

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TODD CARLISLE FISHER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Dawson County, the Honorable Michael B. Hayworth, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTINA L. NEAL
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krneal@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
TAMMY K PLUBELL
Interim Bureau Chief
OLE OLSON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

BRETT J. IRIGOIN
Dawson County Attorney
121 S. Douglas Avenue
Glendive, MT 59330

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW.....	31
SUMMARY OF ARGUMENT	32
ARGUMENT	34
I. Deputy Brett Hoagland was an heir to Wilbur Fisher’s estate and a suspect in his murder. The district court erred when it denied Todd’s motion to dismiss for <i>Brady</i> violations after Deputy Hoagland cleaned and destroyed the crime scene.....	34
A. The State violated Todd’s due process right to a fair trial when it negligently allowed the crime scene evidence to be destroyed.	36
B. The crime scene evidence destroyed by Deputy Hoagland was exculpatory.....	40
II. With no physical evidence conclusively connecting Todd Fisher to the crime, the prosecutor prejudiced Todd’s right to a fair trial when the prosecutor shifted the burden of proof to Todd to prove his innocence.	42
A. The prosecutor’s cross examination of Mark Beck and the prosecutor’s closing argument comments were improper because they shifted the burden of proof.....	43
B. The effect of the prosecutor’s misconduct prevented Todd from receiving a fair trial.....	47

III. After imposing a seventy-year prison sentence, the district court did not have any factual basis to support its determination that Todd Fisher could pay \$25,000 in public defender fees.	48
CONCLUSION	51
CERTIFICATE OF COMPLIANCE.....	53
APPENDIX.....	54

TABLE OF AUTHORITIES

Cases

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	43
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)	1, 2, 34
<i>California v. Trombetta</i> , 467 U.S. 479 (1984)	34, 35
<i>In re Winship</i> , 397 U.S. 358 (1970.)	47
<i>State v. Belgarde</i> , 1998 MT 152, 289 Mont. 287, 962 P. 2d 571	35, 36
<i>State v. Colvin</i> , 2016 MT 129, 383 Mont. 474, 372 P. 3d 471	passim
<i>State v. Favel</i> , 2015 MT 336, 381 Mont. 472, 361 P. 3d	45, 46
<i>State v. Giddings</i> , 2009 MT 61, 349 Mont. 347, 208 P. 3d 363	35, 40, 41
<i>State v. Halter</i> , 238 Mont. 408, 777 P.2d 1313 (1989)	36, 37, 38
<i>State v. Hirt</i> , 2005 MT 285, 329 Mont. 267, 124 P. 3d 147	32, 50
<i>State v. Labbe</i> , 2012 MT 76, 364 Mont. 415, 276 P. 3d 848	32

<i>State v. Madplume,</i> 2017 MT 40, 386 Mont. 368, 390 P. 3d 142	48, 49
<i>State v. Moore,</i> 2012 MT 95, 365 Mont. 13, 277 P. 3d 1212	49
<i>State v. Newman,</i> 2005 MT 348, 330 Mont. 160, 127 P. 3d 374	44, 45, 46
<i>State v. Price,</i> 2002 MT 284, 312 Mont. 458, 59 P.3d 1122	43, 44
<i>State v. Saxton,</i> 2003 MT 105, 315 Mont. 315, 68 P.3d 721	35, 40
<i>State v. Starr,</i> 2007 MT 238, 339 Mont. 208, 169 P.3d 697	48, 51
<i>State v. Stewart,</i> 2000 MT 379, 303 Mont. 507, 16 P.3d 391	44
<i>State v. Sullivan,</i> 280 Mont. 25, 927 P.2d 1033 (1996.)	48
<i>State v. Swanson,</i> 222 Mont. 357, 722 P.2d 1155 (1986)	36
<i>State v. Wagner,</i> 2013 MT 47, 369 Mont. 139, 296 P. 3d 1142	36, 41

Statutes

Mont. Code Ann. § 46-8-113	50
Mont. Code Ann. § 46-8-113(3)	51
Mont. Code Ann. § 46-8-113(4)	48, 51

Other Authorities

Montana Constitution

Art. II, § 17..... 34, 43

United States Constitution

Amend. V..... 34

Amend. XIV..... 34, 43

STATEMENT OF THE ISSUES

I. Deputy Brett Hoagland was an heir to Wilbur Fisher's estate and a suspect in his murder. Did the district court err when it denied Todd's motion to dismiss for *Brady*¹ violations after Deputy Hoagland cleaned and destroyed the crime scene?

II. With no physical evidence conclusively connecting Todd Fisher to the crime, did the prosecutor prejudice Todd's right to a fair trial when the prosecutor shifted the burden to Todd to prove his innocence?

III. After imposing a seventy-year prison sentence, did the district court impose an illegal sentence since it did not have any factual basis to support its determination that Todd Fisher could pay more than \$25,000 in public defender fees?

STATEMENT OF THE CASE

On October 20, 2017, the State arrested Todd Fisher for the death of his father, Wilbur Fisher. (Trial Transcript (Tr.) 823.) On November 7, 2017, the State arraigned Todd on charges of deliberate homicide and tampering with evidence. (District Court document (DC) 10.)

A. Motion to Dismiss

Todd filed a motion to dismiss based on the destruction of evidence which resulted from Deputy Hoagland cleaning the crime scene after Todd's arrest. (DC 58.) He argued: (1) the State had violated his right

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

to due process, pursuant to *Brady*, when it allowed for the destruction of the crime scene; 2) the State acted in bad faith when it destroyed the potentially exculpatory evidence contained in the crime scene; and 3) Todd was prejudiced by the destruction of this evidence. (DC 58, 60.) The matter proceeded to a hearing on August 27, 2018. (DC 92.)

B. The court denies the motion to dismiss

Three weeks before trial, the court denied Todd's motion to dismiss in a two-page order. (DC 169.) The case proceeded to trial on December 10 through December 19, 2018. (DC 293, 320, 342, 350, 366, 369, 373, 378.) A jury convicted Todd of both deliberate homicide and tampering with evidence. (DC 377.) On March 14, 2019, the court issued its formal order denying the motion to dismiss. (Order Denying Motion to Dismiss is attached as Appendix A.) The court held the potentially exculpatory evidence from the crime scene was not destroyed through State action because Deputy Hoagland was not acting in his law enforcement capacity when he cleaned the crime scene. The court also held the crime scene was not in the State's possession when it was destroyed. The court further held the State did not violate

Todd's right to due process through a bad faith failure to collect the potentially exculpatory evidence. (DC 381.)

C. Sentencing

A sentencing was held on March 22, 2019, in which the court sentenced Todd to prison for seventy years. (DC 387.) The court ordered Todd pay \$25,250.00 in attorney costs. (Judgment and Order Imposing Sentence is attached as Appendix B.) Defense counsel objected to the public defender costs and argued the imposition of attorney costs violated Todd's right to a trial by jury in violation of both the United States and Montana Constitutions. (DC 385.) Defense counsel further argued Todd would be unable to pay for the attorney costs, especially given his incarceration, his sole source of income was from social security, and his ongoing physical disabilities. (3/22/18 Tr. 54-58.) Further, the PSI author reported Todd's monthly income of \$1,008.00 was based solely from social security which would not be provided to him in prison. The PSI reported Todd had no assets. (DC 380.)

The court found the cost of defense counsel to be \$80,000 for the attorney time and \$25,250.00 for experts and costs. The court recognized Todd has few resources and, even if Todd is released from

prison, he will have a “relatively stifled” ability to pay for the full costs of his public defenders. Nonetheless, the court ordered Todd to pay \$25,250.00, the amount of the experts and costs. (3/22/18 Tr. 75.) The court indicated if Todd is released and makes a good faith effort at payment, it would reconsider this sentencing condition. (3/22/18 Tr. 77.)

