*IN THE SUPREME COURT OF THE STATE OF MONTANA*

**No. DA 22-0347**

STATE OF MONTANA,

*Plaintiff and Appellee,*

v.

MATTHEW RYAN AILER,

*Defendant and Appellant,*

# OPENING BRIEF OF DEFENDANT/APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, CDC-2014-98, The Honorable Kathy Seeley, Presiding

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## STATEMENT OF THE CASE

On December 11, 2015, Matthew was wrongfully convicted (Doc.186). On March 24, 2016, District Court (DC) imposed a six year deferred sentence and ordered Matthew to pay restitution to Montana State Fund (MSF) (Sent.at52:23-24). On April 11, 2016, Final judgment was entered (Doc.207). On April 21, 2016, Nick Brooke (Brooke) filed a Notice Of Appeal (Doc.243:P.17;245:P.20;Ex.FC).

On May 13, 2016, Former Assistant Attorney General (AAG) Mary Cochenour (Cochenour) discussed Matthew's case during a MSF public meeting in violation of the Rules Of Professional Conduct (MRPC) and provided information that contradicted testimony. (Doc.243:P.17;245:P.20;Ex.FD).

On February 6, 2018, this Court affirmed the wrongful conviction (*State v. Ailer,* 2018 MT 18, 390 Mont. 200). On March 21, 2022, a Rule 60(B) and State violated MRPC Motions were filed (Doc.242-245). On March 22, 2022, Former AAG Melissa Broch and AAG Selene Koepke (Koepke) filed a Petition To Revoke (PTR) (Doc.248). On March 23, 2022, a Motion to waive restitution was filed (Doc.249,250). On April 22, 2022, Brooke submitted his Motion To Dismiss PTR (**App.A**) and Broch filed a NOW (Doc.255). On May 26, 2022, Koepke filed a Motion To Dismiss PTR (Doc.264). On May 27, 2022, DC dismissed the PTR and filed an Order on all pending Motions as moot on June 2, 2022 (Doc.265,266).

## STATEMENT OF THE ISSUES

1. The District Court erred by denying Matthew's requests for relief from his wrongful conviction and illegitimate restitution as moot because the sentence expired without revocation.

2. The District Court erred by denying the Motion For Relief Pursuant To Mont. R. CIV. PRO 60(B) and the Motion that the State violated The Montana Rules Of Professional Conduct as moot and judicial approbation of the State's egregious misconduct.

3. The District Court erred by denying the Motion For The Court To Waive Restitution Pursuant To §46-18-26, MCA by failing to hold a hearing and waive restitution as unjust to require payment as imposed.

4. The District Court erred by failing to hold the State accountable for their egregious misconduct that influenced the jury and the Court by failing to maintain institutional integrity in deterring future misconduct and by failing to grant a new trial and waive restitution in the interest of justice and fundamental principles of fairness.

## STANDARDS OF REVIEW

This Court reviewed DC's decision to grant or deny a post-trial motion in a criminal case for abuse of discretion. *State v. Passmore,* 2014 MT 249, ¶12, 376 Mont. The DC's denial to adjust or waive restitution pursuant to §46-18-26, MCA and failure to hold a hearing constitutes a conclusion of law. This Court conducts plenary review of a DC's conclusion of law to determine whether the conclusion is correct. *City of Billings v. Gonzales,* 2006 MT 24, ¶6, 331 Mont.

This Court will review DC's ruling on a motion pursuant to M. R. Civ. P. 60(b) and it depends upon the nature of the final judgment, order, or proceeding from which relief is sought and the specific basis of the Rule 60(b) motion. *Essex Ins. Co. v. Moose's Saloon, Inc.,*007 MT 2202, ¶16, 338 Mont. Restitution cases create mixed questions of fact and law, which this Court reviews de novo. *State v. Patterson,* 2016 MT 289, ¶9, 385 Mont.

This Court will review DC's legal conclusions for correctness. *Williams v. Bd. of Co. Commrs.,* 2013 MT 243, ¶23, 371 Mont. A DC's findings of fact receive clear error review. *Larson v. State,* 2019 MT 28, ¶16, 394 Mont. The correct interpretation of a statute is a question of law that this Court will review de novo. *Bates v. Neva,* 2014 MT 336, ¶9, 377 Mont. This Court will review DC's discretionary rulings, such as whether to hold an evidentiary hearing, for an

abuse of discretion. *State v. Evert,* 2007 MT 30, ¶12, 336 Mont. This Court reviews de novo a DC's conclusions of law regarding a constitutional question and the application of a statute to determine whether the conclusions are correct. *Billings Gazette v. City of Billings,* 2013 MT 334, ¶10, 372 Mont. 409.

This Court "*exercises plenary review over matters of constitutional interpretation." Nelson v. City of Billings,* 2018 MT 36, ¶8, 390 Mont. An abuse of discretion occurs when a court acts arbitrarily, unreasonably, or without the employment of conscientious judgment, resulting in substantial injustice. *State v. Nordholm,* 2019 MT 165, ¶8, 396 Mont. Mootness "presents a question of law" which this Court reviews de novo. *Montanans Against Assisted Suicide v. Bd. of Med. Examiners, Montana Dep't of Labor & Indus.,* 2015 MT 112, ¶7, 379 Mont.

This Court has an inherent authority to take judicial notice: Mont. R. Evid. 202(b)(6) (Court may take judicial notice of records from any Montana court) and Mont. R. Evid. 201(b)(2) (Court may take judicial notice of facts "not subject to reasonable dispute," as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned"); and Mont. R. Evid. 201(d) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.") and may be taken at any stage of the proceeding (Mont. R. Evid. 201(f)).

## SUMMARY OF ARGUMENT

Matthew was under probation for six years based on a wrongful conviction. Despite overwhelming evidence of the State's misconduct and actual innocence of Matthew in which the State conceded to Matthew and DC to be factually true, the DC refused to grant a new trial and to waive the unjust restitution because Matthew's deferred sentence expired without revocation and determined these issues were moot. Although Matthew's sentence expired, the legal issues in this case are critical ones for this Court to resolve and may be of first impression.

