IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0182

BROADWATER COUNTY, MONTANA,

Plaintiff and Appellee,

and

HELENA INDEPENDENT RECORD,

Defendant and Appellee,

v.

PERSON WITH AN INTEREST IN THE RELEASE OF CONFIDENTIAL CRIMINAL JUSTICE INFORMATION PERAINING TO THE INVESTIGTION AND PROSECUTION OF JASON ELLSWORTH: JASON ELLSWORTH,

Defendant and Appellant.

On Appeal from Montana First Judicial District Court, Broadwater County
Cause No. CDV-2022-02, Hon. Kathy Seeley District Court Judge

APPELLEE HELENA INDEPENDENT RECORD'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INDEX OF EXHIBITS 7

STATEMENT OF THE ISSUES 8

STATEMENT OF FACTS 8

SUMMARY OF THE ARGUMENT 11

STANDARDS OF REVIEW 13

ARGUMENT 14

I. THE DISTRICT COURT CORRECTLY REJECTED ELLSWORTH'S BID TO DELAY CONSIDERATION OF THE CCJI REQUEST. 14

A. Ellsworth's original argument was not developed or preserved and is contrary to the CCJI statute and this Court's precedent. 14

B. Ellsworth's new argument was also not preserved and is incorrect. 18

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING THE RELEASE OF THE CCJI. 21

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

CASES

Anderson v. State DOJ, MVD..... 9
275 Mont. 259, 912 P.2d 212 (1996)

Barber v. Briscoe..... 21
8 Mont. 214, 19 P. 589 (1888)

Berkemer v. McCarty..... 9
468 U.S. 420 (1984)

Billings Gazette v. City of Billings..... 27
2011 MT 293, 362 Mont. 522, 267 P.3d 11

Crone v. Crone..... 15
2003 MT 238, 317 Mont. 256, 317 Mont. 25

Davis v. State..... 16
2004 MT 112, 321 Mont. 118, 88 P.3d 1285

In re Estate of Burrell..... 15
2010 MT 280, 358 Mont. 460, 245 P.3d 1106

Estate of Kinnaman v. Mountain West Bank, NA..... 8
2016 MT 25, 382 Mont. 153, 36 P.3d 486

Ganoung v. Stiles..... 19, 22
2017 MT 176, 388 Mont. 152, 398 P.2d 282

Haggerty v. Sherburne Mercantile Co...... 21
120 Mont. 386, 186 P.2d 884 (1947)

Havre Daily News, LLC v. City of Havre..... 25
2006 MT 215, 333 Mont. 331, 142 P.3d 864

Herman v. State..... 15
2006 MT 7, 330 Mont. 267, 127 P.3d 422

Jefferson County v. Montana Standard 13, 21-28
2003 MT 304, 318 Mont. 173, 79 P.3d 805

MacPheat v. Schauf 21
1998 MT 250, 291 Mont. 182, 969 P.2d 265

Missoula County Public Schools v. Bitterroot Star 14
2015 MT 95, 378 Mont. 451, 345 P.3d 1035

Missoulian v. Board of Regents 24
207 Mont. 513, 675 P.2d 962 (1984)

Montana Human Rights Division v. City of Billings 27-28
199 Mont. 434, 649 P.2d 1283 (1982)

Murphy v. Westrock Co. 15
2018 MT 54, 390 Mont. 394, 414 P.3d 276

Nebraska Press Association v. Stuart 26
427 U.S. 539 (1976)

Pilgeram v. GreenPoint Mortgage Funding, Inc., ... 19
2013 MT 354, 373 Mont. 1, 313 P.3d 839

Rudolph v. Dussault 8
234 Mont. 449, 763 P.2d 1139 (1988)

Sartain v. State 13
2017 MT 216, 388 Mont. 421, 401 P.3d 701

Schlemmer v. North Central Life Ins. Co. 19
2001 MT 256, 307 Mont. 203, 37 P.3d 63

State v. Elison 9
2000 MT 288, 302 Mont. 228, 14 P.3d 456

State v. Essig..... 16
2009 MT 340, 353 Mont. 99, 218 P.3d 838

State v. Rice..... 16
275 Mont. 81, 910 P.2d 245 (1996)