STATEMENT OF THE FACTS

Eighty-year-old, triple amputee, Wilbur Fisher was found shot to death in his bed, on a country road in Glendive, Montana. The issue in trial was who killed Wilbur, and the unexpected drama that followed Wilbur’s death involving: a forty-year-old son, suffering from autism and a social outcast in the community; greedy neighbors who manipulated Wilbur’s disabilities and shimmied their way into his will; a crime scene scrubbed clean by these same neighbors; and physical evidence destroyed and left untested.

The Suspects

Todd Fisher

Todd’s struggles started as young as kindergarten. (Tr. 1493.) He was diagnosed with ADHD and Tourette’s syndrome and medicated. (Tr. 1493-194; DC 341, 1:50:030 – 1:51:00.) Still, Todd worked hard and

was able to graduate from high school. (DC 341, 1:51:00-1:52:00.) Dr. Dee Woolston diagnosed Todd with being on the autism spectrum. (Tr. 1505.)

Dr. Woolston described Todd's autism as a social learning disability. (Tr. 1510.) Often people with autism will have an almost robotic quality to their speech. (Tr. 1522.) Additionally, people with autism make "terrible liars" since they communicate in a literal and concrete fashion. (Tr. 1531.) Beyond his mental health conditions, he also suffers from acute pancreatitis, or almost complete failure of the pancreas, making him insulin dependent. (Tr. 1495.)

Consistent with his autism diagnosis, Todd did not have many friends and kept to himself. (Tr. 589; DC 341, 1:40:00, 1:52:30-1:53:00.) Todd worked as a wood cutter. (DC 341, 1:50:00 – 1:50:30.)

On October 16, 2017, Todd returned home from a weekend of sawing firewood down by the river and camping in his truck. (DC 340. 0:05:30 – 0:23:30.) It was not uncommon for Todd to sleep in his truck. (Tr. 283) It was close to 7:00 a.m., and Wilbur was not awake yet, which surprised Todd. (DC 341, 2:17:30 – 2:18:30.) When he opened the door to Wilbur's bedroom, he saw Wilbur, covered in blood, and deceased.

(Tr. 931; DC 341, 2:11:30 – 2:12:00.) Todd called 911 and reported Wilbur's death and requested law enforcement. (Tr. 367; DC 294; DC 341, 2:13:00 – 2:13:30.) When law enforcement arrived, he solemnly answered their questions, offered assistance, and cooperated whenever asked. (Tr. 562, 586; DC 306; DC 313; DC 340, 0:00:30 - 0:01:00.) He voluntarily consented to searches of the property, the vehicle, and his person. (Tr. 495, 587-588.) He provided Sheriff Canen with the spare key to the house and the combination to the door. (Tr. 588.) He waited quietly with Deputy Bennett while other law enforcement came and went from the home, and finally broke down with tears when he heard the coroner was on his way to the home. (Tr. 575; DC 306; DC 313.)

Todd further voluntarily agreed to be interviewed by Canen, without an attorney present. (DC 340.) Canen interrogated Todd for five hours on October 16, 2020. (DC 340, 0:13:30 – 0:14:00.) Todd told the sheriff he thought on Saturday (October 14) he went to lunch with his dad to the Mexico Lindo restaurant. (DC 340, 0:11:00 – 0:12:00.) This was the last time he saw his father alive. (DC 340, 0:13:30 – 0:14:00.) When they returned home, Todd went down to the river and a neighbor's property and chopped wood. (DC 340, 0:13:00 – 0:17:00.) He

then hauled a load of wood to his wood pile and stayed at the wood pile until 3:30 a.m., chopping wood and listening to music. (DC 340, 0:15:30 – 0:17:00.) Todd then went to the arena and listened to music and slept in his truck until dawn. (DC 340, 0:17:30 – 0:18:00.) At dawn, he went back down to the neighbors to cut more wood. (DC 340, 0:17:30 – 0:18:00.) He had the same pattern Sunday night, and returned home Monday morning. (DC 340, 0:18:30 – 0:23:30.) He bought food and drinks at convenience stores and never returned home during the weekend. (DC 340, 0:19:00 – 0:20:00.)

Canen would not allow Todd to return home and placed him in a hotel room. (Tr. 819.) The next morning, Canen picked Todd up and again, with the help of Glendive Police Chief Fiest, interrogated Todd for another six hours. (Tr. 819; DC 341.) Canen told Todd his story the day before did not match with the surveillance videos for the restaurant because Todd and Wilbur never appeared on the restaurant's video. (DC 341, 0:05:30 – 0:06:00.)

Desperate to explain the unknown, Todd told the officers it might have been CIA operatives who had killed Wilbur. (DC 341, 0:19:00 – 0:24:00.) Although Todd's CIA story was unbelievable, it was not

outlandish for somebody suffering from autism. (Tr. 1514.) Wilbur had, at one point in his younger life, written to the CIA wanting to work for them. (DC 341, 0:19:30 – 0:20:30.) A return letter from the CIA was still in Wilbur's possession and was found by law enforcement. (Tr. 706-707.) Further, this was not Todd's first time showing a fascination with the CIA. When Wilbur was in the hospital in June, his housekeeper arrived to find Todd with guns lying on the bed and Todd talking about the CIA, DEA, and FBI. (Tr. 479.)

When being questioned by Fiest, Todd described his life with Wilbur and Wilbur's regular routine. (DC 341, 1:41:00 – 2:04:00.) Todd also described with pride Wilbur's perseverance after his accident and his accomplishments being an amputee. (DC 341, 2:03:30 – 2:04:30.) "He's always taken care of me, and I've taken care of him." (DC 341, 1:47:30 – 1:48:00.) He also acknowledged his grief was "not setting in right away." (DC 341, 2:01:00 – 2:01:30.) He explained his lack of emotion because he was angry about the murder. (DC 341, 1:24:30.) He further explained, based on his religious beliefs, he does not believe in revenge. (DC 341, 2:05:00 – 2:05:30; 2:22:30 – 2:23:00.) Throughout eleven hours of interrogation, he consistently asserted he had not

harmed his father. (DC 341.) Despite repeated pressure by the interrogators, Todd maintained, “I’ve done nothing wrong.” (DC 341, 2:38:30 – 2:39:00.)

Todd returned home the next day, October 18, 2017. (Tr. 822.) Keeping with his word, the following day, Todd called Canen to check-in. (Tr. 856.)

Deputy Hoagland

Deputy Brett Hoagland met Wilbur in 2003 when the two families became neighbors. (Tr. 939.) The Hoaglands started leasing pasture from Wilbur in 2005. (Tr. 940.) He would occasionally perform neighborly help for Wilbur such as helping start a vehicle or burying a dog. (Tr. 941.)

When Wilbur broke his hip in June 2017, Deputy Hoagland visited Wilbur a couple of times at the hospital and then drove him home from the hospital. Deputy Hoagland testified once Wilbur was home from the hospital, he checked on him daily until he thought Wilbur was doing better and then would check-in with Wilbur on a weekly basis. (Tr. 987.) Although Deputy Hoagland claimed Wilbur was not suffering, he also admitted he did not know the hospital’s recommendation had been for

Wilbur to discharge to the Veteran's Administration (VA) Home instead of returning home. (Tr. 988.)

Deputy Hoagland also knew Todd. (Tr. 944.) He did not have any issues with Todd and testified to some of Todd's routines, such as frequently sitting in his truck at the arena. (Tr. 944, 990.)