## STATEMENT OF THE FACTS

### 1. Matthew's History Of Good Character

During Matthew's adolescent years (1983-2000) he served as an umpire, scorekeeper, grounds maintenance person, concession stand worker, a volunteer for the Staunton Kiwanis Baseball League, and as a coach and mentor in the Little League Basketball Program. (Doc.242:P.2;244:P.4;246:P.1).

Parents, coaches, players, Director of the Kiwanis Club, and an officer of the Bambino Board observed Matthew being competent, truthful, polite, respectful, hard working, trustworthy, faithful, and responsible. (Doc.242:P.2;244:P.4;246:P.1).

When Matthew was Owner of A & R Cleaning (2000-2009), his clients observed his respectfulness, politeness, honesty, and great work ethics.

(Doc.242:P.2;244:P.4;246:P.2).

When Matthew worked for Best Western Hotel (2009-2010), he was viewed as one of the best supervisors according to Former General Manager Dustin Atkins and Former Executive Jeannette Selway. (Doc.242:P.2;244:P.5;246:P.2).

When Matthew worked for Former Owner of Garden City Janitorial (GCJ) (2010-2011), Cory James Miller (Miller) observed Matthew's integrity, exceptional customer service, professionalism, and his quality work. (Doc.243:P.17,Ex.EV;245:P.20,Ex.EV).

Agent Anthony Poppler (Poppler) (Doc.242:P.5,Ex.F;244:P.7,Ex.F), Cochenour and DC (Sent.at46:1-2;52:7-8) confirmed Matthew did not have a criminal record. Probation Officer Amy Bakerowski said Matthew has done well on supervision and has not violated any of his conditions (Doc.248:P.3-5).

**2. The State's False Allegations**

The false allegations were that Matthew **(no criminal history)** and two of his co-workers Jeff Russell (Russell) and Chelsea Chafee (Chafee) **(two career criminals)** alleged a staged accident occurred on October 16, 2011. (Doc.1,3). The State further alleged that Matthew continued to exaggerate or feign injuries to continue to receive medical benefits. (Doc.1,3).

### 3. Chafee, The Persistent Felony Offender, And Career Criminal

State v. Chafee (DC-11-488)

On October 7, 2011, Chafee was involved in a unrelated arson and theft, the case went to trial, and she was convicted (State v. Chafee, 2013 MT 226,¶¶6,7,10 376 Mont). Chafee admitted she violated probation by associating with a registered sex offender Antonio Robinson. (Sent.at400,439).

The Honorable Judge Deschamps (Deschamps) confirmed that Chafee has extensive criminal history, "Chelsea has had possession of intoxicating substances; minor in possession; criminal possession of dangerous drugs, a misdemeanor; obstructing a peace officer, a misdemeanor; burglary, a felony; criminal possession of dangerous drugs with intent to distribute, a felony; a [PTR] in the case here." (Sent.at394) and "you know, we got somebody that's a-- three-time felon, committing new felonies while they're on probation." (Tr.at425).

Deschamps commented on Chafee's credibility, "I saw that videotape of you when you were talking to the officers at the bottom of Pattee Canyon. And you were lying like a rug and you were looking right in their eyeballs and giving them the most innocent, convincing demeanor that I could imagine...you decided to lie, and convincingly at that." (Sent.at438). This Court vacated Chafee's conviction. *Chafee*, ¶30.

On November 18, 2014, the State designated Chafee as a PFO (**App.B**). On November 25, 2014, Chafee signed a plea agreement to 10 years suspended sentence and the State waived the PFO. (**App.C**).

State v. Chafee, (BDC-2014-98:**App.D**)

On April 3, 2014, Chafee pled not guilty related to Matthew's case. The State filed a Notice To Seek Chafee as a PFO. (Doc.18,20). "Routinely the state will file a [PFO] notice in any case where it's likely to encourage a plea agreement despite any alleged cooperation." (*State v. Garding,* DC-10-160:Tr.at415).

Chafee refused to elaborate to the jury and DC the real reason on why she changed her mind and accepted a plea deal. (Tr.at519,520). However, the real reason was apparent in her July 18, 2014 Prison call where Chafee intended to deceive law enforcement, the Court and the jury by stating:

**Chelsea:** **Very important you do not tell anybody about this conversation.**

Trudy: Absolutely Not.

**Chelsea:** **Anybody gets wind of it. I don't even know what I will be able to testify to because I don't know a whole lot that's the shitty part about it. But I have to say something. Because I'm not going to spend 5 more**

**years in prison. My fucking kid will be 16 years old.**

Trudy: Yea, no, well she will be 18 if you spend another 10 she will be an adult.

**Chelsea: Yea, If I take the plea deal and its binding I will go to parole by September.**

Trudy: Well that would be great timing.

(Doc.242:P.6;244:P.9;249:P.7).

On July 23, 2014, while Chafee was in Prison, Chafee struck the plea deal of a lifetime (Doc.243:P.17,Ex.EN,EO;245:P.20,Ex.EN,EO) that waived the PFO and provided Chafee with a bias and motivation to fabricate trial testimony.

On January 21, 2015, Chafee confirmed in an interview with Attorney Marty Judnich (Judnich) to receiving a suspended sentence and only serving probation, and that if she did not take the agreement waiving the PFO Cochenour was going to prosecute her as a PFO. (Doc.242:P.7,Ex.S;244:P.10,Ex.S).

Through the PFO notice and the possibility of a 100-year sentence, the State encouraged Chafee's cooperation to enter into a plea agreement that required her to testify against Matthew, allowed her to be eligible for parole, rewarded her with a 10-year suspended sentence and the withdraw of the PFO.

### 4. Russell, The Persistent Felony Offender, And Career Criminal

(*State v. Chafee,* DC-11-488).

Russell provided testimony at Chafee's trial that provided Russell with a bias and motivation to fabricate trial testimony at Matthew's trial: (**App.E**).

