

**In the Supreme Court of the State of Montana**

Supreme Court No. DA 21-0483

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State of Montana,

Plaintiff &amp; Appellee,

-vs-

Jamie Cal Fuson,

Defendant & Appellant.

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**Appellant's Opening Brief**

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On Appeal from the Montana Ninth Judicial District Court,  
Pondera County, The Hon. Robert G. Olson, Presiding

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### **Statement of the Issue**

With *pro bono* counsel, Fuson appeals arguing that suppression of statements made in a civil proceeding is necessary in a subsequent criminal proceeding when the statements were a direct result of a violation of the defendant's due process right to effective counsel in the civil proceeding.

### **Statement of the Case**

The State charged Jamie Cal Fuson (Fuson) with a single count of felony theft. Much of the evidence supporting the charge consisted of sworn statements Fuson made during a divorce proceeding after he was called to testify by his ex-wife's counsel. Fuson's counsel sat in silence as Fuson was repeatedly questioned about a transaction that would later give rise to the theft charge. Fuson, under oath, provided answers that incriminated him. At no point during the questioning did anyone advise Fuson of his rights not to answer questions that may later form the basis for a criminal action against him—not the district court, not opposing counsel who called Fuson to testify, and most critically, not his own lawyer,.

When that criminal action was eventually brought before the same district court that presided over the divorce proceeding, criminal counsel moved to suppress the statements on the basis that Fuson suffered a due process violation of

his right to effective counsel. A hearing was held on the motion. The motion was denied. (Appendix A). Fuson entered a plea agreement with the state, which reserved his right to appeal the court's denial of his motion to suppress.

At sentencing, the district court adopted the plea agreement and sentenced Fuson to a six-year deferred sentence. (Appendix C at 2).

Fuson filed a timely notice of appeal and is now asking this Court to conclude the district court erred in denying Fuson's motion to suppress.

### **Statement of the Facts**

*"Better well hanged than ill wed."* - Søren Kierkegaard<sup>1</sup>

Fuson's criminal charges arise directly from his protracted divorce proceedings, which were a toxic combination of intransigence, legal ineptitude, and colossally poor decision making on the part of Fuson (who did not know better) and his own lawyer (who should have and is expected to know better). The facts of this case are a Gordian Knot comprised of the same few threads, but their interrelations are so interwoven that splitting the Knot might even exceed the efforts of the great Alexander.

Out of respect to this Court and to appellate counsel's keyboard, only the

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<sup>1</sup>Kierkegaard paraphrases Shakespeare's *Twelfth Night*.



necessary portions of the divorce proceeding, which continue to this day, will be summarized in this appeal. Fuson's testimony at the civil hearing at issue is attached as Appendix D.

On July 9, 2018, a hearing was held in the divorce case to address a motion filed by Fuson's ex-wife, Cindy Fuson, to set aside a property settlement agreement on the grounds that the original valuations provided in the original settlement agreement were undervalued or undisclosed. (Appendix D. at 5-6). At the hearing, Fuson was represented by Penelope Oteri, a 2015 graduate of the University of Montana School of Law. (6/1/20 Tr. at 8). Ms. Oteri passed the Montana State Bar examination in 2016. Upon admission to the bar, Ms. Oteri immediately entered solo practice handling "mostly family law" and some criminal defense cases. (Id. at 9-10). Ms. Oteri had also had experience in criminal law during law school when she interned for well-respected criminal defense attorney Peter Leander of Big Fork. She also had an internship in Shelby with Bill Hunt, who was a prosecutor. (8/21/20 Tr. 8-9). In this latter capacity, Ms. Oteri performed legal research, wrote briefs, and wrote opinions. (Id. at 9). In August 2018, Ms. Oteri became a deputy Hill County Attorney. (6/1/20 Tr. at 11).

Ms. Oteri met Fuson when a tire fell off her car. (Id. at 13). He stopped to

help her. (Id.) She would later represent Fuson in a Temporary Order of Protection proceeding instituted against him by Cindy Fuson as well as a limited scope representation in Fuson's divorce from Cindy. (Id. at 14). The limited scope representation was memorialized in an engagement agreement and dated September 18, 2016. (See Ex. A to 6/1/20 Hrg.) This document created an attorney-client relationship between Ms. Oteri and Fuson. (6/1/20 Tr. at 18).

Further complicating matters was the fact that in 2015 and 2016, Ms. Oteri and Fuson began a romantic relationship. (Id. at 18). Ms. Oteri could not say definitively whether she was in a romantic relationship with Fuson when they entered the limited engagement agreement because "[i]t gets a little fuzzy because it initially ended up as a friendship instead of any kind of romantic relations." (Id.)

