropriate.” *Id.* This is the procedure the Estate first proposed to the County, but the County was not interested.

But that is not the end of the analysis, because the procedures set forth in subsection (5) “are not an exclusive remedy.” Section 44–5–303(6), MCA.

Under subsection (6), a “person or organization may file any action for dissemination of information that the person or organization considers appropriate and permissible.” This is the subsection cited by the Estate in its original petition, along with Article II, § 9 of the Montana Constitution, which provides that “[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”

Under the plain language of the statute, and contrary to the district court’s conclusion, while the procedures set forth in subsections (5) and (6) require the approval of the district court, nothing in (6) contemplates that a prosecutor can exercise absolute veto power over a petition filed under that subsection.

Instead, when a private citizen or an entity files a petition under § 44–5–303(6), MCA, a district court is required to conduct an *in camera* review of the information, and address “the inevitable conflict between the ‘right to know’ and the ‘right to privacy’ to determine” what information should be released to the petitioner. *Montana State Fund*, ¶ 21.

Because the Estate petitioned under this subsection, the district court erred when it declined to conduct this balancing test.

II. The Estate is authorized by law to receive the criminal justice information and the district court erred by failing to undertake the required balancing test.

Section 44–5–303(1) outlines who may receive confidential criminal justice information: “criminal justice agencies, “those authorized by law to receive it,” and “those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.” Section 44–5–303(1), MCA.

The Estate does not satisfy the first criteria.

The Estate does, however, meet the second criteria, because this Court has held that under the Montana Constitution’s right to know provision at Article II, § 29,⁴⁸ any person is “authorized by law” to receive criminal justice information. *Bozeman Daily Chronicle*, 260 Mont. at 224, 859 P.2d at 438–39. This right is qualified only by the right to privacy at Article II, § 10 of the Montana Constitution. The third criteria is therefore extraneous—at least in this case—because it is subsumed by the second.

Once a party has met its initial burden to show they are authorized by law to receive the CCJI, the burden shifts to the agency

⁴⁸ Article II, § 29, the “Right to Know” provision, provides that “No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

in possession of the information “to demonstrate why all or portions thereof should not be released because the rights of individual privacy outweigh the merits of public disclosure.” *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441.

Throughout this process, the Estate has recognized that the CCJI related to Mike’s murder likely includes information that might implicate the privacy interests of some individuals. But as the Estate has also noted, if the district court releases CCJI to the Estate, the Estate will have obligations to guard against the public disclosure of that information, barring a court order to the contrary. Section 44–5–303(3), MCA.

Beyond that, many of the privacy rights implicated by the CCJI related to the murder investigation involve privacy rights personal to Mike and his Estate, including:

- The circumstances and facts surrounding Mike’s murder;
 - The additional forensic test results referenced by but not documented in the autopsy report;
 - The statements collected by law enforcement addressing the circumstances of Mike’s murder;
 - The physical evidence collected during the murder investigation;
- and

- The facts tending to show that specific individuals knew things about the murder that have never been placed into the public record.

This list is, of course, put together without a thorough understanding of the facts contained in the County’s investigative file. And that is precisely the point—the Estate is hobbled in its defense of a serious tort case and a potential wrongful death case because the County baldly asserts that releasing information to the Estate will somehow compromise the murder investigation. But it can’t or won’t say how—especially because the Estate will be under a statutory mandate to not disclose any information it learns without further order of the district court.

At bottom, if the County is correct, the Estate might be kept in the dark forever. This is inconsistent with Article II, § 9’s guarantee that the Estate has a right to know and “right to examine documents” created by public agencies—especially the documents related to Mike himself. Because the Right to Know provision is located with Article II’s Declaration of Rights, it is a fundamental right subject to the highest degree of protection. *See e.g. State v. Tapson*, 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305. Here, by declining to engage in any review of those documents, the district court failed to provide *any* level of constitutional due process to the Estate.

Again, the Estate recognizes that there may be specific information within the County's trove of CCJI that may not be fit for release to the Estate, or that may be subject to redaction. But that is precisely why this Court has held that when a party petitions for the release of CCJI, "[e]ach determination regarding the dissemination of [CCJI] requires careful, fact-specific balancing of conflicting constitutional rights." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 21, 333 Mont. 331, 142 P.3d 864.

The district court should be directed to conduct this balancing test and make specific findings about the releasability of the CCJI to the Estate, and whether any privacy rights that may be implicated can be addressed via specific redactions.

CONCLUSION

The Estate requests that this Court reverse the district court and direct it to:

- (b) Conduct an *in camera* review of the entirety of the confidential criminal justice information (CCJI) associated with the murder of Mike Crites;
- (c) Weigh whether the Estate's constitutionally guaranteed right to know and status as a victim representative eclipse any privacy interests in that information;

- (d) Release that information to the Estate upon a finding that it has a right to know, subject to the mandate that the Estate not disclose publicly any of that information without leave of the Court or the consent of the County Attorney;
- (e) Retain supervision over this matter so the Estate can seek leave to use the information when necessary to defend itself and, potentially, to prosecute its own civil action; and
- (f) Revisit the Estate's entitlement to attorney fees under Article II, § 29 of the Montana Constitution and § 2–3–221, MCA.

September 24, 2018.

WORDEN THANE P.C.
Attorneys for Petitioner/Appellant

/s/ Jesse Kodadek
Jesse Kodadek

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I certify that this brief uses 14-point, double-spaced Century Schoolbook font, and that the body of the brief is 4870 words, as calculated by Microsoft Word.

/s/ Jesse Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-24-2018:

Leo John Gallagher (Prosecutor)
Lewis & Clark County Attorney Office
Courthouse - 228 E. Broadway
Helena MT 59601
Representing: Lewis and Clark County
Service Method: eService

Melissa Broch (Attorney)
County Courthouse-Lower Level
228 E. Broadway
Helena MT 59601
Representing: Lewis and Clark County
Service Method: E-mail Delivery

Electronically Signed By: Jesse C. Kodadek
Dated: 09-24-2018