

ORIGINAL

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11/12/2021

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA  
Case Number: DA 21-0482

In the  
SUPREME COURT  
for the  
STATE OF MONTANA

FILED

NOV 12 2021

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

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DA 21-0482

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JEFFREY ELEC HAMILTON,  
Petitioner-Appellant,

-vs-

STATE OF MONTANA,  
JAMES SALMONSEN- MSP Warden,  
Respondents-Appellee.

APPELLANT'S  
OPENING  
BRIEF  
OF  
APPEAL

\*\*\*\*\*

APPEAL FROM THE DECISION BY THE MONTANA EIGHTH JUDICIAL  
DISTRICT COURT, CAUSE NO: ADV-19-220, OF APPELLANT'S  
PETITION FOR POST-CONVICTION RELIEF, FROM BDC-13-560 TRIAL.

\*\*\*\*\*

Petitioner-Appellant:

Jeffrey Elec Hamilton

A.O. # 3015466

700 Conley Lake Rd.

Deer Lodge, Montana

59722

Pro Se Litigant

Respondent-Appellee:

Austin Knudsen,

Montana Attorney General

215 N. Sanders St.

P.O. Box 201401

Helena, Montana

59620-1401

\*\*\*\*\*

Submitted to the Montana Supreme Court for Appeal, based:  
upon the State District Courts refusal to recognize and  
abide by 'Clearly Established' Montana Laws and Constitutional  
Rights of the State of Montana and the United States.

\*\*\*\*\*

Submitted to the Court on this \_\_\_\_ day of October, 2021.

JEFFREY ELEC HAMILTON

COVER

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## STATEMENT

Comes Now, the Petitioner-Appellant, Jeffrey Elec Hamilton, to appeal the denial for Post-Conviction Relief, as stated by the District Court of the Eighth Judicial District Court. The Petitioner Hamilton presented a great deal of exculpatory state and federal jurisprudence that demands that relief be granted, based upon the Laws of the State of Montana, and demanded by the binding authority of the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Montana Supreme Court, in accordance with the Montana and United States Constitutions and the rights guaranteed therein as cited in this Appeal.

## DECLARATION OF APPEAL

The Petitioner-Appellant requests that the Montana Supreme Court review the Eighth District Courts denial for Post-Conviction Relief, based upon the issues and claims herein that demonstrate that the lower court did not abide by the laws of Montana, nor of this court, which is a denial of the Due Process of Law, under Art.II, §17, Due Process of Law, as demanded by the Montana Constitution; and the Fourteenth Amendemnt of the U.S. Constitution. The Petitioner declares that he met the statutory requirements for Post-Conviction Relief, as demanded by MCA:§§46-21-101 et seq.

The Petitioner-Appellant Hamilton has met the Procedural Requirements as specified in §46-21-104(1) and (2) by:

- (1)(a) Petitioner was convicted in the Eighth District Court, Cause No: BDC-13-560
- (b) Petitioner Appealed the Conviction to the Montana Supreme Court, 2018 MT 253, and on Appeal the remaining charges were not overturned properly due to the death of the Petitioners Appellate Defender, and that the replacement defender refused to follow upon the agreed upon strategy, claims and issues to this court upon direct appeal, which are not presented in this PCR appeal.
- (c) All facts and grounds for relief were presented properly to the District Court for relief, with affidavits, court records and exculpatory evidence that should be brought to this court for a proper appeal and review.

The Petitioner, properly collaterally attacked his conviction and sentence, under §46-21-105(2); see also Rudolph v Day, 273 Mont. 309, 903 P.2d 1007(1995), with claims not reasonably raised on direct appeal.

Petitioner Hamilton, does again claim the ineffective assistance of counsel, at both the trial and direct appeal stages previously before this court. Hamilton appeals the district courts abuse of discretion in not abiding by the laws, caselaw and principles of law herein this appeal, due to "record does not provide basis for challenged acts. and ommissions of counsel...appropriately makes claims in Post Conviction Relief." State v Herman, 2003 MT 149, ¶ 33; and the Court has "recognized the flaw in attempting to determine the presense of tactical reasoning behind ommissions or actions of the trial counsel from a cold record". See State v Roedel, 2007 MT 291, ¶38.

The Basis of the Petition is the Petitioners Actual Innocence and that it is a Constitutional Right not to be subjected to a criminal charge on the basis of False Testimony or evidence, Devereaux v Abby, 363 F.3d 1070, at 1074(9th Cir. 2000).

The Petitioner's Appellate Attorney Died and this matter was given to another attorney who DID NOT bring up the following agreed upon issues to the Montana Supreme Court. The jury at Trial acquitted the Petitioner of (2) Two counts of §45-5-503, Sexual intercourse without consent, AKA Rape. But the Jury found the Petitioner guilty of the lesser included charges of Incest, §45-5-507. The Petitioner had adopted his step-daughter legally through the courts, and was found guilty(2X) of the §45-5-507 charge because the Petitioners daughter cohabitated with the Petitioner. The Petitioner's daughter, the 'alleged victim', stated that the Petitioner had sex with her multiple times during trial. The expert witnesses stated at trial that the Petitioners daughter was still a 'virgin' and that her 'Hyman' was still intact. This clearly proves that this young girl was not being truthful to the court and that her testimony should have been impeached at trial and disregarded at trial as false. The State DID NOT have any FORENSIC EVIDENCE to support their allegations of sexual intercourse but the court and jury punished the Petitioner for legally adopting his step-daughter after the death of his wife...

#### The MISCARRIAGE OF JUSTICE EXCEPTION

This Petition meets the 'Miscarriage of Justice' Exception based on the Petitioners Actual Innocence. The Petitioner can prove by the record that the Trial counsel was ineffective and that upon the death of the Appellate Counsel, Ms. Elaine Larkin, that the Montana Appellate Defenders office did not not submit any of the agreed upon issues for Appeal.

The evidence, expert testimony and the PROVEN PERJURY by the alleged victim, clearly supports the Petitioner's claim that he is Actually and undeniably INNOCENT! Absolutely No forensic evidence showed to the court any sexual contact between the Petitioner and the alleged 'victim'.

