ORIGINAL

In the
SUPREME COURT OF THE STATE OF MONTANA
No: DA 20-0375

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LIONEL SCOTT ELLISON,
Petitioner-Appellant,

vs.

STATE OF MONTANA, et al.,
Respondent-Appellee.

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RESPONSE BRIEF OF THE APPELLANT

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On Appeal from
the Montana Thirteenth Judicial District Court
Yellowstone, County
The Honorable Matthew J. Wald, Presiding

****

APPEARANCES:

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Submitted on this 5th day of October, 2020.

Lionel Scott Ellison
LIONEL SCOTT ELLISON

OPENING STATEMENT IN REPLY

The Appellant, Lionel Scott Ellison, hereby replies to the State of Montana's Brief of Appellee.

The State seems to ignore the rules, holdings and decisions of this court, the Ninth Circuit Court of Appeals, and the controlling judicial law of the United States Supreme Court. Each of these courts are bound by one basic rule of law, which is 'Equal Justice Under the Law', as is engraved in stone on the face of the United States Supreme Court Building. The Rules, Principles and Common laws of our courts are held in the highest that maintain this rule of law.

One of the State of Montana's jurisprudence rules's of law, is in exact step with the Ninth Circuit and the United States Supreme Court holdings. This rule of Law is basic, and was taught to all High School students in debate class... That if you refuse, neglect or fail to argue, brief or debate an issue, that issue or claim is thus conceded, waived, relinquished and surrendered. The above courts have held this same basic principle to be true throughout time in the courts.

In the original filing of this matter, the Appellant's Petition for Post Conviction Relief, Cause No: DV 18-1629, in the Montana Thirteenth Judicial District Court, the State was ordered to reply to Ellison's above Petition, which contained seven (7) claims. The seventh claim was that these proceedings were lawfully barred from further prosecution after Ellison was acquitted of Count I: Arson, which is the required legal and lawful procedure based upon that claim's heading of Collateral Estoppel, and the laws of Montana per statute's MCA: §46-11-503 and §46-11-410§§(2)(b-c).

The State neglected to brief Ellison's claim #7, Collateral Estoppel, which contained the above MCA statutes. By the state's failure to brief that claim/issue, the laws of the above courts hold that the state's failure is then deemed to be a waiver of that issue, and constitutes a concession to that issue per the judicial caselaw of the above superior courts. Which by that law, the remaining Counts of 'Tampering' and 'Impersonation', as alleged by the State are legally barred from further prosecution at the point Ellison was acquitted of Count I: Arson.

The district court in turn neglected/ failed to adjudicate the same issues and claims, statutes and laws of Montana, which in itself is a severe violation to the Due Process of Law.

The State in it's 'Brief of Appellee' does not contest or brief that the Yellowstone County Prosecutors for the state waived/ conceded to Ellison's Claim #7 above, and is also waiving the fact that the courts refusal to adjudicate is a violation.

ARGUMENT WITH SUPPORTING CASELAW

The Montana Supreme Court has held that the State has "the obligation to either brief an issue or concede it". See State v Greeson, 2007 MT 23, ¶16.

Base upon the above holding of this court, the State, through the Yellowstone County Attorney's Office, conceded to Ellison's Claim #7, Collateral Estoppel, which contained the following Montana Statutes, as ratified by the Montana State Legislature. §46-11-503, MCA: Prosecution based upon the same transaction barred by former prosecution.

> "When two or more offenses are known to the prosecutor, are supported by probable cause, and are consumated prior to the original charge and jurisdiction and venue of the offense lie in the same court, a prosecution is barred if: (a) the former prosecution resulted in an acquittal."

Ellison was acquitted of Count I: Arson, [the Former Prosecution], which the state alleged from the same transaction as Count II: Tampering with Evidence, and Count IV: Impersonating a Public Official, [Count III: Tampering was overturned by this Court on Appeal, based upon the Fifth Amendment, Double Jeopardy Clause; and Art. II, §25, Double Jeopardy of the U.S. and Montana Constitutions; establishing the 'Law of the Case' in this matter].

Based upon the above statute, and this courts holding which establishes the presense of Double Jeopardy, as the Law of the Case, as well as the State's failure to brief this Claim #7, in Ellison's petition, the state has conceded this issue and that claim by law.

The Second Montana State Statute cited in Ellison's Claim #7, which the State failed to brief, is §46-11-410 Multiple Charges, which states at §(2): "A defendent may not be convicted of more than one offense if: (b) one offense consists only of a conspiracy or other form of preparation to commit the other," or §(2)(c), "inconsistant findings of fact are required to establish the commission of the offense."

Based upon the above statute, the district court was not allowed to convict Ellison of Counts II, III and IV, after he was acquitted of Count I, due to the fact that the state has alleged that Counts II, III, and IV are in "preparation to commit the other", as an alleged "conspiracy" by Ellison. But Ellison has presented New Evidence and documentation that supports the facts that the conspiracy was not from Ellison, but that a County detective and two State Prosecutors were the culpable individuals, responsible for the conspiracy, a claim the State again failed to brief.

