

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0260

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JENNIFER MICHELLE NORRIS-OSTERMILLER,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County, the Honorable Judge Donald L. Harris Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the Municipal Court err when it denied Defendant's Motion to Dismiss the Criminal Possession of Dangerous Drug Charge due to the intentional or negligent suppression of exculpatory evidence involving the destruction and loss of the Yellowstone County Detention Center booking video showing the search of Ms. Norris-Ostermiller.

## **STATEMENT OF THE CASE**

Defendant and Appellant, Jennifer Michelle Norris-Ostermiller was involved in a multi-car accident in Billings, Montana that occurred on December 13, 2016. Ms. Norris-Ostermiller was charged with Driving Under the Influence of Drugs in violation of Mont. Code Ann. §61-8-401(1) and Criminal Possession of Dangerous Drugs in violation of Mont. Code Ann. § 45-9-102(2). (D.C. Doc. 2, p. 3-5). On September 26, 2017, the City dismissed the charge of Driving Under the Influence of Drugs. (D.C. Doc. 2, p.131). Ms. Norris-Ostermiller proceeded to trial only on the charge of Criminal Possession of Dangerous Drugs.

A jury trial was then held on October 23, 2018. After presentation of the cases, the jury returned a guilty verdict to the charge of Criminal Possession of Dangerous Drugs. (D.C. Doc. 2, p. 12). The Municipal Court then proceeded to sentencing and imposed the following sentence: 6 months deferred imposition of sentence, a \$500 fine plus court surcharge, jury fees of \$331, a public defender fee

of \$250, and a condition that Ms. Norris-Ostermiller complete a chemical dependency evaluation and follow the recommendations. (D.C. Doc. 2, p. 2).

On November 21, 2018, Ms. Norris-Ostermiller timely filed a Notice of Appeal of her conviction for Criminal Possession of Dangerous Drugs in violation of Mont. Code Ann. § 45-9-102(2) to the Montana Thirteenth Judicial District Court. (D.C. Doc. 4). On March 11, 2019, the District Court after reviewing the briefing from the parties and the Municipal Court record affirmed the decision. (D.C. Doc. 11). On March 13, 2019, Ms. Norris-Ostermiller filed a notice of intent to appeal with the Thirteenth Judicial District Court. (D.C. Doc. 12). On April 30, 2019, defendant timely filed a Notice of Appeal with this Court. (D.C. Doc. 13). This Court has granted seven extensions of time to file the opening brief. The Opening Brief is currently due February 10, 2020.

### **STATEMENT OF THE FACTS**

On December 13, 2016, Ms. Norris Ostermiller was involved in a multiple vehicle accident in Billings, Montana. (D.C. Doc. 2, p. 3). Officer Gaertner of the Billings Police Department was the primary officer on the scene. (D.C. Doc. 3, Audio Tr. Trial, Oct. 23, 2018 ("10/23/18" Trial Tr.) at 1:05:21). Officer Kirkpatrick of the Billings Police Department was responsible the crash investigation. (10/23/18 Trial Tr. at 2:57:17-2:57:26). Officer Kirkpatrick interviewed a witness who allegedly stated that Ms. Norris-Ostermiller smelled

like marijuana. (10/23/18 Trial Tr. at 3:01:48-3:01:55); (D.C. Doc. 2, p. 3-4).

However, Officer Kirkpatrick testified that even though his Watchguard video was recording, he never downloaded it from the hard-drive and entered it into evidence. (D.C. Doc. 3, Audio Tr. Brady Hearing, Oct. 23, 2018 ("10/23/18 Brady Tr.") at 1:04:54-1:05:04). The officer testified that the recorded video was preserved for at least 90 days. (10/23/18 Brady Tr. at 1:03:54-1:04:33). Ms. Norris-Ostermiller was then thoroughly searched at the scene by Officer Kirkpatrick, including her coat, and no marijuana was discovered on her person at that time. (10/23/18 Trial Tr. at 2:55:06-2:55:10, 2:59:27-2:59:28); D.C. Doc. 3, Exhibit Dash Cam Video 1, ("12/13/16" Dash Cam) at 35:00-35:33).

The officers' investigation at the scene resulted in Ms. Norris-Ostermiller's arrest for suspicion of Driving Under the Influence pursuant to Mont. Code. Ann. 61-8-401. (D.C. Doc. 2, p. 3-4). Ms. Norris-Ostermiller was then transported to the Yellowstone County Detention Center for further evaluation. *Id.*

At the Yellowstone County Detention center, Ms. Norris-Ostermiller was searched by Officer Tatro who stated the following in her report:

On 12/13/16, I was working as the Booking Officer at the Yellowstone County Detention Facility. At approximately 2305 hours, I was conducting a routine pat search at the remand window, on Ostermiller, Jennifer (DOB: 4-28-74). When I was searching the left side of her jacket, I found a plastic baggie with a green leafy substance inside. I gave the plastic baggie with contents to Billings

Police Department officers Gaertner and Ihde. No other contraband was found.

(D.C. Doc. 2, p. 130).

Officer Tatro testified at the trial on October 23, 2018 that as part of her duties at the Yellowstone County Detention Center that she performs pat searches of inmates. (10/23/18 Trial Tr. at 2:46:33-2:46:43). Officer Tatro confirmed that she performed a search of Ms. Norris Ostermiller. (10/23/18 Trial Tr. at 2:46:59-2:47:07). She testified that she located contraband on Ms. Norris-Ostermiller. (10/23/18 Trial Tr. at 2:48:11-2:48:16). Officer Tatro testified that she "located a baggie of a green leafy substance in her left side jacket pocket." (10/23/18 Trial Tr. at 2:48:18-2:48:23). After locating the substance, she then slid it "underneath the window in plain view of the cameras" where it was then "left on the counter until the arresting officer takes it into custody." (10/23/18 Trial Tr. at 2:48:54-2:49:08). Officer Tatro then confirmed that there is video of the booking area where she searched the defendant and that it is recorded "24/7". (10/23/18 Trial Tr. at 2:50:06-2:50:11). The City stated in its Response Brief filed on October 22, 2018, that the video was "maintained under the control of the County for a period of approximately six (6) months. (D.C. Doc. 9, p. 6).