Further complicating the matter was a man named George Ackerson and a business he owed called Safer Medical Incorporated. (Id. at 11). According to her testimony, Ms. Oteri never represented either Mr. Ackerson or Safer Medical Incorporated. (Id.). Mr. Ackerson was affiliated with an organization titled Glacier Hope Homes, a non-profit organization providing assistance for homeless veterans. Ms. Oteri did represent Glacier Hope Homes, and Mr. Ackerson provided financial assistance to Glacier Hope Homes. According to Ms. Oteri, Mr. Ackerson's

business, Safer Medical Incorporated, paid her salary and donated her “services as a gift in kind, to non-profit.” (Id. at 20).

Mr. Ackerson also wanted to purchase a semi-truck from Fuson. The transaction surrounding this semi-truck, a Peterbilt, would eventually form the basis for Fuson’s criminal prosecution. At this time, Ms. Oteri was living on Fuson’s property and was in a romantic relationship with him. (Id. at 21).

Although Ms. Oteri testified that she did not become involved in the exchange between Fuson and Mr. Ackerson over the purchase of the Peterbilt, evidence suggests otherwise. (Id. at 21-22). For example, Ms. Oteri communicated with Mr. Ackerson’s accountant when “George [Ackerson] wanted to make a payment.” (Id. at 22). That communication between Ms. Oteri and the accountant was made by Ms. Oteri on behalf of Fuson. (Id. at 22).<sup>2</sup> Additionally, during the August hearing, Fuson introduced a “payroll summary” for September 30, 2016 through March 31, 2017, from Safer Medical, Mr. Ackerson’s business, which illustrated that Safer Medical paid Ms. Oteri a net salary of \$25,184.50. (8/21/20 Tr. at 12-13).

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<sup>2</sup>At this point in the hearing in the criminal case, the Zoom connection between Ms. Oteri and the Court essentially failed. The hearing was recessed. It recommenced on August 21, 2020, with all -- including Ms. Oteri -- personally present in the courtroom.

Refuting Ms. Oteri's testimony that she never worked for Mr. Ackerson was a letter to a Mr. Kramarich on Ms. Oteri's professional letterhead. Mr. Kramarich "borrowed money from George [Ackerson], and George wanted it to be paid back through safer medical." (Id. at 15). Ms. Oteri attempted to explain that she "was not trying to collect money." (Id.) Rather, she was "asking Mr. Kramarich to send money back to George [Ackerson], uh, through Safer Medical, apparently." (Id.) Ms. Oteri was eventually forced to concede that she was acting as an attorney for Mr. Ackerson. (Id. at 16). Further undermining Ms. Oteri's claims that she did not represent either Mr. Ackerson or Safer Medical was a series of emails between Ms. Oteri and Mr. Ackerson, introduced as Ex. J during the evidentiary hearing in the criminal matter.

Although Ms. Oteri asserted she resigned before April 10, 2017, (Id. at 18), the email exchanged clearly expresses her desire to "continue working for Safer Medical." (Id. at 19). The email exchange also references a dispute between Fuson and Mr. Ackerson regarding payment for Ms. Oteri's legal services. (Id. at 19-20). Ms. Oteri affirmed that Mr. Ackerson was asking that Fuson repay Mr. Ackerson for Ms. Oteri's representation in the divorce case. (Id. at 20). Recall that on September 18, 2016, Ms. Oteri had entered into her limited scope representation

agreement with Fuson. In that agreement, Ms. Oteri agreed to represent Fuson *pro bono*. This was also during the time that Ms. Oteri was working for Mr. Ackerson/Safer Medical/Glacier Homes.

To be clear, the evidence shows that at certain points in 2016 and 2017, Ms. Oteri represented: Mr. Ackerson, Safer Medical, Glacier Homes, and Fuson. Ms. Oteri was also in a personal/romantic/friendship with Fuson. She could not recall when the relationship stopped being romantic, but believed it to be “probably sometime in 2016.” (Id. at 25). The ingredients for an eventual due process disaster were simmering.

On April 7, 2018, Ms. Oteri and Fuson entered into a attorney-client contract in which read: “Penelope Oteri agrees to represent you in the matter of responding to the April 5, 2018 ‘Motion to Set Aside Property Division; Award Undisclosed Amounts to Responded [Cindy Fuson], and for Fees.’” This motion was filed by Cindy Fuson’s attorney, who also represents Mr. Ackerson. One of the justifications for setting aside the previous property division was Fuson’s sale of the Peterbilt semi to Mr. Ackerson, in which Ms. Oteri had some participation, and the valuation of that semi that Fuson had included in the property disclosures in his divorce proceedings to Cindy. Although it is putting the cart before the horse,

during a July 9, 2018 hearing on the Motion to Set Aside the Property Division, the following situation existed:

1. Fuson was represented by Ms. Oteri, who previously represented Mr. Ackerson and worked for Mr. Ackerson's business, Safer Medical;
2. Cindy Fuson was represented by counsel who also represented Mr. Ackerson;
3. Mr. Ackerson, testified for Cindy Fuson at the hearing;
4. Ms. Oteri had helped Fuson prepare or "ghost-write" the documents that formed the basis for the initial property division, the very same documents that Cindy Fuson was seeking to set aside because of the under-valuation of the Peterbilt semi, which Fuson had sold to Mr. Ackerson.
5. One of the grounds Cindy had for setting aside the original property distribution was an allegation that the valuation of \$25,000 for the Peterbilt in the original property distribution claim in the divorce was fraudulent because Fuson had sold it to Mr. Ackerson for \$100,000.
6. Ms. Oteri had also previously attempted to collect a payment from Mr. Ackerson for the semi on Fuson's behalf. (8/21/20 Tr. at 28).
7. In essence, Cindy was alleging that Fuson's original property valuation,

which had been prepared with the assistance of Ms. Oteri, was fraudulent especially regarding the valuation of the Peterbilt semi.

