IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0404



Robert S Pierce,

Petitioner and Appellant,

v.

State of Montana,

Respondent and Appellee.

APPELLANTS PETITION FOR RE-HEARING PURSUANT TO APPELLATE PROCEDURE RULE 20(2)(c)

NOW COMES, Robert S. Pierce, Pros Se Appellant in DA 18-0404, with this request for a re-hearing. Pursuant to Rules of Appellate Procedure Rule 20(2)(c), the Supreme Court will consider a petition for re-hearing presented only upon the following grounds:
Rule 20(1)(a)(i) that it overlooked some fact material to the decision:
Rule 20(1)(a)(ii) that it overlooked some question presented by counsel that would have proven decisive to the case; or
Rule 20(1)(a)(iii) that it's decision conflicts with a statute or controlling decision not addressed by the Supreme Court.

DISCUSSION

This re-hearing is warrented pursuant to Rule, App.Proc Rule 20(1)(a)(i) due to the Supreme Court overlooking some facts material to the decision.

A) This courts judgement at 13 states: Pierce adds that because MR's prior statments establish the falsity of her trial testimony, the State violated his right to due process in allowing MR to testify falsely. Again, the out of context statements Pierce relies upon here do not demonstrate that her allegations were false. Pierce fails to establish that the prosecution knowingly presented false testimony.

The Court failed to address the claims in claim 5, as presented starting on page 27, which clearly articulated that: A) the changes in statements, between the pre-trial statements, trial statements and post trial statements are profound. Ground 4 of the Petition for Post Conviction covers the differance between the 2nd forensic interview that was used for charging Mr Pierce, and the corresponding trial transcripts from the complaining witnesses(See Ground 4 and supporting exhibits, including transcripts of the first two forensic interviews and transcripts for 4/23/2013).

Post trial statements do prove the forensic interview was based on false statements, as were the trial statements fabricated, even though the complaining witness affirmed to tell the truth in both forensic interviews and swore under oath to tell the truth at trial(Bates 0372, 0391 and TR 4/23/13 @ 13).

The answers to the complaint filed in CV 15-99 as documents 14 and 15 provided a wealth of information for the proof of these false statements. These answers were filed under penalty of perjury and were for both the complaining witness and her mother(Appellant opening brief exhibit tab E: 1).

The attachments to the opening appeal brief labeled Tab A: 26-53 pgs and ground 4 of the petition for post conviction relief clearly shows that the interview statements used for charging and investigation, and determined by the State of Montana to be inadmissible at trial,(See Doc 79, Tab A:24, page 8 and tr 3/11/13 @ 31, AKA Tab A: 25) "for reasons of their own" and the prosecutor stated: "When I have an important interview like that, it's my practice to go through there and, for my own work product to number the statements made and to catalog those statements, so I know what is said."

So if the prosecution states, "I know what is said," and Documents 14 and 15 show both witnesses denied, under penalty of perjury, interview statements on pages 0374, 0377, 0378, 0424, 0425 and 0427 and trial testimony, given under oath on 4/23/2013 pages 91, 92 and 208, and because Mt.R.Evid 1006 allows that the contents of volumious writings, records or photographs which cannot conviently be examined in court may be presented in the form of a chart, summary or calculation. The original, or duplicate, shall be made available for examination or copying or both, by other parties at a reasonable time and place. The Court may order that they be produced in court.

This court ordered the trial records and transcripts, but not the interview transcripts that the State deemed inadmissible. The interview transcripts were provided with the Post conviction records.

Mt.R.Evid Rule 1007 states: Contents of writings, records or photographs may be proved by the testimony or depositions of the party against whom offered or by that party's admission, without accounting for the nonproduction of the original:

Because transcripts, interview and trial and admissions are proof of statements and because transcripts show the prosecutor "knew what was said (Tr 3/11/13 @ 33) and because transcripts show the statements were inadmissible only because of prosecutions "own reasons"(Tr 3/11/13 @ 31) and because summaries of the interviews and trial statements(Tab A: 26-53, and ground 4 of Petition for post conviction) are allowed by Mt.R.Evid 1006, this proves a wrong ruling by this court that "Pierce fails to establish that the prosecution knowingly presented false testimony. These unaddressed issues prove much more than the "out of context statements Pierce relies upon."