On December 13, 2019, Ms. Norris-Ostermiller was then charged with Possession of Dangerous Drugs pursuant to Mont. Code Ann. § 45-9-102(2) and

Driving Under the Influence of Drugs in violation of Mont. Code Ann. §61-8-401(1). (D.C. Doc. 2, p. 3-4). On December 14, 2016, Officer Gaertner performed a test on the substance in the bag and confirmed it contained marijuana. (D.C. Doc. 2, p. 129). The arraignment for Ms. Norris-Ostermiller's charges was scheduled with the Municipal Court for December 29, 2016. (D.C. Doc. 2, p. 3-4).

On December 28, 2016, Ms. Norris-Ostermiller sent a pro se discovery request to the Billings City Attorney's office. (D.C. Doc 6, Exh. A); D.C. Doc. 2, p. 34). The discovery request stated the following:

To whom it may concern, I am requesting all discovery for the following case # 2016-00081354[,]... I am requesting all discovery 2 include - all dashcam footage + produced and preserved ... I am requesting all discovery to include all dash cam footage **and any other video taken produced and preserved - To include Jail Footage on top of video made by BPC** [.] Thank you so very much, ... Jennifer M. Norris [.]

*Id.* (**emphasis added**).

The State confirmed in its Response brief to the District Court that it had received the pro se letter requesting discovery. (D.C. Doc.9, p. 4). The Municipal Court also confirmed the fact that Ms. Norris-Ostermiller requested the booking video before she was arraigned and stated "we do know that." (10/23/18 Brady Tr. at 50:17-50:22).

Ms. Norris-Ostermiller was then arraigned on December 29, 2016. On, January 5, 2017, Ms. Merry Marr, public defender, appeared as counsel for Ms. Norris-Ostermiller. Ms. Norris-Ostermiller then waived her appearance at the omnibus hearing scheduled for January 31, 2017. (D.C. Doc. 2, p. 212). On July 11, 2017, Dan Minnis replaced Ms. Marr as attorney of record. Mr. Minnis then withdrew as counsel in November of 2017 (D.C. Doc. 2, p. 188). She also represented herself pro se at times during the proceeding. Mr. Arthur was then appointed to represent Ms. Norris-Ostermiller on March 15, 2018.

In addition to Ms. Norris-Ostermiller's discovery request made on December 28, 2016, she and her attorneys made additional requests for discovery and filed motions to compel. Defense counsel Mr. Minnis filed a Motion to Compel on September 7, 2017. (D.C. Doc. 2, p. 194-95). On November 14, 2017, Ms. Norris-Ostermiller filed a pro se Motion for Production of Documents and requested "a complete production of all investigative files, photographic and audio recordings, including a complete, unedited and unredacted copy of all police body camera and dash camera video and audio recordings." (D.C. Doc. 2, p. 172-74). On November 29, 2017, Ms. Norris-Ostermiller filed a pro se Motion for Production of Exculpatory and Impeachment Evidence and requested "all photographic and video/audiotape recordings in the possession of plaintiff or its statutory agent officers." (D.C. Doc. 2, p. 145-47).

A final pretrial conference was held on October 15, 2018. During this hearing, Mr. Arthur, defense counsel, made an oral Motion to Compel production of the booking video of Ms. Norris-Ostermiller and the Watchguard video from Officer Kirkpatrick. (D.C. Doc. 3, Audio Tr. Final Pretrial Hearing 2, Oct. 15, 2018 (10/15/18 Pretrial 2 Tr.) at 2:55-3:12; 4:34-4:45) At this hearing, defense counsel called to the Court's attention that Ms. Norris-Ostermiller had requested the booking video. (10/15/18 Pretrial 2 Tr. at 3:49-4:05). The Municipal Court then confirmed whether the City objected to production of the video and the City attorney stated "If it exists, then I have no objections." (10/15/18 Pretrial 2 Tr. at 4:11-4:17). Defense counsel also then requested Officer Kirkpatrick's Watchguard video from the scene of the accident. (10/15/18 Pretrial 2 Tr. at 4:34-4:45). The City stated that "if there is one, it will be in evidence." (10/15/18 Pretrial 2 Tr. at 4:47-4:49). The Municipal Court then addressing both the booking video and the Officer Kirkpatrick video stated that "so City, if they exist, get it to them immediately." (10/15/18 Pretrial 2 Tr. at 5:59-6:02)

Neither of these videos were provided to the defense after the final pretrial conference. On October 22, 2018, Mr. Arthur, defense counsel, filed a Motion to Dismiss the charge of Criminal Possession of Dangerous Drugs for violating Ms. Norris-Ostermiller's due process rights under *Brady*. (D.C. Doc. 2, p 78-80). The City filed a response .(D.C. Doc. 2, p. 47-52). Mr. Arthur then filed a reply brief.

(D.C. Doc. 2, p 35-37). The Municipal Court held a hearing on the Motion to Dismiss on October 23, 2018 prior to the commencement of the trial.