Based upon the above Montana caselaw, Ellison was unlawfully convicted of Counts II, and Count IV, and thus illegally incarcerated for six (6) years... and the state concedes these claims by the laws of this court.

Holdings by the Ninth Circuit Court of Appeals, and the United States Supreme Court are congruent with this courts holding in Greeson.

The Ninth Circuit, in Melkonyan v Gonzales, 225 Fed Appx 693 (9th Cir. 2007) (deeming an issue abandoned due to the party's failure to brief it); cited again by Meechan v County of L.A., 856 F.2d 102, 105 (9th Cir. 1988).

"Arguements must be briefed to be preserved", See Arguasin v Mulkasey, 297 Fed Appx 706 (9th Cir. 2008) at 707; citing Yohey v Collins, 985 F.2d 222,225(5th Cir 1993).

"The government did not raise the arguement in its initial briefing before the court, and it's "failure to brief the issue" results in waiver." See United States v Valenzuela-Espinoza, 697 F.3d 742(9th Cir 2012) at 745; citing United States v Ewing, 638 F.3d 1226, 1230(9th Cir. 2011).

"Failure to brief an issue on appeal constitutes abandonment of the issue." See Paracor Fin. Inc. v General Electric Capitol Corp. 96 F.3d 1151, 1168(9th Cir. 1996). This Ninth Circuit holding is relevant to the States Brief, concerning multiple issues therein, that were present in Ellison's Opening Brief, that the State also Failed to Brief, and has thus conceded to.

The controlling supportive caselaw is in the U.S. Supreme Court decisions, that are also in lock step with this courts Greeson holding, in United States v IBM, 517 US 843,855,n3,116 S.Ct. 1793, 135 L.ed.2d 124(1996); Posters n Things,Ltd v United States, 511 US 513, 527, 114 S.Ct. 1747, 128 L.Ed.2d 539(1994); same as Knowles v Mirzayance, 556 US 111, 128 S.Ct 1411(2009) at footnote N2. Each stating: (finding that party abandoned issue by failing to address it in party's brief on the merits).

Blacks Law Dictionary defines a 'waiver' as:"The voluntary relinguishment or abandonment-- express or implied-- of a legal right or advantage" and "The party alleged to have waived a right must have had both the knowledge of the existing right and the intention of forgoing it." CF Estoppel. "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." See Blacks Law 7th Edition. See denounce and surrender.

Thus based upon the laws of this court, the Ninth Circuit and the Supreme Court, as defined in Blacks, the State as represented by Yellowstone County conceded to Ellisons Claim #7, and the Statutes of the State, that after Ellison was acquitted of Count I, that the State was barred from further prosecution of Counts II,III and IV, as also being illegal based upon the Multiple Charges statute. Ellison is thus unlawfully convicted and incarcerated for six years which demands the reversal of/ overturning, and exonerating Ellison as soon as possible based upon the law.

The Appellant, Ellison, has demonstrated the cause that upon the first direct appeal that the seven PCR claims were not presented in the first direct appeal as being the ineffectiveness of appellate counsel, in DA 16-0105, and Ellison's multiple attempts to receive a substitution during that proceeding in which Ellison presented documentation of that attorney's refusal to submit any of Ellison's requested claims in Ellison's PCR Petition, after receiving the documentation from Judge Brenda Gilbert of the Sixth Judicial District Court that substantiated all of Ellison's PCR claims. Ellison filed a second direct appeal and presented all seven of those claims and this court held that these same seven claims are best presented in Post Conviction Relief, [PCR]. The Petition had been filed in the district court prior to the resentencing hearing from the first direct appeal. Ellison refused to allow the Montana Public Defenders Office represent him in the second direct appeal, due to this major conflict of interest with that office, and Ellison's PCR claim that Appellate Counsel was ineffective during the first direct appeal. Ellison did submit these seven claims on direct appeal, contrary to the States claim. Ellison presented state and federal jurisprudence in support for each of these (7) seven claims herein. The State in it's 'Brief of Appellee' has not argued Ellison's claims as presented on appeal.

Ellison is allowed to bring forth these claims as is ordered by this court and the Federal caselaw as presented upon appeal, based upon the 'Procedural Default Doctrine' per the United States Supreme Court decision, Coleman v Thompson, (1991), 501 US 722, 730-31, 111 S.Ct. 2546, 115 L.Ed.2d 640; and the Ninth Circuit supporting decision in Koerner v Griga, 328 F.3d 1039, 1046 (9th Cir. 2003), that "The Procedural Default Doctrine ensures that the states interest in correcting it's own mistakes is respected."