Sheriff Canen had worked with Deputy Hoagland for thirteen years and considered him the most experienced law enforcement officer in the county. (Tr. 865.) Besides his work at the sheriff's office, he also teaches crime scene investigation at the local college. (Tr. 970.) Canen considered Deputy Hoagland a friend. (Tr. 865.) Thus, Canen contacted Deputy Hoagland, who was on a scheduled vacation, to come into work and assist with the investigation of Wilbur's death. (Tr. 807-808.)

Deputy Hoagland told Canen he was likely in Wilbur's will, so Canen told Hoagland not to become involved. (Tr. 808.) Deputy Hoagland admitted he knew about Wilbur's safe and the contents of the safe. (Tr. 949.) He also knew about the guns Wilbur owned and knew Wilbur owned a handgun. (Tr. 949.)

Sheriff Canen, Undersheriff Mills, and DCI Agent Waldo all considered Deputy Hoagland a suspect in Wilbur's death. (Tr. 327, 793,

860.) Although Deputy Hoagland was a suspect and although the sheriff's office checked video surveillance for the other suspects, Todd and David Pines, the sheriff's office never performed the same checks and scrutiny for Deputy Hoagland and Leanne Hoagland. (Tr. 349-350.) The Hoaglands also own a .357 handgun but it was never inspected or tested as a potential murder weapon. (Tr. 1036, 1165, 1178-1227, 1647.)

Leanne Hoagland

Leanne owns a shire horse business. (Tr. 1598.) In 2017, although the Hoagland's only owned minimal acreage, Leanne owned twenty-two horses. (Tr. 1599-1600.) Therefore, Leanne was dependent on grazing Wilbur's land. (Tr. 1601.) The Hoaglands paid \$15.00 per month per horse and paid at the end of each year. (Tr. 1602, 1615.) In 2017, they paid \$450.00 total to Wilbur's estate, far below market value. (Tr. 1616.)

Leanne admitted she had been in the Fishers' house off and on but claimed she had never been in Wilbur's bedroom. (Tr. 1620, 1630.) Although she claimed to have assisted Wilbur, the only task she helped Wilbur with was cutting his hair one time and balancing his checkbook. (Tr. 1623.) She never helped shovel sidewalks or helped with his lawn.

(Tr. 1624-1625.) She never helped bring Wilbur meals or get groceries.

(Tr. 1624.) She never helped Wilbur clean his house or other chores.

(Tr. 1625.)

As soon as the sheriff arrested Todd, Leanne went to Wilbur's house. She helped her husband lock up the house. (Tr. 1626.) She was present when Ken Young arrived and cleaned the crime scene. (Tr. 1630.)

David Pines

David was one of Todd's few friends. (Tr. 411.) While Wilbur was in the hospital in June 2017 after breaking his hip, David was in a four-wheeler accident while out visiting Todd. (Tr. 401.) Todd did not want to take David to the hospital because Todd was not ready to pick up Wilbur from the hospital as Todd was trying to arrange a placement for Wilbur at the VA Home, as recommended by the Glendive Medical Center. (Tr. 403-404.) Todd was concerned if Wilbur were to return home, he risked being injured again. (Tr. 404.)

While Wilbur was in the hospital with his broken hip, David helped Todd clean the Fisher's house. This allowed David to become familiar with the contents of the home, including Wilbur's safe. (Tr.

413.) David admitted he was not working the entire weekend of Wilbur's death, and therefore, did not have an alibi. (Tr. 414.) Further, although David testified he could not have driven to the Fisher residence that weekend, law enforcement never verified his vehicles were inoperable. (Tr. 416.)

The Victim, Wilbur Fisher

Wilbur grew up in California and worked as a lineman for thirty years. In 1967, he was the victim of a severe electrical shock and became a triple amputee. (Tr. 1672.) He had two prosthetic legs and one amputated arm. (Tr. 422.) Despite Wilbur's physical limitations, he maintained mobility. (Tr. 942.) Wilbur was a likable person but not overly social, and he seldom had visitors out to his ranch. (Tr. 943; DC 341, 1:48:30 – 1:49:00.)

Wilbur's health began to decline steadily in 2017. Teresa Olson, the hospitalist at the Glendive Medical Center, testified she began seeing him regularly in the hospital for falls. (Tr. 422.) On May 2, 2017, she referred Wilbur to Adult Protective Services (APS) because of his frequent hospital visits. (Tr. 1099-1100.) Linda Salinas, an APS specialist, responded to the referral and conducted a home visit. (Tr.

1100.) She determined Wilbur was doing well in his home and gave him information about services if his health declined. (Tr. 1101.) She also talked with Todd regarding Wilbur's health, as Todd was concerned for Wilbur. (Tr. 1102.)

On May 23, 2017, Wilbur returned to the hospital and complained of shoulder pain and was confused. The attending doctor recommended to Todd he consider a nursing home placement for Wilbur. (Tr. 1102.) Todd acknowledged, with his own health needs, it was difficult to continue to care for Wilbur in the home. (Tr. 1103, 1107.)

On May 26, 2017, Wilbur arrived at the emergency room after he had fallen in his arena and had laid undiscovered for hours. Todd had found his father and called 911. Wilbur suffered a broken pelvis, which required a month of hospitalization. (Tr. 422.) Olson had also noted increased cognitive impairment. (Tr. 436.) Given Wilbur's increasing hospital visits and potential dementia, she had recommended he not be discharged home but rather recommended he reside at the VA Home. (Tr. 422.) The discharge committee for the hospital agreed with Olson. (Tr. 467.) Todd supported the hospital's recommendation of Wilbur

going to the VA home. (Tr. 460, 469.) Wilbur was adamant he wanted to return home. (Tr. 460, 472.)

Todd and Wilbur's relationship and struggles before Wilbur's death

Wilbur often struggled with how to cope with Todd's autism. (Tr. 273, 280.) Wilbur would often call Todd "no good" or other derogatory comments. (Tr. 273, 275.) Conditioned to these comments, Todd would just walk away from Wilbur. (Tr. 274.) Gordon Barnes, who had worked on the family's ranch and knew the family for years, testified he never witnessed any physical reaction from Todd or fights between Todd and Wilbur. (Tr. 280.) Their housekeeper also testified the arguments were never physical, and Todd would just walk away and leave the house or go to his room. (Tr. 485.) In fact, Todd was prideful of Wilbur's accomplishments. (Tr. 413.) For example, when David was at the Fisher home with Todd, he showed David pictures of Wilbur when he was a lineman and pictures of Wilbur as a race car driver. (Tr. 414.) Todd also confided in the elders in his church about his concerns for Wilbur and his increased dementia. (Tr. 1135.)

After Wilbur returned home from the hospital, later that summer, on August 18, 2017, Wilbur called Deputy Hoagland and 911 with concerns Todd was suicidal. (Tr. 262, 944; DC 347.) Todd told dispatch and the responding officer he was fine; however, he was struggling with Wilbur and how to get assistance for Wilbur's dementia or possible Alzheimer's. (Tr. 265, 270.) Wilbur's health and dementia continued to place strain on their relationship. (Tr. 481.) Approximately, a week before Wilbur's death, the house cleaner heard Wilbur and Todd arguing and Todd say, "I can take care of you, and I'll put you in a home." (Tr. 484.) She asked Wilbur about the argument, and he replied, "Oh, he flaps off sometimes." (Tr. 481.) Todd told her Wilbur had Alzheimer's, and she testified she would not have been surprised with Wilbur having a diagnosis of dementia. (Tr. 486.)

The Crime Scene

Undersheriff Mills arrived on scene after Deputy Bennett. (Tr. 287.) No lights were on in the home. She went upstairs, as instructed by Todd, and found Wilbur in the upstairs bedroom. (Tr. 289.) She could see trauma to his face but could not see an immediately apparent

gunshot wound. (Tr. 289, 291.) The mortician estimated Wilbur had been dead for at least twenty-four hours. (Tr. 598.)