Russell lost his job at GCJ and was the only one who got into trouble because Chafee gave [Miller] photos of him stealing from Safeway and taking money out of a loose change jar (Tr.at258,268); Russell thought Chafee was a "fucking bitch", "I hate that bitch" and that Matthew was a "piece of shit" (Tr.at259); Russell sold drugs, "do you make money from selling your Lortabs? Yes, Sir. So you sell your Lortabs illegally? Um, yes sir." (Tr.at265); Attorney Rich Buley confirmed that, "he just got fired from his job because [Chafee] showed that he was stealing and said he hated [Chafee] and hated her fiance [Matthew] too...fact of the matter is, Russell is totally unreliable and non-credible…and Russell is the admitted liar." (Tr.at236,422); Russell confessed, "I would never hit Matt" (Tr.at275).

State v. Russell, (ADC-2014-97)

On March 26, 2014, Russell pled not guilty related to Matthew's case. On June 18, 2014 while serving probation for felony Stalking, he struck the plea deal of a lifetime with a 2 year suspended sentence, PSI and restitution waiver and prevention of a PTR by MCAO. (Doc.243:P.17,Ex.EK-EM;245:P.20,Ex.EK-EM).

On April 20, 2015, Russell confirmed in an interview with Judnich that the plea deal waived restitution and PFO, and allowed him to suffer no additional punishment/probation other than what he was already serving. (Doc.242:P.7,Ex.T;244:P.10,Ex.T).

Through the PFO notice and the possibility of a 100-year sentence, the State encouraged Russell's cooperation to enter into a plea deal that required him to testify against Matthew, rewarded him a 2-year suspended sentence, not to pursue PFO, no restitution, no additional probation, and prevented a PTR being filed by MCAO.

**5. Investigations That Proved Matthew Did Not Commit Theft**

**A. Montana State Fund Investigation**

**1. MSF Coordinator Tom Disburg (Disburg)**

On April 16, 2012, Disburg referred a theft allegation to DOJ.

In 2014, Disburg testified in a deposition that he dealt with administrative duties, referrals to DOJ and PI's (Doc.243:P.17,Ex.EP;245:P.20,Ex.EP).

**2. MSF Investigator Gaylen Buchanan (Buchanan)**

Buchanan was asked by MSF Attorney Tom Martello and Retired MSF Claims Examiner Cecelia Robinson (Robinson) to attend a meeting.

Buchanan established that Robinson recorded statements from Matthew, Miller, and Russell confirming the injury. Buchanan contacted Chafee who

confirmed the injury. Miller later informed Buchanan that Chafee photographed Russell stealing from Safeway. As a result from being blamed for the Safeway theft, Russell became upset and alleged the claim was now fictitious.

On July 22, 2014, Buchanan consented to a deposition: Buchanan admitted that he reviewed some medical records but did not include them in his report; he did not know why Matthew used the cane; could not ascertain from a doctor on what activity would exceed Matthew's limitations; acknowledged he was not a doctor and could not determine the limitations of Matthew's abilities; did not know where Matthew fell on the spectrum of people that use a cane; conceded that it was possible that Matthew only needed the cane occasionally and could walk some distance without the cane.

Buchanan further determined that Russell was angry about Chafee blaming him for Safeway. Judnich asked Buchanan if he later learned that Russell admitted to Safeway that he did steal from them and he replied "No". Buchanan did not question Russell's credibility and was unaware of his criminal record. Buchanan retired after his report (Doc.243:P.17,Ex.EQ;245:P.20,Ex.EQ).

### B. Department Of Justice Investigation

#### 1. Agent Anthony Poppler (Poppler)

##### (i) Poppler's May 31, 2012 Investigation Report:

"On April 16, 2012 [Disburg] referred an allegation of Theft to the [DOJ,DCI]...Included with Disburg's referral was an investigative report and case file prepared by [Buchanan]...DCI opened a case and assigned [Poppler] to review the case file, and complete any additional investigation required before it was referred for prosecution...Ailer was employed by [GCJ] when the injury occurred and SF accepted liability for the claim...

[Poppler] reviewed the case file prepared by [Buchanan]...Details regarding this claim, dates of TTD, interviews, and surveillance notes are included in [Buchanan's report]...[Poppler] immediately noted that [Buchanan] and [Disburg] contacted him in March 2012 regarding this case. [Disburg] requested [Poppler] to record an interview between an informant and Ailer. [Poppler] asked [Disburg] the facts to establish probable cause.[Disburg] told [Poppler] that [Russell] had to "get something off his chest" and confessed to helping Ailer falsify a claim.

[Poppler] told [Disburg] that it appeared there was not enough sufficient evidence to obtain a search warrant and questioned the credibility of the informant. [Poppler] told [Disburg] to gather statements from witnesses and provide the documentation in a report to refer the case file to DCI for further investigation...

On November 4, 2011 [Robinson] conducted a recorded interview with Russell. Russell told [Robinson] that he was loading the burnisher into the back of

a van with Ailer. Russell told [Robinson] that Ailer lost control of the burnisher and it fell on top of him. Russell told Robinson that the FROI reported by Ailer was truthful and he witnessed the injury.

On March 12, 2012 [Buchanan] conducted an recorded interview with Russell. Russell told [Buchanan] that he helped Ailer file a false claim. Russell told [Buchanan] that he was promised $20,000.00 by Ailer and [Chafee] when they got a settlement from SF. Russell told [Buchanan] that Chafee was present when he helped stage the accident with Ailer...

On March 21, 2012 [Buchanan] conducted an recorded interview with Chafee. Chafee told [Buchanan] that she was sitting in the truck when Ailer was injured. Chafee told [Buchanan] that she didn't witness the burnisher fall on Ailer. Chafee told [Buchanan] that she was engaged to Ailer and had known Russell for over two years.

[Poppler] noted after reading the case file and related documents that the only evidence regarding the case was the new statement provided by Russell. [Poppler] obtained criminal histories on Ailer, Russell, and Chafee. Ailer did not have a criminal record, however Russell and Chafee had substantial criminal records involving the sale and use of narcotics.