During the hearing on the Motion to Dismiss held on October 23, 2018, the City changed its position on providing the booking video, arguing "that is a county, that is not the city" and that "they have a very definite procedure to get booking tapes" and that the "defense has to serve a subpoena on them." (10/23/18 Brady Tr. at 44:09-44:32). The Municipal Court then asked whether the City was ever in the possession of the video, and the City Attorney stated "ever, no." (10/23/18 Brady Tr. at 44:57-45:03). The Court then stated that the prosecutor has no control over the procedure and the City Attorney stated "that is correct." (10/23/18 Brady Tr. at 45:03-45:21). The Court also confirmed the fact that Ms. Norris-Ostermiller requested the booking video before she was arraigned and stated "we do know that." (10/23/18 Brady Tr. at 50:17-50:22).

The Municipal Court then found that the City did not have access to the video and that it was defendant's obligation to obtain the video. (10/23/18 Brady Tr. at 54:54-55:18). The Court also concluded that even if Ms. Norris-Ostermiller requested the video from the City, the "City doesn't have to go out and get it." (10/23/18 Brady Tr. at 55:25-55:41). The Court also concluded that the "jail is not a City agent" and "we do not have anything to do with the county." (10/23/18 Brady Tr. at 55:41-55:53).

At the hearing on October 23, 2018, the Municipal Court also addressed the production of Officer Kirkpatrick's Watchguard video. With regard to Officer Kirkpatrick's Watchguard video, he testified that the video is "constantly recording" and "it's stored on a hard drive" for at least 90 days. (10/23/18 Brady Tr. at 1:04:01-1:03:33). He testified that a video is not in evidence because he did not download it. (10/23/18 Brady Tr. at 1:05:01-1:05:04). When asked whether he was in possession of any evidence from the video, he stated "only hard evidence." (10/23/18 Brady Tr. at 1:06:01-1:06:07). The Municipal Court then concluded the video never existed. (10/23/18 Brady Tr. at 1:06:35-1:06:40).

At the trial on October 23, 2018, Officer Kirkpatrick testified as to his patdown search conducted of defendant at the scene. As part of that search, he stated that he was not checking for contraband because "they do a thorough search at the jail and it will be discovered at that time." (10/23/18 Trial Tr. 2:54:20-2:54:32). As part of his search of defendant, he testified that he did not find anything. (10/23/18 Trial Tr. at 2:55:06-2:55:09). However, he also testified that he has found contraband on individuals when he performs a search at a scene. (10/23/18 Trial Tr. at 2:58:42-2:58:44). He stated that if he does find contraband, that "we carry paper bags in our trunk" to hold any evidence collected off a person. (10/23/18 Trial Tr. at 2:58:54-2:59:11). He further testified when asked whether he has found contraband when doing a pat down, he stated "sometimes." (10/23/18

Trial Tr. at 2:59:12-2:59:17). When asked whether he did a thorough search of Ms. Norris-Ostermiller, Officer Kirkpatrick stated, "yah." (10/23/18 Trial Tr. at 2:59:23-2:59:28).

After closing arguments, the jury then deliberated and found Ms. Norris-Ostermiller guilty of Criminal Possession of Dangerous Drugs in violation of Mont. Code Ann. § 45-9-102(2). (D.C. Doc. 2, p. 12). Ms. Norris-Ostermiller through counsel timely appealed her conviction to the District Court. The District court affirmed the Municipal Court on all issues. Ms. Norris-Ostermiller then timely filed her appeal with this Court.

### **STANDARDS OF REVIEW**

"On appeal from municipal courts of record, district courts function as intermediate courts of appeal with the scope of review limited to 'the record and questions of law'. ..." *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 11, 397 Mont. 134, 142, 447 P.3d 1048, 1054; Sections 3-6-110(1), 3-5-303, MCA. On appeal of a judgment of an intermediate court of appeal, we review the record independent of the district court as if the matter was originally appealed directly to this Court. *Id.* The Court "examine[s] the record independently of the district court's decision, applying the appropriate standard of review." *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 84, 296 P.3d 461, 464.

Our review of constitutional questions, including alleged *Brady* violations, is plenary. *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 205, 422 P.3d 1219, 1223. A district court's decision on a motion to dismiss charges in a criminal case presents a question of law that this Court reviews de novo. *State v. Colvin*, 2016 MT 129, ¶ 10, 383 Mont. 474, 477, 372 P.3d 471, 47. "Review is plenary, to determine whether the district court is correct," and "[f]indings of fact are reviewed to determine whether they are clearly erroneous. *Id.* A district court's discretionary decisions are reviewed for abuse of discretion. *Id.*

### **SUMMARY OF ARGUMENT**

Ms. Norris-Ostermiller's due process rights as guaranteed by the 14th Amendment were violated under *Brady* when the city prosecutor failed to preserve and produce the Yellowstone County Detention Center booking video. Ms. Norris-Ostermiller was thoroughly searched at the scene of a multi-vehicle accident and no marijuana was found, supporting a conclusion that she did not have any marijuana on her person. Ms. Norris-Ostermiller was then transported to the Yellowstone County Detention Center where she was searched again by Officer Tatro who found marijuana in her coat. Ms. Norris-Ostermiller defense at trial was that the marijuana was not on her person at the scene and thus was not hers.

The City prosecutor had an "affirmative" duty to provide exculpatory evidence to Ms. Norris-Ostermiller whether she requested it or not. However, Ms.

Norris-Ostermiller did request this booking video evidence, multiple times. She first sent a pro se written request for discovery, including jail footage, to the City the day before her arraignment. The City admits it received the pro se request. Despite the prosecutor's affirmative duty and specific requests from the defendant during the case, the prosecutor failed to turn over this favorable evidence to the defendant. This evidence was material to the defendant's guilt or punishment and thus the City's failure to produce it violated Ms. Norris-Ostermiller's due process rights under the Fourteenth Amendment.

