IN THE SUPREME COURT OF THE STATE OF MONTANA
Case 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 PERTAINING TO THE INVESTIGATION AND PROSECUTION OF JASON ELLSWORTH: JASON ELLSWORTH,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana First Judicial District,
In and for the County of Broadwater,
Cause No. DV-2022-02; Honorable Kathy Seeley, Presiding

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1. Ellsworth was not provided proper notice under Montana Code Annotated § 44-5-303(5)(a)(iii).

As this Court is aware, and neither Plaintiff/Appellee Broadwater County ("Broadwater") nor Defendant/Appellee Helena Independent Record ("Helena IR") dispute, the only document Ellsworth received in the underlying action was the Motion for Leave to Deposit Investigative File Under Seal with the Court. (Doc. 2). The Motion was mailed to Ellsworth, and put him on notice "the Helena Independent Record," "through its reporters" requested "to access the investigative file of Jason Ellsworth." (Doc. 2, p. 1). The two page Motion provided approximately one page of text, with none of the notice requirements set forth in Montana Code Annotated § 44-5-303(5). Instead, the Motion indicated Broadwater "seeks leave to deposit the Investigative File, which is CCJI, with the Court, to enable the Court's in camera review of the file for possible disclosure." (Doc. 2, p. 2). Two days after Broadwater filed its Motion for Leave, before any party appeared, the District Court granted the Motion and placed the file under seal with the Clerk of Court. (Doc. 3). Thereafter, none of the parties moved the District Court for dissemination. Rather, acting on its own accord, the District Court stepped into the shoes of Helena IR, performed its own analysis, and then issued its Order Following i*n Camera* Review. (Appendix to Appellant's Opening Brief ("App.") A).

Contrary to Broadwater and Helena IR's position, Broadwater's Motion did not provide the statutorily required notice to Ellsworth. And contrary to Helena IR's position that "Ellsworth had actual notice and opportunity," proper notice and opportunity was not provided to Ellsworth as set forth below. (Helena IR's Response Brief, p. 12).

Montana Code Annotated § 44-5-303(5)(a)(i)-(iii) clearly provides the required notice that must be provided to Ellsworth, but never was. In pertinent part, the statute provides:

> (5) (a) If a prosecutor receives a written request for release of confidential criminal justice information relating to a criminal investigation that has been terminated by declination of prosecution or relating to a criminal prosecution that has been completed by entry of judgment, dismissal, or acquittal, or if the disclosure may be in the public interest, the prosecutor may file a declaratory judgment action with the district court pursuant to the provisions of the Uniform Declaratory Judgments Act, Title 27, chapter 8, for release of the information. The prosecutor shall:
>
> > (i) file the action in the name of the city or county that the prosecutor represents and describe the city's or county's interest;
> >
> > (ii) list as defendants anyone known to the prosecutor who has requested the confidential criminal justice information;
> >
> > (iii) no later than the time of the filing of the declaratory judgment action:
> >
> > > (A) make reasonable efforts to provide notice to a victim of the alleged offense and any person with a protected privacy interest in information contained in the confidential criminal justice information and any other individual who would be affected by release of the information of the request for release

> of confidential criminal justice information and the filing of the declaratory judgment action; and
>
> **(B) 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;**

Mont. Code Ann. § 44-5-303(5)(a)(i)-(iii) (Emphasis added). Broadwater acknowledges in its Answer Brief this notice is required, but avoids explanation as to why it failed to give Ellsworth such notice. Instead, Broadwater makes the conclusory and inaccurate statement that "[i]n this case, the above process was followed." (Broadwater's Answer Brief, p. 11). Indisputably absent from the record in this case is any notice to Ellsworth that he may file an objection to disclosure with the district court if he believes a privacy interest he possesses exceeds the merits of public disclosure. *See* Mont. Code Ann. § 44-5-303(5)(a)(iii)(B). Rather, the only document, and thus "notice," Ellsworth received was a copy of the Motion served by mail.

Simply, the Motion lacks the requisite notice requirement to Ellsworth regarding his ability to file an objection to disclosure of his CCJI. The Motion only indicates that Broadwater seeks leave to deposit its investigative file for an in camera review for possible disclosure. No other documents were mailed to Ellsworth, or otherwise served on Ellsworth, by Broadwater.