State v. Thibeault..... 16-17
2021 MT 162, 404 Mont. 476, 490 P.3d 105

State v. Tomaskie..... 16
2007 MT 103, 337 Mont. 130, 157 P.3d 691

State ex rel. Missoulian v. Mont. Twenty-First Judicial District Court..... 26
281 Mont. 285, 933 P.2d 829 (1997)

St James Healthcare v. Cole..... 26
2008 MT 44, 341 Mont. 368, 178 P.3d 696

Terry v. Ohio..... 9
392 U.S. 1 (1968)

Tipton v. Montana Thirteenth Judicial District Court..... 13
2018 MT 164, 392 Mont. 59, 421 P.3d 780

Turner v. Tranakos..... 8
229 Mont. 51, 744 P.2d 898 (1987)

In re Williams..... 16-17
145 Mont. 45, 399 P.2d 732 (1965)

Yellowstone County v. Billings Gazette..... 25
2006 MT 218, 333 Mont. 390, 143 P.3d 135

STATUTES

§ 44-5-303, MCA..... *passim*

§ 46-1-202, MCA..... 15–16

INDEX OF EXHIBITS (SEE ACCOMPANYING APPENDIX)

State of Montana v. Ellsworth, No. CR-2021-2, Complaint ..... App. 1

Jefferson County v. Montana Standard, No. 02-092,
Appellant's Opening Brief ..... App. 2

Jefferson County v. Montana Standard, No. 02-092,
Appellee's Answer Brief ..... App. 3

STATEMENT OF THE ISSUES

I. Can a § 44-5-303(5) declaratory judgment action, concerning the release of confidential criminal justice information, be brought upon entry of a criminal judgment with a deferred sentence?

II. Did the district court abuse its discretion when it ordered the release of certain confidential criminal justice information?

STATEMENT OF FACTS

Jason Ellsworth was charged with reckless driving, speeding in a construction zone, and obstructing a police officer. App. 1 ("Complaint"), pp. 1–2.[1]

The criminal complaint alleged that Ellsworth was traveling approximately thirty miles over the speed limit when he was stopped by Montana Highway Patrol. *Id.* at 2, ¶ 1. An altercation arose when Ellsworth left his vehicle and refused law enforcement's instructions to return to it. *Id.* at 2–3, ¶¶ 4–7. Ellsworth identified

[1] The criminal complaint was not included in the district court record below. This Court can and should take judicial notice of the complaint which was referenced in the district court's order, from which this appeal was taken, and expressly informed the district court's findings. *See Turner v. Tranakos*, 229 Mont. 51, 54, 744 P.2d 898, 900 (1987) (the Montana Supreme Court can take judicial notice of "[r]ecords of any court of this state" (citing Rule 202, M.R.Evid.)); *Estate of Kinnaman v. Mountain W. Bank, NA*, 2016 MT 25, ¶ 26, 382 Mont. 153, 36 P.3d 486 (courts may take judicial notice of the record of related, prior actions); *Rudolph v. Dussault*, 234 Mont. 449, 451, 763 P.2d 1139, 1140 (1988) (Montana courts may take judicial notice of public records of a relevant criminal conviction).

himself as a state senator and demanded to be released, claiming a constitutional privilege against arrest while traveling to a legislative session—even though the legislature was not convening until the next day—and threatened to call the Attorney General. *Id.* at 2–4, ¶¶ 2, 4, 6–7, 9–10.[2]

Ellsworth pled guilty to the obstruction charge and the court entered judgment, deferring imposition of the sentence for a period of one year. *See* Dkt. 1 ("Complaint for Declaratory Relief") and internal Ex. 1 ("Order and Judgment"); *see also* Dkt. 6 ("Order Following *In Camera* Review"), pp. 1–3, 7–8.

After entry of the judgment and during the deferral period, a reporter for the Helena Independent Record requested a copy of the investigative file related to Ellsworth's case. Dkt. 1, p. 2, ¶¶ 3, 7; Dkt. 6, p. 2.