[Buchanan] and [Disburg] told [Poppler] when the case file was referred that there was a recorded confession from a telephone call in Missoula County. [Buchanan] told [Poppler] that [Donovan] had a recorded telephone call from Russell's phone made by Antonio Robinson where Ailer confessed to the false claim. [Buchanan] and [Disburg] told [Poppler] that Chafee and Robinson were recently charged with Arson and Theft in Missoula. [Poppler] contacted [Cochenour] regarding the information provided by [Buchanan] and [Disburg]. [Cochenour] told [Poppler] she would contact County Attorney Donovan to find out if there was a recording. [Cochenour] told [Poppler] she contacted [Donovan] and was advised there was no recording between Ailer and Robinson.

[Poppler] contacted the [MCSD] and spoke to a Detective who was handling the arson case involving Chafee and Robinson. The Detective told [Poppler] that there was no recording that he was aware of between Ailer and Robinson. The Detective told [Poppler] that he would contact him if he had any further information but didn't know anything about a workers' compensation claim.

On May 22, 2012 [Poppler] contact Russell and conducted an recorded interview. Russell told [Poppler] that he was promised by [Buchanan] that if he cooperated and provided a statement he wouldn't be charged with helping Ailer commit a theft. Russell said that if he wasn't promised immunity from being

charged with a crime then he wouldn't cooperate regarding this case. [Poppler] told Russell he couldn't make the promise and would contact [Cochenour] for further guidance. Russell said he was on Probation for Felony Stalking and was serving a three year deferred sentence.

On May 22, 2012 [Miller] called [Poppler] after he received a call from Russell which was recorded by [Poppler]. Miller said Russell called him after he was contacted. Miller said he had credibility concerns with Russell and told [Buchanan] that he was a "sketchy witness". Miller said he was interviewed by [Buchanan] and provided the exculpatory information regarding Russell.

Miller told [Poppler] that Russell changed his statement in March 2012 after he was caught shoplifting at Safeway. Miller said that Chafee took photos of Russell stealing over $100.00 in groceries. Miller said Chafee showed him the pictures and he took Russell to Safeway to turn himself in. Miller said Russell had a civil agreement with Safeway to payback the money. Miller said Russell was cooperative due to his concerns that he would be sent to prison if he was charged by Safeway for theft.

Miller told [Poppler] that Safeway attempted to locate Chafee and couldn't find her. Miller said Safeway contacted Russell and told him that since they couldn't locate Chafee the theft case would be prosecuted.

Miller said Russell got very upset and told him that he was promised money from Ailer and Chafee to help file the false claim. Miller said Russell never mentioned anything about the false claim until he was told by Safeway that he would be charged with the theft because they couldn't find Chafee.

[Poppler] contacted [Cochenour] regarding the missing exculpatory information provided by Miller to [Buchanan] and the promises made to Russell. **[Cochenour] told [Poppler] that she would not prosecute Ailer due to the lack of evidence and the handling of the case file by SF.**

This case will be submitted to the [AG'S] for review of theft charges against Matthew Ryan Ailer." (Doc.242:P.5,Ex.F;244:P.7,Ex.F).

**(ii) Poppler's May 22, 2012 Interview with Miller:**

Poppler informed Miller that there was nothing mentioned about the alleged staged accident until the Safeway incident and asked Miller if there is anything else that shows proof of a alleged staged accident and Miller replied "No".

Miller confirmed that he was interviewed by Buchanan and told Buchanan that Russell was a sketchy witness and had a felony stalking charge; that Chafee provided Miller with photographs of Russell stealing from Safeway and Russell was not happy; and that Russell did not say anything about the work comp case until he was going to get turned in and get charged with theft from Safeway.

Miller told Poppler that he wrote all the information down from Russell whether it was true or not. Poppler advised Miller that there was no recording stating anything about any admissions about the claim being a false claim provided by Buchanan.

Miller stated, "Like I said, that was stuff that Russell had told me." and Poppler responded, "Yeah. Actually the information was provided to us was even different than what [Russell] provided to you. So there is definitely some credibility issues here." Miller agreed with Popplers' analysis that Matthew's factual version of the buffer accident was possible. (Doc.242:P.5,Ex.I;244:P.8,Ex.I).

**(iii) Poppler's July 22, 2014 deposition:**

Poppler told Judnich that he was contacted by Buchanan and Disburg and received the case file in April 2012; reviewed Buchanan's report; tried to contact Russell for a interview but would not cooperate unless he was given immunity; investigated Buchanan and Disburg's allegation of a confession jail call and determined there was no such call; confirmed that Russell may have had a different motivation because before reporting the alleged false claim to MSF he had been accused by Chafee of stealing at Safeway and then told Miller the claim was now fraud; Russell was upset being accused of stealing by Chafee; Russell said that Chafee was liar and that she set him up for the Safeway shoplifting; Poppler was

unaware that Russell changed his story and admitted to the Safeway investigator that he was stealing; it was a possibility that Russell had a motivation to change his story since Chafee accused him of shoplifting and wanted to get back at her; Russell would not provide a statement and due to his lack of cooperation Poppler's investigation stopped; Poppler knew Russell's criminal record was 12 pages long; Miller told Poppler that Russell had credibility problems and was a sketchy witness; and Poppler determined there was no reason for charges to validate a fraud allegation. (Doc.242:P.5,Ex.J;244:P.8,Ex.J).

### 2. DCI Agent Butch Huesby (Huesby) Investigation

Presumably, Cochenour disagreed with Poppler's report and her own findings, **"[Cochenour] told [Poppler] that she would not prosecute Ailer due to the lack of evidence"** as she decided to have a second investigator conduct a second investigation that would result in a different conclusion.

#### (i) Huesby's July 22, 2014 deposition:

Huesby told Judnich that this case was referred back to him to find anything for a prosecution; he reviewed all medical records and talked with all doctors; and stated the following:

> But you don't know how [CD] is diagnosed?
>
> **No, I'm not a medical professional**

...So are you aware of how [CD] is diagnosed?

**No.**

...Do you think that might be important to figure out since we're relying on medical opinions here?