In its Answer Brief, despite never providing Ellsworth a copy of the Complaint for Declaratory Relief and failing to provide the required statutory notice, Broadwater still suggests Ellsworth failed to follow the statutory procedure, and could have filed a brief stating his position regarding whether or not the CCJI should be released. However, there are multiple fallacies in Broadwater's position. First, Ellsworth requested briefing. At the time Ellsworth requested briefing, he had been provided a copy of the Motion, but not a copy of any Complaint. The District Court ruled on the lone pending Motion – to deposit the investigative file under seal – two days after the Motion was filed and before Ellsworth had the opportunity to respond. Thus, at the time Ellsworth requested briefing, there were no pending motions, and he had not been served or made aware of the Complaint for Declaratory Relief.

Second, Broadwater not only failed to provide the statutorily required notice addressed above, but it also failed to follow Montana Code Annotated § 44-5-303(5)(a)(v). Broadwater was required to:

> (v) request the court to:
>
> > (A) no sooner than 30 calendar days following the filing of the declaratory judgment action to ensure an opportunity for a person seeking to protect a privacy interest, conduct an in camera review of the confidential criminal justice information to determine whether the demands of individual privacy do not clearly exceed the merits of public disclosure; and

> (B) order the release to the requesting party defendant of whatever portion of the investigative information or edited version of the information the court determines appropriate.

Mont. Code Ann. § 44-5-303(5)(a)(v)(A) & (B). Despite Broadwater's briefing, the burden does not rest with Ellsworth, instead Broadwater carries the burden under the statutory scheme.

Specifically, Broadwater was required to file the declaratory action. Mont. Code Ann. § 44-5-303(5)(a). Then, no sooner than 30 days after filing the declaratory action, Broadwater could file a request with the court to conduct an in camera review. Mont. Code Ann. § 44-5-303(5)(a)(v)(A). The purpose of this delay is plainly stated – to ensure an opportunity for a person seeking to protect a privacy interest. *Id*. Instead, Broadwater filed both the Complaint for Declaratory Relief and Motion for Leave to Deposit Investigative File Under Seal with the Court on January 18, 2022 (Docs. 1 & 2). Thereafter, Broadwater filed nothing further, but curiously only mailed its Motion to Ellsworth, and never served or provided a copy of the Complaint. Thus, Ellsworth was deprived of the opportunity to seek protection of his privacy interest.

Accordingly, Broadwater did not comply with the requirements under Montana Code Annotated § 44-5-303(5) in the underlying action. Due to this failure, it was error for the District Court to order dissemination of Ellsworth's confidential criminal justice information. Without being given proper notice, nor

the opportunity to brief whether the information should be disseminated, Broadwater and Helena IR have not shown Ellsworth was provided the required statutory notice. This constitutes reversible error and this Court should remand the case to the District Court.

2. The District Court erred when ordering dissemination of Ellsworth's confidential criminal justice information without requiring Helena IR to make the required showing and without allowing appropriate briefing.

Both Broadwater and Helena IR argue Ellsworth's arguments should not be considered by this Court because they were not raised below. For example, Helena IR argues "Ellsworth did not object below," "Ellsworth failed to preserve this argument," and "[t]his is another untimely new argument." (Helena IR's Response Brief, pp. 12, 19, 22). Ellsworth agrees "the Court generally will not address either an issue raised for the first time on appeal." *See Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 59, 385 Mont. 307, 384 P.3d 68. However, the same holds true for the arguments raised by Broadwater and Helena IR.

The problem with the procedure below is that none of the parties were provided the opportunity to raise arguments before the District Court despite Ellsworth's request for briefing. Instead, the District Court addressed the merits of the Declaratory Judgment Complaint despite that Complaint never being served or even mailed to Ellsworth or any other party of interest. Quite simply, the reason

the record is lacking is because the parties were never provided proper notice or opportunity to brief and preserve any arguments.

The basis for the general rule of not addressing issues first raised on appeal is that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *Grizzly*, ¶ 59. However, it is also fundamentally unfair to fault the parties for not raising issues when they were prevented from doing so. As Broadwater acknowledges, at no time in Ellsworth's brief did he discuss his position regarding whether CCJI should be released or not. (Broadwater Answer Brief, p. 6). At that time, Ellsworth had no notice of the Complaint, and there were no outstanding motions that Ellsworth had been provided. Simply, Broadwater's Motion for Leave to Deposit Investigative File Under Seal with the Court had been granted, and Ellsworth specifically requested briefing on the right to privacy issues before the Court took any further action.

This Court dealt with a similar case where there was no briefing and no argument in *Ravalli County v. Erickson*, 2004 MT 35, 320 Mont. 31, 85 P.3d 772. Neither Broadwater nor Helena IR address *Ravalli County*, despite Ellsworth addressing the case in his Opening Brief. As noted in *Ravalli County*, if this type of procedure was allowed to stand, the adversary system would be bypassed in the district courts. *Ravalli County*, ¶ 23 (J. Warner concurring). In this case, the

District Court did not require nor allow the parties to address the issues raised in the Complaint for Declaratory Relief. Instead, despite that Complaint never being served, the District Court addressed the merits. As such, instead of holding the absence of a record against Ellsworth, the case should be reversed and remanded so the record can be appropriately developed in a procedurally sound way. *See Ravalli County*, ¶ 19.