The Petitioner claims his Actual Innocence, which is synonymous with the 'Miscarriage of Justice' exception, as per Murray v Carrier, 477 US 478, 106 S.Ct. 2649, 91 L.Ed.2d 397 (1986).

The Petitioner stands on his claim through Herrera v Collins, 506 US 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), that he did not commit a crime and the State's complete lack of evidence that the Petitioner committed a crime,(Substantive).

The Petitioner, also stands on Schlup v Delo, 513 US 298, 115 S.Ct. 851, 861, 130 L.Ed.2d 808(1995), "actual innocence with substantive claims of constitutional

violations at trial, which is sufficient to bring him within the narrow class of cases...implicating a fundamental 'Miscarriage of Justice'."

The Petitioner also meets the State of Montana criteria for 'Actual Innocence', as the court held in State v Clark, 2005 MT 330, and also §(2) of §46-21-102 MCA, that is substituted for the 5th Prong of Clark, as per Marble v State, 2015 MT 242, stating the new evidence must be "Proved and viewed in light of the evidence as a whole." The forensic medical experts clearly back that the Petitioner's teenage step-daughter was not truthful in her claims of having 'sex' with the Petitioner if the experts medical examination clearly showed that she was a 'virgin' and her female 'Hyman' was still intact, which the one expert stated was impossible if this step-daughter had ever had sex...let alone over 200 times as she claimed.

The Judicial Point at issue herein is the Petitioner's 'Actual Innocence' and the insufficiency of supporting forensic evidence to support her false claims. This is summed up by, "The elements of a state crime are determined by state law, and the state legislatures have a broad discretion to define the elements of a crime. Nevertheless, once a state's laws are written, a defendant has the Due Process right to insist that the state prove 'Beyond a reasonable doubt' EVERY element of the offense charged." Medley v Runnels, 506 F.3d 857, (9th Cir. 2007).

The crux of this entire matter is that a teen-age stepdaughter did not wish to live with the Petitioner, and lied to the court about incidents that she falsified under oath to the court. Incidents that could not have happened as proven by the expert medical witnesses examinations. The Teen-age girl's testimony must be completely impeached as false and perjurious as per the Rules of Evidence and the Rules on Hearsay, Rules 801-806. Under Rule 806, the Petitioner hereby attacks the credibility of all of the Petitioner's step-daughter as false and perjurious and completely lacking in factual content...except in her mind to find a way to go live with her grand-parents so she would not have to abide by the Petitioner's rules of conduct for a teenage girl and her wish to be 'Free' as she claimed many times...

#### STANDARD OF REVIEW

The Petitioner requests that this court review this Petition based on the Petitioner's Constitution Rights as guaranteed in the United States Constitution and its Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment. These rights have been violated and denied to the Petitioner. The Rights guaranteed to a citizen of the State of Montana, by the State's Constitution have also been denied under ART. II;...  
§16- The Administration of Justice; §17- Due Process of Law; §22- Cruel and Unusual Punishment; §24- Right to appear and defend in person and by counsel; and also §25- Double Jeopardy- No person shall be twice put in Jeopardy for the same offense.

The Petitioner claims the State ordered "sentence was unconstitutional on it's face and the Procedures used to impose this sentence was unconstitutional", as per Lott v State, 2006 MT 279.

The Montana Supreme Court further held in State v. Lone Elk, 2005 Mont. 56, "This court can not adopt a lower standard to protect any right...that the U.S. Supreme Court recognizes". This means that the federal case law cited herein takes precedent as per the Supremacy Clause of the U.S. Constitution, in Article VI. The Montana Supreme Court has ruled and followed the 'Jurisprudence Constante' doctrine, that the court MUST give great weight to the rule of Law that is accepted and applied throughout these United States. This court has also held that it should not overrule or modify its own decisions.

The Montana Supreme Court has held continuously and stood that "Physical facts are often more potent in the ascertainment of truth than the sworn statements of witnesses, they may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason and common sense." State v Gunn, 85 Mont. 553, (1929).

In this matter the physical evidence and true facts are congruent with the truth, and support the Testimony of the Petitioner. The Physical evidence clearly impeaches all of the Petitioners step-daughters claims as false and lacking in ANY credibility. With this said the State Prosecutors did not have a reliable witness or any facts or physical evidence to procure this false and wrongful conviction and it's illegal sentence...that the Petitioner must suffer for everyday of this matter..

#### SUMMARY OF PETITION

Comes Now, Jeffrey Elec Hamilton, the Petitioner in this entitled cause asking for relief from this Honorable Court per Post Conviction Relief, based on the contents of this Petition. The Petitioner hereby claims that the Respondents imposed a unjustified sentence as a result of a unconstitutional and illegal conviction. That the Petitioners Rights guaranteed under the U.S. and Montana Constitutions have been violated and denying the Petitioner a fair and accurate Tribunal.

The unjust sentence and conviction are thus subject to the following legal 'Collateral Attack' based on the following grounds and claims herein.

The Petitioner was charged with Count I, §46-5-503, Sexual Intercourse without Consent. The Petitioner was acquitted of this charge by the jury at trial.

The Petitioner was charged with Count II, §46-5-503, Sexual Intercourse without Consent. The Petitioner was acquitted of this charge by the jury at trial.

The Petitioner was found guilty of Counts III and IV, Incest, §45-5-507, based upon the same facts and times as he was acquitted of Count I and Count II. Federal Law states that this is a violation of the FIFTH Amendment Double Jeopardy Clause.

AFFIDAVIT

of

Petition, Facts and Claims

I, Jeffrey Elec Hamilton, do hereby swear that the contents of this Petition for Post Conviction Relief and its Claims and exhibits are true and correct.

I swear I am, 'Absolutely Innocent' of the 2 remaining charges of Incest, after the Jury found that I was innocent of Sexual Intercourse without Consent, AKA Rape.

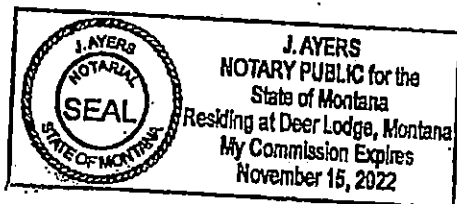
I hereby Challenge the present sentence from BDC-13-560 in the Eighth Judicial District Court as being obtained thru the following violations of Right as guaranteed to all citizens of the United States and Montana by these governments Constitutions.

