

In the Supreme Court for the State of Montana

Supreme Court No. DA 21-0512

STATE OF MONTANA,

Plaintiff & Appellee,

-vs-

CLOVIS CHRISTOPHER GENO,

Defendant & Appellant.

Appellant's Opening Brief

On Appeal from the Montana Fifteenth Judicial District Court
Roosevelt County, the Hon. David Cybulski, Presiding

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Statement of the Case

Although the death occurred in late January, 2020, the State did not charge Geno with deliberate homicide until mid-February of that year. Initially, the State provided notice of its intent to seek the death penalty. That request was later withdrawn.

Geno rejected a plea offer and he was tried on one count of deliberate homicide before a jury in Roosevelt County. After a six-day jury trial – three of which consisted of voir dire – the jury convicted Geno and rejected a lesser-included-offense of mitigated deliberate homicide. (Trial tr. at 897-898).

The district court sentenced Geno on August 18, 2021. The court imposed a fifty-year term to the Montana State Prison without a parole restriction. Geno was also ordered to pay \$3,515.00 in restitution for funeral expenses, and various costs and fees. (Appendix A).

This appeal follows.

Statement of the Issues

The district court erred when it denied Geno's Motion to Suppress information and statements made during an interview between Geno

and law enforcement officers. The court also erred when it failed to address Geno's motion to suppress his statement on the grounds that the statements were in violation of his right to counsel.

The district court erred by imposing fees and costs without considering Geno's health conditions and limited income.

Statement of the Facts

On February 18, 2020, the State charged Geno with committing the deliberate homicide of his common-law wife¹, Ramona Naramore. (Dkt. 1). Initially, the State sought the death penalty but later filed a Notice of Withdrawal of Intent to Seek the Death Penalty. (Dkt. 70). Ramona's death occurred "some time between Saturday, January 25 of 2020 and the early morning hours of January 26th, 2020." (Trial Tr. at 257). An autopsy would later determine that Ramona died of "asphyxiation by strangulation." (Trial Tr. at 263).

Geno initially reported Ramona's death to his neighbors, Terri and Brian Merrill. At the time, Terri was an administrative assistant at Roosevelt Medical Center in Culberston. Previously, she had been a

¹Trial Tr. at 258.

certified nursing assistant “throughout high school and a few years after high school.” (Trial Tr. at 317).

Terri had seen Ramona a Saturday evening when Terri heard yelling and opened her door to look outside. (Trial Tr. at 323). Terri saw Ramona lying on the ground in front of their neighbor’s vehicle. Because the ground was “icy and wet,” and “really slick,” Terri enlisted Geno’s help to get Ramona inside. (Trial Tr. at 323-324).

The next morning “around seven o’clock,” Geno knocked on the Merrill’s door. Brian Merrill answered the door. Geno informed Brian that Ramona was not breathing. Brian called 911. (Trial Tr. at 345). Geno also called 911 after Brian. (Id.) Geno then asked Terri to come to the apartment he and Ramona shared. (Trial Tr. at 326). Terri entered the apartment and saw Ramona lying on the floor. (Id.) Terri checked Ramona’s pulse but “knew she was gone.” (Trial Tr. at 327).

Law enforcement and medical personnel were dispatched, and the first officer to interview Geno was Jason Baker, a deputy for Roosevelt County Sheriff’s Department. (Trial Tr. at 367 & 373). By this time, Terri must have left because when Deputy Baker arrived, “[i]t was just

Mr. Geno and the body.” (Trial Tr. 375). Deputy Baker and Geno had “a conversation” that was captured on Deputy Baker’s body camera. That conversation, State’s Ex. 128, was played for the jury. (Trial Tr. at 377).

Joe Reinhart, a Wolf Point police deputy who also acts as animal control officer and corner, also responded to the scene. He too had contact with Geno. (Trial Tr. at 405). Geno told Deputy Reinhart that Ramora “fell down at least twice, one outside and one up in the bathtub.” (Trial Tr. at 406).

Pilar Kunz, another Roosevelt County Sheriff’s deputy, along with Chief Deputy Sheriff Patrick O’Connor, became involved in the investigation into Ramona’s death approximately one week after her body was discovered by Geno and after the State Medical Examiner concluded Ramona’s death was caused by strangulation. (Trial Tr. at 425).