The State has admittedly made an egregious Mistake, in the transcripts Prosecutor Mees stated on page 629 at line 7 that the "No there is no evidence of that" concerning the identity of who made the call to get Ellison Fired (4X). Mees admitted that the only evidence she had was circumstantial evidence that the Appellants parents were suing Detective Fritz for the harrassment and threats against them by Detective Fritz, in a suit the Appellant was not a party to. See also Page 616 were "The reason there is no evidence" was because Ellison was to smart...how can that be grounds to convict? The eye-witness testimony from the two persons who identified the actual perpetrator 'consistantly' state that Detective Fritz was the person they saw run from their home with Ellison and themselves tied inside the house. No evidence exists to contradict that testimony except the false statements and conjecture and innuendo by the State, a fact that the State in the Brief of Appellee does not dispute or brief. See page 195 line 12, confirming investigator Stovall had the phone when calls made to Fire Ellison.

THE PROCEDURAL DEFAULT DOCTRINE:

The U.S. Supreme Court has held repeatedly that a defendent/ petitioner is not barred from presenting and pursuing his actual innocence when "a prisoner who makes a credible showing of 'Actual Innocence' may pursue his constitutional claims... on the merits notwithstanding [regardless of] the existance of a procedural bar to relief." See McQuiggin v Perkins, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).

Which follows the cited Coleman v Thompson, 501 US 722, 730-31, 111 S.Ct. 2546 (1991) origination of the 'Procedural Default Doctrine' at 750, and Murray v Carrier, 477 US 478(1986). The Ninth Circuit has followed with the previously cited ruling in Koerner v Griga, 328 F.3d 1039, 1046(9th Cir 2003), ensuring "the states interest in correcting it's own mistakes is respected."

The doctrine has consistantly been used and cited for that very purpose, that being thecase herein. The U.S. Supreme Courts ruling in Schlup v Delo, 513 US 298, 326-27, 115 S.Ct. 851, 130 L.Ed.2d 808(1995) and House v Bell, 547 US 518, 536-37, 126 S.Ct. 2064, 165 L.Ed.2d 1(2006), hold that "One means of excusing procedural default is to show Actual Innocence." See Smith v Baldwin,510 F3d 1127, 1140(9th 2007).

Actual Innocence is "factual innocence, not merely legal insufficencey", See Bousley v United States, 523 US 614, 623-24, 118 S.Ct. 1604, 140 L.Ed.2d 828(1998).

"Abandonment by Counsel is a recognized cause to excuse procedural default", See Maples v Thomas, 565 US 266, 132 S.Ct. 912, 922-924, 181 L.Ed.2d 807(2012)

The above holdings by the U.S. Supreme Court must be held as the 'Law of the Land' per the Supremacy Clause of the U.S. Constitution, and as such,nother courts are bound by law to adhere to thisejurisprudence, as this court follows per Greeson.

Based upon the undeniable fact that the State did not present any evidence at trial or present any justifiable cause for filing these charges, Ellison meets the required criteria above for the court to review all seven of Ellison's claims, including his 'Actual Innocence' and the 'Insufficiency of Evidence' claims, based upon this lack of evidence, and the lack of a legitimate probable cause to file the charges, which the court is "required to invalidate a conviction because of insufficient evidence", citing Jackson v Virginia, 443 US 307,324, 99 S.Ct. 2781,2792 (1979).

Many of Ellison's claims are not briefed or argued by the State in it's 'Brief of Appellee', which Ellison will respond to the states responses, even though by law the state has surrendered, waived and conceded this case and the fact that Ellison is unlawfully convicted, and illegally sentenced. Ellison does this in order to preserve all of Ellison's Claims, and prove the undeniable retaliation and collusion of the the Prosecutors and Detective Fritz for what occurred in Park County.

APPELLANTS RESPONSE TO THE STATE'S REPLY TO EACH OF ELLISON'S (7) CLAIMS:

The 'Law of the Case' has been established by this court, that Double Jeopardy is present in this matter, by this courts dismissal of Count III: Tampering with Evidence, in its decision in DA 16-0105, State v Ellison, 2018 MT 252. The State does not dispute the presence of this in its 'Brief of Appellee'.

The Montana Supreme Court cited "The 'law of the case' posits that when a court decides a rule of law, that decision shall continue to govern the same issues in subsequent stages, of the same case." Arizona v California, 460 US 605, 618, 103 S.Ct. 1382, 1391(1983), in Norbeck v Flathead City, 2019 MT 84, ¶26, and following Christianson v Colt Indus. Operating Corp, 486 US 800,815,108 S.Ct. 2166(1988).

Thus the Petitioner will show the relevance of the 'Law of the Case' to other issues herein and the established 'Double Jeopardy' violation, and the prejudicial affects of that constitutional violation, and the State's failure to brief additional claims in Ellison's Opening Brief that again constitute a waiver and is also a concession to the issues presented to this court in Ellison's 'Opening Brief' herein. Ellison firmly holds that the Montana Attorney General, Sr. Deputy, Mr. C. Mark Fowler, is an honest man, by his statements on page 2 of his 'Brief of Appellee', in which he proves that Detective Frank Fritz Committed Perjury on the Stand, in support of Ellison's Claim #6, Perjury, as follows. Ellison lacked space for that in Opening.