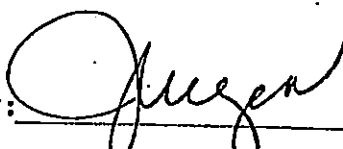
I, hereby demand, that the State of Montana release me from illegal incarceration that is the result of the State of Montana's unconstitutional acts and conviction.

Dated this 29 day of March, 2019.

  
Jeffrey Elec Hamilton

(seal)



Notary: 

Expiration: 11.15.22



## Factual and Procedural History

The Petitioner met his wife Lesley Ann [REDACTED] in the spring of 2005. Ms. [REDACTED] had a 6 year old daughter named [REDACTED] who was born in 1998.

The Petitioner and Ms. [REDACTED] became a couple in the Summer of 2005 and resided in the basement of the Petitioners parents Alvin and Laureless Hamiltons home. [REDACTED] started her first day of school at that time and became an active Girl Scout, with the Petitioners support.

In early spring of 2006 the Petitioner and MS. [REDACTED] purchased a trailer that took both their incomes to make the payments and supply the family with decent food and clothing. The Petitioner took on extra work each year to provide christmas presents.

The Petitioner worked for Ron Hill Sprinklers, and worked his way up to Sprinkler Tech in 7 years. The Petitioner had only an 11th grade education. During the Christmas Season the Petitioner worked at the "Loading Zone" bar as a 'swamper' or night janitor for 8-12 AM every weekend.

The Petitioner and Lesley became 'common law' man and wife at this time and were very happy.

On March 31st 2009, Lesley [REDACTED] Hamilton died. She passed away after a mix up in her prescription medication.

The Petitioner and [REDACTED] were devastated. In 2010 [REDACTED] wanted to be adopted and the Petitioner did so happily. The Petitioner only made \$23,000 a year working at Ron Hill Spinkler and had to take many extra jobs in order to make ends meet with the loss of Lesleys income. At times this caused great tension between the Petitioner and [REDACTED] the 'alleged victim'. [REDACTED] sometimes acted out after her mothers death, demanding more clothing/ personal possessions then the Petitioner could afford. The Petitioner had to rent out a room in order to make the trailer payments. When [REDACTED] turned 15 she wanted a car the Petitioner could not afford.

In June of 2013 [REDACTED] moved out of the trailer after an argument. She then moved in to her grandmothers home.

On June 29th 2013 the Petitioner was arrested for a DUI, and was later given sanctions by the Court, the Petitioner quit drinking on July 17 2013. The Petitioner had a hard time accepting

his wifes death, and the arrest schocked him away from alchohol.

On October 7 2013 [REDACTED] moved back into the trailer with the Petitioner. On November 25th 2013 the Petitioner refused to purchase [REDACTED] a car. On November 26th 2013 [REDACTED] left school and went to the Police Station to file a false statement against the Petitioner. The Petitioner was not aware at the time that this had happened.

On December 20 2013 Great Falls Police Department arrested the Petitioner on 2 counts of Sexual Intercourse Without Consent, and 5 counts of Incest. The Petitioner lost everything.

On October 6, 7, and 8th of 2014 the Petitioner went to trial and was not allowed to speak. He was acquitted of Count 1 and Count 2, Sexual Intercourse without Consent. The Petitioner was found guilty of counts 3 and 4 Incest, and acquitted of counts 5, 6, and 7 incest.

On March 3 2015 the Petitioner was sentenced to 100 years in the Montana State Prison with all but 25 years suspended, and 25 years without Parole on each count to run concurrently. This was all based on the hearsay of the Petitioners daughter, without any corroborating or forensic evidence to support her false claims.

The Petitioner was transported to the Montana State Prison in Deer Lodge on March 11th 2015. There He was housed on the Martz Intake and Diagonstic Unit for 87 days of 23 hour a day lock down.

The Petitioner has completed his high school education, and is now the Payroll/Billing Clerk for the Motor Vehicle Maintainence divison of the Montana Correctional Enterpirises.

The Petitioner appealed the District Courts verdict and sentence to the Montana Supreme Court and was appointed an appellate defender named Elain Larkin. Ms. Larkin worked closely with the Petitioner and helped develope the following claims.

Shortly thereafter Ms. Larkins died suddenly during a heart surgery. The Petitioner was then appointed Appellate Defender Chad Wright. Mr. Wright refused to commicate with the Petitioner and submitted issues that were NOT agreed with by Ms. Larkin. The Appeal failed in November of 2018.

Claim #1: THE PETITIONER CLAIMS HIS ACTUAL INNOCENCE TO THE OFFENSES CHARGED AND CHALLENGES THE SUFFICIENCY OF THE EVIDENCE.

The Petitioner hereby claims his Actual Innocence and that BDC-13-560 proceedings in the Eighth Judicial District Court of Montana violated the Petitioners Fourth, Fifth, Sixth, Eighth and Fourteenth amendment rights.

The Petitioner was originally charged with two counts of Sexual Intercourse Without Consent and five counts of incest.

The jury aquitted the Petitioner of all the counts except counts 3 Incest and count 4 Incest.

This claim is based on facts that the two medical experts at trial testified that the Petitioner's adopted daughter, 'the alleged victim' was found to be still a 'virgin' at the time of the medical examinations. This person testified that the Petitioner had forced her to have sexual intercourse weekly for years which these doctors stated could not happen with the female 'hymen' still intact. The Doctors agreed with studies that show after 10 sexual encounters the hymen could not be intact. See Dr. Nacey Maynards testimony on pages 324-339. Notes on pages 336-337 that Dr. Maynard stated the Hymen was still intact.

The State at no time had any forensic evidence of the crime of Incest. No DNA or other physical evidence. Just the testimony of the adopted daughter that stated she was raped by her step-father who willingly adopted her after her mother died. She stated she was raped by the Petitioner over 200 times, yet her hymen remained intact.