Mills entered from the front door. (Tr. 288.) Todd had told her when he returned home that morning, the side door was damaged and the safe broken into. (Tr. 287-288.) When she inspected the side door, she concluded the side door had been pried from the inside out. (Tr. 303.)

Later in the afternoon, Deputy Baisch found a Taurus .357 Magnum revolver under a bush thirteen feet from the sidewalk near the side door. (Tr. 499.) One cartridge was fired from the gun. (Tr. 655.)

Mills knew this situation was beyond her department's capabilities, so she called for assistance from the Department of Criminal Investigations (DCI). (Tr. 293, 602.) DCI agent Waldo arrived on the scene that afternoon. (Tr. 618.) Waldo noticed the house was tidy, contrary to what he would have anticipated if a burglary had been taking place. (Tr. 623, 628.) However, the side door was missing its hardware, which was lying on the floor. (Tr. 624.) He found no damage to the screen door or the outside of the door. (Tr. 665, 671.) Therefore, Waldo concluded someone had staged a burglary. (Tr. 708.)

Waldo found a screwdriver in the bottom of the kitchen “junk drawer” but never tested the screwdriver for fingerprints and did not take into evidence other screwdrivers found in the same drawer. (Tr. 686, 760-762.) The safe was partially open but did not appear to be forcibly opened as he could not find any tool or pry marks on the safe. (Tr. 626, 627.) He found rifles, antiques, jewelry, and documents in the safe. (Tr. 634.) Included in the documents in the safe was Wilbur’s last will, dated July 16, 2013. (Tr. 690-691; DC 333, DC 372.)

Law enforcement also found the bowl in the kitchen, in which Todd had explained they kept the gun found in the bushes. (Tr. 629.) However, the investigators never dusted the bowl for fingerprints. (Tr. 759.)

When Waldo first went into the bedroom, he found Wilbur lying on his left side in bed. (Tr. 637.) Blood spatter was on the walls above Wilbur’s bed. (Tr. 770.) The blood on the sheets on the bed had dried, making it difficult to preserve the sheets. (Tr. 699.) Therefore, Waldo just photographed the linen. (Tr. 773.) There was also an end table next to the bed, which had blood spatter patterns on it. (Tr. 979; DC 319 (State’s Exhibit 54.))

Wilbur's prosthetics were still standing up, near the bed, undisturbed. (Tr. 784, 977.) The prosthetics contained blood spatter, as was noticed by Deputy Hoagland when he cleaned the crime scene. Deputy Hoagland admitted he was surprised when he discovered the prosthetics still left behind. (Tr. 977.) Nonetheless, Waldo did not think to collect the prosthetics as evidence. (Tr. 698, 785.)

Although the location of Wilbur's death, Waldo took no items from the bedroom as part of his investigation. (Tr. 698.) Waldo never generated a crime scene sketch. (Tr. 774.) Waldo never used an alternative light source kit. (Tr. 782.) Waldo also never collected any trace evidence from the hallway and path the killer would have taken to get to Wilbur's room. (Tr. 800.)

The crime scene cleanup

Deputy Hoagland knew he was a suspect in Wilbur's death, as Waldo had interviewed Deputy Hoagland before Todd's arrest. (Tr. 794, 992.) Deputy Hoagland contacted Sheriff Canen throughout the week and requested Canen contact him "if Todd gone." (Tr. 823).

Canen arrested Todd on October 20, 2017. (Tr. 824.) Canen left the keys on the kitchen table, contacted Deputy Hoagland, and told

him, "Todd's been arrested ... now would be a good time ..." to go to the Fisher house. Canen further told Deputy Hoagland the location of the keys. (Tr. 824.) Undersheriff Mills conceded Deputy Hoagland was not legally authorized to have the keys or to be on the property. (Tr. 346.) As soon as Deputy Hoagland received the call from Canen, Deputy Hoagland went and got the keys from the Fisher house. (Tr. 952.) Deputy Hoagland conducted a walk-around the house, shut windows and doors, and watered and fed Wilbur's cat and horse. (Tr. 952-953.)

Deputy Hoagland contacted Young, a professional cleaner, to come to the Fisher house to clean the crime scene. Young owns a cleaning business which is used often by the sheriff's office. (Tr. 1113, 1114.) Deputy Hoagland never contacted DCI or the sheriff's office before arranging to have the crime scene cleaned. (Tr. 982.)

Young arrived the next day, and Deputy Hoagland and Leanne met him at the Fisher's house. (Tr. 956-958.) Young assumed the cleanup was for the sheriff's department. (Tr. 1115.) Therefore, he titled the invoice "Sheriff's Department disaster murder site clean-up." (DC 367.)

Deputy Hoagland showed Young to Wilbur's room, and as Young testified, "he wanted us to clean the scene up." At Deputy Hoagland's request, Young only cleaned the bedroom and the path to the bedroom. (Tr. 1116.) Deputy Hoagland assisted Young in carrying out the mattress and box springs but otherwise left the cleaning to Young. (Tr. 957-958.) Deputy Hoagland knew the crime scene still contained trace evidence such as blood evidence, hair evidence, DNA evidence, and fiber evidence. (Tr. 1020.) Deputy Hoagland admitted he had been in Wilbur's home previously but claimed he had never gone beyond the dining room. (Tr. 942, 1004.)

Young wiped down the walls in the crime scene. (Tr. 1117.) Young then removed all the items from the room, even the carpet and portions of the subfloor. Young further used a Hepa vacuum to clean the stairs near the bedroom and a small pathway from the bedroom to the front door. (Tr. 1131.) He did not use the Hepa vacuum anywhere else in the house. (Tr. 1132.)

Deputy Hoagland claimed to have immediately cleaned the crime scene because of rodents and the smell. (Tr. 954, 958.) However, the rest of the house also reeked of odor. Wilbur had three cats and the

house smelled of cat urine. Wilbur's weekly house cleaner acknowledged the house needed a professional cleaning. (Tr. 480.)

The next Monday, after returning to work, Deputy Hoagland reported to Undersheriff Mills he had scrubbed the crime scene. She knew Deputy Hoagland was included in Wilbur's will, so she told him not to discuss the case with any of the other officers. (Tr. 311.) She contacted Waldo and reported Deputy Hoagland's action. (Tr. 312.)

Although Waldo considered Deputy Hoagland a suspect and knew that he was second in line on Wilbur's will, Waldo took no action when Deputy Hoagland cleaned the crime scene. (Tr. 715, 793.)

On October 25, 2020, two days after Deputy Hoagland had reported to Undersheriff Mills what he had done and after Mills had contacted Waldo with this information, Young took the items removed from the crime scene to the Dawson County landfill. (Tr. 1117, 1132; DC 367.) Waldo never attempted to recover the items removed by Deputy Hoagland. (Tr. 715, 785.)

Financials and Legal Documents

Besides Wilbur's bank assets and a money market account, his property consisted of his home, 320 acres and a nice horse arena. (Tr.

379-380, 1135, 1659-1660) Wilbur had sold off a section of land about five months before his death. (Tr. 1688.) He used the money from the sale of the land to pay off remaining debts, including credit card debts. Therefore, the estate would have been debt-free at the time of his death. (Tr. 1257, 1689.) Wilbur also had a life insurance policy worth \$61,000 but had not listed a beneficiary on this policy. (Tr. 1694.)

Todd's health struggles made financial stability and money management difficult. Most months he carried a credit card debt around \$2,500, with no available credit. (Tr. 723-725.) Wilbur would often write checks to Todd to help him through the month. (Tr. 386.) While Wilbur was in the hospital with his broken hip, during June 2017, Todd used Wilbur's credit card and accumulated significant debt. (Tr. 395, 1110.)