More importantly, Ellsworth's arguments do not amount to such a significant change in legal theory that this Court must decline to consider his appeal. *See Becker v. Rosebud Operating Services, Inc*., 2008 MT 285, ¶ 18, 345 Mont. 368, 191 P.3d 435. Rather, Ellsworth did take the position in the underlying case that he should be permitted to brief the matter before the Court determined whether confidential criminal justice information should be disseminated, and specifically raised the need to address individual privacy versus the merits of public disclosure. (Doc. 5, p. 2). In his Brief in Opposition, Ellsworth argued "[t]his should be done through appropriate briefing" and "…only after considering briefing on privacy could the Court then make the requisite written findings contemplated in Mont. Code Ann. § 44-5-303(5)(b)…". (Doc. 5, p. 2). Accordingly, this Court should consider the arguments set forth in Ellsworth's briefing.

In the underlying action, the District Court acted on its own accord. The District Court acted without either interested party (Ellsworth and Helena IR) being served and without any party moving for the information to be released. Instead, the only motion before the District Court was for leave for Broadwater to deposit the investigative file. (Doc. 2, p. 2). Further, the District Court held the criminal case was complete[1]. After making this determination, the District Court should have ordered Broadwater to serve the Complaint on the parties, or at a minimum, to provide the required statutory notice to the parties so they could then appropriately respond, raise appropriate defenses and address dissemination versus privacy issues. Montana Code Annotated § 44-5-303(5)(a)(iii)(B) specifically requires notice be given to a person with a protected privacy interest "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." Instead, the District Court held "[t]here will be no additional opportunity for briefing." (App. A, p. 5) and its ruling concluded the case despite no service of and no response to the Declaratory Judgment Complaint. Again,

[1] Helena IR spends a great deal of its Response Brief arguing the District Court correctly held the criminal action was complete. Ellsworth never raised this issue or argument on appeal, and Helena IR has not appealed. Thus, this issue is not before the Court.

because there was no opportunity to submit appropriate briefing before the District Court, the case should be reversed and remanded. *See Ravalli County*, ¶ 19.

Helena IR also fails to address its burden that it is entitled to the information before the District Court, which it failed to meet – because it never appeared, was never served, and the District Court did not allow the parties to appropriately brief the issue. This Court has held "in cases involving confidential criminal justice information, an inevitable conflict exists between the public's right to know and an individual's right to privacy." *Jefferson County v. Montana Standard*, 2003 MT 304, ¶ 14, 318 Mont. 173, 79 P.3d 805. In order to deal with the conflict, the party requesting the information is *required* to make a showing that it is entitled to receive such information. *Id*. (emphasis added). In this case, Helena IR was the party requesting the information and was required to make the requisite showing. Despite this requirement, the District Court relieved Helena IR of its burden, and the District Court instead addressed the merits of the non-served Declaratory Judgment Complaint. Without ever appearing in the case, and without appropriate briefing, Helena IR failed to meet its burden. Importantly, Helena IR does not contest that it failed to meet its requirement. Accordingly, the District Court erred when issuing its Order without first having Helena IR satisfy its burden. Therefore, this case should be reversed and remanded to the District Court for appropriate briefing and a determination of whether Helena IR has met its burden.

3. The District Court erred when ordering dissemination of Ellsworth's confidential criminal justice information without allowing the parties to brief the issue of appropriate procedural safeguards.

The parties have laid out, and this Court is aware, of when CCJI may be disseminated. The real issues before this Court are whether Ellsworth was provided proper notice, and whether the District Court acted appropriately without either party, Ellsworth or Helena IR, briefing the issue or being served with the Complaint. As Broadwater acknowledges, its role is to notify the parties and "it is uncommon for the County Attorney to make argument regarding whether the information should or should not be released." (Broadwater's Answer Brief, p. 13). Accordingly, Broadwater takes no position on whether the CCJI should have been disseminated or what safeguards should have been adopted with the dissemination order.