The legal definition of 'Incest' according to Black's Law Dictionary 7th edition states:

"Incest, n. - Sexual relations between family members; or close relatives, including children related by adoption."

The Petitioner asks the court how could the above occurred if the 'alleged victim' was still a virgin per the medical examinations.

Dr. Thomas Bennet, testified on pages 529-563. Dr. Bennet testified that the hymen will be torn or damaged normally after 10 or less sexual encounters, and that 81% of women no longer have a hymen after that time and the remaining 19% have only

portions remaining. Yet the 'alleged victims' hymen was intact.

The medical evidence completely contradicts the hearsay testimony of the 'alleged victim'.

Again, if this teenage 'victim' was being sexually assaulted weekly why would she move back in to the home of her adopted father on October 7th 2013? This was after she moved in to her grandmothers house in July of 2013, 3 months before.

Why would Dr. Bowan Sme lko, a licenced psychologist in Montana and Colorado state on page 570, line 6-7, that he "couldn't find a consistant pattern of behavioral systems" as to this 'alleged victim' was abused.

The Petitioner had two different roommates to help pay the rent on his trailer, niether ever saw or heard any evidence of abuse or sexual acts in the trailer home.

The State did not have 'Probable Cause' except for the hearsay statement of a teenage girl who wanted her adopted father to buy her items he could not afford. By statute this is not "Probable Cause'.

Under the Fourth Amendment, a state "must provide a fair and reliable determination of probable cause as a condition for any significant pre trial restraint from liberty." Gerstein v Pugh 420 US 125, 95 S.Ct. at 868-69.

Hearsay evidence MUST be supported by additional evidence that a reasonable trier of fact could come to the conclusion that a citizen is guilty of a crime.

The Constitution of the United States requires that there must be evidence to convict a defendent...in this matter there was none. And most importantly there must be absolute fairness required as a "Safeguard of Due Process of Law", as per precedent US Supreme Court caselaw of, In the Matter of Winship 397 US 358, 25 L.Ed 2d 368, 90 S.Ct. 1068 (1970).

The Petitioner asks that this court review the elements of the criminal offenses charged as defined by the Montana State Laws. The insufficiency of evidence is clearly stated in Jackson v Virginia, 443 US 307, 61 L.Ed 2d 560, 99 S.Ct. 2781(1979)

" As an essential of the due process guaranteed by the Fourthteen amendment, no person shall be made to suffer onus of a criminal conviction execpt upon sufficient proof, which is defined as the evidence necessary to convince a trier of fact beyond a

reasonable doubt of the existence of every element of the offense; accordingly a state prisoner who alleges that the evidence in support of his state conviction can not be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." There was no crime committed by the Petitioner.

The complete lack of logical evidence is not present for either of the remaining same counts charged. The Prosecution used 'smoke and mirrors' as stated in Winship, and did not meet any element of the offense as is needed to convict"quoting Jackson v Virginia 443 US 307 99 S.Ct. 2781. Counts 3 and 4 should be overturned as per 28 USC 2254(d)(2) which states that "a unreasonable determination of the facts in light of the evidence". Due to the total insufficiency of any evidence that the Petitioner committed a crime and that all evidence points to another, along with the evidence the Prosecution both hid and suppressed, it should be clearly logical that the Prosecution violated rights guaranteed the Petitioner under the Fourth and Fourteenth Amendments. US and Montana law provides that the 'Miscarriage of Justice'. as in this present matter, must be so obvious that the 'Judgement is rendered a nullity' and the Petitioner "must present evidence that the Petitioner did not commit the crime which relief is sought" as per McQuiggin v Perkins 133 S.Ct. 1924(2013). " Minor Circumstantial evidence by the prosecutor at trial did not satisfy the Constitutional Standard of Sufficiency of Evidence," Newman v Metrich 543 F.3d 793 (6th Cir. 2008)

Again due to the insufficiency of any actual evidence the Petitioner asks that Count 3 and 4 be overturned and expunged from the record as the relief to be granted by the Petitioner for Post Conviction relief.

Claim #2 INEFFECTIVE ASSISTANCE OF COUNSEL- Professional Misconduct, Abandonment and unlawful Acts/Omissions by Trial/Appellant Counsel in violation of the Petitioners 5th, 6th, and 14th Amendment rights of the US Constitution.

The Petitioner hereby brings forth these claims of Ineffective Assistance of Counsel(IAC) first by Trial Counsel, whose acts/omissions during the BDC-13-560 proceedings violated and denied the Petitioner of these above rights.

This IAC claim is allowed to be brought up in Postconviction Relief (PCR) as per the US Supreme Court ruling in Martinez v. Ryan 556 US \_\_\_, 132 S.Ct. 1309, 182 L.Ed 2d 272, (2012), which held where, under state law claims of IAC of trial counsel had been raised in an initial-review collateral proceeding (Direct Appeal to MT.S.Ct.) a procedural default would not BAR a court from hearing further substantial claims of IAC at trial, if the Appellate Counsel was also shown to be ineffective. Thus with the Appellate counsel being also IAC, (Appellate Counsel lied to the MT.S.Ct. about facts) the Prejudice was never properly addressed, leaving both issues open for a constitutional rights decision, on remand.

Accordingly under the Supremacy Clause (Art. VI) and Comity Clause (Art. IV 2); of the U.S. Constitution the Petitioner is not barred from bringing forth these further claims of IAC to the Court in PCR. Thus the Martinez decision supersedes ~~and over~~ rules the Montana MCA codes 46-21-104(1)(c) and 46-21-105(2).

The Following list of unconstitutional acts were committed by both the trial counsel and the appellate counsel.

1) Trial counsel did not claim the Petitioners Fifth amendment right against Double Jeopardy prior to trial.

2) Trial Counsel did not stand on the hearsay rule against unsubstantiated claims

3) After Conviction and prior to sentencing the Trial Counsel did not inform the Court that is is 'Collaterally Estopped' from further prosecution upon acquittal of both counts 1 and 2.

4) After Appellate Counsel Larkins died, the substituted Counsel Chad Wright did not communicate or submit any of the agreed upon issues herein or Actual Innocence, Double Jeopardy, Ineffective Assistance of Counsel and Perjury.