Broadwater County determined the file contained confidential criminal justice information ("CCJI"), so it initiated a declaratory judgment action, asking

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[2] It is collateral to this appeal, but the IR notes Mont. Const. art. V, § 8 affords a limited immunity from "arrest." A traffic stop is not an "arrest." *Anderson v. State DOJ, MVD*, 275 Mont. 259, 264–65, 912 P.2d 212, 215 (1996); *see State v. Elison*, 2000 MT 288, ¶ 29, 302 Mont. 228, 14 P.3d 456 (a traffic stop is more analogous to a *Terry* investigative stop "than to a formal arrest" (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Plainly, the purpose of the privilege is to prevent interference with the legislative process and ensure legislative business will not be interrupted by a legislator being held for a minor offense. It does not excuse elected officials from the operation of public safety laws many hours or days prior to a legislative session. Ellsworth's invocation of the privilege against "arrest" while "going to" a legislative session, to escape a traffic ticket, was doubly improper.

the district court to decide whether any personal privacy rights implicated by the records outweighed the public's right to know. Dkt. 1. Because such proceedings are authorized "relating to a criminal prosecution that has been completed by entry of judgment, dismissal, or acquittal[,]" *see* § 44-5-303(5), MCA, the County certified that the Ellsworth prosecution was complete and attached the criminal judgment. Dkt. 1, pp. 3–4, ¶¶ 9, 11.D and internal Ex. 1.

Ellsworth appeared in the declaratory judgment action, but he did not file an answer or lodge a privacy objection. Instead, he filed a "brief in opposition" to the complaint that made a single argument. *See* Dkt. 4. Citing no legal authority, Ellsworth claimed that because the court deferred imposition of his sentence, the criminal case was not "completed" for purposes of § 44-5-303(5), MCA. Ellsworth effectively sought a stay of proceedings without filing a motion and without any showing of entitlement to such relief. He urged the court to postpone consideration of the records request until after the deferral period, at which point his criminal case would be complete and he would assert his right to privacy. Dkt. 4, p. 2.

The district court rejected Ellsworth's argument. It found the declaratory judgment action was timely because there was no pending prosecution and the court presiding over the criminal case had entered a judgment. *See* Dkt. 6, pp. 4–5.

The district court then conducted an *in camera* review and decided the

merits of the CCJI declaratory judgment action. Even though Ellsworth did not articulate his privacy interest within the time allowed by § 44-5-303(5)(a)(v)(A), MCA, the district court gave him the benefit of the doubt and assumed that he claimed such an interest. Dkt. 6, pp. 5–8. The court concluded there was no reasonable expectation of privacy under the circumstances:

> Ellsworth is an elected State Senator who was charged with three misdemeanors and pled guilty to obstructing a police officer. The obstructing charge alleged that he used his position as a senator in the obstruction. The traffic offenses were dismissed, and Ellsworth received a deferred imposition of sentence for obstruction of a police officer. The Court finds that Ellsworth occupies a position of public trust, and that the crime to which he pled guilty directly bears upon his position. An expectation of privacy in the investigation of these charges is unreasonable under these circumstances, and his individual privacy rights do not exceed the merits of public disclosure.

Id. at 7–8. Thus, observing this Court's well-settled precedent concerning the substantially reduced expectation of privacy enjoyed by public officials, the district court ordered production of most of the investigative file. *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly found that the CCJI declaratory judgment action was ripe and timely. Section 44-5-303(5)(a), MCA, authorizes such an action when a criminal prosecution "has been completed by entry of judgment, dismissal or acquittal...." Broadwater County's complaint confirmed that the criminal

prosecution was complete and it attached the resulting judgment, satisfying the statute's requirements.

Ellsworth's argument below—that his criminal case was incomplete, notwithstanding the entry of judgment, because he received a deferred sentence—was not properly raised or preserved for appeal. It is also wrong. This Court has repeatedly held that a deferred imposition of a criminal sentence is a final judgment that disposes of a criminal case. Thus, the prosecution was completed by a judgment and the declaratory judgment action was timely.

Ellsworth's further argument on appeal—that he was deprived of the chance to file a substantive brief because he was not served with the complaint or a copy of the CCJI file—was not preserved, either. Ellsworth did not object below and he opted to make a voluntary appearance, waiving any service defects. In any case, the CCJI statute does not require that privacy claimants be formally joined, but only that they be given notice and opportunity to file a privacy objection. Ellsworth had actual notice and opportunity. He filed a brief. He simply declined to lodge a substantive objection, betting on his erroneous procedural argument.