Claim #1: Ellison's Actual Innocence/ Insufficiency of Evidence.

The State cited State caselaw that is now overcome by the previous section on the 'Procedural Default Doctrine'. Ellison in his Opening Brief has show that he is 'Actually Innocent' and that the State lacked Legitimate and lawful probable cause. The State at trial even admits that it did not have evidence, and placed unsubstantiated and false statements before the court and the jury. Even admitted this matter concerned the fact that Claude and Marlene Ellison, had been suing Detective Fritz and the Yellowstone County Sheriff's Department, for Fritz's threats and harrassment of Claude and Marlene. A suit that the Appellant Ellison was not a party to, but in which the State at Trial repeatedly represented this was cause to find Ellison guilty, that was completely irrelevant to the charges against Ellison.

The Appellant Ellison has shown the Court that the State did not have legitimate probable cause, based upon the two previously cited U.S. Supreme Court cases in this reply brief, DA v Osborne, and Melendez-Diaz v Mass.; and the four forensic studies that disprove the States Probable Cause, and they knew it. The State does not contest this either, that the County Prosecutors Mees and Linneweber lacked Probable Cause, and used this matter as retaliation, as vindictive prosecution.

Ellison has met the requirements that the state did not prove any of the required elements of the two remaining charges. The State, has not reviewed the transcripts it seems because the State in closing admits that they only had the circumstancial evidence that Ellison' Family was suing Fritz, not Ellison. Ellison presented a vast amount of New Evidence that he was innocent and that the State violated the Order in Limine, which requires the State to supply all evidence relating to Detective Fritz. What Fritz and Ellison's exwife did to Ellison is now of record, the state DID NOT meet the criteria to establish ALL of the elements of a criminal offense. The record proves this based upon the transcripts of the trial, and statements by the State.

Claim #2: Judicial Bias

The State is in err in its claim that no evidence exists of the Judicial Bias by the Trial Judge. The Petition for Post Conviction Relief's Supporting Brief contains the Affidavit of Claude Ellison, who was also a owner in the two construction companies who built two homes for the 'Special K' ranch next door to the trial Judges home. Claudes Affidavit clearly states that their was a verbal confrontation between, Judge Jones with Mike Dooley[ranch manager];and Claude and Lionel Ellison[Appellant] over non-payment of $2,500 for work done on that ranch [two Homes and a greenhouse].

The Judge stated differently, but the presumption of bias is thus established, per the laws of Montana, and the caselaw cited in the Petition for Post Conviction Relief. The trial judge allowing the 'Double Jeopardy' also shows his bias.

Claim #3: Mental Incoherance

The State seems to forget the New Evidence again that the Yellowstone County Detention Facility confirms that the named guards did not feed Ellison during the last two days of the Trial, in their 'Internal' Investigation, done by Sgt Pluhar who signed the attached grievance confirming this fact. Attorney Kakuk only fed Ellison lunch the first day, and refused to on the second and third day. The Appellant has also presented confirmed documentation that these same guards who refused to feed Ellison, later had Ellison stabbed 3 times in retaliation by a former employee of Ellison's construction company. These guards are the defendents for their illegal acts in the U.S. District Court, cause no: CV 18-56-BLG-BMM-JTJ.

Ellison, has presented documentation from multiple doctors that Ellison is a severe Hypoglycemic, and must not be denied any meal, and must have many 'snacks' between meals and at night. The Jail provided an extra meal for that purpose, Kakuk can not confirm that Ellison was fed at the Jail, and the jail Transport guard confirms that Ellison collapsed after the second day of trial due to lack of food. Kakuk and the statements in his affidavit are false. Kakuk's credibility is unreliable, as will be shown in the following IAC Claim, in which he witheld exculpatory evidence, by his own admission. A guard admitted in writing he witheld food during trial.

Claim #4: Prosecutorial Misconduct/ Malicious Prosecution.

The State didynot argue all of the Appellants issues and claims of Prosecutorial Misconduct. Ellison presented (4) seperate issues in his appeal of this misconduct, but the State only mildly addresses one of them, and thus it must be concluded that the State concedes those issues also based upon this courts Greeson holding that the State has "the obligation to either brief an issue or concede it."

The State in its 'Brief of Appellee' did not brief issue 1 on page 26, which is that the State lacked probable cause, by the States misrepresentation of a known natural act, as being probable cause. The State knowingly mischaractorized Ellison's DNA being present at the home he lived in as being probable cause, knowing that the State had been informed previously of the 'Secondary DNA Transfer' studies and the two named U.S. Supreme Court Cases disallowing known false use of DNA, and the two reports included in those cases. Ellison presented Four forensic studies that proved that 'Secondary DNA Transfer' occured 85% of the time to objects in contact with other objects that a person never touched. Literally described as 'Dust', which is everywhere at a persons home. The caselaw presented shows that the state knowingly used Ellison's DNA out of context, in order to stop Ellison from suing the State Prosecutor Linneweber of the Yellowstone County Attorney's Office, for his previous Brady violations in Park County when he was the County Attorney in that County. Linneweber was fired from Park County, for suppressing a 40+ minute Dashcam video that proves Ellison did not commit the Tampering Charge. Ellison has proven that he did not commit this same charge in Yellowstone County, filed by Prosecutors Linneweber and Mees, herein.