Like all IAC claims the precedent caselaw is Strickland v Washington, 466 US 668, 80L. Ed 2d 674, 104 S.Ct.2052(1984), the court ruled... when "Counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment", ID at 687. The Petitioner must show that the deficient performance Prejudiced the defense, ie, "counsel errors were so serious as to deprive the defendant of a FAIR trial, a trial whose result is reliable", ID at 687.

With respect to a trial counsel's conduct, the U.S. Supreme Court has held that "the defendant must show that counsels representation fell below an objective standard of reasonableness" which must be judged under "prevailing professional norms" Strickland at 688. Trial Counsel ignored clear Fourth Amendment violations is far below the Montana professional norms in this States Judicial profession, the Petitioner is sure, and completely unreasonable and prejudicial.

The Supreme Courts test for prejudice is stated in Kyles v Whitley, 514 US 419, 115 S.Ct. 1555 (1995). To meet this test for relief the Petitioner must show "a reasonable probability" of a different result" and "the question is whether the defendant would more likely than not have received a different verdict... But whether he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." ID at 434. Furthermore the resulting prejudice from counsels errors must be "considered collectively, not item by item" ID at 436.

The total lack of representation listed above collectively shows that appellate and trial counsel prejudiced the Petitioners defense in the eyes of the jury by allowing the Prosecution to charge the Petitioner with seven counts of the same charge, clearly prejudiced the jury with this 'Multiplicity' of a single count.

The 'two prongs' of Strickland for ineffective assistance of counsel are met, Trial counsel was Ineffective in representing the Petitioner.

Additionally the U.S. Supreme Court has held in United States v Cronin, 466 US 648, 80 L.Ed 2d 657, 104 S.Ct. 2039(1984) that " The right to effective assistance of counsel is...the right of the accused to require the prosecutions case to survive the crucible of a meaningful adversarial testing. Where a true adversarial

criminal trial has been conducted...the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

"Some circumstances warrant a presumption of prejudice. These circumstances include the complete denial of counsel at a Critical Stage of Trial" ID at 659.

Trial Counsel did not object during pre-trial or trial proceedings to this "shotgunning" of charges, and refused to allow the Petitioner to take the stand to clarify these false accusations. Both at critical stages of the trial can not be denied, thus violating the Petitioner's Sixth Amendment right and further making adversarial court process, presumptively unreliable. To be applied to both trial and Appellate stages of MT justice.

"Impeachment evidence is especially likely to be 'material' when it impugns the testimony of a witness is critical to the prosecutions case," Banks v Dretke, 540 US 668 691, 24 S.Ct. 1256 (2004), at 700. This court has held that impeachment evidence was 'material' where it pertained to the Prosecutions 'Star' witness "when the withheld evidence would seriously undermine the testimony of a key witness or an essential issue...the withheld evidence has been found to be 'material'" as stated in Carriger v Stewart, 132 F. 3d 463 480(9th Cir. 1997).

The Fact that the only evidence was hearsay statements from the 'alleged victim' was clear impeachable evidence that trial counsel did not pursue during questioning of the 'alleged victim'.

The inconsistencies in the Prosecutions case would have been brought out and the complete insufficiency of the Prosecutions evidence casting great doubt on the alleged victim's honesty. Making it abundantly clear the Petitioner had not "received a fair trial, understood as a trial resulting in a verdict worthy of confidence" Kyle 514 US at 434.

Appellate and Trial Counsels complete deficiency was a complete mockery of our judicial System by not putting the prosecution to any type of adversarial test, which also violates the MT Rules of Professional Conduct; Client Attorney Relationship Rules:

Rule 1.1 Competence

Rule 1.2 Scope

Rules 1.3 Diligence



Rule 1.3 Diligence

Rule 3.4 Fairness

Lockhart v Fretwell, 506 US 364 (1992) states " counsels deficient preformance renders the result of the trial unreliable and the proceedings fundamentally unfair."

The Petitioner again the court grant complete relief on this claim and the fact that Counsel representation violated the Petitioner's Sixth and Fourteenth amendment rights. With this violation the Petitioner asks for immediate relief and release from illegal and unconstitutional incarceration.

Claim #3- The Petitioner claims that the Prosecutions witness comitted Perjury under oath to further violate and injure the Petitioners right to a fair trial under the Due Process Clauses of the Fifth and Fourteenth Amendment of the Constitution against lawlessness and injustice.

The Petitioner hereby claims that the Petitioners adopted daughter intentionally falsidied her statements of being raped and abused. This is referred to as Perjury when a person states a falsehood under oath.

The alleged victim stated that she had been vaginally raped over 150 times, yet her hymen in her vagina was still completely intact. The Medical experts both claimed that this is unlikely as a woman's hymen diappears after 10 sexual experiences.

The Petitioner has claimed his innocence to this horrendous falsehood that the state only had the adopted daughters testimony.

The Petitioner wants to remind the court that this teenage girl wanted a car that the Petitioner could not afford and remind the court that the 'victim' moved out of the trailer with her adopted father and then moved back in just months prior to the false statements to the Great Falls law enforcement.

The evidence "does more than impeach the character or credit of a witness" as stated in State v Green, 135 Mont. 580 342 P.2d 1052(1959).

"It impeaches the swore testimony given at trial by the states principle witness....which resulted in the dfendents conviction of a felony. It now appears that the sworn evidence....given at trial was false, such being the case the defendent did not have a fair trial." Green, at 589.

The Montana Supreme Court has held that " a person commits perjury if in an official proceeding he [she] knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when the statement is material", State v Trull 2002 MT 119, p.19, and Section 45-7-201(1)MCA.

Clearly the alleged 'victim' lied under oath and this false statement was material to this matter, being the only evidence presented to the court.

" A false statement is material, regardless of the admissibility of the statement under the rules of evidence, if it, could have

affected the course or outcome of the proceedings" "Whether a falsification is material in a given situation is a question of law" Trull at 18 and Section 45-7-201(3)MCA.

The statements made by the adopted daughter were the only evidence the state presented, as material, and this was clearly medically disputed as false by the doctors and their examinations that her vaginal hymen was completely intact.