Wilbur last updated his will on July 16, 2013. (Tr. 690-691; DC 333.) He designated Todd as the heir to his estate and as his personal representative. (Tr. 692.) If Todd was unavailable to inherit the estate, next in line were Deputy Hoagland and Leanne. (Tr. 1677; DC 372.) Deputy Hoagland testified he understood if Todd was convicted of Wilbur's death, Deputy Hoagland and Leanne would inherit Wilbur's

estate. (Tr. 997.) Interestingly, Wilbur never mentioned the Hoaglands to other family members. (Tr. 1591, 1673.) The previous will, drafted in 2000, had Todd as the beneficiary with Wilbur's niece, Tracy, and her brother, Dirk, as second in line, should Todd not be available. (Tr. 1676.)

Shortly after Todd's arrest, Leanne obtained ten copies of Wilbur's death certificates. (Tr. 1640, 1642.) Leanne requested the death certificates "to finalize estate." (Tr. 1642.) To obtain the death certificates, Leanne had to know Wilbur's father's name, his mother's maiden name, his place of birth, and his birthdate. (Tr. 1641-1642; DC 370.) Leanne then contacted Wilbur's bank and attempted to freeze his bank accounts and provided the bank with a copy of his death certificate. (Tr. 1260, 1643.) The bank told Leanne they could only close an account at the request of a beneficiary or with a court order. (Tr. 1261.) Leanne had no authority to act on Wilbur's behalf or the estate's behalf. (Tr. 1644.)

When an administrator from the estate went to inspect Wilbur's property, on February 1, 2018, it was in complete disarray. (Tr. 1680, 1683.) The house had not been winterized. (Tr. 1683.) The computer

had been left on, and somebody had tampered with the filing cabinets. (Tr. 1698, 1700.)

Despite the Hoagland's feigned friendship with Wilbur, they had destroyed the land. The land was "horrendously overgrazed." (Tr. 1687.) However, a new lease, negotiated with another rancher, yielded market-value. (Tr. 1686-1687.) The new lease was for \$30 per month per animal unit and required a payment in July and at the end of the grazing season in the fall. Further, the lessee had to maintain fences at their expense. (Tr. 1687.) This amount was double per animal unit compared to what the Hoaglands were paying Wilbur. (Tr. 1602.) Further, due to years of neglect by the Hoaglands, the new lessee had to employ two people for two days to repair the fences. (Tr. 1687.)

The Physical Evidence

Undersheriff Mills applied for search warrants for Todd's person, the Fisher house, and Todd's truck. (Tr. 333-334.) Mills located a pair of pants in the laundry room. (Tr. 301.) She thought they contained wood chips and a spot of blood. A screwdriver was found in the junk drawer. (Tr. 302.) The only physical evidence taken from the bedroom was Wilbur's body. (Tr. 338.) Although Deputy Hoagland, Leanne

Hoagland and David Pine were all also suspects, Mills chose not to take DNA swabs from them. (Tr. 335.)

Experts

Gun Shot Residue

Bahne Klietz of the Montana State Crime lab tested Todd's jeans and sweatshirt for gunshot residue. (Tr. 534-536.) He found no gunshot residue on the jeans. (Tr. 540.) On the sweatshirt, he found gunshot residue only on the left cuff. (Tr. 541.) However, he was unable to determine the source of the gunshot residue or when the gunshot residue would have been deposited. (Tr. 542.) Although law enforcement took gunshot residue swabs from Todd's face and hands, it was never analyzed by the crime lab because law enforcement allowed too much time to elapse before sending the samples to the crime lab. (Tr. 1027.)

Autopsy

Robert Kurtzman, the Chief Medical Examiner at the Montana State Crime Lab, performed the autopsy on Wilbur. (Tr. 869, 872.) He estimated Wilbur's time of death to have been Saturday (October 14, 2017) night. (Tr. 878.) He concluded Wilbur died of a gunshot wound

below his right eye, which resulted in a significant loss of blood quickly. (Tr. 883, 885.) He estimated Wilbur was shot from close range, guessing between six to twenty-four inches. (Tr. 905.)

Serology

Law enforcement sent the gun, Todd's jeans, and Todd's sweatshirt to the crime lab for review. (Tr. 1036.) The crime lab found no blood on the gun nor on Todd's jeans. (Tr. 1037, 1040.) Another expert, Kevin Winer, the Chief Criminal Supervisor at the Kansas City, Missouri Police Crime Lab, found blood on Todd's jeans but could not determine how the blood got on the jeans. (Tr. 1066.) Todd's sweatshirt had one blood stain on it, which Winer testified matched Todd's DNA. (Tr. 1076-1077.) Winer also examined Todd's shoes and T-shirt and did not find blood on either of these pieces of clothing. (Tr. 1075, 1079.)

DNA

The crime lab forensic DNA analyst, Jamie Bray, found DNA on the gun, and determined it was a mixture of two people. (Tr. 1047, 1050, 1055.) Todd's DNA was on the gun, which Bray testified would be reasonably expected. (Tr. 1050, 1055.) The analysis could not explain when the sample was deposited or who was handling the gun when it

was fired. Bray could not identify the DNA for the minor contributor. (Tr. 1055.) Todd's DNA expert agreed with Bray but explained the lab only tested for the Y chromosome for the minor contributor. Therefore, its testing overlooked potential female contributors. (Tr. 1414.)

Broken Door and Toolmarks

Lynette Lancom, a firearm and tool mark examiner at the crime lab, examined the damaged side door and the screwdriver from the drawer in the kitchen. (Tr. 1178, 1181, 1192.) She concluded the screwdriver was the tool used to damage the door. (Tr. 1203.)

Firearm

Lancom also examined the .38 caliber bullet removed from Wilbur with the Taurus .357 found in the bushes next to the house. (Tr. 1215.) Although she concluded the bullet could have come from this gun, she could not form a conclusive opinion. (Tr. 1215, 1219.)

Fingerprints

Mike Raney, with the Dawson County Correctional Facility, attempted to fingerprint Todd. (Tr. 1155-1158.) However, because of years being pricked to check his blood for his diabetes, Todd's fingers

are calloused over and rigid and stiff. Raney could not get a complete roll from edge to edge to get a full fingerprint. (Tr. 1158.)

Stephanie Shapee, the latent print analysts at the crime lab, testified she was unable to retrieve any latent prints from the gun, cartridges, or the electronic keypad from the front of the safe. (Tr. 1163, 1166-1167.) She did locate one latent impression from the front of the safe. (Tr. 1167.) However, since Raney failed to get a full fingerprint, the crime lab analysts testified she was unable to compare Todd's fingerprints with the latent prints found on the handle of the safe. (Tr. 1169.) She did not attempt to compare the safe's latent print with any of the other suspects. (Tr. 1170.) Therefore, the latent print from the safe remains unidentified. (Tr. 1171.)

Mark Beck, a certified latent print examiner, testified on behalf of Todd. (Tr. 1322, 1325.) He detected latent prints on the revolver, cartridges, and safe keypad. However, the prints had insufficient ridge detail to be used for comparison. (Tr. 1339.) He explained the reason Shapee did not compare other suspects' fingerprints with those from the latent print on the safe's handle was because law enforcement failed to request any other comparisons. (Tr. 1341.) Law enforcement also failed

to take fingerprints from Wilbur so his prints could be tested against the latent print on the safe. (Tr. 1354.) Beck testified a comparison could have been obtained from Todd with more effort and a more experienced officer. (Tr. 1355, 1360.)