To the extent the Court is inclined to revisit the merits of the district court's decision about the propriety of disclosing the CCJI, the district court correctly exercised its discretion in ordering the release of the investigative file.

Ellsworth's only argument on this point is another new one. He contends that the district court, even if it allowed disclosure to the IR, should have restricted further publication of the investigative file. This Court has never required or approved such restrictions which are constitutionally problematic.[3] Whether a court can restrict dissemination of records beyond the requesting party in *any* case, after finding the records are within the public's right to know and do not implicate any legitimate right to privacy, is not something this Court presently needs to decide. Ellsworth waived this issue, too. He did not ask for any such restrictions so the district court could not have abused its discretion by failing to impose any.

STANDARDS OF REVIEW

With respect to the issue of whether the CCJI declaratory judgment action was timely (Argument I, *infra*), Ellsworth cites the correct standard. A district court's interpretation of a statute is reviewed *de novo*. *Tipton v. Mont. Thirteenth Jud. Dist. Court*, 2018 MT 164, ¶ 9, 392 Mont. 59, 421 P.3d 780 (citing *Sartain v. State*, 2017 MT 216, ¶ 9, 388 Mont. 421, 401 P.3d 701).

With respect to the issue of whether the district court properly resolved the records request (Argument II, *infra*), Ellsworth omits the relevant standard. A

[3] The case Ellsworth cites on this point, *Jefferson County. v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805, is discussed in Argument II, *infra*.

district court's decision to release public records, following *in camera* review, is entitled to deference and is reviewed for an abuse of discretion. *See Missoula Cnty. Public Schools v. Bitterroot Star*, 2015 MT 95, ¶ 10, 378 Mont. 451, 345 P.3d 1035.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED ELLSWORTH'S BID TO DELAY CONSIDERATION OF THE CCJI REQUEST.

A. Ellsworth's original argument was not developed or preserved and is contrary to the CCJI statute and this Court's precedent.

Ellsworth argued below that the CCJI declaratory judgment action was premature because he was given a deferred sentence. *See* Dkt. 4. This argument, the only one Ellsworth made, was not preserved and is meritless.

He failed to preserve his argument in two ways.

First, Ellsworth's "brief in opposition" to the complaint was not a proper vehicle for raising his argument. The brief was not a responsive pleading or a motion authorized by M.R.Civ.P. 12 and the only informal objection permitted in a CCJI statute is a privacy objection under § 44-5-303(5)(a)(iii)(B), MCA. Ellsworth's brief did not invoke his right to privacy but argued he should be allowed to do so later. In effect, he sought a stay of proceedings without filing a motion. A request for relief, not set forth in a motion and stating the particular grounds for granting it, is not properly before the court and is not preserved for

appeal. *See* Rule 7(b)(1), M.R.Civ.P. ("A request for a court order must be made by motion."); *In re Estate of Burrell*, 2010 MT 280, ¶ 36, 358 Mont. 460, 245 P.3d 1106; *Crone v. Crone*, 2003 MT 238, ¶ 37, 317 Mont. 256, 317 Mont. 256.

Second, Ellsworth's procedural objection, i.e. that the case was untimely due to his deferred sentence, was unsupported by any citation to legal authority. *See* Dkt. 4. This Court will "not consider unsupported arguments; nor [does it] have an obligation to formulate arguments or locate authorities for parties on appeal." *Herman v. State*, 2006 MT 7, ¶ 22, 330 Mont. 267, 127 P.3d 422; *see also Murphy v. Westrock Co.*, 2018 MT 54, ¶ 14, 390 Mont. 394, 414 P.3d 276 (undeveloped, skeletal arguments or "passing references" to theories not "supported by legal authorities … are insufficient to preserve an issue for appeal").

Ellsworth's argument is also wrong. Had he conducted even cursory research to vet his theory, he would have found it is at odds with settled precedent.

Section 44-5-303(5)(a), MCA, authorizes a county attorney to initiate a CCJI declaratory judgment action upon receipt of a request for information about a criminal case "that has been completed by entry of judgment, dismissal, or acquittal...." A "judgment" is "an adjudication by a court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court." § 46-1-202(11), MCA. A "sentence" is a

"judicial disposition of a criminal proceeding upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty." § 46-1-202(25), MCA.