These false statements were material and whether "it would be reasonable to find that a witness statement if believed could have altered the course of the proceedings," see State v Thompson, (1978) 176 Mont. 150, 154, 576 P.2d 1105, 1107. Citing State v Scanlon (1977) 174 Mont. 139, 569 P.2d 368.

The case reveals that the jury was presented with conflicting evidence and inconsistent testimony as well as forensic evidence that proved that the alleged victim was falsifying her testimony as a way to be allowed away from the Petitioner who refused to purchase her a car at age 15. It is unrealistic to believe a girl or woman would move back into a possible unsafe situation, if her statement could be believed. The victims own actions discredit her testimony.

The Petitioner again requests that the Court dismiss both counts 3 and 4 due to the victims false statements under oath.

Claim #4: The Petitioner claims that Count 3 and Count 4 constitute a violation of the Double Jeopardy Clause of the U.S. Constitution, and that they both should be dismissed as unlawfully charged after the Petitioner was Aquitted of the Major Offense of Sexual Intercourse without Consent and the other 3 Incest Charges, as per the 'Collateral Estoppel' Doctrine of the Fifth Amendment. Multiple Montana State Laws also support this issue and dismissal of charges.

The Petitioner hereby claims that after the Petitioner was aquitted of Counts 1 and 2 Sexual Intercourse without Consent and Counts 5,6,and 7 Incest that both counts 3 and 4 Incest 45-5-507 MCA should be dismissed as per the U.S. Constitutions Fifth Amendment and its Double Jeopardy clause with its "Collateral Estoppel" Doctrine that the Federal Courts has ruled takes precedent in a case such as this.

The Montana Constitution also contains its own Double Jeopardy Clause in its Article II subsection 25, which states "no person shall again be put in Jeopardy for the same offense previously tried in any jurisdiction".

The rationale behind both are the exact same that it is a mandated requirement under state and federal law in place to protect all defendants and citizens from multiple prosecutions for offenses arising out of the "Same Transaction" or multiple punishments imposed from a single prosecution from the same statute or offense.

The Petitioner claims that the Prosecutors were aware that the identical charges constituted Double Jeopardy and violated the 'Collateral Estoppel' doctrine as ruled upon many times by the U.S. Supreme Court and the Ninth Circuit Court of Appeals.

The Petitioner also claims that Counts 3 and 4 should also be dismissed because per Montana Statutes, MCA 46-11-410(2)(c) their was inconsistent findings of fact, (as in Claim 1, insufficiency of evidence to convict). MCA 46-11-410 bars prosecution for and Defines the Multiple Charges Statute of the MCA codes.

The Petitioner also claims that this matter violated MCA 46-11-503. Prosecution based on same transaction barred by former prosecution. A statute that carries the state laws into the same opinion and rulings as the federal 'Collateral Estoppel' doctrine.

The Montana Supreme Court has its own three (3) part test for Double Jeopardy under State v Tadewalt 277 Mont. 261 922 P.2d 463 (1996). The parts to be satisfied to meet the 'same transaction' and double jeopardy are:

- 1) Defendant is charged within the jurisdiction of the court where subsequent charges were pursued.
- 2) When Prosecution resulted in a conviction, and
- 3) The subsequent prosecution was based on a offense out of the same transaction. "same transaction" is defined in 46-1-202(23) MCA "Same transaction" means conduct consisting of a series of acts or omissions that are motivated by:

- (a) a purpose to accomplish a criminal objective; or
- (b) a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or property of the same person.

The MCA states in 46-11-410 Multiple Charges in 2 that:

- 2) A defendant may not, however, be convicted of more than one offense if:

- a) one offense is included in the other;
- b) one offense consists only of a conspiracy or other form of preparation to commit the other;
- c) inconsistent findings of facts are required to establish the commission of offense.

Counts 3 and 4 meet all of the Tadewalt, 'same transaction' criteria and definition. Counts 3 and 4 are barred from further prosecution also per 46-11-410(2)(b) in that the OIncest would have to be considered a included charge to Sexual Intercourse without Consent, that the defendant was acquitted. Also the inconsistent (total lack of evidence) findings of in Count 3 and 4 qualify as barred by 2(c).

Additionally State Law states in MCA 46-11-503, Prosecution based on the same transaction barred by former prosecution.

- 1) When two or more offenses are known to the prosecutor, are supported by probable cause, and are consummated prior to the original charge and jurisdiction and venue of the offense lie in a single court, a prosecution is barred if:

- (a) the former prosecution resulted in acquittal. There is an acquittal whenever the prosecution results in a finding

of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant conviction.

By the above MCA statute 46-11-503(1)(a), the prosecution ~~of~~ count 3 and 4 are barred from prosecution after the acquittal of the Defendant of charges on counts 1, 2, 5, 6, and 7. The evidence needed to convict the defendant was insufficient and the elements of these criminal acts were not met. Counts 3 and 4 should be overturned or reversed due to State Statute and lack of evidence to meet the elements of the offenses.

Again, the defendant will cite the Montana Supreme Court in its ruling State v Nocevar, 2000 MT 157, "criminal counts part of the same transaction are not subject to further prosecution."

The convictions of count 3 and 4 violate the Fifth Amendment of the Fifth Amendment of the U.S. Consitution also under the 'Collateral Estoppel' effect and also the federal caselaw against "Multilicity"

The Defendant will use the following Federal Caselaw 'Path' to substantiate the above violations, in the Double Jeopardy Clause of both the Montana and US Constitutions.

Federal Judiciary Rules of caselaw, under the fifth Amendment and the Fourteenth Amendment state that 'Jeopardy' attaches once the jury trial is sworn in, per Crist v. Bretz 437 US 28, 98 S.Ct. 2156; 57, L.Ed 2d 24 (1978).

"the Double Jeopardy Clause of the Fifth Amendment forbids a second prosecution for the 'same offense' after a defendant has been acquitted", as per Ball v U.S. 163 US 662, 16 S.Ct. 1192(1896).

The U.S. Supreme Court stated that the "legislative Intent" is clear that determines the scope of what constitutes the "same offense", concerning the same time and location, as per Missouri v Hunter, 459 US 359, 103 S.Ct. 673 74 L.Ed 2d 535 (1983); and also Albernaz v United States, 450 US 333, 101 S.Ct. 1137 (1981).