8. At the time of the hearing on the Motion to Set Aside the Property Division, Ms. Oteri was aware that Fuson had originally valued the semi at \$25,000 and that Mr. Ackerson had paid at least \$70,000 for the same vehicle. (Id. at 29). In fact, Ms. Oteri affirmed that she had “ghost-written” the original valuations. (Id. at 32).
9. At the time of the hearing, Ms. Oteri knew that Mr. Ackerson had paid Fuson at least \$70,000 for the semi;
10. At the time of the hearing, Ms. Oteri was also aware that Fuson had not transferred the title to Mr. Ackerson and had, in fact, sold the vehicle to someone else, (Id. at 38), and transferred possession of the vehicle to that person.<sup>3</sup>

When the hearing on the Motion to Set Aside the Property Division in the divorce case occurred, Ms. Oteri labored under several unwaivable conflicts of interest. The consequences to Fuson were dire and amounted to a total due process violation in both the divorce proceeding and the later criminal case.

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<sup>3</sup>That 3rd individual almost immediately wrecked the semi in an accident.

The hearing on the Motion to Set Aside the Property Division began with Cindy's counsel calling Fuson to testify. (Appendix D at 7). Almost immediately, counsel began to question Fuson about the sale of the semi to Mr. Ackerson. (Appendix D at 8-9). Ms. Oteri did object to the line of questioning despite the fact that she had ghost-written the original valuation "marital assets spreadsheet" and that she was aware that Fuson had sold the semi to Mr. Ackerson for at least \$70,000. "Your honor, I object to this line of questioning. Because it doesn't really speak to whether or not Jaime had an awareness of the value of the truck, at the time he prepared his marital assets spreadsheet." (Appendix D at 11). The objection was overruled, (Id.), and Cindy's attorney proceeded to walk Fuson, under oath, through what would later prove to be the elements of felony theft.

Q: Do you recall what number you and George agreed upon, that he's going to pay off the truck at?

Fuson: 100,000.

Q: 100,000. And that deal was made in approximately June of 2016?

Fuson: I think so, yeah.

(Appendix D at 16).

Q. Now the truck that you were going to sell to George Ackerson,



was a 2000 Peterbilt . . . is that right?

Fuson: Yes.

Q: That's the only 2000 Peterbilt you own?

Fuson: Yes.

Q: And this [property valuation] was filed February of 2017. You received approximately \$80,000 for that Peterbilt, from George Ackerson, at that time, correct?

Fuson: I guess. Yes.

Q: And you actually knew that George would pay you another \$20,000, if you delivered the truck to him at that time?

Fuson: Yes.

....

Q. The truck was eventually sold to Wylie Miner, is that correct?

.....

Fuson: Is that up to you - - does that matter, who it was sold to?

Court: You just need to answer the question.

Fuson: Yes.

Q: And how much did Mr. Miner pay for that vehicle?

Fuson: Sixty.

(Appendix D at 20-22).

Later in the direct examination, Ms. Oteri allowed Fuson to deny that he had sought legal advice or had anyone advocate for him when he prepared the initial financial disclosures. (Appendix D at 19). This was categorically false, and Ms. Oteri knew it because she is the one from whom Fuson sought legal advice and who had ghost-written the initial financial disclosures. Ms. Oteri wrote the very financial disclosure that were subject to revision and fraud allegations during the civil proceeding. This fact was established by the district court in its order on the Motion to Set Aside the Property Division (Appendix B at 2) and Ms. Oteri would later confirm it in the criminal case (8/21/20 Tr. at 32).

Ms. Oteri did not improve either her own or Fuson's position during her cross-examination of Fuson. Because Ms. Oteri's position in the case both as ghost-writer for Fuson on the original property settlement -- which was likely fraudulent -- and her intimate knowledge of the proceedings, at one point the court had to ask Ms. Oteri if she was "testifying or arguing, counsel?" (Appendix D at 56). Ms. Oteri also asked Fuson to affirm that he did not transfer ownership of the 2000 Peterbilt semi to Mr. Ackerson. (Appendix D at 59). That question by Ms. Oteri and the subsequent admission by Fuson was tantamount to a confession of felony theft. At no point during these proceedings did either Ms. Oteri or the court

advise Fuson that the answers he was giving subjected him to criminal prosecution and that he had a right to remain silent.