Deputy Kunz and Chief Deputy O’Connor begin by interviewing a number of individuals, including Geno, who consented to the officers entering and photographing his residence. (Trial Tr. at 427). This

interview occurred on January 31, 2020. (Trial Tr. at 429). Geno was cooperative with officers at all times during that encounter. (Trial Tr. at 435).

O'Connor and Kunz had tried to contact Geno the previous day, January 30, 2020, but were unsuccessful. O'Connor was eventually able to speak with Geno on the phone. During that call, Geno made some "inaccurate" statements to Chief Deputy O'Connor about his whereabouts. (Trial Tr. at 570). The next day, January 31, law enforcement encountered Geno returning to his residence and O'Connor was notified. Upon arriving at Geno's residence, O'Connor noted Geno had an injury to his left wrist. (Trial Tr. at 574).

Chief Deputy O'Connor asked Geno to accompany he and Deputy Kunz to the Culbertson airport because it was a "quiet place to sit down and talk without interruption." (Trial Tr. at 578). Geno agreed and accompanied the officers.

That interview was recorded and an edited version was played for the jury. (State's Ex. 69). The interview lasted over two hours. (Trial Tr. at 580). After the interview, Geno agreed to accompany the officers

back to the residence so they could take photos. (Trial Tr. 664). The officers departed and the investigation continued.

Chief Deputy O'Connor would testify at trial that "a little bit before February 19, 2020," he considered Geno a suspect. (Trial Tr. at 668). On February 19, O'Connor and Kunz learned Geno was staying at the home of his boss, Glen Detienne, which was located approximately 28 miles away from Culbertson. The officers drove to that location and found Geno staying in a "small residence." (Trial Tr. 670). Geno was interviewed again. Unbeknownst to Geno was the fact that one day earlier, the Roosevelt County Attorney sought leave to charge Geno with the deliberate homicide of Ramona, (Dkt. 1), and had obtained an arrest warrant for Geno. (Dkt. 5). The warrant, signed by the same district court judge who would preside over Geno's trial, ordered "any peace officer of this state" "to arrest" Geno, "and bring [him] before the court" "without unnecessary delay." (Dkt. 5).

When O'Connor and Kunz – both peace officers of the state of Montana – encountered Geno, they proceeded to interview him for approximately 38 minutes without telling him about either the warrant

or the filed Information. Geno was arrested following the interview. Through counsel, Geno would later move to suppress the statements and video of this interrogation. (Dkt. 77). Although the court held an evidentiary hearing on March 25, 2021, Geno's suppression motion would be denied. (Appendix B).

At trial, Chief Deputy O'Connor denied the February 19, 2020, interview was solely to get Geno to confess. Rather, he allegedly "had a couple different reasons for interviewing him." (Trial Tr. at 696). He did, however, acknowledge that "one of the main reasons" was to get Geno to confess. Chief Deputy O'Connor proffered that a second reason for interviewing Geno was to see if Geno could offer information "that might point to a different suspect." (Trial Tr. at 698).

During cross-examination of Chief Deputy O'Connor, the district court interjected in front of the jury and suggested to the witness that "I'm going to suspect that had you come up with something that made you disbelieve what you were thinking to point in another direction you had the authority not to arrest, also didn't you?" (Trial Tr. at 701). O'Connor agreed with the court, although he did not explain the source

of his authority in light of the clear and mandatory language of the court's own arrest warrant.

Unable to convince either the officers or the jury of his innocence, Geno was convicted of deliberate homicide. At sentencing, the state asked for 100 years without parole and restitution in the amount of \$3,515." (Appendix C at 8-9). The defense requested "20 years of incarceration" noting that both Geno and Ramona were very intoxicated on the night Ramona died and Geno's general absence of a criminal history as well as his military service. (Appendix C at 14). The defense also asked the court to strike "public defender costs and fees" because counsel did not "anticipate he is going to be able to pay that." (Appendix C at 16). Counsel then asked the court to strike the \$50 PSI fee. (Id.) Finally, counsel asked the court to "make a finding of inability to pay to strike [the statutory fees] obviously [Geno's] not going to be working and he hasn't been working. He has no income right now and he isn't going to have any any income in the foreseeable future depending on what happens here." (Id).