This Court has held in State v Johnson, 179 Mont. 61,68-69, 585 P.2d 1328(1978), "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort", see North Carolina v Pearce, supra, 395 US [711] at 738, 89 S.Ct. 2072, 23 L.Ed.2d 656(1969)

The State then must be conceding that the Yellowstone County Prosecutors did not have probable cause, and knew that the charging documents were frivolous and without, legitimate merit, based more upon vindictive prosecution, for Linnewebers being dismissed in disgrace as the Park County Attorney for his exact same unlawful deeds in that county, as shown by the dismissal of the 'Tampering' Charge by the very Honorable Judge Brenda Gilbert. The State unlawfully portrayed Ellison's DNA at his home as evidence, knowing that the detective who was identified by the two eyewitnesses was also the actual perpetrator of Ellison Being Abducted, Tortured and Raped..and dumped in Park County. Again another fact that the State does not dispute herein.

The State in its Brief only claims that detective Richardson did not tape record the Statements of the eye-witnesses Claude and Marlene Ellison, and Appellant Ellison because the defense attorney Kakuk said the detective did not do so in his affidavit. Kakuk was not at our home that morning and could not make such a statement. Kakuk was told that we were recorded that morning, and did nothing to obtain the recording.

The Appellant has presented the Affidavits of both Claude and Marlene Ellison, and himself that Richardson did record our statements that morning and they saw Fritz run from our home the morning that the bomb thing woke us. Either the Prosecutors Mees or Linneweber or Detective Richardson suppressed the audio recording. The audio recording contained all of the information of what occurred in Park County that resulted in Linnewebers being fired from Park County, his suppression of evidence and the involvement of detective Fritz. Mees claims she did not get a audio recording.

The required protocol is well established when interviewing witnesses done by a detective investigating a criminal act, they are to record the interview, which Det. Richardson did, and wrote notes. Neither of which were presented to the Appellants family attorney, Liz Honaker, at the beginning of this, which is a BRADY violation.

The State also claims that the one photo of the door knob does not show a blood stain on the knob. The photo clearly shows a stain on the handle, which Ellison had to later clean up, just like he had to repaint over the burn marks from the bomb thing thrown against the wall. The Court can view the photo and see the stain for themselves.

Again the State is relying upon an affidavit of attorney Kakuk, who stated that the State did not have the phone at trial and did not present the phone during trial with the Photo of Ellisons Left hand that shows the cuts from the broken glass. Yet in his affidavit and by the States admission here, Kakuk had the phone all the time and had knowingly suppressed it. Kakuk's credibility is now impeached as being self serving and fraudulant by his own statements.

The State in it's 'Brief of Appellee' does not brief or address the facts on page 27 of Ellison's Opening Brief that Prosecutor Mees prejudiced the jury and the Court by deliberately attacking the credibility of the eye-witnesses. Mees stated to the Jury "I suggest to you that you take Marlene and Claudes testimony with a grain of salt". (See Trans. Page 582/ line21). which is a traditional way of calling them both liars. Mees also stated "Again we have circumstancial evidence. This can be used in this case, because you can't trust the direct evidence of Claude and Marlene" (who saw Fritz Fleeing our home), these statements are illegal per the cited caselaw of this court and the Ninth Circuit as well as placing Mees's personal opinions to the jury that she could see "Financial motive written all over him" (Ellison), (See page 599/ lines 10 and 16). This must also be deemed to be conceded.

"We have previously concluded that it is reversabble error for a prosecutor to comment directly on the credibility of a witness". See State v Hayden, 2008 MT 274, P28; quoting State v Stringer, 271 Mont. 367,380-81(1995); see per State v Daniels, 2003 MT 247, P20.

"The court has emphasized that it is improper for a prosecutor to offer personal opinions as to witness credibility." State v Rodgers, 257 Mont. 413,417(1993).

"The record, leaves unsettled the question of the fundamental fairness of the proceedings." Hayden at P33. The State does not contest this misconduct issue either.

Again the State does not argue or brief this issue that the State violated the sanctity of the jury to illegally influence the jury without evidence and only her personal views that are irrelavant and inadmissible and not legally proven by evidence. See Hayden at 28. Again this must be construed as a concession to this issue, and requires reversal based upon the above also. See MT.R.Evid. Rules 401-403.

Lastly in this claim, the State does not argue or brief that Linneweber knowingly made false statements to the court during the August 10, 2015 hearing before the court, in which he knowingly made claims that he knew to be false concerning the Park County charges that the court in Park County dismissed by Judge Gilbert. Linneweber knowingly falsely stated that Ellison had previously "had staged a crime scene" in Park County, and that "There is no evidence to support his [Ellisons] claims." Linneweber blatently lied and prejudiced the court against Ellison, knowing that he, Linneweber, had hidden and sealed the State Report from the Department of Public Services, Dr. Virginia Hill, which proved his deception in that matter in connection to this matter.