To her limited credit, Ms. Oteri did attempt to correct Fuson's prior statements regarding her representation.

Oteri: Okay. You earlier testified that, you had not hired me to do legal work for your. And in that representation, was it your intention to testify that you hadn't, you didn't recall having me come on record as your attorney?

Fuson: You hadn't come on my record as my attorney, I don't think.

....

Oteri: So did you intend to mislead or misrepresent to the court, that you had not had me as an attorney, prior to April 5th?

Fuson: - - no, I didn't. I'm so wound up right now, I can't even think straight. I just want this over with.

(Appendix D at 64-65).

With a remarkable lack of foresight, at the time of the civil hearing Ms. Oteri believed there was "no possible way this could become a criminal case." (8/21/20 Tr. at 39). She based this on both her knowledge of Fuson's intent and Mr. Ackerson's intent. (Id.) Her insights were the result of the fact that she had acted as counsel for both.

Her conflicted role was seriously at issue during the civil hearing. At that

hearing, according to Ms. Oteri, Mr. Ackerson perjured himself. (Id. at 33). Unfortunately for Fuson, Mr. Ackerson's alleged perjury could not come to light because the very person who could have testified about it during the civil hearing was representing Fuson. The reason Ms. Oteri knew Mr. Ackerson had committed perjury was based in large part on her prior representation and professional dealings with Mr. Ackerson and Fuson. For example, contrary to the testimony she gave during the hearing on the motion to suppress in the criminal matter (that she did not get paid to broker the semi deal between Fuson and Mr. Ackson), the district court concluded that "Penelope Oteri represented George Ackerson in the truck sale. She advised Ackerson that the truck was worth \$100,000. At the time Ms. Oteri was representing Mr. Ackerson in this sale, she was also representing Petitioner in a limited scope representation in this divorce and property and settlement matter." (Appendix D at 2).

For his part, Mr. Ackerson supported the court's findings that Ms. Oteri represented him. This is contrary to Ms. Oteri's testimony during the criminal hearing. Mr. Ackerson's and Cindy Fuson's counsel introduced an email from Ms. Oteri to Mr. Ackerson dated March 29, 2017 -- just over a month **after** Fuson provided financial statements that grossly undervalued the Peterbilt -- informing

Mr. Ackerson that she, Ms. Oteri, “represents [Fuson] in a limited scope, prepared his pleadings, responses, spreadsheets of assets, etc.” (Appendix D at 75).

During her cross-examination of Mr. Ackerson (Ms. Oteri’s previous client), Mr. Ackerson accused Ms. Oteri of lying. (Appendix D at 82). In turn, Ms. Oteri informed the district court that “George Ackerson has perjured himself . . .” (Id. at 83). Nearing the end of its considerably long tether of patience, the district court threatened to find Mr. Ackerson in contempt. (Id. at 85). Lost in the proceedings is the obvious fact that part of the reasons Ms. Oteri knew Mr. Ackerson had allegedly committed perjury was based on knowledge Ms. Oteri gained through her representation of Mr. Ackerson.

During the exchange, Ms. Oteri asked Mr. Ackerson why he believed the Peterbilt was worth \$100,000. Mr. Ackerson, apparently waving his attorney-client privilege, responded: “Because my attorney, at the time, who was Penny Oteri, also said it was worth \$100,000. That’s why I believed it was worth \$100,000.” (Appendix D at 87). At this point, Pandora’s Box opened.

Ms. Oteri asked Mr. Ackerson if he had the semi appraised. He responded, “No. I didn’t. I trusted you, and I trusted Jaime. That’s a fact.” (Appendix D at 88). Undaunted by the professional quagmire in which she had immersed herself,

Ms. Oteri nevertheless persisted. “Did you offer the 100,000 or did Jamie name the price?” Mr. Ackerson noted that Fuson named the price but he had text messages from Ms. Oteri in which she informed Mr. Ackerson that “‘Jaime put a lot in to the truck, he loves the truck. It’s worth \$100,000.’ Those text messages he<sup>4</sup> has. I agreed to pay because I guess I just trusted you [Ms. Oteri].” (Id.) Mr. Ackerson trusted Ms. Oteri to his detriment. So, too, did Fuson. Fuson just didn’t know it until he was charged with felony theft for accepting \$80,000 from Mr. Ackerson for a semi he turned around and sold to someone else.

In the criminal proceeding, Fuson moved to suppress all of his sworn testimony that he gave during the July 9, 2018 hearing at which Ms. Oteri “represented” him. Fuson argued Ms. Oteri was ineffective during the civil proceedings and, consequently, his due process rights were violated because Ms. Oteri was ineffective on a number fronts, including the conflicts of interest under which she labored.

In the criminal proceeding, the same district court that presided over the civil hearing also held a hearing on Fuson’s motion to suppress. That hearing was held over the course of two days. The district court denied Fuson’s motion to

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<sup>4</sup>To whom Mr. Ackerson is referring by this pronoun is unclear from the record.

suppress. (Appendix A). Fuson later entered a conditional plea agreement allowing him to appeal the denial of the motion to suppress. Prior to sentencing, Mr. Fuson paid the entirety of the restitution owed to Mr. Ackerson.