To prove a due process violation under *Brady*, a Ms. Norris-Ostermiller can show: (1) the City possessed the evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different.

First, the City constructively possessed the Yellowstone County Detention Center booking video. The prosecution bears an obligation under *Brady* to turn over all favorable materials within its actual or constructive possession. Importantly, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Officer Gaertner stated in his report that Ms. Norris-Ostermiller was transported to the county detention center for further drug evaluation. In this case,

Officer Tatro, a county employee working at the Yellowstone County Detention Center acted on behalf of the City's investigation by aiding in the search and investigation of Ms. Norris-Ostermiller at the detention center. The marijuana that Officer Tatro located was provided to Officer Gaertner who then charged Ms. Norris-Ostermiller with Criminal Possession of Dangerous Drugs. Because Officer Tatro acted on behalf of the City, then the City prosecutor constructively possessed the video of Officer Tatro's search.

Although Officer Tatro worked as a county employee and it was the City that was prosecuting the charge, these facts do not foreclose a *Brady* violation. The general rule regarding separate sovereignties does not apply because Officer Tatro actively aided in the investigation of Ms. Norris-Ostermiller by conducting a thorough search of her on behalf of the City. Officer Tatro then provided a report of her search to the City, thereby giving the City access to Officer Tatro's "files" related to this search. Thus, while in those county files, the City had an obligation to obtain the booking video showing the City's primary witness, Officer Tatro, searching Ms. Norris-Ostermiller's coat and locating the marijuana. For all these reasons, the City prosecutor constructively possessed the video.

The Yellowstone County Detention Center booking video also constitutes favorable evidence. Officer Kirkpatrick testified that he conducted a thorough search of Ms. Norris-Ostermiller and did not find any contraband. He testified that

he "sometimes" finds contraband when searching individuals. The dash cam video shows Officer Kirkpatrick's thorough search of Ms. Norris-Ostermiller coat at the scene, but he did not locate any marijuana. Thus, the dash cam video from the scene supports a conclusion that Ms. Norris-Ostermiller did not possess marijuana at the scene. She maintained at trial that the marijuana was not on her at the scene and was not hers. The booking video would have shown how easily Officer Tatro found the marijuana and if Officer Kirkpatrick had thoroughly searched that same location of the coat at the scene. Thus, the video constitutes favorable evidence to the defense.

Second, the City intentionally suppressed the booking video of the search by failing to preserve it. The City prosecutor had an affirmative duty under *Brady* to preserve and disclose the video. The City prosecutor at the pretrial conference stated that she had no objection to providing the video to the defense "if it exists." Strikingly, there is no evidence the City ever requested the video at any time during the case. Instead, the prosecutor a week later at the *Brady* hearing stated that the City never possessed the video because it was maintained by the county. The City in its post-trial briefing to the District Court stated that the booking video was only maintained for 6 months. Notably, the prosecutor failed to raise any of these points at the final pretrial conference. The prosecutor's failure to act was an intentional suppression of the booking video evidence which was then lost or

destroyed after six months of its recording. At the very least, the City's failure to obtain and disclose the video was a negligent suppression of evidence that was material, of substantial use, and vital to Ms. Norris-Ostermiller's defense that she did not possess marijuana at the scene and that it was not hers.

Finally, Ms. Norris-Ostermiller can show that a reasonable probability exists that the outcome of the trial would have been different had the video been produced. Ms. Norris-Ostermiller was subjected to a thorough search at the accident scene. Officer Kirpatrick testified that he regularly does find substances on individuals when he searches them on the scene. The dash cam video shows the thorough search of her coat. The record evidence from the scene supports a conclusion that the marijuana was not in her coat at that time. Thus, the video would have shown how easily Ms. Tatro was able to find the marijuana in the coat, and whether Officer Kirkpatrick searched that same area and should have discovered it if the marijuana was in fact on her. Thus, the failure to provide to the defense was prejudicial because it bears directly on the question of where the marijuana was found and eliminated a key piece of impeachment evidence as well for Officer Kirkpatrick. Thus, the video would have contained evidence that undermines the confidence in the verdict and its suppression was prejudicial to Ms. Norris-Ostermiller's defense.

For all these reasons, Ms. Norris-Ostermiller requests that this Court conclude that the Municipal Court erred in finding that no Brady violation occurred and to dismiss the charge of Criminal Possession of Dangerous Drugs. This remedy is warranted to achieve the fundamental purpose of the *Brady* rule, which is to protect the due process rights of the accused.

### **ARGUMENT**

#### **A. THE CITY HAD A DUTY UNDER *BRADY* TO DISCLOSE EXCULPATORY EVIDENCE, THE YELLOWSTONE COUNTY BOOKING VIDEO, TO THE DEFENDANT AND FAILURE TO PRESERVE AND PRODUCE IT WARRANTS DISMISSAL OF THE CHARGE.**

The City's failure to disclose exculpatory evidence to Ms. Norris-Ostermiller constitutes a violation of her Fourteenth Amendment guarantee of due process. To prove a due process violation under *Brady*, a defendant must show: (1) the City possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 209–10, 422 P.3d 1219, 1225–26. The defendant bears the burden of proving all three prongs to establish a *Brady* violation. *Id.*, ¶ 30.

This Court stated that:

Prior to *Reinert*, Montana courts considered a fourth factor, that being whether the evidence could have been obtained by the defendant with reasonable diligence. Jackson, ¶ 53. We abandoned the diligence factor in *Reinert*, ¶ 17, n.1, explaining that the Ninth Circuit had held, in *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014), that the diligence factor was inconsistent with federal law and unsound public policy. See also *Kathryn Brautigam, Brady Violations and the Due Diligence Rule in Montana*, 78 Mont. L. Rev. 313, 333-37 (2017).