The U.S. Supreme Court held in North Carolina v Pearce, 395 US 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969), that the guarantee against Double Jeopardy consists of three separate Constitutional protections. "It protects against a second prosecution ~~for the~~ same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

The Federal Courts have also held that "the rule against Multiplicity stems from the Fifth Amendment of the Constitution which forbids placing a defendant twice in jeopardy for one offense. The rule prohibits the Government from charging a single offense into several counts and is intended to prevent multiple punishments for the same act", as stated in U.S. v Kimbrough, 69 F.3d 723 (5th Cir. 1995).

The Courts found that the use of 'Multiplicity' is a "artificial and unlawful attempt to divide a single offense into multiple offenses," and that "Multiplicious counts are improper because they allow multiple punishment for a single criminal offense", as per U.S. v Wood 57 F.3d. 913 (9th Cir 1995).

By the State charging the Identical Statutes in Counts 3 and 4, they violated the 'Multiplicity Rule' as cited above.. The state violated the offense in count 1 into 7 seperate offenses, that concern the same time and location, in order to obtain any conviction possible due to the lack of evidence.

The U.S. Supreme Court held in United States v Dixon 509 US 688, 125 L.Ed 2d 556, 113 S.Ct. 2849(1993), that the court was over ruling Grady v. Corbin, 495 US 508 109 L.Ed 2d 548, 110 S.Ct. 2084(1990), and replaced the 'same evidence' test for Double Jeopardy analysis with the return to the previous 'same elements' test in Blockburger v United States, 284 US 299, 304, 76 L.Ed. 36, 52 S.Ct. 180(1932). The Court held that in both the multiple punishment and multiple prosecution contexts, it was concluded that when two offenses for which the defendant is punished or tried, can not survive the "same elements" test, that double jeopardy applies and that the convictions and punishments are barred.

Dixon further stated that "the same elements test, sometimes referred to as the 'Blockburger Test', inquires whether each offense contains an element not contained in the other, if not they are the 'same offense' and double jeopardy bars additional or successive prosecutions", at 696.

The Dixon Court further stood on the earlier opinion in Ashe v. Swenson 397 US 436 25 L.Ed 2d 469 90 S.Ct. 1189(1970), concerning 'Collateral Estoppel'; that "Bars a later prosecution for a seperate offense where the Government has LOST an earlier

prosecution involving the same facts."

As per Ashe and Dixon, when the State of Montana 'Lost' by acquittal of the 1, 2, 5, 6, and 7th at trial, before being found guilty of the two lesser charges in counts 3 and 4 Incest then as per definition and the fact that all seven counts involved the same facts presented to the court, the 'Collateral Estoppel' effect and defense is warranted as an Appellate Claim in this present matter. And as such the two identical counts of Incest are barred completely from further prosecution upon the jury's acquittal of the defendant of Count 1 and 2.

The "Cottateral Estoppel" effect and doctrine established by the U.S. Supreme Court was further explained in its decision in Yeager v. United States 557 US 110 129 S.Ct. 2360 174 L.Ed. 2d 78, (2009), that a "apparent inconsistency between a Jury's verdict of acquittal on some counts and its failure to return a [like] verdict on the other counts does not affect the preclusive force of the acquittal under the Double Jeopardy Clause of the Fifth Amendment."

Under Yeager, the U.S. Supreme Court held that "a jury's acquittal unquestionably terminates a defendant's jeopardy with respect to the issues finally decided on these Counts," at 557 US 119.

Most Importantly the Yeager Court, quoted the Fifth Amendment Double Jeopardy Clause and further stated it "recognized that the Clause embodies two vitally important interests. The First is the 'deeply engrained' principle that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty" quoting Green v United States 355 US 184, 187-188, 78 S.Ct. 221, 2L.Ed 2d 199 (1957); and Benton v Maryland 395 US 784 795 89 S.Ct. 2056, 23 L.Ed 2d 707(1969).

"The Second Interest is the preservation of 'Finality of Judgements'," as per Crist v Bretz 437 US 28, 33, (8 S.Ct. 2156, 57 L.Ed.2d 24 (1978)). This second interest is further explained in Arizona v Washington, 434 US 497, 505-6, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), "the interest in giving the prosecution one complete opportunity to convict those who have violated its law",



434 US at 509.

Yeager went one step further and stated, "to identify what a jury necessarily determined at trial, courts should scrutinize a jury's decision, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgement regarding all evidence and arguments presented to it." quoting Fong Foo v U.S., 437 US 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

In the present matter, the court should scrutinize the Jury's decisions, based on the insufficiency of evidence, and the court will see that the Jury's decision violated the fifth amendment.

In deeper analysis, the Yeager court explained that "a critical issue of ultimate facts in all the charges against a [defendent], a jury verdict that is necessarily decided that issue in his favor, protects him from further prosecution for any charge", at 557 US 123.

The above 'Judicial Path' leads a jurist of reason to the decision that the State denied the defendant his guaranteed Fifth Amendment rights, through the Double Jeopardy Clause and that Clauses 'Collateral Estoppel' effect.

The 'Collateral Estoppel' effect, as well as the 'Multiplicity Rule' protects a defendant from the 'Mud Slinging' strategy used by some prosecutors. The Courts do not approve of this strategy, as stated by the 10th Circuit Judge Neil Gorsich (Now a U.S. supreme Court Justice) who stated, "We must stop this practice of throwing as much mud as possible against the wall, hoping something sticks...wasting valuable time and taxpayer money," (speech to the Colorado State Bar).

The Defendant was acquitted of the first two counts of Sexual Intercourse Without Consent and the final 3 counts of Incest and the state was able to get convictions on the two identical counts of Incest which should be dismissed due to the above "Collateral Estoppel" effect.

CLAIM #5: THE PETITIONER HEREBY CLAIMS THAT HIS CONSTITUTIONAL RIGHT TO THE EQUAL PROTECTION UNDER THE LAW WAS VIOLATED BY THE DISTRICT COURT, AS GUARANTEED TO HAMILTON UNDER THE FOURTEENTH AMENDMENTS 'EQUAL PROTECTION CLAUSE' OF THE UNITED STATES CONSTITUTION.