The court sentenced Geno to "a flat 50 years to the Montana State

Prison, no parole restriction. I'm going to impose the fees; I'm going to impose the repay costs of court appointed counsel. I'm going to impose the restitution because when you make a parole plan, they will want you to address those issues in your parole plan." (Appendix C at 18).
Geno had no questions and this appeal follows.

Summary of the Arguments

The district court erred when it denied Geno's Motion to Suppress evidence from his February 19, 2020, interview with Chief Deputy O'Connor and Deputy Kunz. Despite having reviewed extensive briefing and a hearing at which witnesses testified, the substantive portion of the district court's analysis on the issue consists of one sentence: "Although it is probable the interview was uncomfortable, it is also clear that there was not inappropriate coercion, so much so that throughout the interview Defendant continued to believe he would get his knife back from O'Connor, talked about his plans to clean the apartment, and so on." (Appendix B). This cursory factual finding is not correctly applied as a matter of law.

Also incorrect is the district court's failure to address or resolve

Geno's argument that his February 19th statements should be suppressed as they were obtained in violation of his right to counsel as guaranteed by the *Sixth Amendment* and *Art. II, § 24* of the United States and Montana constitutions, respectively.

The district court erred when it failed to comply with statutory mandates to consider Geno's ability or inability to pay fines and costs before the court imposed those financial burdens as part of Geno's sentence.

Standards of Review

"This Court reviews a district court's denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether the facts are correctly applied as a matter of law." *City of Great Falls v. Allderdice*, 2017 MT 58, ¶ 8, 387 Mont. 47, 390 P.3d 954. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of evidence, or if this Court is definitely and firmly convinced the district court made a mistake.

This Court reviews sentencing conditions first for legality, then

for abuse of discretion as to the condition's reasonableness under the facts of the case. *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d 1044 (citations omitted). Whether a sentence is legal is a question of law subject to *de novo* review. *Daricek*, ¶ 7. This Court reviews criminal sentences for legality. *State v. Eaton*, 2004 MT 283, ¶ 11, 323 Mont. 287, 99 P.3d 661 (citing *State v. Montoya*, 1999 MT 180, ¶¶ 15-16, 295 Mont. 288, 938 P.2d 937).

This Court's review is generally confined to determining whether the sentence falls within the statutory parameters, whether the district court had the statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297; *accord. State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799.

A district court's determination of a defendant's ability to pay an imposed fine, fee, cost or other charge is "essentially a finding of fact that this court will reverse only if it is clearly erroneous." *State v. Reynolds*, 2017 MT 317, ¶ 17, 390 Mont. 58, 408 P.3d 503.

Arguments

A. Error in Denying Motion to Suppress Feb. 19, 2020 Interview

Geno sought to suppress his February 19 statements to Chief Deputy O'Connor and Kunz under multiple authorities. Specifically, he supported the argument using *Mont. Code Ann. § 46-6-107, Art. II, § 25* of the Montana Constitution, and the *Fifth* and *Fourteenth Amendments* to the United States Constitution. The essential basis of the argument was that the *Miranda*² waiver the officers obtained from Geno on February 19, 2020 was an involuntary waiver. (Dkt. 77).

Counsel for Geno also argued that law enforcement's questioning him after the court had issued a warrant and granted the State's Motion for Leave to File an information alleging deliberate homicide violated Geno's *Sixth Amendment* right to counsel at a critical stage, i.e., a post-charge interrogation. (Dkt. 77 at 2) (citing *Massiah v. United States*, 377 U.S. 201, 204-205 (1964)). *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) also supported this *Sixth Amendment* argument.

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

I. Involuntary Waiver and Statements

“Determining whether a confession is voluntary is a factual issue that depends on a consideration of the totality of the circumstances.”

State v. Eskew, 2017 MT 36, ¶ 16, 386 Mont. 324, 390 P.3d 129 (citing *State v. Hermes*, 273 Mont. 446, 448, 904 P.2s 587, 588 (1995)).

Voluntary confessions are generally admissible and are the “result of a free choice by the suspect, and ‘if he has willed to confess, it may be used against him.’” *Eskew*, ¶ 14 (citing and quoting, *State v. Davison*, 188 Mont. 432, 438, 614 P.2d 489, 493 (1980) ((quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961))).

Involuntary confessions are not admissible against a defendant in a criminal proceeding, “and if the defendant moves to suppress a confession, the burden shifts to the State to ‘prove by a preponderance of the evidence that the confession or admissions was voluntary.’”