*Ilk*, ¶ 29.

"The fundamental purpose of the *Brady* rule is not to punish the government for misconduct; it is to protect the due process rights of the accused." *State v. Colvin*, 2016 MT 129, ¶ 22, 383 Mont. 474, 480, 372 P.3d 471, 475; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197(1963) "Consistent with this Court's abandonment of the diligence factor, the U.S. Supreme Court has described a prosecutor's duty to disclose evidence as an 'affirmative duty,' noting, 'a defendant's failure to request favorable evidence [does] not leave the Government free of all obligation.'" *State v. Ilk*, 2018 MT 186, ¶ 34, 392 Mont. 201, 211–12, 422 P.3d 1219, 1226–27 (citing *Kyles v. Whitley*, 514 U.S. 419, 432-33, 115 S.Ct. 1555 (1995)).

"It is fundamental that the State must disclose any evidence that is material to a defendant's guilt or punishment." *State v. Reinert*, 2018 MT 111, ¶¶ 16, 391 Mont. 263, 267, 419 P.3d 662, 665, *reh'g denied* (June 20, 2018). In addition, "the prosecutor shall make available to the defendant for examination 'all material or

information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.' ” *Id.*; Section 46-15-322(1)(e), MCA. "The prosecutor's failure to turn over evidence that is favorable to the defense and material to the defendant's guilt or punishment can violate a defendant's Fourteenth Amendment guarantee of due process, and therefore, require a new trial." *Id.*

**1. The City Prosecutor Constructively Possessed Evidence Favorable to Ms. Norris-Ostermiller.**

Under the first prong, the defendant must show that the City "possessed evidence, including impeachment evidence, favorable to the defense." *State v. Ilk*, 2018 MT 186, ¶ 31, 392 Mont. 201, 210, 422 P.3d 1219, 1226. The defense must make a showing of more than "mere speculation about materials in the government's files." *Id.* (citing *United States v. Mincoff*, 574 F.3d 1186, 1200 (9th Cir. 2009)). "Favorable evidence includes evidence that has the potential to lead directly to admissible exculpatory evidence." *Ilk*, ¶ 31 (citing *State v. Stutzman*, 2017 MT 169, ¶ 28, 388 Mont. 133, 398 P.3d 265 (internal quotations omitted)).

Furthermore, "[t]he prosecution bears an obligation under *Brady* to turn over all favorable materials within its actual or constructive possession." *Johnson v. Laxalt*, 624 F. App'x 492, 493 (9th Cir. 2015) (citing *Strickler v. Greene*, 527 U.S. 263, 275 n. 12, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). In *Kyles v. Whitley*, the

U.S. Supreme Court held that state prosecutors have a duty to disclose impeachment evidence known to the police, even if the prosecutors themselves were not actually aware of the information:

... the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such [undisclosed favorable] evidence and make disclosure when the point of “reasonable probability” is reached. This in turn means that **the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.**

.  
*Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567(1995).

Similarly, "the Ninth Circuit held that the prosecution had a duty to obtain and review the Department of Corrections file of its principal witness, and to disclose any material, impeaching evidence." *Odle v. Calderon*, 65 F. Supp. 2d 1065, 1071 (N.D. Cal. 1999)(citing *Carriger v. Stewart*, 132 F.3d 463, 479–82 (9th Cir.1997)). In *Carriger*, the U.S. Supreme Court stated:

The prosecutor's actual awareness (or lack thereof) of the exculpatory evidence in the government's hands, however, is not determinative of the prosecution's disclosure obligations ... Rather, the prosecution has a duty to learn of any exculpatory **evidence known to others acting on the government's behalf.**

*Carriger*, at 479–80 (citations omitted)(emphasis added)

In the present case, on December 28, 2016, Ms. Norris-Ostermiller submitted a pro se request that included a request for "jail footage." (D.C. Doc. 6, Exh. A) . The State acknowledges that it received the pro se request. (D.C. Doc. 9, p. 4). The Court also confirmed the fact that Ms. Norris-Ostermiller requested the booking video before she was arraigned and stated "we do know that." (10/23/18 Brady Tr. at 50:17-50:22). On November 14, 2017, Ms. Norris-Ostermiller filed a pro se Motion for Production of Documents and requested "all investigative files, photographic and audio recordings" (D.C. Doc. 2, p. 172-74). On November 29, 2017, Ms. Norris-Ostermiller filed a pro se Motion for Production of Exculpatory and Impeachment Evidence and requested "all photographic and video/audiotape recordings in the possession of plaintiff or its statutory agent officers." (D.C. Doc. 2, p. 145-47). Defense counsel also moved to compel production of the booking video at the *Brady* hearing on October 15, 2018. (10/15/18 Pretrial 2 Tr. at 4:34-4:45).

Importantly, the prosecutor's duty to turnover favorable information in its possession is imposed upon the prosecution whether the Defendant requests it or not. The U.S. Supreme Court stated " [t]he prosecution's **affirmative duty** to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland...*" and that " it became

clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490 (1995)

At the final pretrial conference on October 15, 2018, the prosecutor did not object to providing Ms. Norris-Ostermiller the booking video. Specifically, the Municipal Court confirmed whether the City objected to production of the booking video and the City attorney stated "if it exists, then I have no objections." (10/15/18 Pretrial 2 Tr. at 4:11-4:17). The prosecutor failed to make any arguments at that time that, if the booking video existed, that the City did not possess it.