Fuson now appeals asking this Court to reverse the district court's ruling on his motion to suppress on the grounds that Ms. Oteri violated Fuson's rights to due process as guaranteed by the *Fifth* and *Fourteenth* Amendments to the United States Constitution and *Article II, § 17* of the Montana Constitution.

### **Summary of the Argument**

Although not a criminal proceeding implicating *Sixth Amendment* protections, Fuson still had a right to due process protection at the civil hearing via the protections in the Due Process clauses of the *Fifth* and *Fourteenth* amendments to the United States Constitution, as well as *Article II, § 17* of the Montana Constitution, which is not limited to criminal proceedings.

Ms. Oteri's roles in Fuson's civil and criminal cases were so riddled with conflicts of interest, as well as blatant malpractice, that she was not acting in the capacity anticipated either by Fuson or the legal system of the State of Montana.

Further, because Ms. Oteri failed to protect Fuson before it became necessary, it was the district court's obligation to protect him after the fact, i.e.,

suppress the fruits of Ms. Oteri's incompetence.

### **Standards of Review**

"We review a district court's denial of a motion to suppress to determine whether the court's findings of fact are clearly erroneous, and whether those findings were correctly applied as a matter of law." *State v. Elison*, 2000 MT 288, ¶ 12, 302 Mont. 228, 14 P.3d 456.

### **Argument**

#### **A. Due Process Right to Effective Assistance of Counsel**

Suppression of Fuson's statements made during the civil hearing was necessary in the subsequent criminal case because the statements were a direct result of a violation of Fuson's Due Process rights. Ms. Oteri's role as Fuson's attorney in the civil case fell far short of the advocacy required and expected of a member of the Montana bar. Her advocacy was so filled with conflicts of interest and legal incompetence that Fuson was left exposed, forced to answer questions later used to incriminate him in a criminal proceeding, all without any intervention by Ms. Oteri.

Further, the district court failed to fulfill its own duties to protect Fuson's rights to due process and against self-incrimination during the civil proceeding.



In Aaron Sorkin's brilliant play "A Few Good Men," -- later made famous by the Columbia Pictures film of the same name -- intrepid young lawyer Lt. Daniel Kaffee relentlessly questions the acclaimed but morally ambiguous Col. Nathan R. Jessop, who is on track to be the next Chairman of the Joint Chiefs. In a scene made famous by Tom Cruise (Kaffee) and Jack Nicholson (Jessop), Kaffee questions Jessop to the point where Jessop eventually declares that he ordered the "Code Red" that ultimately killed Pfc. William T. Santiago. The admission occurs after Jessop previously testified that he was both aware that the practice of Code Reds was against military protocol and that he had not, in fact, ordered the Code Red. The scene ends with Jessop's famous declaration that Kaffee is "goddamn right" that he ordered the Code Red. While what happens after that scene-stopping moment is less dramatic, it is of great legal relevance. After an awe-struck pause, Kaffee makes the following plea: "Please the Court, I suggest the [jury] be dismissed so that we can move to an immediate Article 39(a) session<sup>5</sup>. The witness has rights."<sup>6</sup> It is difficult to quantify how ingrained *Miranda* and the constitutional

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<sup>5</sup>The military law court version of a side-bar conference outside the presence of the jury.

<sup>6</sup>"A Few Good Men," Columbia Pictures at 2:08:10 (1992).

right to silence are in society<sup>7</sup>, but if Tom Cruise understands them, everyone likely does.

This Court held that the *Fifth Amendment* privilege against self-incrimination protects an individual from being compelled to testify against himself in a criminal or civil proceeding, including a proceeding to terminate parental rights. *In re. A.N.*, 2000 MT 35, ¶ 33, 298 Mont. 237, 995 P.2d 427 (The *Fifth Amendment* “protects an individual from involuntarily being called to testify against himself or herself in criminal proceedings and also creates a privilege for the individual to avoid answering questions in other proceedings, whether civil or criminal, formal or informal, if the answer might incriminate the individual in future criminal proceedings.”) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d 274, 281 (1973)). The exclusionary rule articulated in *Miranda v. Arizona*, 384 U.S. 436, 462, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), “serves the *Fifth Amendment* and sweeps more broadly than the *Fifth Amendment* itself.” *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed.2d 222 (1985).

Even as a witness, Fuson like Col. Jessop, had rights. In the film, it was the

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<sup>7</sup>“At this point in our history virtually every schoolboy is familiar with the concept, if not the language” of the *Fifth Amendment*. *Michigan v. Tucker*, 417 U.S. 433 (1974), 439.

opposing counsel that asserted Jessop's own rights. Fuson, however, was afforded no such opportunity most critically by even his own lawyer. Without objection, Ms. Oteri allowed Fuson to be called to the witness stand to be compelled to answer questions under oath about the fact that Mr. Ackerson paid Fuson \$80,000 for a semi truck that Fuson not only did not deliver but actually sold to someone else, i.e., felony theft. Ms. Oteri compounded the problem by questioning Fuson on the same topic and eliciting more damning admissions.