Eskew, ¶ 14 (Citing and quoting *Mont. Code Ann. § 46-13-301(2)*; *Davison*, 188 Mont. at 438, 614 P.2d 493).

It is true in this case that Geno was *Mirandized* and waived those rights. However, this Court has emphasized that to be constitutionally

sufficient *Miranda* warnings “must be meaningful, rather than ‘mere lip service.’” *State v. Old-Horn*, 2014 MT 161, ¶ 26, 375 Mont. 310, 328 P.3d 638 (quoting *State v. Grimestad*, 183 Mont. 29, 37, 598 P.2d 198, 203 (1979)); *see also*, *State v. Grey*, 274 Mont. 206, 214, 907 P.2d 951, 956 (1995) (holding “the mere perfunctory reading of Grey’s *Miranda* rights was not sufficient” and “advising Grey of this rights while simultaneously making sure he did not assert them . . . renders the giving of the *Miranda* warnings a hollow and meaningless exercise”).

“When a defendant’s *Miranda* rights are downplayed and he is assured that he is not a suspect, the waiver of those rights may be considered involuntary.” *Old-Horn*, ¶ 26 (citing *Grimestad*, 183 Mont. at 37, 598 P.2d at 203).

When determining the voluntariness of a confession, the district court must take into account the totality of the circumstances, including the interrogation techniques used by police; the defendant’s age and level of education; the defendant’s prior experience with the criminal justice system; the defendant’s demeanor, coherence, articulation, and capacity to make use of his or her faculties; and whether the defendant was advised of his or her *Miranda* rights. A confession induced by any threat of violence, improper influence, or by direct or implied promise, *however slight*, may be involuntary.

Old-Horn, ¶ 17 (emphasis added).

In *Grimestad*, officers gave Grimestad a *Miranda* rights advisement, and Grimestad signed the waiver. *Grimstad*, 183 Mont. at 31, 598 P.2d at 200. However, an officer prefaced the warning by telling Grimestad,

I don't want you to freak out with the thing, but just by our procedures and the way the courts go and everything, before we talk to anybody about virtually anything we have to advise them of their rights, and I don't want you to get all excited thinking we're accusing you of anything or we suspect you of anything or anything else, but that's part of the procedure.

Grimestad, 183 Mont. at 31, 598 P.2d at 200. This Court affirmed suppression of the statement, agreeing with the district court that “mere lip service was given to the *Miranda* requirements here, rather than a meaningful warning.” *Grimestad*, 183 Mont. at 37, 598 P.2d at 203.

In *Eskew*, the defendant was charged in the death of her daughter, Brooklyn. By the time officer *Mirandized* and questioned Eskew, Brooklyn had suffered catastrophic brain injuries that would later result in her death. However, after Eskew signed the *Miranda*

waiver, “[t]he two officers assured Eskew that her daughter was being cared for and that as soon as they finished talking to her she would be reunited.” *Eskew*, ¶ 5. The officers told Eskew “that Brooklyn could not be adequately treated unless she answered their questions and the sooner they finished the interview the sooner they could get her back to her daughter. *Id.* Despite repeatedly denying she had done anything to harm Brooklyn, after about four hours of interrogation, “Eskew relented and shook [a doll given to her by the officers for demonstrative purposes] and told them she had shaken her daughter.” *Eskew*, ¶ 7. Although the district court denied Eskew’s suppression motion, this Court ruled that decision to be erroneous and reversed Eskew’s conviction.

In *Eskew*, this Court went on to summarize the history of factors it deems relevant in evaluating the voluntariness of a confession, highlighting that “no single factor controls.” *Eskew*, ¶ 17 (citing *Grey*, 274 Mont. at 210, 907 P.2d at 954). In addition to the factors articulated in *Old-Horn*, this Court noted “[t]he use of psychological pressure on the defendant in a coercive setting, including coercive

questioning that minimizes the defendant's ability to deny wrongdoing, along with the failure to deliver adequate *Miranda* warnings are relevant considerations. *Eskew*, ¶ 17 (citing *Hermes*, 273 Mont. at 448, 904 P.2d at 588).

This Court went on to discuss how non-physical coercion can still render a confession or waiver involuntary.