The State again, by law conceded this issue also per Greeson and the other cited caselaw herein in the 'Failure to Brief' pages herein. The suppressed photos are graphic of what a Yellowstone County detective did to Ellison, as supported by the Rape Report and other evidence herein.

Ellison has also supplied a recent Report from the Department of Corrections, in which upon evaluation, the D.O.C. has concluded on page (3) that "Mr. Ellison's court records appear to support his allegations of being falsely accused". See the Appellants filing of Supplemental Authority.

This court has held also in State v Johnson, 179 Mont. 61,585 P2d 1328(1978), at ¶72, that "The timing of the notice (The States Affidavit/ Information to Charge herein) in this case raises an inference of retaliation on the prosecutors part which offends Due Process."

"In some cases courts have recognized that actual proof of vindictive intent is difficult to produce, and... if the facts indicate a likelihood of vindictiveness, then it can be presumed". See State v Knowles, 2010 MT 186, ¶31.

Based upon the uncontested lack of Probable Cause in this matter, and the evidence of the misdeeds by Prosecutor Linneweber, while he was the Park County Attorney, which is also uncontested by the State in this appeal, it can definately be presumed or taken as absolute that this matter was more a matter of retaliation and self preservation from a civil accountability suit, by Linneweber, Mees and Fritz. Ellison prays that the court will hold true with its previous holdings in situations like this and reverse the last two charges, which violated Ellison's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights guaranteed him by the U.S. Constitution, which now warrants a dismissal of the last two remaining charges that the State has now lawfully conceded to having been barred from further prosecution after Ellison was acquitted of Count I: Arson, and this court establishing the 'Law of the Case' being the presence of 'Double Jeopardy'.

Claim #5: Ineffective assistance of Counsel [at both the Trial and Direct Appeal].

The Trial attorney Kakuk, has by his own admission in his PCR affidavit admitted to his ineffectiveness, when he stated that he had the phone that had been in the possession on Attorney Liz Honaker and her Investigator Greg Stovall, which was the phone and number used to call four of Ellison's consecutive employers, and in which the person calling identified themselves as Det. Frank Fritz, and then demanding that the employers 'Fire' Ellison. Kakuk witheld the phone and did not have it examined for the phone calls from it, nor did he present the photo from the phone that is in evidence in this Petition.[Stovall had custody of phone when calls made].

This is not the only evidence that he suppressed from the court, he suppressed a letter from the man whose home Det. Fritz was supposely searching the morning of the bombing of the Ellison's home. The Letter clearly stated that det. Fritz had left the man's home at the order of his partner detective Bancroft, to go take care of the 'It'. The man's letter stated that Fritz left the mans home then and Fritz did not return. This was very important impeachment evidence that Kakuk refused to use or investigate. Relying on the Prosecutors denial of this and their denial of the Park County charge which was dismissed, and Linneweber fired. The states claim that this was not ineffective assistance of counsel is meritless. The evidence submitted in Ellison's PCR and it's Supporting Brief of Evidence prove this as well as Kakuk's own words in his Affidavit that must now be deemed as be impeached due to his acts, and especially his omissions. His omission to present any defense and refusal to cross examine the man identified by the eye-witnesses, Det. Fritz, and only stating 'Defense Rests' as the only defense presented...he abandoned Ellison at the most critical stage of trial, knowing Ellison was suffering from mental incoherance, due to the lack of food. That the evidence herein proves.

The total lack of evidence was clearly present before trial, and the fact that Ellison was being charged with the same charge twice, which it is abundently clear even to this layman Petitioner, that the State was subjecting Ellison to Double Jeopardy. Trial Counsel Kakuk was undeniably ineffective for not bringing the fact that Count III: Tampering was Double Jeopardy, and that his not recognizing this fact undeniably showed Kakuk's incompetense and negligence that can only be held as prejudicial.

Kakuk also prejudiced this matter for his failure to properly consult and call on a Forensic DNA expert to learn about DNA. He would have then found out about the now proven fact that DNA is transfered from one object to another naturally by the dead skin cell's of humans, technically referred to as 'Secondary DNA Transfer', and also referred to by the Forensic Scientists and everyone else as 'Dust'. Kakuk knew that the State was relying only upon this DNA from the ropes that were tied to the doorknobs of the Ellison Home, tying Ellison and his parents inside, with the State claiming this in its affidavit/ information to charge, as circumstantial evidence. With only a small amount of investigation of DNA, Kakuk could have easily found the two U.S. Supreme Court cases cited by Ellison; DA v Osborne, 557 US 52,82, 129 S.Ct. 2308(2009) and Melendez-Diaz v Massachusetts, 517 US 305, 129 S.Ct. 2527(2009). Kakuk could have also easily have found that the Montana State Attorney General was notified of the report from 'The National Academy of Science' as stated in Melendez-Dias, about the dangers of misusing DNA, and that"Impecise and exaggerated testimony has contributed to the admission of erroneous and misleading evidence". Citing that many "documented cases of fraud and error involving forensic [DNA] science", and the study of cases in which exonerating evidence resulted in overturning criminal convictions", from "invalid testimony [The States Affidavit/ Information to Charge], contributed to 60% of the cases" The State misused the DNA in "false context", as per State v Favel, 2015 MT 336, at ¶28. Kakuk could have easily found and presented both to the jury, and with a simple 'GOOGLE' search found three of the four Forensic Studies Ellison has now presented concerning 'Secondary DNA Transfer'. Kakuk clearly failed to understand DNA, and did not attempt to do either of the above.