**Ah, maybe**

...How is it [Matthew] has a verified medical condition that starts on the date where you're saying he faked the incident?

**Good question, I don't know.**

...Do you recall in Poppler's report where he states that Miller gave him a lot of information to basically discredit Russell?

**Yes.**

...Did [Miller] give you any information about the credibility of Russell?

**No, he didn't say anything to me.**

...[Russell] says he punched [Matthew] "sixty times in the chest" and that he physically saw bruising on his arm; that he had caused on his arm and chest.

**That's what he claimed.**

...Um, in your investigation, did you find any inconsistency with that statement?

**Yeah.**

What's the inconsistency?

**The doctor's never found any bruises on him.**

That seems problematic that he's claiming in excessive amount of assault, physical disturbance to [Ailer's] body he's physically seeing a bruise that doctors don't see.

**Right.**

So how it that justified, if that's the case?

**...I mean all I could do was look at the medical file and see how it compared and I noted that he didn't show that kind of injury. But what it did do was still tell me there still was possibly you know a possibility, there was a staged accident. So I just stuck with a staged accident.**

...So it's possible that [Russell] had no idea whether he had bruising or not.

**Sure.**

And potentially assumes he has bruising because the burnisher fell on [Ailer].

**Uh huh (Affirmative)**

So if [Russell] is now trying to create his own version of this fraud claim, he assumes well he must have had bruising, well, how did he get the bruising, I gave it to [Ailer]. Is that one other possibility that could exist?

**You'd have to ask [Russell] that.**

Sure. Nobody did though, did they?

**No I didn't**

Okay, Poppler didn't ask him that and

**I just relied on the medical file.**

I get that. But like you said we have two different version of events we're trying to decide who's telling the truth, right? That seems to me to be a pretty glaring hole in his story that he's talking about his excessive amount of damage but none of that's in the medical record. Why didn't anybody explore that more to find out; are you telling me the truth or not, because it's not in the medical record.

**I don't know, I can't explain it, I never did ask him.**

(Doc.242:P.7,Ex.N;244:P.9,Ex.N).

**(ii) Huesby's trial testimony:**

Huesby testified he was aware of Stratford's deposition and Russell's interview but did not review them; his investigation from doctors revealed the use of a cane, testing, and symptoms were all consistent with CD. (Tr.at595,602,633).

**6. Matthew's Medical Providers Diagnosing Conversion Disorder**

William Stratford, MD, (2012;Ex.FM) Lennard Wilson, M.D (2011;Ex.FN), Stephen Powell, M.D (Powell) (2012;Ex.FO), John Harrison, PhD (2013;Ex.FP) diagnosed Matthew with CD. (Doc.250:P.18).

Eric Ravitz, DO (2014;Ex.FQ), Sean Tollison, PhD (2014;Ex.FR), Holly Schleicher, PhD (2015;Ex.FS), Jocelyn Head, PT (2015;Ex.FT), Brent Dodge, PT (2015;Ex.FU), Sherry Reid, MD (2016;Ex.FV), Kelly Pearce, PhD (2016;Ex.FW), Susan Swierc, PhD (2017;Ex.FX), Katie McCall, PhD (2017;Ex.FY), Mary Frank, PT (2017;Ex.FZ), Meadow Summers, PA-C (2018;Ex.GA), Heather Kroll, MD (2018;Ex.GB), Sean Tollison,PhD (2018;Ex.GC), Jennifer Roy, OT (2018;Ex.GD), Kerrigan O'Connell, ST (2018;Ex.GE) and Eric Ravitz, DO, (2022;Ex.GF) were aware of the alleged staged accident, fraud allegations, conviction, and they did factor all of those into their medical evaluations and diagnosed CD (Doc.250:P.18).

They observed similar observations of inconsistent cane and right arm use by State witnesses and still continued to diagnose CD. (Doc.243:P.2,Ex.CP).

**Dr. Ravitz:**

Dr. Ravitz testified by deposition that the May 18, 2011 MVA was the cause of Matthew's CD (Depo.atP.7); would revisit Matthew's treatment plan every-time because of the complexity of Matthew's CD symptoms (Depo.at23); could not have falsified his CD and is not malingering (Depo.atP.37,38,62); and this legal situation is hindering Matthew's mental and physical recovery. (Depo.at44). (Doc.242:P.3,Ex.A;244:P.6,Ex.A).

Ravitz told Cochenour and Huesby that the May 18, 2011 MVA was the cause of Matthew's CD could not have falsified his CD, and is not malingering in an pre-trial interview. (Doc.242:P.17;Ex.FB). Ravitz wrote two letters that Matthew suffers from CD, that he is not capable of the deception and criminal behavior, and still continued to diagnose CD despite his conviction. (**App.F**).

**Dr. Stratford**

Dr. Stratford testified that Matthew suffers from CD, is not malingering, had no evidence of a Fictitious Disorder (Depo.atP.24,32,33,34,37,38), and the May 18, 2011 and October 16, 2011 accidents could have contributed to Matthew's CD. (Depo,atP.35,36). (Doc.242:P.3,Ex.B;244:P.6,Ex.B).

Robinson withheld medical records from Stratford for his evaluation and knew that Stratford was not qualified to diagnose or treat individuals suffering from a closed heady injury. (Doc.242:P.17,Ex.FA;244:P.20,Ex.FA).

**Dr. Tollison**

Dr. Tollison provided a deposition to Cochenour informing her that Matthew was very genuine in his presentation; Matthew's level of difficulty in doing things varied depending on his emotional state; diagnosed CD; reviewed Stratford and Harrison's evaluations; the cause of Matthew's CD was the stressor from the MVA and the subsequent accident; there was a definitive change with the MVA and then it was exacerbated by the accident with the buffer; the program cost Matthew $16,000; Matthew's CD is related to the MVA and that he was not malingering. (Doc.243:P.17,Ex.ET;245:P.20,Ex.ET).