Other relevant factors in evaluating the voluntariness of a confession are the use of psychological coercion; isolating the suspect in a small room; using a mean cop-nice cop interrogation technique; interrogation under the assumption of guilt; and lying to the suspect about what is known in her involvement in the crime. . . . A confession may not be induced by threats of violence, promises, or lies and deception by the interrogator. . . . Lying to the suspect about what law enforcement knows about her involvement in the crime is particularly repulsive to and totally incompatible with the concept of due process. We recently emphasized that we will not condone the use of deception to obtain a confession.

Eskew, ¶ 18 (internal citations and quotations). In particular, this Court has “condemned the guilt by assumption technique of interrogation as coercive.” *Hermes*, 273 Mont. at 450, 904 P.2d at 589 (citing *Allies*, 186 Mont. at 113, 606 P.2d at 1050). The guilt by assumption technique involves officers premising an interrogation upon

the suspect's guilt and structuring questions so that the suspect "could not effectively deny that the incident occurred." *Hermes*, 273 Mont. at 450, 904 P.2d at 589.

In addition to the prophylactic protections of *Miranda*, the Due Process Clause of the *Fourteenth Amendment* prohibits the admission of a defendant's involuntary confession to the police. *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960); *State v. Morrisey*, 2009 MT 201, ¶ 26; 351 Mont. 144, 214 P.3d 708. The right is codified in *Mont. Code Ann. § 46-13-301* and further provides the burden to prove the voluntariness of a defendant's confession is on the State. A defendant's involuntary confession is inadmissible for any purpose. *Mont. Code Ann. § 46-13-301(4)*; *Morrisey*, ¶ 29.

The test for an involuntary confession is "whether the suspect's will was overborne by the circumstances of the confession." *Morrisey*, ¶ 26 (citing *Dickerson v. United States*, 530 U.S. 428, 433-434 (2000)).

With this well-established body of law, the totality of the circumstances demonstrate both that Geno's waiver and statements were involuntary and the district court erred in denying Geno's motion

to suppress.

The February 19, 2020 interview of Geno at his “small residence.” (Trial Tr. 670), occurred at 5:32 p.m. (Dkt. 77 at 1). By that time and had law enforcement not deceived through omission, a number of critical events occurred that affect the voluntariness analysis of Geno’s statement and waiver. The first of those events occurred the day before the interrogation when, at the request of the county attorney, the court issued a warrant for Geno’s arrest and granted the State’s motion to file an Information charging Geno with deliberate homicide. The second, and by far the most significant of the events, occurred the day of the interview: The State provided notice that it intended to seek the death penalty against Geno. (Dkt. 4 at 2).

Neither Chief Deputy O’Connor nor deputy Kunz advised Geno of these facts before they administered the *Miranda* waiver or started questioning Geno. (Dkt. 77 at 1). Rather, Chief Deputy O’Connor told Geno at the outset of the interrogation that “the reason why I’m here is because last time we talked, um, I told you that I might have some more questions and I’d have to follow-up[.]” (Dkt. 77 at 2). O’Connor

told Geno that the questions “shouldn’t take too long” and that the two officers would “try not to keep you too long.” (Id.)

Geno asked to move around the room and O’Connor instructed Geno that he [O’Connor] was nervous about Geno’s access to weapons. (Id.) Geno told the officers he did not have any weapons, not even his knife, which law enforcement has seized from the apartment back in January. In response to this, Chief Deputy O’Connor told Geno that law enforcement still had the knife. O’Connor promised Geno that O’Connor was “gonna give that [knife] back to you” when they were done with the interview that day. (Id.) Consistent with what he told the district court at trial, O’Connor also told Geno that if Geno had additional details to share about how Ramona acted toward Geno, “this is the time to discuss it.” (Id.)

At the evidentiary hearing on Geno’s motion to suppress, the State first called Chief Deputy O’Connor. O’Connor began by explaining his prior interactions with Geno. (3/25/21 Hrg. Tr. at 8-12). He then went on to explain the February 19, 2020, interview with Geno, including that both he and Det. Kunz were armed. Chief Deputy

O'Connor denied he threatened Geno with violence (Id. at 23) or threatened his family (Id. at 24).

On cross-examination, O'Connor acknowledged he and Kunz arrived in separate marked vehicles. O'Connor also acknowledged that he specifically informed Geno that he wasn't under arrest at the time of the interview. (Id. at 27). O'Connor made this misrepresentation if not outright lie to Geno despite the fact that O'Connor had a clear and unambiguous warrant from the court directing O'Connor to arrest Geno. O'Connor only informed Geno of the arrest warrant at the end of the conversation. (Id. at 29).