Ellison has shown that the State knew of these DNA reports and has not denied that the State knew that the Probable cause cited was without merit, Kakuk should have brought that to the courts attention. Again showing his ineffectiveness.

Ellison told Kakuk of what had occurred in Park County previously concerning Prosecutor Linneweber, Detective Fritz, and the dismissed charge, and Linneweber being fired. Kakuk did not investigate that either, choosing instead to believe Linneweber's version that nothing occurred in Park County.

Reasonable performance of counsel includes adequate investigation of facts of the case, consideration of viable theories and the development of evidence to support these theories. Counsel has a duty to investigate all witnesses who allegedly possessed knowledge concerning guilt or innocence. Park Cty Judge Gilberts testimony for sure.

Kakuk's inaction throughout this Billings case, with Kakuk coming from Helena, "has utterly failed to subject the prosecutions case to a meaningful adversarial testing". See U.S. v Cronic, 466 US 648,659, 104 S.Ct. 2039(1984).

Kakuk abandoned Ellison at the most critial stage of the trial, knowingly and purposely, witholding exculpatory evidence, which can only be held as prejudicial to Ellison's defense, in which there was overwhelming evidence that implicated the culpability of Detective Fritz. Even under the most tolerant standards of evaluation Kakuk failed the most rudimentary level of pretrial investigation in learning about DNA, and his refusal to cross examine the person the two eye-witnesses saw run from their yard after the bomb thing woke us up, and Kakuk only accepting the States version of the facts concerning Fritz. The Record shows that Kakuk only performed the least perfunctory representation possible by appearing in court at Ellison's side, not presenting evidence, not cross examining the states 'Star' Witness, Fritz and DID NOT recall the sequestered eye-witnesses to rebut the States claims. Kakuk sat beside the incoherant Ellison and stated only 'Defense Rests'. Ignoring his duty as Ellison's advocate. Kakuk undeniably abandoned Ellison during trial, his credibility VOID.

This court adopted the Ninth Circuits reasoning in Frazier v United States, 18 F.3d 778,782,784(9th Cir 1994) in State v Jones, 278 Mont. 134-35(1996) as cited in State v Schowengert, 2018 MT 7, ¶33, holding that "A presumption of prejudice is warranted when counsel totally abandons the duties of loyalty and confidentiality to a client by putting counsels personal interest ahead of the client, thus essentially joining the prosecutions efforts, or 'by an Actual Conflict of Interest'", citing Frazier at 782. "That an actual conflict of interest adversely affected counsels performance", with "the right to a 'conflict free representation' as guaranteed in the Sixth Amendment applied to the States through the Due Process Clause of the Fourteenth Amendment." See State v St. Dennis, 2010 MT 229, ¶¶28,29,32; See also Longjaw v State, 2012 MT 243, ¶11; Cuyler v Sullivan, 446 US 335, 100 SCt 1708(1980).

Errors satisfying the 'performance' prong of Strickland test for Ineffective Assistance of Counsel include omissions that can not be explained convincingly as resulting from sound trial strategy but instead arose from oversight...ineptitude or laziness, violating the 'Confrontation Clause' which "Requires reversal unless harmless beyond doubt" Davis v Alaska, 415 US 308, 94 SCt 1105(1974). Abandonment is not 'harmless'. Both prongs of Strickland are satisfied. Reversal appropriate.

Claim #6: Perjury

Ellison has already demonstrated that Fritz committed perjury by his statements of only seeing Ellison 'Face to Face' Twice...the Park County documentation proves this false, as well as Linneweber's false statements concerning Park County.

Claim #7: Collateral Estoppel

This has been previously discussed herein. The State did not preserve the right to argue this claim, after the the state's failure to brief the issue previously, and by law conceded to the Laws in MCA:§46-11-503 and §46-11-410, that prosecution is barred for Counts II and IV, after Ellison was acquitted of Count I. Requiring the requested relief,[due to the legal Estoppel, barring the State] of reversal/ exoneration.