However, a week later at the Brady hearing, the City changed its position and argued "that is a county, that is not the city" and that "they have a very definite procedure to get booking tapes" and that the "defense has to serve a subpoena on them." (10/23/18 Brady Tr. at 44:09-44:32). The Municipal Court then asked whether the City was ever in the possession of the video, and the City Attorney stated "ever, no." (10/23/18 Brady Tr. at 44:57-45:03). The Court then stated that the prosecutor has no control over the procedure and the City Attorney stated "that is correct." (10/23/18 Brady Tr. at 45:03-45:21). The Court also concluded that even if Ms. Norris-Ostermiller requested the video from the City, the "City doesn't have to go out and get it." (10/23/18 Brady Tr. at 55:25-55:41). The Court concluded that the "jail is not a city agent" and "we do not have anything to do

with the county." (10/23/18 Brady Tr. at 55:41-55:53). The Court denied the motion to dismiss.

Importantly, this Court has eliminated consideration of whether Defendant could exercise reasonable diligence to obtain the video. *State v. Ilk, Ilk*, ¶ 29. Nevertheless, the prosecutor was essentially arguing that for the City to obtain the booking video placed an undue burden on the City and that the defendant could just as easily obtain it. However, [t]he prosecutor's obligation to seek out exculpatory evidence in the government's possession is not tempered by considerations of reasonableness or undue burden. *United States v. W. R. Grace*, 401 F. Supp. 2d 1069, 1076 (D. Mont. 2005). "The failure to comply with a constitutional command to present evidence fairly at trial is not excused by any inconvenience, expense, annoyance or delay." *Id.*(citation omitted).

This Court has stated that "[a]s a **general rule**, the State's obligation to disclose information under *Brady* does not impose a duty on the prosecutor or investigators to learn of information possessed by other jurisdictions or agencies **that have no involvement in the investigation or prosecution at issue.**

*McGarvey v. State*, 2014 MT 189, ¶ 16, 375 Mont. 495, 500, 329 P.3d 576, 583 (citing *U.S. v. Morris*, 80 F.3d 1151, 1169–70 (7th Cir. 1996)). This general rule does have exceptions. First, the statement itself recognizes that the rule would not necessarily apply if those other jurisdictions or agencies aided in the investigation

or prosecution at issue. Second, "[d]espite the separate sovereignty concept, two alternative avenues can lead to a *Brady* duty in the federal-state context." *United States v. Cerna*, 633 F. Supp. 2d 1053, 1059 (N.D. Cal. 2009). The court in that case further elaborated:

A second avenue arises when, even though the local agency is not a "lead investigative agent," the federal prosecutor consults local police records. **When state police gives a federal investigator access to its files for the purpose of pulling items of interest to a federal investigation, *Brady* requires that the prosecution team review as well for *Brady* materials within the same universe of files.** In this instance, separate sovereignty no longer matters. The reason is that the state has invited the federal authorities into its file room and given access to the evidence. Once inside the stacks with permission to rummage about for prosecution evidence, the federal authorities must search for and retrieve defense evidence bearing on the same question. **The same would hold if the access is only by mere requests, *i.e.*, if the local police allow the federal prosecutor to make written or verbal requests for records searches to be conducted by local officers, then the federal prosecutor must ask for *all* information on the same subject, pro and con.** This arises not because there is "agency" but because the federal prosecution team is given free access to retrieve information and the search must be even-handed as to the point of inquiry.

*Id.*, at 1060 (**emphasis added**).

In this present case, the City constructively possessed the Yellowstone County Detention Center's booking video that recorded Officer Tatro's search of Ms. Norris-Ostermiller. Even though Officer Tatro worked as an officer at the

Yellowstone County Detention Center, the City was nevertheless in constructive possession of the booking video for purposes of a *Brady* violation.

First, Officer Tatro aided in the investigation of Ms. Norris-Ostermiller. Notably, Officer Kirkpatrick testified when he was searching Ms. Norris Ostermiller that he was not checking for contraband because "they do a thorough search at the jail and it will be discovered at that time." (10/23/18 Trial Tr. at 2:54:20-2:54:32). Officer Gaertner's report also confirms that she was transported for further drug evaluation at the Yellowstone County Detention Center. (D.C. Doc. 2, p. 3-4). Officer Tatro then conducted a thorough search of Ms. Ostermiller. (D.C. Doc. 2, p. 130). Once Officer Tatro discovered the green leafy substance, she then slid it "underneath the window in plain view of the cameras" where it was then "left on the counter until the arresting officer takes it into custody." (10/23/18 Trial Tr. at 2:48:54-2:49:08). Pursuant to *Kyles v. Whitley*, the City prosecutor had "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567(1995). In this case, Officer Tatro acted on behalf of the City and actively aided Officer Gaertner, the primary officer, in the investigation of Ms. Norris-Ostermiller and, therefore, the City constructively possessed the video.

Second, the Court in *McGarvey v. State* stated "[a]s a general rule, the State's obligation to disclose information under *Brady* does not impose a duty on the prosecutor or investigators to learn of information possessed by other jurisdictions or agencies that have no involvement in the investigation or prosecution at issue. *McGarvey v. State*, 2014 MT 189, ¶ 16. This general rule does not apply because Officer Tatro actively aided in the investigation on behalf of the City and Officer Gaertner.

Third, Officer Tatro provided a report of her search to the City. (D.C. Doc. 2, p. 130). In *United States v. Cerna*, the Court stated "[w]hen state police gives a federal investigator access to its files for the purpose of pulling items of interest to a federal investigation, *Brady* requires that the prosecution team review as well for *Brady* materials within the same universe of files." *United States v. Cerna*, 633 F. Supp. 2d 1053, 1060 (N.D. Cal. 2009) . The Court further stated that "[i]n this instance, separate sovereignty no longer matters. The reason is that the state has invited the federal authorities into its file room and given access to the evidence...The same would hold if the access is only by mere requests." *Id.* Thus, since the City obtained the report from Officer Tatro regarding her search, the City was also then required to obtain the booking video of that search and disclose it to the defendant. Thus for this reason, the City constructively possessed the Yellowstone County Detention Center's booking video.