O'Connor acknowledged it was his plan to arrest Geno after the interview and that Geno "wasn't free to leave at any point" once he and Kunz made contact. This testimony is a contradiction to the statement O'Connor gave to the court during trial. (Trial Tr. at 701). In O'Connor's mind, Geno was a suspect and O'Connor expressed that suspicion to Geno during the February 19th interview. (3/25/21 Tr. at 53-54).

The State also called Det. Kunz. Unsurprisingly, Kunz's

testimony was virtually identical to O'Connor's, although she did not witness Geno actually fill out the *Miranda* waiver during Geno's first interrogation at the airport in January. (3/25/21 Tr. at 34). Det. Kunz did acknowledge that they presented Geno with "harder questions for him to answer" during the February 19 interview. (Id. at 41).

On cross-examination, Kunz admitted that it was "the plan ahead of time" to place Geno under arrest. (Id. at 47). She also affirmed that neither she nor O'Connor informed Geno that there was an arrest warrant before the interview began or at any time during the course of the interview. (Id.)

Geno also testified during that hearing on the motion to suppress. Geno testified that he did not believe he was a suspect during either of the interviews he was subjected to by O'Connor and Kunz. He affirmed that the first interview the officers "passed off as if they needed to ask some questions to close the case." "This was helping them just to close the case." (Id. at 57). During the February 19, 2020, interview Geno did not remember thinking "yeah, I'm a suspect." (Id.) Geno also acknowledges there was a third deputy present on the property during

the February 19th interview. In fact, Geno testified that he specifically asked “you know, am I being arrested or what? He [O’Connor] was no, no, no, no, he’s just here for backup for me.” (Id. at 59).

Geno also testified that O’Connor’s assurances that he would receive his knife back at the end of the interview supported Geno’s belief that he would not be arrested at the end of the interview. Obviously, Geno testified that if he had know he was going to be arrested, he would not have waived his *Miranda* rights or answered the questions from law enforcement. (Id. at 60).

Geno also recounted that at some point during the February 19th interview he “got up to get like a drink of water or something, and . . . O’Connor was like no, no, just sit right there. You can’t go behind me.” (Id. at 62). Geno did not understand why he was “quote, unquote not under arrest but I’m not allowed to get up and drink some water.” (Id. at 63). “We had already determined that there were no weapons in the house. That he still had my knife, so there was no reason for [O’Connor] to have any concerns about his safety.” (Id. at 63).

It is difficult, if not impossible, to envision a scenario in which

Geno would not invoke his right to remain silent and right to counsel had he been informed that he was under arrest and the State was seeking to kill him. It defies logic to believe that Chief Deputy O'Connor's misrepresentations and omissions were not material to Geno's ability to execute a knowing, intelligent and voluntary waiver of those rights. It is equally logical that O'Connor believed the same and that is why he withheld information about the warrant and the Information from Geno until after their conversation. An omission is material if it is "logically related to the transaction in which it occurs and rationally significant to the parties in view of the nature and circumstances of the transaction." *Demaree v. Wal-Mart Stores, Inc.*, 511 F.App'x 660, 661 (9th Cir. 2013). Generally, an omission is material if it has a natural tendency to influence or is capable of influencing the decision maker. *See e.g. Kungys v. United States*, 485 U.S. 759 (1988) (defining concealment or misrepresentation as material under 8 U.S.C. § 1451.).

Under the totality of the circumstances in Geno's case, O'Connor's omissions to Geno during the February 19th interview are tantamount

to the misrepresentations in *Eskew*, especially given the fact the State was seeking the death penalty.

The district court's one-sentence order denying the motion to suppress fails to address or even account for the totality of the circumstances. The issue was not, as the district court ruled, whether the interview was "comfortable," for Geno, but whether the totality of the circumstances demonstrate that his waiver was voluntary. It was not voluntary and the totality of the circumstances including the omissions, clearly illustrate that. The district court's order is not supported by substantial evidence and, even reading the court's one-sentence conclusion as generously as possible, it is clear the court misapprehended the effect of the omission and the evidence presented.

II. Sixth Amendment Violation

The district court's cursory order also fails to address Geno's *Sixth Amendment* claim.