Under these definitions, "any judicial disposition of a criminal case resulting from a plea, verdict or finding of guilt is itself a sentence, **regardless of whether actual punishment is deferred or immediately imposed**." *State v. Rice*, 275 Mont. 81, 84, 910 P.2d 245, 246 (1996) (emphasis added). Thus, a deferred sentence is a final judgment that "judicially dispose[es] of the criminal proceeding at issue" even though the case may later be reopened for resentencing or retroactive dismissal. *Id.* at 82–85, 910 P.2d at 246–47; *see also State v. Thibeault*, 2021 MT 162, ¶ 13, 404 Mont. 476, 490 P.3d 105 ("**a deferred imposition of sentence is a final dispositive judgment of conviction and sentence**…."); *State v. Essig*, 2009 MT 340, ¶ 34, 353 Mont. 99, 218 P.3d 838 ("**A deferred sentence constitutes a conviction and final judgment**."); *State v. Tomaskie*, 2007 MT 103, ¶ 13 337 Mont. 130, 157 P.3d 691 ("**the imposition of a deferred sentence does constitute a conviction and final judgment**..."); *Davis v. State*, 2004 MT 112, ¶ 16, 321 Mont. 118, 88 P.3d 1285 (a deferred sentence is a "**judicial disposition of a criminal proceeding**") (all emphases added).

Ellsworth offers no contrary authority and the only authority that favors his position is no longer good law. In *Thibeault*, this Court considered *In re Williams*,

145 Mont. 45, 54, 399 P.2d 732, 737 (1965), which held that an order that defers pronouncement of a sentence is not a final judgment. *Thibeault* explained that *Williams* was interpreting different statutory language under the pre-1991 criminal code. Under the current code, in effect the last thirty years, a deferred imposition of a sentence is not merely a "stay" of sentencing but a sentence in and of itself amounting to a final judgment. *Thibeault*, ¶ 19, n. 13; *id.* ¶ 21, n. 16.

Recognizing a deferred sentence as a final judgment, for purposes of the CCJI declaratory judgment statute, also makes good sense and comports with sound public policy. Even if the conditions of a deferred sentence are breached, such that the court must reopen the case for resentencing, there is no risk that disclosure of CCJI will cause problems or interruptions. The investigation and prosecution are already complete and a conviction secured by a guilty plea.

Moreover, if Ellsworth's theory were correct, the public's right to know could be frustrated for months or years when a case is resolved by a guilty plea and a deferred sentence, while the same records would be immediately subject to review for public disclosure in the event of a dismissal or acquittal. It makes no sense that the public's right to know would ripen with respect to a criminal defendant who has been exonerated of the charges, but not with respect to a defendant—and especially a public official—who has pled guilty. It would

arbitrarily afford some criminal defendants a tool to postpone public scrutiny in the hope that public interest might fade, as Ellsworth no doubt intended here.

This is at odds with § 44-5-303, MCA, which provides for an expedited procedure in CCJI disputes to give timely effect to the public's right to know. There is no motion to release the documents required, and no opportunity for later briefing, as Ellsworth surmised. When a CCJI declaratory judgment action is initiated, privacy claimants have thirty days to object then the court decides whether to permit disclosure and on what terms. § 44-5-303(5)(a)(v)(A), MCA.

In summary, Ellsworth is determinedly wrong that the district court needed to await completion of the deferral period before entertaining and deciding the CCJI request. Ellsworth pled guilty and the court entered a judgment. The criminal case was "completed by entry of judgment" so the CCJI declaratory judgment action was ripe and timely under § 44-5-303(5), MCA.[4]

B. Ellsworth's new argument was also not preserved and is incorrect.

Still unable to support the argument he made below, Ellsworth pivots. He principally argues, instead, that he was deprived of opportunity to file a substantive

[4] The district court found, alternatively, that Ellsworth's argument failed because a county attorney can initiate a CCJI declaratory judgment action, even when a criminal case is *not* completed, when disclosure is in the public interest. *See* § 44-5-303(5)(a), MCA; Dkt. 6, p. 5. Ellsworth has not challenged this alternative ground for the district court's decision, which affords an independent basis to affirm.

objection because he was not served with the complaint and did not receive the investigative file. Ellsworth's new argument is deficient in at least three ways.