Dr. Tollison testified that inconsistencies in Matthew's use of a cane made no difference to the existence of CD; the MVA had a significant impact on the diagnosis; it was possible that Matthew had CD when he was admitted to the ER for 3 days and they were unable to figure it out at that time. (Tr.at349:12-24;343,346,347,367,368).

### 7. May 18, 2011 Motor Vehicle Accident - #041000691316

Cochenour (Tr.at107:10-21;107:25-108:1;108:25-109:12), Robinson (Tr.at164:11-15), Huppert (Tr.at553:14-21), and Huesby (Tr.at596:15-21;597:3-17) **testified that the first claim was not contested and was not subject of criminal charges.** Robinson approved the claim and payment for Matthew's medical bills and assigned claim number 041000691316.(Tr.at159:6;161:20-162:2).

### 8. Events Leading Up To The Second Claim

On June 20, 2011, Matthew saw Dr. Josh Smith (Smith) regarding his injuries and Smith ordered an MRI (State'sTr.Ex.4). Miller and Matthew discussed his injuries and Smith's recommendations. (Doc.243:P.6,Ex.DB;245:P.8,Ex.DB).

On June 20, 2011, Robinson notified Matthew that he needed to cancel the MRI. (**App.G**). On July 1, 2011, Matthew discussed his injuries with Miller. (Doc.243:P.6,Ex.DC;245:P.8,Ex.DC). On July, 8, 2011, Robinson contacted Matthew discussing his ongoing arm and neck injuries. (**App.H**).

Robinson notified Matthew and Miller that MSF has accepted the claim for benefits. (Doc.243:P.6,Ex.DD;245:P.9,Ex.DD).

On August 16, 2011, Matthew had an MRI conducted, still had pain in the neck and right arm, and proceed with PT (State's Tr.Ex.4). After the MRI, Miller confirmed that Matthew discussed his issues:

> "fast forward till August, [Matthew] told me that he needed to start going to [PT] because he had some issues and at that point, I don't remember what he said his issues were but he was going to [PT] and so I said, "Okay." (Doc.243:P.6,Ex.DA;245:P.8,Ex.DA).

On September 2011, Robinson notified Matthew and Miller regarding Dr. Willstein and Powell's letter regarding the injuries sustained on May 18, 2011 including medical records. (Doc.243:P.6,Ex.DD;245:P.9,Ex.DD).

On October 4, 2011, Powell observed Matthew's neck, right arm and right upper back issues; Matthew had a soft tissue injury to the cervical spine and rotator cuff impingement syndrome; to start PT, and was given a prescription for Naproxen. (State'sTr.Exhibit:MR-528,529).

On October 4, 2011, Robinson had a conversation with Rocky Mountain PT, "called re UT guidelines for IE accepted POB is rt arm but med supports tx for cervical and shoulder as well. Dr. Powell requesting tx for shoulder impingement and neck. Add cervical and shoulder to claim as IE initially treated for cervical for neck on right and altered sensation to rt arm, whole arm." (**App.I**).

On October 6, 2011, PT Kristin Green (Green) evaluated and treated Matthew for cervical pain, cervical sprain, right shoulder impingement syndrome and recommended PT for 4 weeks. (State'sTr.Exhibit:MR-251,252).

On October 7, 2011, Chafee was involved in a unrelated arson and theft, and was arrested by police. *Chafee*,¶7.

On October 10, 2011, Green continued to treat Matthew for injuries s sustained in his 5/18/2011 MVA. (State'sTr.Exhibit:MR-253).

On October 11, 2011, Miller received a call from Chafee from the Missoula County Jail (MCJ) requesting that he provide Matthew with her paycheck so that she could get bonded out. (**App.J**). Later that day, Bondsman Allen Jackson bonded Chafee out of MCJ. (Doc.243:P.5,Ex.CW-CY;245:P.7,Ex.CW-CY).

On October 13, 2011, Green wrote a note for Matthew because he was experiencing numbness and pain in his arm when lifting the burnisher and at the end of the visit provided the note to him. (Tr.at238:3-21).

**9. October 16, 2011 Buffer Accident - #041000734924**

On October 16, 2011, Matthew, Russell, and Chafee arrived at O'Reilly's Auto Parts Store at 6:45PM. (Doc.242:P.17;244:P.20;249:P.17) and finished burnishing the floors at 7:45 PM. (Doc.242:P.17;244:P.20;249:P.17).

Russell and Matthew then proceeded to put the burnisher back in the work truck when the buffer accident occurred and Russell and Chafee helped Matthew to the work truck and all three went to the Community Medical Center (CMC) (Tr.at 667:4-668:13). Chafee, Russell and Matthew all confirmed that they contacted

Miller about the accident on the way to the hospital and Miller confirmed this communication with Robinson.(Doc.243:P.7,Ex.DI,DL,DM;245:P.9,Ex.DI,DL,DM).

They arrived at CMC at 7:55 PM and entered the emergency room at 8:00 PM. At 8:08 PM, Matthew reported what happened to CMC Nurse Rita Webber. (Doc.242:P.17;244:P.20;249:P.18;Ex.CL). CMC medical documentation showed the buffer accident occurred at 7:45PM. (Doc.242:P.17;244:P.20;249:P.18;Ex.CM). The arrival and departure times were verified. (Doc.242:P.17;244:P.20;249:P.18;Ex.CN).

Chafee and Russell falsely testified that they staged the accident by placing a buffer on Matthew and jumping on it, and later, pummeling him with punches to create bruises (Tr.at471:22-474:16;445:22-446:10). But when Matthew went CMC, he showed no discernable injuries, bruising or otherwise (Tr.at175:8-12).

Dr. Jurist testified at trial that he would have expected to see physical injuries from such an event, and found Chafee and Russell's story to be "questionable" given the lack of any physical injuries (Tr.at293:1-24).

Chafee admitted to lying to police in past cases (Tr.at501:5-8). Chafee testified that her parole eligibility was threatened by the possibility of these new charges, and she changed her story only after accepting a plea deal (Tr.at506:8-11;521:2-8).

Russell could not explain the inconsistencies of the many statements he gave (Tr.at447:1-24).