Unlike Broadwater, Helena IR argues for the first time on appeal, that the District Court properly ordered the release of the CCJI with limited redactions but with no restrictions on further copying or publication. As the old adage goes, what is good for the goose is good for the gander, and Helena IR cannot argue on one hand that Ellsworth is raising new arguments, while advancing its own arguments never raised below. According to Helena IR's brief, its arguments should not be considered by this Court because they were not raised below. *See Grizzly*, ¶ 59. Therein lies another issue with the procedure in the underlying case. Had the

District Court required that the Declaratory Judgment Complaint be served before it took action, then appropriate briefing by all parties of interest would have naturally flowed which would have required Helena IR to meet its burden for dissemination. At that point in time, presumptively the record would have been sufficient for the District Court to rule, and then for this Court to review an appropriate record if necessary. However, due to the District Court's procedure relieving Helena IR of meeting its burden, neither party was able to set forth its arguments to the District Court. As a result, those arguments are now being advanced before this Court. Thus, instead of acting in place of the District Court, this Court should reverse and remand.

The parties disagree about the appropriate restrictions that the District Court should have placed on the CCJI. Ellsworth believes the District Court should have followed through with the conditions this Court had already approved of in *Jefferson County*. Namely, the District Court should have prohibited Helena IR from copying or publishing Ellsworth's CCJI. Ellsworth will not repeat his arguments regarding *Jefferson County* herein; however, it again shows the District Court erred by not allowing the parties to brief this issue and by not requiring Helena IR to meet its required burden to make a showing it was entitled to receive the CCJI and what it would be allowed to do with the information if it met its burden. *See Jefferson County*, ¶ 14.

The final Helena IR argument is that "lacking such a record, appellate review of this practice [restriction on dissemination] should be left for another day and another case…." (Helena IR's Response Brief, p. 28). As part of that argument, the Helena IR again places fault on Ellsworth for not preserving his arguments or developing a record for this Court to review despite his request for briefing. As set forth by Ellsworth *ad nauseam*, the reason the record is incomplete is the parties were not served, proper notice was not given, and the opportunity to brief was not provided to either Ellsworth or Helena IR. Instead, the District Court immediately granted Broadwater County's Motion for Leave to Deposit the Investigative File Under Seal without an appearance by any party. When this was discovered by Ellsworth, he specifically noted his opposition to the release of the confidential information and requested further briefing since none had yet been afforded. Instead, the District Court alleviated Helena IR from making its required showing or even appearing in the underlying action.

While Ellsworth believes the District Court should have followed through with the conditions this Court had already approved of in *Jefferson County*, the case must be remanded so the District Court can make an appropriate determination based upon briefing by the parties. If Helena IR is not required to do so, it will set forth precedent that the party requesting CCJI does not need to meet its statutory requirements.

CONCLUSION

The procedural anomalies in the underlying action warrant reversal and remand by this Court. Proper notice was not given to Ellsworth as required by Montana Code Annotated § 44-5-303(5)(a)(iii)(A) & (B). Further, Broadwater failed to follow Montana Code Annotated § 44-5-303(5)(a)(v)(A) by not waiting 30 calendar days to request the Court conduct an in camera review. Rather, Broadwater filed both the Complaint for Declaratory Relief and Motion for Leave to Deposit Investigative File Under Seal with the Court on the same day, and then filed nothing further in the underlying case. Despite the Complaint never being served, the District Court addressed the merits of that Complaint without appropriate appearances or briefing. Moreover, this was not a case where a default had been requested or entered that would warrant the District Court from taking such unilateral action.

A party requesting the CCJI is required to make a showing that it is entitled to receive such information. *Jefferson County*, ¶ 14. Helena IR, the requesting party, was never served and never appeared in the underlying action. Thus, Helena IR did not make the required showing that it was entitled to Ellsworth's CCJI, and the District Court improperly inserted itself in the Helena IR's shoes. Therefore, Helena IR never met its burden and the District Court erred when issuing its Order Following *In Camera* Review. (App. A).

Lastly, the District Court erred when it did not allow Ellsworth the opportunity to brief whether the information should be disseminated after it granted Broadwater's Motion for Leave to Deposit the File Under Seal. If it had, the interested parties could have not only briefed their positions on appropriate procedural safeguards regarding dissemination of Ellsworth's CCJI, but could have engaged in discussion over whether or not appropriate safeguards could be agreed upon.

For the reasons set forth herein, as well as in his Opening Brief, Ellsworth respectfully requests this Court conclude the District Court erred when issuing its Order Following *In Camera* Review. (App. A). Further, Ellsworth requests this Court reverse and remand this case to District Court, with instructions to have the Complaint served on Defendants and give the parties the opportunity to brief the issue of appropriate dissemination of Ellsworth's CCJI.

DATED this 26th day of October, 2022.

By /s/ *David M. McLean*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellant's Reply Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 3,477 words.

/s/ *David M. McLean*
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CERTIFICATE OF SERVICE

I, David Matthew McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-26-2022:

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