First, Ellsworth failed to preserve this argument, too. He did not complain to the district court about insufficient service or lack of opportunity to review the investigative file. It is "well established" that this Court will not consider new arguments and theories raised for the first time on appeal. *Pilgeram v. GreenPoint Mortg. Fund'g, Inc.*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. This restraint is "rooted in fundamental fairness to the parties" and prevents litigants from withholding arguments, taking a chance on a favorable outcome, then changing theories on appeal. *Id.* ¶ 21. It is also a matter of fairness to the district court, which cannot be faulted for failing to decide issues Ellsworth did not raise. *Schlemmer v. N. Cent. Life Ins. Co.*, 2001 MT 256, ¶ 22, 307 Mont. 203, 37 P.3d 63; *Ganoung v. Stiles*, 2017 MT 176, ¶ 28, 388 Mont. 152, 398 P.2d 282.

Second, Ellsworth was not entitled to the rights he belatedly claims.

The CCJI statute does not presume that a privacy claimant like Ellsworth gets access to the sealed records in a declaratory judgment action. Naturally, there may be multiple competing privacy interests, so the records are not automatically turned over to anyone. Ellsworth presumably also has a good idea of what the file contains, sufficient to articulate an objection. He is their subject, after all, and had

access to the records in criminal discovery.

With respect to Ellsworth's new complaint about lack of service, the modified procedure for CCJI declaratory judgment actions is spelled out by § 44-5-303, MCA. In contrast with ordinary declaratory judgment actions that require joinder of all interested parties, CCJI disputes do not require that privacy claimants be formally joined or served. Upon filing a CCJI declaratory judgment action, the county attorney must:

> [M]ake reasonable efforts to provide notice to … any person with a protected privacy interest in information contained in the confidential criminal justice information … of the request for release of confidential criminal justice information and the filing of the declaratory judgment action; and … provide notice that the person may file an objection to disclosure with the district court if the person believes a privacy interest that they possess exceeds the merits of public disclosure.

§ 44-5-303(5)(a)(iii)(A)–(B), MCA; *compare* § 44-5-303(5)(a)(ii), MCA (the requesting party must be named as a defendant). Whether Ellsworth was formally joined and served is thus irrelevant to his ability to assert his right to privacy. He was entitled to notice and opportunity to object, which he had. He made an appearance and could have lodged an objection but declined, instead attempting to forestall the court's decision by arguing that it was premature.

Third and finally, Ellsworth affirmatively waived his objection about service

by appearing in the declaratory judgment action to complain about ripeness without also filing a Rule 12(b)(5) motion. The "only purpose" of a summons is to bring a party into court so, when a party appears voluntarily, the "summons ceases to have any function and any defects in it or in the proceedings by which it was obtained become immaterial." *Haggerty v. Sherburne Merc. Co.*, 120 Mont. 386, 295–95, 186 P.2d 884, 890 (1947). It is "too late to complain" after appearing voluntarily, for any reason other than to object about service, which appearance "cures all defects or irregularities in the process as well as want of service." *Barber v. Briscoe*, 8 Mont. 214, 19 P. 589, 590 (1888); *see also MacPheat v. Schauf*, 1998 MT 250, ¶ 12, 291 Mont. 182, 969 P.2d 265 (objections to sufficiency of service must be raised in a party's initial responsive filing under penalty of waiver).

Ellsworth's untimely new procedural arguments were not preserved, were affirmatively waived, and otherwise lack merit.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING THE RELEASE OF THE CCJI.

Notwithstanding Ellsworth's failure to lodge a timely privacy objection, the district court correctly undertook to review the documents and weigh potential privacy interests against the public's right to know. *See Jefferson County*, ¶ 19 (it is proper to conduct *in camera* review and attempt to identify and protect any legitimate privacy interests even if a privacy claim has not been asserted).

On appeal, Ellsworth does not engage the district court's analysis. He does not contest the court's conclusion that he is an elected official with a substantially reduced expectation of privacy, that he lacked a reasonable expectation of privacy in this case, or that the public's right to know outweighed any privacy rights he might claim. Ellsworth only complains that the court failed to employ "procedural safeguards" by restricting the IR from further copying or publishing the records.