Huesby could not explain the inconsistencies of Chafee and Russell's story (Tr.at607:25-609:20).

Unaware of Poppler's investigation, Wisse and her neighbors observations, and CMC's medical records, Russell and Chafee provided interviews that were not consistent with the facts and contradicted themselves and each other. (Doc.242:P.7,Ex.O,P,Q,R,S,T,U,V,W;244:P.10,Ex.O,P,Q,R,S,T,U,V,W).

When Matthew became aware that he was being investigated by DCI, he repeatedly told Chafee in recorded jail calls to "tell the truth" if she was questioned about the accident (Tr.at507:13-18). On October 18, 2011, Miller sent an email to Robinson stating, "Here is the letter from Matt's physical therapist." (**App.K**).

On October 18, 2011, Miller falsely filled out his First Report by failing to list Chafee as a witness; Miller confessed during an unemployment hearing that he met with "Chafee Sunday night October 16 she was a witness to a accident." and Miller did confirm that he did not have any reason to question the accident. (Doc.243:P.7,Ex.DJ,DK;245:P.9-10,Ex.DJ,DK).

On October 19, 2011, Robinson claim policy notes stated, "TW Cory...Cory was notified of injury right away." (Doc.243:P.7,Ex.DI;245:P.9,Ex.DI). October 24, 2011, Matthew filled out his First Report truthfully as Chafee was listed a witness and no safety equipment was provided. (Doc.243:P.7,Ex.DO;245:P.10,Ex.DO).

Vocational Supervisor Jerry Davis (Davis) confirmed his conversation and information provided by Miller with Huesby and Cochenour that there were no ramps available only a two person lift of heavy equipment: ***"And in this case the job required two, maximum lift is 50 to 100 pounds. There's a two person lift of heavy equipment, like a burnisher, propane tank, equipped on the burnisher, and carpet."*** and Davis' report stated, ***"50-100 #'s Two person lift of heavy equipment; burnisher/propane tank; carpet equipment."*** (Doc.242:P.5,Ex.K,L,M).

The State persuaded DC that Miller failing to ensure the safety and welfare of his employees was inadmissible "character evidence." (Doc.75:P.7).

> "Miller had been given notice by medical professionals that Mr. Ailer was to be placed on light duty work with physical restrictions. Instead of following this, and making reasonable accommodations (as is required under the law) he failed to provide ramps to vehicles, and failed to reasonably accommodate Mr. Ailer for his medical condition." (Doc.94:P.6-7).

On March 13, 2012, Buchanan contacted Miller who learned from Russell the location of the alleged staged accident. Miller stated he contacted neighbors of 1637 Idaho Street who did not see/hear anything regarding the alleged staged accident. (Doc.242:P.4,Ex.C,D;244:P.7,Ex.C,D).

On March 21, 2012, Buchanan contacted Loretta Wisse, owner of 1637 Idaho Street, who did not witness any incidents taking place in front of her residence. (Doc.242:P.4,Ex.C,D;244:P.7,Ex.C,D).

**10. The State's Egregious Misconduct**

**A. Altered Medical Records Of Jerry Davis**

On February 14, 2014, MSF submitted Notice Of Exchange (NOE) in WCC (Doc.242:P.8,Ex.AB). The exhibits "Ex.18-001" (Doc.242:P.8,Ex.AC) through "Ex.18-029" (Doc.242:P.8,Ex.AC) show Davis' unaltered medical records (MR) under the **first uncontested claim**. Davis' unaltered Health InsuranceForms (HIF) (Doc.242:P.8,Ex.AD) and Robinson's Explanation Of Benefits (EOB's) (Doc.242:P.8,Ex.AE) stated that Davis' bills and medical services were paid under the **first uncontested claim**. Cochenour, Huesby, and Robinson had access to these unaltered medical records and HICF's. Cochenour then submitted the altered MR's (Doc.242:P.8,Ex.AF) of Davis in State's Exhibit 1 where the **first uncontested claim** number was changed to the **second contested claim** number without the permission of Davis or the patient Matthew. Cochenour, Robinson, Huesby, and MSF were all aware that Davis' medical services and bills totaling $2,898.41 were under the **first uncontested claim** because it was not submitted during the restitution hearing as a loss benefit. (Doc.206).

### B. Altered Medical Records Of Dr. Powell

MSF submitted NOE in WCC (Doc.242:P.9,Ex.AG). The exhibit "Ex. 8-006" (Doc.242:P.9,Ex.AH) shows the unaltered Powell's 10/20/11 MR under the **first uncontested claim**, the exhibit "Ex. 8007" (Doc.242:P.9,Ex.AI) shows the unaltered Powell's 10/20/11 second page MR under the **first uncontested claim**, and the exhibit "Ex.8-008" (Doc.242:P.9,Ex.AJ) shows the unaltered Powell's 10/20/11 Medical Status Form under the **first uncontested claim**. Powell submitted his unaltered 10.20.11 MR, unaltered 10.20.11 medical status form, 10.20.11 unaltered HICF under the **first uncontested claim** and 5.18.11 injury as requested by Robinson. (Doc.242:P.9,Ex.AK). Robinson reviewed Powell's 1.31.2012 MR and determined it was related to the **first uncontested claim** in her EOB. Robinson paid Powell $308.76 for his treatment of injuries sustained in the 5.18.11 MVA. (Doc.242:P.9,Ex.AL). Cochenour, Huesby, and Robinson had access to these unaltered MR's, medical forms, and HICF's. Cochenour then submitted the altered medical status forms, HICF's and medical records (Doc.242:P.9,Ex.AM) of Powell in State's Exhibit 1 where the **first uncontested claim** number was changed to the **second contested claim** number without the permission of Powell or the patient Matthew. Although Powell's 10.20.11 and 1.31.2012 bills totaling **$603.83** occurred after October 16, 2011, they were considered under the **first uncontested claim** and

were not submitted during the restitution hearing as a loss benefit by either MSF or the State. (Doc.206).