The Petitioner-Appellant Hamilton hereby claims that his constitutional rights, as stated have been violated concerning the district courts denial of Hamilton's Post Conviction for Relief filing in the district court.

The district courts statements are contrary to the Laws of Montana, as ratified by the Montana Legislature, concerning the Petitioner Hamiltons Double Jeopardy Rights, as codified as MCA: §46-11-460 Multiple Charges, and §46-11-503 Prosecution based upon the same transaction barred by former prosecution. [See claim 4 herein, page 18].

Hamilton has not been afforded the same statutory protection against 'Double Jeopardy' as have other Montana residents, who were acquitted of crimes and then found guilty of a 'same transaction' offense.

The United States Supreme Court has made it clear as to what constitutes a violation to an individuals 'Equal Protection Rights', as follows:

"The equal Protection Clause proscribes arbitrary decisions - decisions unsupported by any rational basis-...a discretionary decision with out any 'reasonable conceivable' rational justification will not support an equal protection claim; only a truly arbitrary one will." *Engquist v Or. Dept. of Ag*, 553 US 591,613(2008).

Hamilton claims that the district courts decision was purely arbitrary, and contrary to the Laws of Montana, and Hamiltons constitutional rights and protections, for the Due Process of Law, [Art. II §17, MT. Const.] and Double Jeopardy after a acquittal, [Art. II §25, MT. Const.], as demanded by the Fourteenth Amendments protections, under 'Equal Protection Clause'.

The U.S. Supreme Court further holds that a decision which is contrary to the 'Clearly Established' Montana Laws, as presented herein, as being "unconstitutionally arbitrary or disproportionate only were it infringed upon a weighty interest of the accused." See *Chambers v Mississippi*, 410 US 284,295, 35 L.Ed.2d 297,93 S.Ct 1038 (1973).

Hamiltons Life and Liberty are 'weighty interests of an accused, and the district courts refusal to abide by Montana Laws in order to unlawfully preserve a unlawful conviction, qualifies as being a violation to Hamilton's Right as "Nor deny to any person within it's jurisdiction equal protection of the laws." Fourteenth Amendment Law which requires that the Petitioner Hamilton's Rights be upheld and the unlawful charges vacated.

## CONCLUSION

The Montana Supreme Court has held in Lott v State, 2006 MT 279, 334 Mont. 270, ¶20, "The central function of the courts is the pursuit of Justice. Like all Human endeavors this pursuit is occasionally flawed", quoting Jackson v Virginia, 442 US 307, 332 n.5, 99 S.Ct. 2781 (1979).

Lott at ¶22, also stated "...as applied to a facially invalid sentence... a sentence which is a matter of law, the court has no authority to impose... We hold that the incarceration of an individual pursuant to a facially invalid sentence represents a 'Grievous Wrong' and a 'Miscarriage of Justice' as per State v Perry, 232 Mont. at 463, warranting relief." Each of the previous grounds proves that the conviction was wrongfully obtained and the sentence was invalid on its face.

The Petitioner asks the court to correct this invalid and flawed sentence. The Court and Jury were NEVER given the full true and accurate facts.

The Courts have held, "where the verdict does not have the same meritorious support from the evidence, from the evidence, it will be set aside and disregarded." State v Pepo, 23 Mont. 473. These are older cases that have held for decades by this court as righteous.

The Petitioner's Actual Innocence combined with the other claims constitute documented Procedural and Structural error.

The Petitioner has shown to the court four grounds that are supported by Montana Supreme Court Law and United States Supreme Court Law. Based on the facts and the testimony in the attached transcripts, the Petitioner has supplied, the Court can clearly see that no crime was committed. The Petitioner's teenage step-daughter was not happy with the living situation without the money and priveleges that she thought she should be given. The Petitioner could not afford these items even working 2-3 jobs after his wifes death. The Petitioner believes that the court will see the truth, and rectify this unjust conviction and incarceration. That this should not be precedent for a unhappy teenager who does not get her way can search Google and find ways to get her way. Can falsify and make false statements just for the sake of my spoiling her for years after her mother passed and her sense of entitlement. The Petitioner begs the Court to overturn

this wrongful conviction and resulting sentence. That this honorable and highest court on Montana hold the District Court accountable for its violation of constitutional right in it's arbitrary decision to violate Montana Law. That this court remand this matter back to that court and vacate the last remaining charges as being illegal, and order the immediate release of the Appellant-Petitioner Hamilton from unlawful incarceration due to the facts, the forensic evidence, Montana Legislative Law, and the Common Laws as upheld by the Montana Supreme Court previously, as the binding authority requiring that the Court overturn this 'Miscarriage of Justice', in the interest of justice for all Montana residents.

Dated this 29 day of October, 2021.

  
Jeffrey Elec Hamilton.

CERTIFICATE OF SERVICE:

I, Jeffrey Elec Hamilton hereby certify that I have supplied a true and accurate copy of this Appeal, Postage Paid, through the prison mailroom into the USPS mail system, to the following:

Austin Knutsen-Montana Attorney General  
P.O. Box 201401  
Helena, Montana 59620-1401

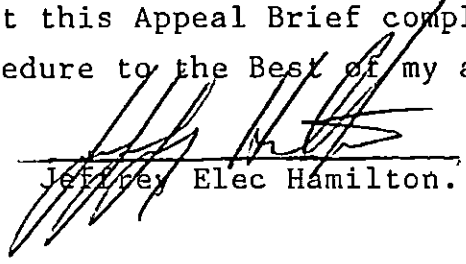
Representing the Appellee's for the State of Montana:

Cascade County Attorney  
121 Fourth St. North, Suite 2A  
Great Falls, MT 59401

  
Jeffrey Elec Hamilton.

CERTIFICATE OF COMPLIANCE:

I, Jeffrey Elec Hamilton certify that this Appeal Brief complies with the the Rules of Appellate Procedure to the Best of my ability, as required under Rule 12 & 13.

  
Jeffrey Elec Hamilton.