Finally, Officer Tatro was the City's primary witness in the prosecution of Ms. Norris-Ostermiller. Officer Tatro testified at the trial on behalf of the City prosecutor and provided testimony that she located the marijuana in the left pocket of Ms. Norris-Ostermiller's coat. (10/23/18 Trial Tr. at 2:48:18-2:48:23). As the Ninth Circuit Court of Appeals stated in *Carriger v. Stewart*, 132 F.3d 463, 479–82 (9th Cir.1997), "the prosecution had a duty to obtain and review the Department of Corrections file of its principal witness, and to disclose any material, impeaching evidence." Officer Tatro testified that there is video of the booking area where she searched the defendant and that it is recorded "24/7." (10/23/18 Trial Tr. at 2:50:06-2:50:11). Thus, since Officer Tatro was the City's primary witness in prosecuting the charge of Criminal Possession of Dangerous Drugs, the prosecutor had a duty under *Brady* to obtain and disclose the booking video that showed her search of Ms. Norris-Ostermiller and, therefore, the City constructively possessed the video.

The booking video also constitutes favorable evidence. This Court has stated that '[f]avorable' evidence includes evidence that has the 'potential to lead directly to admissible exculpatory evidence.' ” *State v. Ilk*, 2018 MT 186, ¶ 31, 392 Mont. 201, 210, 422 P.3d 1219, 1226 (citing *State v. Stutzman*, 2017 MT 169, ¶ 28, 388 Mont. 133, 398 P.3d 265). The present case is unlike the facts of *State v. Robertson* where "Robertson offers nothing to indicate that the Detention Center video constituted favorable evidence. Robertson's contention that the erased video

would have demonstrated his sobriety is 'mere speculation' unsupported by the record." *State v. Robertson*, 2019 MT 99, ¶ 35, 395 Mont. 370, 381, 440 P.3d 17, 24.

In the present case, it is not mere speculation that the booking video constituted favorable evidence. Officer Kirkpatrick testified that he conducted a thorough search of Ms. Norris-Ostermiller and did not find any contraband. (10/23/18 Trial Tr. at 2:55:06-2:55:10, 2:59:23-2:59:28). He testified that he "sometimes" finds contraband when searching individuals. (10/23/18 Trial Tr. at 2:59:12-2:59:17). The video of Officer Kirkpatrick's search also shows a thorough search. (12/13/16 Dash Cam at 35:00-35:33). Thus, the officers failed to discovery any evidence at the scene confirming that Ms. Norris-Ostermiller was in possession of marijuana. The Defendant maintained at trial that the marijuana was planted on her. (10/23/18 Trial Tr. at 3:56:45 – 4:03:29); (D.C. Doc. 9, p. 6). Thus, it is not mere speculation unsupported in the record that the video would be favorable.

At the very least, the video would have provided impeachment evidence regarding Officer Kirkpatrick's failure to locate the substance at the scene. The video would also have shown how easily it was for Officer Tatro to locate the substance as part of her search, meaning if it was on her person and easily located, why did Officer Kirkpatrick not discover it as part of his search if he searched the

same area. For all these above reasons, the City constructively possessed favorable evidence.

**2. The City Prosecutor Intentionally Suppressed The Favorable Evidence By Failing to Preserve it.**

Under the second element, a defendant must prove that “the prosecution suppressed the favorable evidence.” *State v. Ilk*, 2018 MT 186, ¶ 34, 392 Mont. 201, 211–12, 422 P.3d 1219, 1226–27. “Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* “[I]f the State has suppressed evidence, only a deliberate or intentional suppression of exculpatory evidence is a per se violation of due process under *Brady*.” *McGarvey v. State*, 2014 MT 189, ¶ 17, 375 Mont. 495, 500, 329 P.3d 576, 583. “Negligently suppressed evidence only amounts to a violation of due process when it is material and of substantial use, vital to the defense, and exculpatory.” *Id.* (citing *State v. Gollehon*, 262 Mont. 1, 13, 864 P.2d 249, 257 (1993)).

“To establish materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *State v. Wagner*, 2013 MT 47, ¶ 27, 369 Mont. 139, 145, 296

P.3d 1142, 1146–47 (citations omitted)(internal quotations omitted). Evidence is exculpatory if it “ would have tended to clear the accused of guilt.” *Id.* "Where destroyed or lost evidence is only potentially exculpatory, the defendant must show bad faith by the State in order to establish a due process violation." *Id.*

In the present case, the video evidence at the Yellowstone County Detention Center had been recorded and therefore gathered, but the video not preserved. As this Court stated in, *State v. Belgarde*, "police officers at the Sheriff's Department **failed to 'preserve' evidence when they erased the videotaped recording of Belgarde in the sally port, and, furthermore, they failed to 'gather' evidence when they failed to activate the videotape camera in the booking room during Belgarde's booking process.**" *State v. Belgarde*, 1998 MT 152, ¶ 17, 289 Mont. 287, 292–93, 962 P.2d 571, 574. Office Tatro testified that the area in booking where she searched Ms. Norris-Ostermiller was recorded "24/7." The City stated in its Response Brief filed on October 22, 2018, that the video was " maintained under the control of the County for a period of approximately six (6) months. (D.C. Doc. 9, p. 6). Thus, the evidence was gathered but it was not preserved.