CLOSING STATEMENT:

Ellison prays that this court will adjudicate, and then exonerate Ellison, and follows the Ninth Circuit in United States v Watson, 792 F.3d 1174,1183 (9th Cir 2015), being "No tradition is more firmly established in our system of law than assuring to the greatest extent that its inevitable errors are made in favor of the guilty rather than the innocent. Our legal system has always followed Blackstone's principle that 'it is better that ten guilty persons escape than one innocent suffers'. The moral force of our criminal law requires this allocation...It is critical that the moral force of the criminal law not be diluted by a standard of proof [or we suggest a rejection of scientific testing] that leaves people in doubt whether innocent men are being condemned." Ellison has shown that he has been falsely imprisoned for crimes that were committed by another. The district court excluded the transcripts of the two 'Badmen' who refused to terrorize Ellison, which "an exclusion of evidence will almost invariably be declared unconstitutional when it significantly undermines fundamental elements of the defendents defense", see United States v Scheffer, 523 US 303,315(1998). The district court refused to adjudicate Ellison's Claim #7, which is a due process violation itself. The district court ignored the U.S. Congressional Act 18 USC §3600, the Innocence Protection Act, cited in Watson, which mandates the revisiting of mistaken convictions. As previously held the district courts refusal to adjudicate Claim #7, "amounts to a policy dispute with federal law", per Haywood v Drown, 556 US 729, 758, 129 SCt 2108(2009), disputing the Fifth Amendment, Double Jeopardy [the Law of the Case], and the above two State Laws §46-11-503/ §46-11-410.

Ellison prays the court will do Plain Error Review, and confirms he is unlawfully incarcerated for SIX years, and that this court will overturn these last 2 charges as the proper relief without further delay of Justice, based upon the law and the States concession to many issues herein. Thank You.

Dated this 5th day of October, 2020. Lionel Scott Ellison

Lionel Scott Ellison/ Pro Se Appellant.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was placed in the Montana State Prison Mail System to be mailed in the U.S. Mail, postage prepaid and addressed to the following:

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Dated this 5th day of October, 2020. Lionel Scott Ellison

Lionel Scott Ellison/ Pro Se Appellant

CERTIFICATE OF COMPLIANCE

This is to certify that this Appellants Reply Brief meets the page count (14) as is demanded by the MT Supreme Courts Rules of Appellate Procedure, without a way of a word count at Montana State Prison, on antiquated typewritters that only partially work.

Dated this 5th day of October, 2020. Lionel Scott Ellison

Lionel Scott Ellison/ Pro Se Appellant

APPELLANTS STATEMENT OF APOLOGY

The Appellant Ellison, wishes to apologize for his statements in other filings, that this court has admonished Ellison for. Ellison has been steadfast and constant in his Actual Innocence, and that evidence exists that proves this fact, even before Ellison could obtain and then submit the evidence. Now the evidence that was witheld from Ellison is now presented to the District Court, of the underlying cause of the now proven actions of certain Yellowstone County officials. Evidence and documentation that a company in Oregon has gone to great lengths, and spending large amounts of money to keep the companys culpability for 'Bond Fraud' from the courts. To the now documented extent that they paid monies to hired 'gang members' to do physical harm to Ellison, and his family. To at first sway the Ellison family from continuing with the $30,000,000 civil suit, and lastly to Abduct, Torture, and Rape Ellison... and lastly to tie the doors shut from the outside of the Elder Ellisons Family Home, with the Patriarch of the family Claude and Marlene Ellison, with Ellison inside. Evidence in the Appellants Petition proves this beyond doubt, with Ellison's submission of the transcripts from the video depositions from two known Seattle 'Badmen' gang members who refused the offer to 'Terrorize' the Ellison Family. The district court has ordered this evidence excluded from the record, which is in violation of State Law and the preservation of a just judicial system.[See pages of transcript attached]

The Court has admonished Ellison for not being able to prove that individuals conspired with one another to place Ellison in a position not to be able to hold the County officials accountable. Ellison has now presented this evidence, and also has asked the new Clerk of Court to present these transcripts to the court, that the district court excluded, that proves and documents the conditions which supstantiate Ellison's claims to the Court of the complete lawlessness and deceptive intent by these local officials. The district courts exclusion of the New Evidence that Ellison submitted for admission, must be deemed an abuse of discretion, if the court follows City of Missoula v Mont. Water Co., 2016 MT 183, ¶18. The exclusion of this material evidence that shows the cause for thes officials unlawful acts must surely exceed the bounds of reason of any United States Court, and offend the conscientious ethics of any jurist. That and the district courts refusal to decide Ellison's Claim #7, Collateral Estoppel, which is not harmless error and must be deemed as a seperate violation of Due Process as a seperate claim, above the Petitions 7 claims, and the Addendums that document the violation of the First Amendment Right against retaliation for Ellison's Right to redress for the County officials wrongdoing. None of which were addressed by the district court, not even after the State in their answer to the Petition refused to acknowlege or brief Claim #7, which by law is a concession of that claim that demands relief.

I am truely sorry, and pray the court understands and forgives me for my laymans fight for justice and my liberty...Respectfully,