B. Ms. Oteri's Conflicts and Inefficacy

Ms. Oteri is no rube. She graduated from the University of Montana School of Law, passed the Montana Bar Examination, and interned for both a prosecutor and a criminal defense attorney. She had a duty to understand Fuson's *Fifth Amendment* rights and, as his attorney, she was duty bound to protect those rights. "In all professional functions a lawyer should be competent, prompt and diligent. Competence implies an obligation to keep abreast of changes in the law and its practice. . . ." *Mont. R. Prof. Conduct*, Preamble at (5); "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* at Rule 1.1 (Competence).

Fifteen years before Ms. Oteri graduated from law school, this Court reaffirmed that the right to silence extends to civil proceedings. Forty-two years before she graduated law school, the United States Supreme Court reaffirmed a decision from 1924. “The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him.” *Lefkowitz v. Turley*, 414 U.S. 70 (1973), at 77 (citing and quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40 (124)). This is clearly established state and federal law as determined by the two highest courts tasked with interpreting their respective constitutions. Ms. Oteri’s failure to ensure Fuson was, at minimum, advised of his rights, was a failure of both competence and efficacy. The prejudice to Fuson was immense.

While words like “competence,” “efficacy,” and “prejudice,” are more conducive to an analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), that test is inapplicable here because the divorce proceeding was not a proceeding at which Fuson had a right to counsel, therefore he had no corresponding right to effective assistance of counsel. *See Wainwright v. Torna*, 455 U.S. 586 (1982)

(where there is no constitutional right to counsel there can be no deprivation of effective assistance).

However, courts including this one have expressed a willingness to recognize a due process right to effective assistance of counsel even in non-criminal proceedings.

The United States Supreme Court has held that in civil proceedings, a claim of ineffective assistance of counsel can still be raised and relief sought under the Due Process Clause of the Fifth Amendment. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Similar protections necessarily exist under Montana law because of both the incorporation of the *Fifth Amendment* to the states via the *Fourteenth Amendment* and the *Fourteenth Amendment* itself. Additionally, *Article II, § 17* contains independent guarantees of due process to the citizens of Montana.

In immigration proceedings, an individual seeking to demonstrate ineffective assistance of counsel rising to the level of a due process violation must show that “the proceeding [was] so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Denko v. INS*, 351 F.3d 717 (6th Cir. 2003). “The alien carries the burden of establishing that ineffective assistance of counsel prejudiced him or denied him fundamental fairness in order to prove that he has

suffered a denial of due process.” *Huicochea-Gomez v. INS*, 237 F. 3d 696, 699 (6th Cir. 2001). As a civil case with significant resulting consequences, the same standard should apply to Jamie’s case.

This Court has held that parents have a due process right to effective assistance of counsel in parental termination proceedings. *In re A.S.*, 2004 MT 62, ¶ 23, 320 Mont. 268, 87 P.3d 408. This right is also founded in the due process clause. *Id.* This Court has found a due process right to effective assistance of counsel in involuntary commitment proceedings as well. *In re K.G.F.*, 2001 MT 140, ¶ 33, 306 Mont. 1, 29 P.3d 485 (overruled on other grounds). As in criminal proceedings, these claims present mixed questions of law and fact. *In re J.S.*, 2017 MT 214, ¶ 9, 388 Mont. 397, 401 P.3d 197. Again, because involuntary commitment proceedings are civil in nature, the right to effective assistance of counsel is founded in the Due Process Clause of the Constitution rather than in the *Sixth Amendment*.

Neither the Due Process Clause of the *Fifth Amendment* nor the Due Process Clause of *Article II, section 17* are directly tied to a criminal proceeding. Each guarantees that “no person shall be deprived of life, liberty or property, without due process of law.” *Mont. Con., Art. II, § 17* (see also *U.S. Const., Amend. V*). It

was these rights to due process that were violated in Fuson's case and they undermined the fundamental fairness of the divorce proceeding and the subsequent criminal proceeding.

Further violating Fuson's rights to due process was the fact that Ms. Oteri had multiple clear and unwaivable conflicts of interest during the divorce hearing on the motion to set aside the property settlement. In *State v. St. Dennis*, 2010 MT 229, ¶ 19, 358 Mont. 88, 244 P.3d 292, this Court held that the right to "conflict-free representation" guaranteed by the *Sixth Amendment* is applied to the states through the Due Process Clause of the *Fourteenth Amendment*. While both *St. Dennis* and the *Sixth Amendment* are criminal in their context, it must be recognized here that the language of Montana's due process claims "is also identical to the due process language in both the Fifth and Fourteenth Amendments to the U.S. Constitution [and is] a standard constitutional provision, found in every modern western constitution." Larry M. Elison and Fritz Snyder, "The Montana State Constitution," Oxford Commentaries on the State Constitutions of the United States, pg. 68. Therefore, there is no logical reason why due process protections against conflict-free counsel are not also applicable to civil cases.