The City's failure to preserve the Yellowstone County Detention Center video of Ms. Tatro's search of the coat was an intentional suppression of evidence. It is undisputed that the City failed to obtain and disclose the booking video. The City's principal witness, Officer Tatro, performed the search that was shown on the

video that was gathered and preserved for 6 months. It is undisputed that Ms. Norris-Ostermiller submitted a pro se discovery request to the City for the video of Officer Tatro's search. She also submitted additional motions requesting production of the booking video. The City prosecutor at the final pretrial conference stated that she had no objection to providing the video if it exists. (10/15/18 Pretrial 2 Tr. at 4:11-4:17). There is no information the City ever attempted to even request the video, despite its affirmative duty and the pro se request made by Ms. Norris-Ostermiller the day before her arraignment. Thus, the City's failure to act to obtain favorable evidence in its constructive possession constitutes an intentional suppression of the video evidence thereby constituting a per se violation pursuant to *Brady*.

At the very least, the City's failure to obtain the video from the Yellowstone County Detention Center was a negligent suppression of the evidence. "Under the second prong, negligently suppressed evidence amounts to a due process violation only where the evidence "is material and of substantial use, vital to the defense, and exculpatory." *State v. Robertson*, 2019 MT 99, ¶ 33, 395 Mont. 370, 380, 440 P.3d 17, 24. In this case the Yellowstone County Detention Center booking video was material because it possessed "an exculpatory value that was apparent before the evidence was destroyed, and...defendant would be unable to obtain comparable evidence by other reasonably available means." *Wagner*, ¶ 27

The present case is also unlike that in *State v. Robertson* where the Court stated that "Robertson's contention that the erased video would have demonstrated his sobriety is "mere speculation" unsupported by the record. *Robertson*, ¶ 35. The Court further stated that [a]lthough Detention Center Supervisor Shawver confirmed that the Detention Center video was mistakenly overwritten, Robertson fails to demonstrate that it was material, vital to his defense, or exculpatory." *Id.*

Ms. Norris-Ostermiller maintained at trial that the marijuana was not found on her at the scene, was not hers, and therefore was planted on her. (10/23/18 Trial Tr. at 3:56:45 – 4:03:29). The video contains evidence that is material to her defense because it would have shown how easily Officer Tatro located the substance in her coat and whether Officer Kirkpatrick searched that same area during his thorough search. This evidence was material and vital to Ms. Norris-Ostermiller's defense that she did not have possession of the marijuana at the scene and therefore contained exculpatory value. Furthermore, Ms. Norris-Ostermiller would not be able to obtain comparable video evidence. Thus, the City at the very least negligently suppressed the evidence by failing to preserve it.

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**3. If The City Prosecutor Had Preserved And Disclosed The Yellowstone County Booking Video, There Is A Reasonable Probability That Outcome Of The Trial Would Have Been Different.**

Under the third prong, the defendant must show that “had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different.” *State v. Ilk*, 2018 MT 186, ¶ 37, 392 Mont. 201, 212–13, 422 P.3d 1219, 1227. “To prove a reasonable probability that the result would have been different, a defendant need only show that ‘the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.’” *State v. Reinert*, 2018 MT 111, ¶ 17, 391 Mont. 263, 267–68, 419 P.3d 662, 665–66, *reh'g denied* (June 20, 2018)(citation omitted). “Stated differently, the question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *State v. Ilk*, ¶ 37 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555).

However, “[t]he defendant is not required to show that the evidence would have led to acquittal, *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1565–66, 131 L.Ed.2d 490 (1995), and a defendant meets his burden by showing that suppression of the evidence was prejudicial to the defense.” *State v. Colvin*, 2016 MT 129, ¶ 13, 383 Mont. 474, 478, 372 P.3d 471, 474.

In this case, Ms. Norris-Ostermiller was subjected to a thorough search at the accident scene. Officer Kirpatrick testified that he regularly does find

substances on individuals when he is completing his "safety" search prior to transporting an individual to jail. (10/23/18 Trial Tr. at 2:59:12-2:59:17). The video from the scene shows the thorough search, including of Ms. Norris-Ostermiller's coat. (D.C. Doc. 3, 12/13/16 Dash Cam at 35:00-35:33). Ms. Norris-Ostermiller has maintained that the marijuana discovered at the Yellowstone County Detention Center was planted on her. (10/23/18 Trial Tr. at 3:56:45 – 4:03:29); (D.C. Doc. 9, p. 6). The video of Ms Tatro searching Ms. Ostermiller's coat was more than speculation that it would have been exculpatory. The video would have shown how easily Ms. Tatro was able to find the marijuana in the coat and where it was specifically located. This evidence would have been used to compare to the search Officer Kirpatrick conducted and whether he should have discovered it during his search, supporting her defense that she did not possess the marijuana at the scene. Indeed, the video evidence from the scene supports a conclusion that the marijuana was not in her coat at that time. Thus, the failure to provide the video to the defense was prejudicial because it bears directly on the question of where the marijuana was found and eliminated a key piece of impeachment evidence as well for Officer Kirkpatrick. Thus, the video would have contained evidence that undermines the confidence in the verdict and it's suppression was prejudicial to Ms. Norris-Ostermiller's defense.

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## **CONCLUSION**

Based on the arguments and authorities advanced above, the prosecutor's intentional suppression of the Yellowstone County Detention Center Booking video constitutes a *Brady* violation warranting reversal of the conviction and dismissal of charge.

Respectfully submitted this 10th day of February, 2020.

FERGUSON LAW OFFICE.

By: /s/ John J. Ferguson

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,970, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/John J. Ferguson

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JOHN J. FERGUSON

APPENDIX

District Court Order Affirming ..... App. A  
Pro Se Discovery Request ..... App. B

## CERTIFICATE OF SERVICE

I, John J. Ferguson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-10-2020:

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