Courts nation wide have discussed false statements:

A Lie is a lie, no matter what it's subject, and if it is any way relevent to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elict the truth.(quoting People v. Savvides 1 N.Y.2d 554-557, 136 N.E.2d 853, 854-855, 154 N.Y.2d 885(NY Ct App 1956))

It is understood that the recanting witness lacks credibility by virtue of the fact that he has already lied at least once, where a witness makes subsequent statements directly contradicting earlier testimony, the witness is lying now, was lying then or lied both times. State v. Perry 253 Mont 455, 462-63 758 P.2d 208 272-73(1988).

Counsel's failure to impeach with prior inconsistant statements was ineffective assistance. United States v. Tucker 716 F.2d 585-87(9th Cir 1983).

The dignity of the United States Goverment will not permit the conviction of any person on tainted testimony. Masarosh v. US 353 US 1, 1 L.Ed.2d 1, 77 S.Ct 1(1956).

B) This court has made several referrences about the inadmissibility of pre-trial interviews, such as those made at 7): to support his claim of actual innocense, Pierce argues (4) the transcripts of Mr's Per-trial interviews were deemed inadmissible but then improperly considered by the therapist conducting the psychsexual evaluation."

The following is based on Rule of App. Proc Rules 20(1)(a)(iii) that it's decision conflicts with a statute or controlling decision not addressed by the Supreme Court.

Based on records provided to the Supreme Court these issues are relevent and unaddressed.

The prosection stated(Tr 3/11/13 @ 33); "When I have an important interview like that, it's my practice to go through there and, for my own work product, to number the statements made and to catalog those statements, so I know what is said."

In Dc 12-29 Doc 104, Memorandum and Order, page 1: "The State advises that it does not intend to introduce the recordings themselves of the interviews at trial."

The Court stated(Tr 3/11/13 @ 31): "The State specifically advises the Court however, that for reasons of it's own, it does not intend to introduce transcripts of two statements...The State indicates that it does not intend to introduce transcripts or the recording themselves of either of these interviews."

In document 79, DC 12-29, States Response to Defendants Motions in Limine 1 - 11, page 8: "Never the less, for other reasons, the State finds that both the transcripts of the victim's statements and the recordings of the victim's interviews to be

inadmissible at trial."

When the State responded to the petitioners petition for post conviction relief on pages 8 and 9 they articulated: "The Montana Rules of evidence including the victims statements govern the admissibilty of evidence. See Mont.R.Evid 101. The general rule pursuant to Mont.R.Evid 801 and 802 is that the victims statements constitute inadmissible hearsay at trial. In the present case, the Defendant filed a motion in limine asking the Court to issue an order precluding the State from admitting the victims statements at trial. The State did not object to this portion of the Defendants Motion in Limine because the State agreed with the defendant that generally the admission of a victims statements are not admissible at trial."

This statement does not ring true to hearing statements or law. The Defendants Motion in Limine was to exclude the prosecutors work product, not the original transcripts or recordings:

"This is my work product. It seems to have been inadvertently sent to Mr Bunitsky(Tr 3/11/13 @ 33.12)...This was inadvertently sent to him. It's just numbers and a couple comments(Tr 3/11/13 @ 33.20)."

The defense counsel the stated: "I accept Mr Guzynski's explaination Judge, It makes sense to me now. I have some idea, or I can Speculate as to why he did what he did, and I know I'm not entitled to his work product, so I won't push that issue any further. If they what to provide me a clean copy, that's fine(TR 3/11/13 @ 34)."

The Defense Counsel also stated: "Judge, I thank the State for their candor and not wanting to introduce these transcripts or the video. However, I think it's a violation of discovery and my clients due process. The time for me, if, by chance, they had to introduce this qestion to someone about it from the stand. There are markings on this transcript, Judge, which I don't understand, and the only person who put them on there knows what they are and what they mean.

The time for me to find out is not while they're on the stand testifying. I'm entitled to know ahead of time so I can properly prepare for trial and properly prepare for cross examination(Tr 3/11/13 @ 32)."

Motions in Limine - When not proper to exclude prior inconsistant statements: A Motion in Limine may not properly prevent the use of prior inconsistant statements fro impeachment purposes under this rule. St v. Lias 218 M 124, 706 P.2d 500, 42 St Rep(1985).

The equitable doctrine of Judical estoppel prevents a party from taking a postion contradictory to the postition taken on another issue or in a previous but relevent proceeding.

A conviction secured by the use of perjured testimony known to be such by the prosecuting Attorney, is a denial of due process. White v Ragen 324 US 760, 65 S.Ct 978, 89 L.Ed 1348(1945)

Cr'men Falsi 1) A crime in the nature of perjury, 2) Any other offense that involves some element of dishonesty or false statement.