Further support for extending due process protection to conflicts of interest

beyond a criminal case is found in *Draggin' Y Cattle Co. v. Addink*, 2016 MT 98, ¶ 16, 383 Mont. 2433, 371 P.3d 970 (concluding a party raised a “claim sufficient to invoke its substantial right to due process because” of the judge’s “potential conflict of interest.”)

Had these facts arisen in a criminal proceeding, Fuson would have likely been entitled to a presumption of prejudice under *United States v. Cronin*, 466 U.S. 648 (1984). In *Cronin*, the Supreme Court recognized three circumstances where prejudice may be presumed. First is the complete denial of counsel. *Cronin*, 466 U.S. at 659. Second, a presumption of prejudice is warranted “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* Finally, a presumption of prejudice is warranted in situations where counsel is called upon to render assistance under circumstances where competent counsel very likely could not.” *Bell v. Cone*, 535 U.S. 685 (2002), 696 (citing *Cronin*, 466 U.S. at 659-62).

Following *Cronin*, the United States Supreme Court held that a defendant does not have to prove prejudice if the defendant demonstrates “that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 466 U.S. 335, 348-49 (1980); *see also State v. Christenson*, 250 Mont. 351,



820 P.2d 1303 (1991) (applying *Sullivan*)). For *Sullivan* to apply, the defendant must demonstrate that his counsel “actively represented conflicting interests.” *Sullivan*, 446 U.S. at 350. The Supreme Court has described *Sullivan* as a “more limited” presumption of prejudice than the presumption in *Chronic* because a defendant is required to show that the conflict had an adverse effect on counsel’s performance. *Burger v. Kemp*, 483 U.S. 776, 799 n.6 (1987).

If Fuson had been a criminal defendant being represented by Ms. Oteri, establishing that Ms. Oteri had an actual conflict would be easily demonstrated. She ghost-wrote the documents alleged to be false, she previously represented Mr. Ackerson and had at least some involvement in the transaction surrounding the Peterbilt. The representation of Fuson also prevented her from acting as a witness to either defend her ghost-writing or challenge Mr. Ackerson’s alleged perjury. Under these circumstances it is illogical and fundamentally unfair not to conclude that prejudice to Fuson should be presumed. That the proceedings were civil rather than criminal is an insufficient answer, especially in light of the prior due process decisions articulated by both this Court and the United States Supreme Court.

In light of these circumstances and the clear constitutional language, Fuson

urges this Court to recognize that in civil proceedings, a claim of ineffective assistance of counsel can be raised and relief sought under the Due Process Clauses of the *Fifth* and *Fourteenth Amendments* and *Article II, section 17* of the Montana Constitution.

If this Court adopts such a holding, it must then turn to the analysis of whether Fuson's due process right to effective assistance of counsel was violated. As with immigration proceedings, the focus should be on the fundamental fairness of the entire proceedings. In this case, almost no aspect of Fuson's divorce hearing can be seen as fair let alone fundamentally so. His attorney was conflicted and made no attempt to ensure Fuson's *Fifth Amendment* guarantee against providing incriminating statements against himself.

The district court, which presided over both the divorce and subsequent criminal case, recognized Ms. Oteri's conflicted role even if it did not specifically use the word "conflict." The absence of fundamental fairness in the civil proceeding gave rise to Fuson's incriminating statements. To allow statements, which arose from a process made fundamentally unfair as the result of attorney conflict and inefficacy is anathema to the very principles of due process.

As an attorney, failing to ensure that one's client is fully advised of their

constitutional rights, even in a civil proceeding, falls short of any standard expected by any member of the Bar regardless of their area of practice or speciality.

Consequently, the fruits of Fuson's unfair proceeding should have been suppressed in the subsequent criminal proceeding.

"Officially coerced" incriminating or "damning admissions" on the part of "wrongdoers" are contrary to the *Fifth Amendment*. *Elstad*, 470 U.S. at 305. For the United States Supreme Court, requiring *Miranda* warnings is a "practical reinforcement for the right against compulsory self-incrimination." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Compulsory statements made in violation of the *Fifth Amendment* are excludable from a criminal prosecution. *Elstad*, 470 U.S. at 308. Fuson's statements at the civil hearing were compelled. His lawyer did not call him to the witness stand to testify. The district court admonished Fuson several times to answer questions and, then, on cross-examination by his ineffective counsel he provided even more incriminating answers.

Paradoxically, Fuson would have received greater constitutional protection during the civil hearing had he proceeded *pro se*. At minimum, it is likely the court would have recognized the incriminatory nature of the questions being posed to Fuson during the direct examination by opposing counsel and advised Fuson of his

*Fifth Amendment* rights. Fuson also could have called Ms. Oteri as a witness who could testify that she, in fact, ghost wrote the financial disclosures that were at issue as Fuson's attorney. Fuson, in turn, then could have potentially asserted an "advice of counsel" defense to the allegations made in the civil proceeding.