This is another untimely new argument. The district court discharged its statutory and constitutional obligations by reviewing the records and making a discretionary judgment about what should be released and on what terms. Ellsworth never asked the court to restrict publication of any of the records or to impose any other conditions on their release. The court cannot be faulted "for failing to address an issue that was not presented to it." *Ganoung*, ¶ 28. To the extent any conditions or restrictions might have been appropriate, beyond the redactions the court ordered, Ellsworth waived the opportunity to seek them and failed to preserve this issue for appeal.

Ellsworth is also wrong that courts must always restrict copying and dissemination of CCJI beyond the requesting party, which he characterizes as mandatory "procedural safeguards." Ellsworth infers a bright-line rule based on *Jefferson County*, *supra*, which affirmed an order that released CCJI to a media

outlet but restricted further copying or publication. *Id.* ¶¶ 7–8, 20. Contrary to Ellsworth's reading, this Court in *Jefferson County* did not approve this practice.

In that case, the party that requested the records did not contest the district court's restrictions on further dissemination. Whether the restrictions were legally permissible or appropriate was not at issue and was not addressed by the parties' briefs. *See* App. 2 (Appellant's Opening Brief); App. 3 (Respondent's Answer Brief), pp. 4–5, 8, 20. Naturally, this Court did not address the issue, either. The opinion's reference to these restrictions was merely a recitation of the procedural posture of the case regarding an uncontested issue. At most, it was *obiter dictum*.

It is also noteworthy that, while this Court expressed no opinion about the restrictions on copying and publication, it expressly approved the district court's other condition, i.e. redaction of social security and driver's license numbers. *Id.* ¶¶ 19–20. Having found a continuing privacy interest in the personal identification numbers, the Court deemed the redaction of that information an appropriate safeguard that did not contravene the public's right to know. *Id.* The publication restrictions could not have been justified in the same way, given the Court's determination that there was otherwise no reasonable expectation of privacy in the contents of the investigate file. *Id.* ¶ 17. In other words, there is no basis for restricting the dissemination of CCJI when it would not serve to protect any

legitimate privacy interests.

Ellsworth's suggestion that *Jefferson County* compels restrictions on further dissemination also contradicts the fundamental principle that records disputes are, by their nature, idiosyncratic. District courts must exercise judgment to balance competing interests and reach a fair result "in the context of the facts of each case." *Missoulian v. Board of Regents*, 207 Mont. 513, 529, 675 P.2d 962, 971 (1984). That the district court in *Jefferson County* though it appropriate to limit further copying or publication (for some reason the record does not disclose) under the facts of *that case* is irrelevant. The district court in *this case* imposed no similar conditions and Ellsworth makes no showing that the court abused its discretion in this regard when no such conditions were requested.

Case-by-case determinations are appropriate because *Jefferson County* is also factually distinguishable. It involved a run-of-the-mill DUI by a public official. While the charge was undoubtedly relevant to the defendant's fitness for public service, generally, the disputed CCJI did not involve a specific abuse of authority like the district court found here. *See* Dkt. 6, p. 7 ("The obstructing charge alleged that he used his position as a senator in the obstruction."). One of the relevant inquiries in weighing personal privacy against the public's right to know is the "relationship" between the information sought and the public duties of the privacy

claimant. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864; *see also Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 26, 333 Mont. 390, 143 P.3d 135 (elected officials retain privacy interests in conduct unrelated to their public functions). The record does not speak to this issue, but perhaps the district court's unexplained restrictions in *Jefferson County*, and its rather crabbed view of the public's right to know, reflect a judgment that the defendant's conduct and her public duties were sufficiently attenuated that publicity of the (no doubt embarrassing) recorded DUI stop would not have meaningfully promoted public trust. In this case, it was entirely appropriate and within the district court's discretion to effectuate the public's right to know by permitting public scrutiny of a recorded altercation with law enforcement involving the abuse of a constitutional privilege enjoyed by Mr. Ellsworth by virtue of his status as an elected public official.

Finally, it is doubtful whether such restrictions on further dissemination are constitutionally permissible at all in a case like this one.