> In the unlikely event that a victims testimony at trial is inconsitant with her prior statements, the Montana Supreme Court recently affirmed a district courts admission of a childs interview, holding such admission did not violate the defendants right to confrontation, nor was it hearsay, State v Baker 2013 Mt 113, 16-32, 370 Mont 43, 300 P.3d 696.
>
> Testimonial hearsay statements of witnesses absent from trial are inadmissible under the confrontation clause, unless the declarent is availble and the defendant had a prior opportunity for cross examination. When the declarent appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. State v Howard 2011 Mt 246, 362 Mont 196, 265 P.3d 606.
>
> When the declarent appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. Crawford v. Washington 541 US 36, 68, 124 S.Ct 1354, 158, L.Ed.2d 177(2004).
>
> The opinions of the US Supreme Court show that the right to Confrontation is a trial right, designed to prevent improper restrictions on the type of questions that defense Counsel may ask during cross-examination. See California v. Green 399 US 149, 157(1970),

The only reason the State would exclude the only forensic evidence in their case was if they knew the forensic interview statement were false, thereby leading to false testimony.

C) Under R.App.P Rule 20(1(a)(ii) that it overlooked some fact material to the decision.

It was ordered on February 13, 2019 that seperate appendix's filed under Rule 12(5) of the Montana Rules of Appellate Procedure, the Clerk of Court is directed to attach a November 16, 2018 appendix and a February 1, 2019 Appendix to Pierce's opening brief. As the Court documented, the State of Montana has not filed a response to the February 1, 2019 appendix and the State did not repond to his first request either(November 16, 2018. This court did not address his motion at that time. Upon consideration and no objection raised, therefore IT IS ORDERED.

Because these issues in these appendix's were not objected to, nor were they reponded to, the Supreme Court was obligated to review and rule on the fact that the State called the charging statements inadmissble and the requirement that those statements be excised from the charging documents and replaced with material admissible evidence other than the victims statements, then continueing to file amended informations with no probable cause and proving

inadmissible information to be used in the psychosexual evaluation and PSI report, and thereby causing sentencing to be based on false information.

These issues were not reviewed or address by the Supreme Court, even though the State has an obligation to either brief an issue or concede it. State v Greeson, 2007 Mt 23, 336 Mont 152 P.3d 695.

Because the State did not object or respond to the appendix's, they conced those issue and the Supreme Court Should rule in Pierce's favor. As was addressed in the seconda appendix:

> It is not required that information in the affidavit supporting a charge, which might later be found inadmissible at trial, be excised before the determination or probable cause is made. If at trial, the State could not prove it's case against Holt with admissible evidence, Holt could move to dismiss at the cloase of the States case-in-chief and such motion would have to granted. State v Holt 2006 Mt 151 332 Mont 426, 139 P.3d 819 P29.
>
> No one can be convicted on the basis of facts different from those facts on which the charges were based. Russell v. United States 369 US 749, 82 S.Ct 1038(1962).

## CONCLUSION

The appellant believes that for the mentioned reasons and facts that were filed with the Supreme Court and elborated in this petition, and pursuant to Rule 20(1)(a) and Rule 20(2) of Rules of Appellate Procedure, that a re-hearing is warrented. All the issues addressed in this request were unadressed by the Supreme Court and this in (C) were unopposed and unresponded to by the State of Montana. Based on these issues the decision to affirm should be reversed as it's decision was an erroneous determination.

DATED this 3 day of June, 2019

Robert S Pierce
Pro Se Appellant

## CERTIFICATE OF SERVICE

I do hereby certify that the undersigned were sent true and accurate copies of this APPELLANTS PETITION FOR RE-HEARING PURSUANT TO APPELLATE PROCEDURE RULE 20(2)(c) and were served by first class US Postal Service.

Mary Elizabeth Cochenour
Daniel Guzynski
Special Deputy County Attornies
for Anaconda/Deer Lodge County
PO Box 201401
Helena, Mt 59620-1401

Mardell Ployhar
Assistant Attorney General
PO Box 201401
Helena, Mt 59620-1401

Timothy C. Fox
Montana Attorney General
PO Box 201401
Helena, MT 59620-1401

Ben Krakowka
Anaconda/Deer Lodge
County Attorney
800 South Main
Anaconda, MT 59711

## CERTIFICATE OF COMPLIANCE

Pursuant to Rules Of Appellate Procedure Rule 20(3) this petition for re-hearing does not exceed 10 pages of prepared monospaced typeface or typewritten

Dated this 3 day of June, 2019

Robert S Pierce
Pro Se Appellant