C.     The District Court Failed to Protect Fuson from His Own Counsel

Here, the district court should have recognized that Fuson was being compelled to give incriminating statements, that Ms. Oteri was conflicted because she had helped him prepare the statements which were the subject of the current hearing, that Ms. Oteri had made herself a witness when she began to refute testimony made by Mr. Ackerson -- her former client -- while questioning him on cross-examination, as well as when the court ultimately found that Ms. Oteri had "ghost written" Fuson's property disclosure. At some point, the district court was obligated both as a member of the bar and as an officer sworn to uphold the Constitution and law of Montana to put a halt to the travesty of justice occurring in its courtroom. Absent timely intervention, the only remedy left to either the court or to Fuson was to suppress the statements in the subsequent criminal proceeding.

Under these circumstances, Fuson's civil statements should have been suppressed not because he was denied his *Miranda* warnings or denied his right to

counsel, the statements should have been suppressed because Fuson's counsel was ineffective and the district court recognized Fuson's lawyer was conflicted given both the nature of the proceedings and by her prior representation of Mr. Ackerson. Again, nothing about that civil proceeding remotely resembled due process for anyone except Cindy Fuson. Even Mr. Ackerson suffered at the hands of Ms. Oteri; he was placed in the unfortunate position of having to call his prior counsel a liar while that same attorney was cross-examining him.

One of the purposes of the exclusionary rule is to "ensure judicial integrity." *State v. Malkuch*, 2007 MT 60, ¶ 13, 336 Mont. 219, 154 P.3d 558. That purpose is accomplished through the exclusion of evidence obtained through violations of an individual's constitutional rights. "In extending the exclusionary rule, the [United States] Supreme Court relied in part on the imperative of judicial integrity. That imperative expresses the fear that if the courts use illegally obtained evidence, they would condone and encourage the illegal activity, and thereby breed contempt for the laws which they are sworn to uphold." *State v. Christensen*, 244 Mont. 312, 317, 797 P.2d 893.

Here, not only was Fuson compelled to give incriminating answers in violation of his *Fifth Amendment* right, his due process right to effective assistance

of counsel was violated. The district court's denial of Fuson's motion to suppress the statements in the criminal proceeding ultimately affected the judicial integrity of that proceeding. Not suppressing the statements put Fuson on the horns of a dilemma. It would have compelled his testimony during the criminal trial and also would have compelled him to call Ms. Oteri, which necessarily would have required Fuson to relinquish both his attorney-client privilege but also Ms. Oteri's duty of confidentiality to him.

Fuson would not have faced these Hobson's Choices had Ms. Oteri been acting in the role contemplated by the State Bar of Montana or even the role Fuson expected of his own lawyer. He also would not have faced the choices had the district court intervened in the divorce proceedings in a timely fashion to prevent Fuson from providing incriminating statements that later proved to be the basis for a criminal prosecution. At the least, the court later should have suppressed those statements in the criminal prosecution. The system failed Fuson on almost every level. It is incumbent on this Court to rectify those failings.

### **Conclusion**

It is a maxim of Montana's jurisprudence that "for every wrong there is a remedy." *Mont. Code Ann. § 1-3-214*. Unless this Court reverses the district

court's denial of his motion to suppress, Fuson will have suffered a series of wrongs for which he has no remedy.

“The core of due process ‘emphasizes fairness between the State and the individuals dealing with the State.’ This means that concerns about fairness, integrity and accuracy of the process carry great weight.” *In re. S.M.*, 2017 MT 244, ¶ 26, 389 Mont. 28, 403 P.3d 324 (citing and quoting *Evitts v. Lucey*, 469 U.S. 387, 405 (1985)). Ms. Oteri is an attorney licensed to practice law by the State of Montana. She is entrusted with a great responsibility and both the State and her clients must expect basic competency. That competency was not demonstrated in Fuson's case and he suffered dearly for it.

The citizens of Montana have a general right in the belief that attorneys licensed by its Bar are qualified or, at minimum, will not cause them more harm than good. Because Ms. Oteri was licensed, Fuson had a due process right to expect her to be effective. Efficacy of counsel should not just be a luxury afforded to defendants under the *Sixth Amendment*, civil litigants like Fuson should also expect competency, especially when its absence directly results in criminal prosecution.

For those reasons and those set forth above, Fuson request this Court

reverse the district court's denial of Fuson's Motion to Suppress the statements made in his civil proceeding.

Respectfully submitted this 31<sup>st</sup> day of January 2022.

/s/ Colin M. Stephens

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### **Certificate of Compliance**

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Equity Text A typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates is 7,038.

Dated this 31<sup>st</sup> day of January 2022.

/s/ Colin M. Stephens  
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## **CERTIFICATE OF SERVICE**

I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-31-2022:

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