"...[T]he *Sixth Amendment* right to counsel is not a 'protective device' that functions solely as a safeguard against compelled self-incrimination." *State v. Scheffer*, 2010 MT 73, ¶ 20, 355 Mont. 5234,

230 P.3d 462. Critically, and for Geno’s case, “the *Sixth Amendment’s* protection of the attorney-client relationship – the right to rely on counsel as a medium between [the accused] and the State – extends beyond *Miranda’s* protection of the *Fifth Amendment* right to counsel.” *Scheffer*, ¶ 20 (citing and quoting *Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988). “The *Sixth Amendment* right to counsel is specifically affirmed in the Constitution, and it broadly guarantees an accused ‘aid in coping with legal problems or assistance in meeting his adversary’ (the government) at critical stages of the criminal proceedings.” *Scheffer*, ¶ 20 (citing and quoting *United States v. Ash*, 413 U.S. 300, 310-11, 313 (1973)).

The crux of Geno’s claim to the district court – which was wholly ignored by the court – was that his February 19th statements should be suppressed because they were made in violation of his right to “meet his adversary” with the assistance of counsel during a critical stage of his proceeding, i.e., a post-charge interview with law enforcement. This Court’s decision in *Scheffer* is instructive.

In *Scheffer*, this Court noted the right to counsel extends beyond

merely being a trial right. “[B]ecause ‘today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality, *United States v. Wade*, 388 U.S. 218, 224 . . . (1967), the right to counsel under the *Sixth Amendment* and *Article II, § 24* extends (once the adversary judicial process has been initiated) to having counsel present at all pretrial ‘critical’ interactions between the defendant and the State.” *Schaffer*, ¶ 16.

In *Schaffer*, this Court noted the right to counsel under the *Sixth Amendment* “does not attach until prosecution has been commenced, i.e., until adversary judicial criminal proceedings have been initiated, whether by way of *formal charge*, preliminary hearing, indictment, *information*, or arraignment.” *Schaffer*, ¶ 16 (emphasis added) (citing *Rothgery v. Gillespie Co.*, 554 U.S. 191 (2008); *State v. Schneider*, 2008 MT 408, ¶¶ 16-23, 347 Mont. 215, 197 P.3d 1020. Nothing about either *Schaffer* or *Rothgery* suggest the right to counsel *only* attaches once a defendant has made an appearance. In fact, the specific inclusion of

the number of ways a judicial criminal proceeding can begin, including by way of indictment or arraignment, necessarily contemplate the attachment of the *Sixth Amendment / Art. II, § 24*, right even before a defendant makes an appearance before a judge or magistrate.

In fact, by their very wording, both *Schaffer* and *Rothgery* support the 1964 ruling from the United States Supreme Court in *Massiah v. United States*, 377 U.S. 201 (1964) in which the Court held “the petitioner was denied the basic protections of [the *Sixth Amendment*] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.”

The United States Supreme Court and other major legal associations have made clear the importance of providing counsel both at the earliest possible time after arrest as well as on appeal. See *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958); *White v. Maryland*, 373 U.S. 59 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963). See also: Association of the Bar of the City of New York, Special

Committee to Study the Defender System, *Equal Justice for the Accused* (1959); Report of the Attorney General's Committee on Poverty and the Administration of Justice (1963); Beaney, *Right to Counsel Before Arraignment*, 45 *Minn.L.Rev.* 771 (1961); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 *Minn.L.Rev.* 783 (1961); Douglas, *The Right to Counsel—A Foreword*, 45 *Minn.L.Rev.* 693 (1961); Kamisar, *The Right to Counsel and the Fourteenth Amendment; A Dialogue on “The Most Pervasive Right” of an Accused*, 30 *U.Chi.L.Rev.* 1 (1962); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 *Mich.L.Rev.* 219 (1962); Symposium, *The Right to Counsel*, 22 *Legal Aid Briefcase* 4–48 (1963). This provision has been made by law for a Legal Aid Agency in the District of Columbia which is charged with the duty of providing counsel and courts are admonished to assign such counsel “as early in the proceeding as practicable.” D.C. Code §2–2202. Congress has now made provision for assignment of counsel and their compensation in all of the districts. *Criminal Justice Act of 1964* (78 Stat. 552).