Certainly, courts can refuse to permit disclosure altogether, or redact parts of otherwise public records, where privacy interests outweigh the public's right to know. In contrast, what Ellsworth suggests is a media gag order as to records that the court has decided are public. This would enfeeble the media's ability to

investigate and report on matters of public concern, as guaranteed by Article II, § 7 of the Montana Constitution and the First Amendment, and raises serious issues vis-à-vis the doctrine of prior restraint. *See St James Healthcare v. Cole*, 2008 MT 44, ¶ 26, 341 Mont. 368, 178 P.3d 696 ("Of all the forms of infringement on the right to free speech, prior restraints 'are the most serious and least tolerable…'") (quoting *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976)).

It is constitutionally permissible for a court to restrict the media from publishing information in limited circumstances, not present here.

For example, restrictions on media coverage about a criminal case may be necessary and appropriate to protect the integrity of ongoing legal proceedings. *State ex rel. Missoulian v. Mont. Twenty-First Jud. Dist. Ct.*, 281 Mont. 285, 299, 933 P.2d 829, 837–38 (1997). But, the CCJI declaratory judgment statute requires a threshold determination that releasing the records would not cause such interference because the prosecution is complete. Restricting copying or publication makes little sense in this setting and does not serve any "significant government interest," as is required to justify media censorship and overcome the constitution's abject "repugnance" to prior restraints on free speech. *Cole*, ¶ 28.

There may also be situations where disclosure to a limited audience is necessary to safeguard legitimate privacy interests, for example, in the setting of

certain government investigations and legal proceedings. In *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982), for example, this Court limited dissemination of employment records beyond the Human Rights Commission investigation for which they were sought. As the Court later explained, the records implicated the privacy interests of innocent third parties "who had no connection" to the matters under investigation and who could have been harmed by broader disclosure, which is "not logically akin" to a case where the privacy claimant is a public official accused of misconduct in which there is no reasonable expectation of privacy. *Billings Gazette v. City of Billings*, 2011 MT 293, ¶ 25, 362 Mont. 522, 267 P.3d 11.

Even in *Montana Human Rights*, where there was an ongoing case and innocent third-party rights were at risk, this Court urged caution. It warned that "clamping too tight a lid" on such records may invite "further constitutional conflict" and amount to an unlawful prior restraint on free speech. *Id.* at 447–48, 649 P.2d at 1290. Any such restrictions thus require "close scrutiny" and should be employed only when the harm of further dissemination or disclosure is shown to be "substantial and serious" and when the restrictions are "narrowly drawn and precise." *Id.* at 448, 649 P.2d at 1290.

In summary, the law is the opposite of what Ellsworth urges. Restrictions on

further dissemination of records, once designated for disclosure, are not automatic or presumed. Such restrictions are constitutionally suspect and employed only in rare cases and with extreme caution.

Importantly, this issue was not developed in *Jefferson County* (because no one objected to the restrictions) or in this case (because Ellsworth did not seek any restrictions). This brings full-circle Ellsworth's failure to preserve his arguments and develop a record for this Court to review. If Ellsworth thought restrictions on further publication of the investigation file were appropriate, he should have requested them so the district court could consider his request under appropriately "close scrutiny." *Montana Human Rights*, 199 Mont. at 448, 649 P.2d at 1290. Lacking such a record, appellate review of this practice should be left for another day and another case where restrictions were sought by the privacy claimant, granted by the court, and challenged by the party seeking disclosure.

The district court properly ordered the release of the investigate file with limited redactions but with no restrictions on further copying or publication. There is no basis for this Court to find that the district court abused its discretion.

CONCLUSION

This appeal can be resolved by a straightforward application of plain statutory language and this Court's prior decisions that a deferred sentence is a

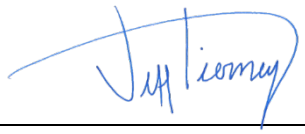
final judgment. A CCJI declaratory judgment action is timely when a "criminal prosecution … has been completed by entry of judgment." § 44-5-303(5)(a), MCA. Such a judgment was entered in Ellsworth's criminal case. All of Ellsworth's other arguments were not raised below or preserved for appellate review, have otherwise been waived, and lack merit. This Court should affirm.

Dated this 12th day of September, 2022

Kyle W. Nelson
Jeffrey J. Tierney

CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P. 11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 10,000 words (5,173).



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CERTIFICATE OF SERVICE

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