On cross-examination the State chastised Beck for not seeking out law enforcement agencies to access other fingerprints and for not completing his own independent tests. (Tr. 1365.) Defense counsel objected and argued the prosecutor was attempting to shift the burden of proof to Todd. The prosecutor denied his questions were burden shifting and argued, “if they’re going to raise issues on investigation, and do investigations affirmatively, and say things should have been done, I think it’s fair to ask why didn’t they do them.” The court reiterated the burden of proof is on the State but allowed the prosecutor to pursue questions to Beck on why Beck did not personally attempt to fingerprint Todd. (Tr. 1365-1374.) (A copy of this portion of the cross-examination of Beck, the defense objection, discussion with the court, and the court ruling (Tr. 1365-1374) is attached as Appendix C.)

Closing Arguments

The prosecutor again criticized Beck in his rebuttal closing argument. (Tr. 1794.) Although he claimed he was not shifting the burden of proof to Todd, in the same breadth, the prosecutor argued, “But when they bring an expert in here, who has done something. Who said he did do a fingerprint analysis, who said he could have done one, but, then, he didn’t then the question is: Well, why not? That’s a fair question. Why Because if it’s so dang important then why didn’t Mark Beck do it.” (Tr. 1794-1795.) Defense counsel objected, and the court gave a cautionary statement to the jury that Todd “has no burden here.” (Tr. 1795.) (A copy of the transcript of this portion of the State’s rebuttal argument, the defense objection, and the court ruling (Tr. 1794-1795) is attached as Appendix D.)

STANDARD OF REVIEW

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, 372 P. 3d 471 (citations omitted). Review is plenary, to determine whether the

district court is correct. *Colvin*, ¶10. Findings of fact are reviewed to determine whether they are clearly erroneous. *Colvin*, ¶10.

This Court reviews allegations of prosecutorial error de novo, considering the prosecutor's conduct in the context of the entire proceeding. *State v. Labbe*, 2012 MT 76, ¶11, 364 Mont. 415, 276 P. 3d 848 (citations omitted). This Court reviews a criminal sentence for legality only. *State v. Hirt*, 2005 MT 285, ¶11, 329 Mont. 267, 124 P. 3d 147 (citations omitted).

SUMMARY OF ARGUMENT

Todd Fisher's due process rights were violated by the State's negligent destruction of exculpatory evidence. To Todd's detriment, his right to obtain exculpatory evidence was frustrated and hampered when law enforcement provided Deputy Brett Hoagland, a suspect in Wilbur's murder, the keys to the Fisher house, at which time Hoagland had the crime scene professionally cleaned. The lost evidence in this case can never be replaced and there is simply no comparable physical evidence from any other source that Todd could reasonably obtain. Todd's convictions must be reversed.

Instead, the matter proceeded to trial, a trial in which the jury was deprived of potential evidence because of the sloppy investigation. Thus, the prosecutor attempted to shift the burden of supplying this evidence to Todd. Over defense counsel objection, the prosecutor cross-examined Todd's fingerprint expert regarding why the expert did not conduct his own fingerprint testing to attempt to exonerate Todd. The prosecutor, during rebuttal closing argument, emphasized this questioning and the expert's failure to produce fingerprint testing in support of Todd. The prosecutor's improper cross-examination and closing argument comments shifted the burden of proof and deprived Todd of his right to a fair trial.

Additionally, the district court erred when it imposed more than \$25,000 in public defender costs without any factual record to support this condition. This condition should be stricken from his sentence.

///

///

///

ARGUMENT

- I. Deputy Brett Hoagland was an heir to Wilbur Fisher's estate and a suspect in his murder. The district court erred when it denied Todd's motion to dismiss for *Brady* violations after Deputy Hoagland cleaned and destroyed the crime scene.**

Under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 17 of the Montana Constitution, criminal prosecutions must comport with prevailing notions of fundamental fairness. Under *Brady*, the State violates a Defendant's right to due process when it possesses evidence that had exculpatory value, the evidence was willfully or inadvertently suppressed; and that suppression prejudiced the defense. *Colvin*, ¶13. A due process violation hinges not on whether the suppression of the evidence would have led to an acquittal, but only that it was "prejudicial to the defense." *Colvin* at ¶13.

The United States Supreme Court has interpreted this standard of fairness to require that a criminal defendant "be afforded a meaningful opportunity to present a complete defense." *See, California v. Trombetta*, 467 U.S. 479 (1984). To safeguard this fundamental right, the United States Supreme court has developed a constitutionally

guaranteed right of “access to evidence.” *Trombetta*, 467 U.S. at 485 (citation omitted.) This constitutional privilege delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous convictions and ensuring the integrity of our criminal justice system. *Trombetta*, 467 U.S. at 485, 104 S.Ct. at 2532.

This Court also recognizes that criminal defendants have a constitutionally derived right to obtain exculpatory evidence. *State v. Belgarde*, 1998 MT 152 ¶ 16, 289 Mont. 287, 962 P. 2d 571 (citations omitted). The State’s negligent suppression of evidence may constitute a denial of a defendant’s due process rights. *State v. Giddings*, 2009 MT 61, ¶ 52, 349 Mont. 347, 208 P. 3d 363 (citations omitted.) Negligently suppressed evidence must be “material and of substantial use, vital to the defense, and exculpatory” to violate due process. *Giddings*, ¶ 52 (citations omitted.) In order to establish the materiality requirement, the 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. Saxton*, 2003 MT 105, ¶ 32, 315 Mont. 315, 68 P.3d 721 (citation omitted.) Physical evidence of an

alleged crime, assuming such evidence exists, is critical to the State to obtain a conviction and to a defendant to obtain an acquittal. *State v. Halter*, 238 Mont. 408, 413, 777 P.2d 1313, 1316 (1989).

A. The State violated Todd’s due process right to a fair trial when it negligently allowed the crime scene evidence to be destroyed.

A defendant’s constitutional right to obtain exculpatory evidence is considered a personal right. *Belgarde*, ¶ 16. Accordingly, although police officers do not have an affirmative duty to gather exculpatory evidence on behalf of defendants, police may not “frustrate or hamper a defendant’s right to obtain exculpatory evidence.” *State v. Wagner*, 2013 MT 47, ¶26, 369 Mont. 139, 296 P. 3d 1142 (citations omitted). When the State’s negligence precludes a fair trial, dismissal of the case with prejudice is the appropriate remedy. *See, State v. Swanson*, 222 Mont. 357, 362, 722 P.2d 1155, 1158 (1986).

In *Colvin*, a case involving a shooting inside a car, this Court upheld the lower court’s dismissal when the State released the vehicle to its owner prior to the defense having an opportunity to examine it. This Court found that the intervening cleaning and daily use of the vehicle after being released made the vehicle lose its evidentiary value,

even though the vehicle still existed and was available for the defense to view. *Colvin*, ¶¶17, 20. The defendant in *Colvin* was accused of attempted deliberate homicide. A key question in the case was how far away Colvin was when the gun went off, to establish or disprove intent. *Colvin*, ¶3. A month after charging Colvin, the State concluded its investigation and released the vehicle to its owner. *Colvin*, ¶7. The State took photographs of the vehicle while still in its possession, but the defense was not given the opportunity to view the vehicle prior to its release. *Colvin*, ¶5.

The State in *Colvin* argued that the vehicle was still available, and the defense was not prejudiced by not having an earlier opportunity to conduct its own investigation. This Court was not persuaded by the State's argument and upheld the dismissal, stating that the argument that the evidence in the car "still exists" was "mere speculation...[as to]... the extent to which intervening time, use, cleaning, and weather compromised important evidence." *Colvin*, ¶17.

In *Halter*, the defendant was accused of stealing and branding a neighbor's bull. *Halter*, 238 Mont. 408, 777 P.2d 1313 (1989). The State's expert examined the bull, and it was subsequently slaughtered.