These principles are reduced to an absurdity if a police officer,

aware of and in possession of an arrest warrant and a document charging an individual with a capital offense carrying a capital penalty, can (1) withhold that information from an individual, (2) suggest they are not under arrest, (3) question them, (4) arrest them on the warrant, and then (5) claim the defendant's questions were legally voluntary. No reasonable person would submit to law enforcement questioning knowing he was being arrested and charged and the state was intent on executing him. The omissions of that material information vitiate any waiver or suggestion that Geno waived his rights.

Even if that point could be debated, the district court was required to settle the debate in its order. The court's order is utterly silent on Geno's *Sixth Amendment* argument and cannot withstand any review by this Court, even under the most generous of those standards.

B. Error Regarding Costs and Fees

A court must consider the financial resources of the defendant and “[i]f a [sentencing] court determines under [*Mont. Code Ann* §§ 46-18-231, [] - 232 that a person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court

shall waive payment of the charge imposed by this section. *Mont. Code Ann. § 46-18-236(2)*.

In *Ingram*, this Court affirmed the imposition of the mandatory fine of \$5,000 for a felony DUI conviction, pursuant to *Mont. Code Ann. § 61-8-731(1)(a)(iii)*. *Ingram*, ¶ 12. Nevertheless, the Court reversed a \$500 felony surcharge – 10% of the \$5,000 fine – because the sentencing court failed to consider the defendant’s ability to pay the felony surcharge, in violation of *Mont. Code Ann. § 46-18-236(2)*.

Additionally, “[a]s with other fines, fees, or charges, the court must first determine whether the defendant has the ability to pay the public defender fee.” *State v. Hotchkiss*, 2020 MT 269, ¶ 24, 402 Mont. 1, 474 P.3d 1273 (citing *Mont. Code Ann. § 46-8-113(3)*; *Reynolds*, ¶ 20). In reaching its determination, the court must “scrupulously and meticulously” inquire as to the defendant’s ability to pay. *State v. Gable*, 2015 MT 200, ¶ 22, 380 Mont. 101, 354 P.3d 566, “tak[ing] into account the financial resources of the defendant and the nature of the burden the payment of costs will impose.” *Mont. Code Ann. § 46-8-113(4)*. “The court may find that the defendant is able to pay only a

portion of the costs assessed.” *Id.*

With respect to the district court, nothing about its decision to saddle Geno with fees and costs could be called “scrupulous” or “meticulous.” The court made no inquiry into Geno’s financial resources and no analysis of the burden the payment of costs would impose. Only after the sentence was imposed the following colloquy occurred between the court and defense counsel:

COUNSEL: You weren’t going to impose OPD fees?

COURT: Yeah.

COUNSEL: You did.

COURT: They can be addressed as part of his parole plan.

COUNSEL: I have no other questions, your Honor.

(Appendix C at 20).

In *Hotchkiss*, this Court reversed the district court’s imposition of the public defender fee when the court only asked “two questions regarding [Hotchkiss’s] financial condition: what he did for work prior to his incarceration, and whether it was work in which he planned to return to upon his release.” *Hotchkiss*, ¶ 25. This Court faulted the

district court because it “never examined this fee in light of Hotchkiss’s other financial obligations, whether this type of work provided Hotchkiss with the financial ability to pay the fee, whether he had other assets he could use to pay the fee, or if the fee would cause any present or future financial hardship on Hotchkiss.” *Id.* This Court reversed the district court’s imposition of the public defender fee and remanded for a determination regarding Hotchkiss’s ability to pay holding “[t]he district court’s brief examination into Hotchkiss’s financial conditions falls below the requisite scrupulous and meticulous inquiry.” *Hotchkiss* ¶ 25 (internal citations and quotations omitted).

If the two questions posed by the district court in *Hotchkiss* were insufficient to meet the statutory mandates, the zero questions posed by the court in Geno’s case must necessarily fall shorter.

Therefore, as in *Hotchkiss*, Geno requests this Court reverse the district court’s imposition of all fees and costs and remand his case for a hearing at which the court may conduct a proper inquiry into Geno’s ability to pay said costs and fines.

Conclusion

In light of the above arguments and the district court's errors, Geno respectfully requests this Court reverse his conviction and remand his case for a new trial.

Respectfully submitted this 27th day of March 2023.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 6,298.

Dated this 27th day of March 2023.

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CERTIFICATE OF SERVICE

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