This Court upheld the lower court's dismissal on the grounds that the State had allowed exculpatory evidence to be destroyed when the bull was slaughtered before the defendant had the opportunity to have its own expert independently examine it, thereby denying the opportunity to challenge the State's timeline of when the bull was branded. *Halter*, 238 Mont. at 411, 413, 777 P. 2d at 1315-1316.

What *Colvin* and *Halter* have in common is the necessity of allowing the criminal accused to access evidence in the State's possession directly, rather than being compelled to rely upon what was gathered by the State in order to put on its defense. In both cases, the State frustrated the accused's right to obtain exculpatory evidence by relinquishing possession too soon.

Here, as in *Colvin*, the State negligently destroyed exculpatory evidence because law enforcement failed to preserve the crime scene. Wilbur was shot in his bed, and all the evidence indicated he never moved from this location after being shot. (DC 168, pp. 11, 61, 112.) Therefore, his assailant would have traveled in and out of Wilbur's bedroom to commit the crime. Agent Waldo admitted the blood at the crime scene had significant evidentiary value. (DC 168, p. 41.) Waldo

further admitted Wilbur's killer could have left trace evidence such as DNA or hair fibers. (DC 168, pp. 62, 113.) Yet, after two days of exclusive control over the Fisher's home, Waldo took no steps to secure this physical evidence. (DC 168, pp. 49-62.)

Law enforcement only allowed Todd in the home for two days before Sheriff Canen arrested Todd, and Canen took possession of the home again. (DC 168, pp. 135, 138.) Once Canen removed Todd from his home, the sheriff's office assumed responsibility for the home. (DC 168, p. 140.) Instead of contacting the attorney personal representative or Wilbur's relatives, Canen contacted Deputy Hoagland, who was still considered a suspect in Wilbur's death, and turned over the keys to the Fisher's home to Deputy Hoagland. (DC 168, pp. 140-141, 147, 153.)

Once Deputy Hoagland had the keys, he immediately orchestrated to have the crime scene scrubbed. (DC 168, p. 191.) He had all Wilbur's personal physical items removed, removed the carpeting and sub-floor, and wiped down and disinfected walls, nightstand, and bedframe. (DC 168, p. 166.) Further, he had the bedroom floor HEPA vacuumed and, moreover, the path from the door to the bedroom vacuumed. (DC 168, p. 168.)

Deputy Hoagland reported to work two days later and told the undersheriff about what he had done with the crime scene. (DC 168, p. 15.) Although the cleaning company had not yet destroyed the items taken from the crime scene, law enforcement chose to do nothing. (DC 168, p. 52.) Two days later the cleaning company took the items to the local landfill. (DC 168, p. 167.)

B. The crime scene evidence destroyed by Deputy Hoagland was exculpatory.

To establish the materiality requirement, Todd must show that “the evidence possessed 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.” *Saxton*, ¶ 32.

In *Giddings*, the defendant argued that the police negligently destroyed potentially exculpatory evidence when the detective destroyed his handwritten notes from interviewing witnesses. *Giddings*, ¶¶47-49. This Court affirmed the district court’s denial of Giddings’ motion to dismiss because the defendant still possessed the detective’s typed reports that summarized each interview, and he also had the

ability to interview all of the witnesses whom the detective interviewed. *Giddings*, ¶54.

In *Wagner*, the police allowed the victim's father to enter and move the victim's car, in which the shooting had occurred, prior to the police processing the car. *Wagner*, ¶7. Wagner argued the police negligently allowed exculpatory evidence to be destroyed when the police allowed the dad to move the vehicle. *Wagner*, ¶24. This Court found Wagner failed to show the police were negligent in preserving the evidence and further, Wagner failed to show the evidence was, in fact, exculpatory. *Wagner*, ¶¶32-33.

Here, contrary to *Giddings* and *Wagner*, when law enforcement allowed Deputy Hoagland access to the crime scene, at which time he removed Wilbur's items, the bed, the linen, and the carpet, Todd lost physical evidence which can never be replaced. Todd had no way of undoing the damage that was done to the physical evidence in the case. Based upon the nature of the destroyed evidence (blood droppings, trace evidence such as hair and DNA deposits, and fingerprints and footprints), and the failure to preserve evidence, there is simply no comparable physical evidence from any other source. Although Waldo

photographed the blood spatter, the trace evidence was lost. Even after being notified about Hoagland's crime scene cleaning, law enforcement took no action. (DC 168, p. 52.) The evidence removed from the crime scene and subsequently destroyed at the landfill possessed an exculpatory value that was apparent before it was destroyed and is of such a nature Todd could not obtain it by other reasonably available means.

II. With no physical evidence conclusively connecting Todd Fisher to the crime, the prosecutor prejudiced Todd's right to a fair trial when the prosecutor shifted the burden of proof to Todd to prove his innocence.

The court allowed the prosecutor to question Todd's fingerprint expert on why the expert had not contacted various law enforcement agencies to obtain fingerprint samples and why the expert did not take his own fingerprint sample from Todd. (App. C.) Then in rebuttal closing arguments, although the prosecutor slyly tried to claim before the jury he was not shifting the burden, he nonetheless reinforced his theme that Todd should have done his own forensic testing when he told the jury, "... when they [the defense] bring in an expert in here, who has done something. Who said he could have done one, but, then, he didn't,

then the question is: Well, why not? That's a fair question. Why? Because if it's so dang important then why didn't Mark Beck do it." (Tr. 1794-1795.) While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

A. The prosecutor's cross examination of Mark Beck and the prosecutor's closing argument comments were improper because they shifted the burden of proof.

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution state that no person shall be deprived of liberty without due process of law. In Montana, a "burden-shift" is the shorthand this Court uses when it recognizes a dilution in the presumption of innocence and the reasonable doubt standard. *State v. Price*, 2002 MT 284, ¶¶ 33-34, 312 Mont. 458, 59 P.3d 1122. "Burden shifting calls into question both the fairness of [trial] as well as the integrity of the judicial process." *Price*, ¶ 34. A burden-shift can appear in many forms. *Price*, ¶ 36. For example, a jury instruction shifts the burden of proof when the State

requires the accused to prove an element of his or her own alleged criminal offense. *Price*, ¶ 36. A burden-shift can also take shape in the form of improper prosecutor comments. *State v. Stewart*, 2000 MT 379, ¶¶ 35-36, 303 Mont. 507, 16 P.3d 391.

This Court indicated that a prosecutor's comments can create an unconstitutional burden shift. In *Stewart*, the Court criticized a prosecutor for misrepresenting the reasonable doubt standard to the jury by arguing that reasonable doubt had been met because the State satisfies the burden of proof every day. *Stewart*, ¶¶ 35-36. Although counsel may comment on the burden of proof, they cannot misrepresent the law. *Stewart*, ¶ 40 (citation omitted.)

In *State v. Newman*, 2005 MT 348, ¶27, 330 Mont. 160, 127 P. 3d 374 (*J. Nelson, concurring*), the prosecutor told the jury that the defendant could not call certain witnesses because they would perjure themselves. *Newman*, ¶ 27 This Court explained the prosecutor used his closing argument to criticize Newman for failing to present witnesses to corroborate her testimony. This Court reasoned, the prosecutor's arguments suggested to the jury guilt could be established by Newman's failure to call witnesses, suggested Newman had an

obligation to present evidence, and improperly shifted the jury's attention from the State's substantive evidence to the lack of affirmative evidence presented by Newman. *Newman*, ¶ 29 (*J. Nelson, concurring*). This Court concluded the prosecutor's remarks undermined the presumption of innocence and diminished the State's burden of proof. *Newman*, ¶ 29 (*J. Nelson, concurring*).

This Court further held in *Newman* that jury instructions regarding the State's burden of proof did not provide a sufficient remedial effect. *Newman*, ¶ 37 (*J. Nelson, concurring*). Further, this Court disregarded the State's argument the statements were merely an attack on the defendant's credibility. *Newman*, ¶ 38 (*J. Nelson, concurring*). "An attack on the presumption of innocence is not rendered acceptable just because it is also an attack on the defendant's credibility." *Newman*, ¶ 38 (*J. Nelson, concurring*). This Court reiterated, "defendants should not have to struggle for the right to be presumed innocent." *Newman*, ¶ 37 (*J. Nelson, concurring*).

Later, this Court, in *State v. Favel*, 2015 MT 336, ¶26, 381 Mont. 472, 361 P. 3d 1126, held a prosecutor's comments that the defendant could have proven her innocence in a DUI case by submitting to a

breath test, were improper. This Court commented, “[t]he risk is simply too great that the State’s burden of proof in the mind a juror will be diminished by the repeated use of burden of proof language – such as demonstrate, show, and prove, in reference to what the defendant could have done.” *Favel*, ¶26.

Like the prosecutor in *Newman*, the prosecutor in Todd’s case argued he was entitled to cross-examine Todd’s experts on why Beck did not conduct fingerprint testing on behalf of Todd because it went to the expert’s credibility. (Tr. 1365-1374.) Compounding this argument, the prosecutor reinforced this theme in his rebuttal closing argument. (Tr. 1794-1795.) However, just as in *Newman* and *Favel*, the State had the entire burden of establishing Todd’s guilty beyond a reasonable doubt, and it was never Todd’s responsibility to prove his innocence. Todd never had an obligation to conduct any forensic testing because it is not his burden to prove his innocence. The burden rested entirely upon the State, and the prosecutor’s improper cross-examination of Beck, and the prosecutor’s improper closing argument had the effect of shifting the burden of proof to Todd.

It is the burden of the State, never the accused, to establish guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970.) The prosecutor's act of arguing otherwise misrepresented the law and diluted the presumption of innocence.

B. The effect of the prosecutor's misconduct prevented Todd from receiving a fair trial.

The improper commentary by the prosecutor during cross-examination and closing arguments denied Todd a fair trial. The prosecutor improperly insinuated that it was Todd's responsibility to conduct forensic testing and bring witnesses to the trial to prove his innocence. This misconduct by the prosecutor violated Todd's right to a fair trial and warrants a new trial.

The State did not have overwhelming evidence against Todd. The State had no witnesses to the crime. The State had no physical evidence conclusively tying Todd to the crime, any more than the other suspects. Therefore, although Todd repeatedly and adamantly denied killing his father, the State's entire case essentially hinged on Todd's interviews with Canen.

The prosecutor's improper pattern of comments prejudiced Todd's right to a fair trial. The improper cross examination of Beck and the comments made at rebuttal closing argument were part and parcel of the State's ongoing theme that Todd failed to prove the guilt of another one of the suspects. The comments contributed to the conviction by suggesting to the jury that Todd was guilty because an innocent person would have more actively conducted his own independent testing. *State v. Sullivan*, 280 Mont. 25, 36-37, 927 P.2d 1033, 1039-1040 (1996.)

Reversal is required.

III. After imposing a seventy-year prison sentence, the district court did not have any factual basis to support its determination that Todd Fisher could pay \$25,000 in public defender fees.

The district court ordered Todd to pay more than \$25,000 in assigned counsel costs. A district court may sentence a defendant to pay the costs of assigned counsel only if the defendant can pay or will be able to pay those costs. *State v. Madplume*, 2017 MT 40, ¶37, 386 Mont. 368, 390 P. 3d 142 *citing* Mont. Code Ann. § 46-8-113(4); *State v. Starr*, 2007 MT 238, ¶8, 339 Mont. 208, 169 P.3d 697. To accomplish these legislative commands, the sentencing court must “demonstrate a

serious inquiry or separate determination into the defendant's ability to pay. ..." *Madplume*, ¶37 (citation omitted.) This determination should include the amount and method of payment of costs, the defendant's current financial resources, the defendant's future ability to pay costs, and the nature of the burden that payment will impose. *State v. Moore*, 2012 MT 95, 365 Mont. 13, 277 P. 3d 1212 (citation omitted.)

Here, the PSI author reported Todd's monthly income of \$1,008.00 was based solely from social security which would not be provided to him in prison. The PSI reported Todd had no assets. (DC 380.) Defense counsel argued Todd would be unable to pay for the attorney costs, especially given his incarceration, his sole source of income was from social security, and his ongoing physical disabilities. (3/22/18 Tr. 54-57.) The district court never questioned Todd directly about his financial resources. (3/22/18 Tr. 73-77.) Instead, the court recognized Todd will have a "relatively stifled" ability to pay for the full costs of his public defenders. (3/22/18 Tr. 75.)

The court further attempted to insulate its lack of detailed findings on ability to pay by ruling Todd could petition the court for a reduction of the fees at some future date. (3/22/18 Tr. 77.) However,

this Court has specifically held a district court cannot reserve to itself this option. In *Hirt*, the court ordered the defendant to pay almost \$10,000 in public defender cost. *Hirt*, ¶9. The court recognized, at the time the sentence was imposed, the defendant lacked the financial resources to pay these costs. *Hirt*, ¶¶9-10. Therefore, the court indicated it intended to reassess the defendant's financial status in the future. *Hirt*, ¶10.

This Court, in *Hirt*, acknowledged a defendant can, at any time, petition for remission of court appointed counsel costs. *Hirt*, ¶20. However, no statutory authority exists for the district court to reserve authority for itself to modify the sentence regarding reimbursement of court-appointed counsel once it has been imposed. *Hirt*, ¶20. This Court also found the district court failed to comply with the statutory requirements of Mont. Code Ann. §46-8-113, when it failed to articulate a basis for its determination the defendant could pay for counsel costs. *Hirt*, ¶23.

In this matter, contrary to the court's own observations, the PSI documentation, and defense counsel's arguments, the court imposed more than \$25,000 in public defender costs. The lack of adequate

inquiry into Todd's financial resources and the court's own musing about Todd's ability to pay being "relatively stifled" does not meet the "ability to pay" requirements of Mont. Code Ann. § 46-8-113(4).

Therefore, this Court should strike the public defender fees imposed in Todd's sentence. *Starr*, ¶11.

CONCLUSION

This Court should reverse Todd's conviction and dismiss with prejudice the case against him. The State failed to preserve exculpatory evidence and then negligently allowed for its destruction after Deputy Hoagland scrubbed clean the crime scene.

Alternatively, Todd respectfully requests that this Court reverse and remand for a new trial. The prosecutor prevented Todd from receiving a fair trial by shifting the burden of proof to Todd through his cross examination of Todd's experts and his improper rebuttal closing argument.

Additionally, the district court's sentence requiring Todd to pay almost \$25,000 in public defender costs is not supported with evidentiary findings and is illegal because it does not meet the requirements of Mont. Code Ann. §46-8-113(3). Therefore, this Court

should reverse and remand with instructions to strike the portion of the sentence concerning the public defender costs.

Respectfully submitted this 25th day of September, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristina L. Neal
KRISTINA L. NEAL
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,989, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
KRISTINA L. NEAL

APPENDIX

Order Denying Motion to Dismiss	App. A
Judgment and Order Imposing Sentence	App. B
December 17, 2018 Jury Trial Transcript, pp. 1365 - 1374	App. C
December 18, 2018 Jury Trial Transcript, pp. 1794 - 1795	App. D

CERTIFICATE OF SERVICE

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-25-2020:

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Brett Irigoin (Attorney)
121 S. Douglas Avenue
Glendive MT 59330
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by Kim Harrison on behalf of Kristina L. Neal
Dated: 09-25-2020