### C. False Testimony By Robinson And Huesby Regarding The First Uncontested Claim Medical Records and Bills

Robinson and Huseby testified that Davis, Powell, Dr. Capps, Missoula Radiology, Stratford and CMC bills and medical services were related to the **second contested claim** and were improperly received benefits. Robinson testified that Davis, Capps, Powell and Stratford medical services and bills were a loss to MSF. (Tr.at171,172). Huseby testified falsely on a material factual issue that after Powell released Matthew back to work in October the **first uncontested claim** was essentially over and any benefits after October 16, 2011 were defrauded to the insurance company on a false claim. (Tr.at601,620). The State furthered elicited false testimony from Huseby that only evidence of the amount on the **second contested claim** number was brought into evidence (Tr.at623). Huesby testified that Stratford's bill was a loss to MSF. (Tr.at601:14-25).

Although the following medical services and bills totaling $13,975.71 occurred after October 16, 2011, they were considered under the **first uncontested claim** and were not submitted during the restitution hearing as a loss benefit (Doc.206).

1. CMC. Robinson paid $4,042.50. (Doc.242:P.10,Ex. AN).

2. Missoula Radiology. Robinson paid $195.84. (Doc.242:P.10,Ex. AO).

3. Stratford's office called Robinson inquiring about what claim number should be used for billing. Robinson responded to use the first claim. (Doc.242:P.10,Ex. AP). Stratford submitted his HICF. (Doc.242:P.10,Ex.AQ). Robinson paid Stratford $4,750. (Doc.242:P.10,Ex.AR).

4. Capps. Robinson paid $1,350. (Doc.242:P.10, Ex. BA).

5. Davis. Davis submitted his June 15, 2012 MR (Doc.242:P.11, Ex.BB), HIF (Doc.242:P.11,Ex.BC) and Robinson paid $975.61 (Doc.242:P.11,Ex.BD). Davis submitted his 7/15/12 MR (Doc.242:P.11,Ex.BE), , HIF (Doc.242:P.11,Ex.BF) and Robinson paid $819.00 (Doc.242:P.11,Ex. BG).

   Davis submitted his 8/22/12 MR (Doc.242:P.12,Ex.BH), HIF (Doc.242:P.12,Ex.BI) and Robinson paid $793.00 (Doc.242:P.12,Ex. BJ). Davis submitted his 1/22/14 MR(Doc.242:P.12, Ex.BK), HIF (Doc.242:P.12, Ex.BL)

and Robinson paid $67.20 (Doc.242:P.12, Ex.BM).

Davis submitted his 12/20/13 MR (Doc.242:P.12,Ex.AN), HIF (Doc.242:P.12,Ex.BO) and Robinson paid $243.60 (Doc.242:P.12,Ex.BP).

### D. False Testimony During The Sentencing Hearing

MSF Claims Examiner Suzanna Simmons falsely testified that all bills was paid on the second claim. (SentTr.at17:1-5;20:23-21:1). However, Missoula Radiology (Ex.AO), CMC (Ex.AN), Stratford (Ex.AP-AR), Capps (Ex.AS-BA), Davis (Ex.BB-BP) and Powell's (Ex.AL) medical services and bills totaling $13,975.71 occurred after October 16, 2011, and they were considered under the **first uncontested claim** and were not submitted as loss benefits. (Doc.243:P.15).

### E. Brady Violations

#### 1. During Sentencing Hearing

The State provided DC with Brady evidence during the sentencing hearing that were not turned over before trial. (Doc.242:P.12,Ex.BQ). These documents indicated Robinson approved payments for CD treatment. Robinson authorized treatment for CD because it was related to Matthew's claims. (Doc.243:P.16,Ex.EB). This Brady evidence contradicted Robinson's perjured testimony that Matthew was never treated for CD and his CD was not related to his claims. (Tr.185:21-186:4;187:5-11).

### 2. 154 Pieces Of Brady Evidence Not Disclosed

The State admitted they have and gave to MSF the 154 pieces of Brady Evidence but continues to withhold it. (Doc.242:P.13,Ex.BR). Some examples:

**(a)** Miller's Interview With Russell (Doc.242:P.13,Ex.BS-BX)

**(b)** Huesby's Original Report (Doc.242:P.13,Ex.BY)

**(c)** Capps' Notes (Doc.242:P.13,Ex.BZ)

**(d)** Davis' Physical File (Doc.242:P.13,Ex.CA)

**(e)** Green's Medical Record (Doc.242:P.14,Ex.CB,CC)

**(f)** Miller's Pictures Of MVA (Doc.242:P.14,Ex.CD)

**(g)** Robinson's Interviews With Miller & Chafee (Doc.242:P.14,Ex.CE,CF)

**(h)** The Agreement Between DOJ, Cochenour, Huesby and Miller. (Doc.242:P.14-15,Ex.CG-CK).

## F. False Allegations That There Were Ramps Available

Cochenour (Tr.at111:8-16;112:16-17;656:1-4;719:13-19), Miller (Tr.at211:11-23;234:14-15), and Russell (Tr.at446:16-22) falsely testified that there were ramps available. **FACTS:** Cochenour and Huesby prior to trial found that there were no ramps available: Davis confirmed his conversation and information provided by Miller with Huesby and Cochenour and in his report that there were no ramps avaiable only a two person lift of heavy equipment. (Doc.242:P.5,Ex.K,L,M).

## G. Perjured Testimony And Additional Misconduct

The State presented perjured testimony from Huesby (Doc.243:P.1,Ex.CO; Doc.242:P.5-6,Ex.K,L,M;Doc.242:P.9-12,Ex.AN-BP); Gabrielle Weiss (Doc.243:P.3-4,Ex.CT-CV); Miller (Doc.243:P.5-7,Ex.DA-DP;P.7-8,Ex.K,L,M); Dr. Jurist (Doc.243:P.16-17,Ex.EC-EJ); Chafee (Doc.243:P.4-5,Ex.CW-CZ;P.8-15,Ex.DQ DZ;Doc.242:P.7,Ex.Q).

Matthew was not in financial distress due to the alleged garnishment or credit card debt. (Doc.243:P.17,Ex.FE).

The State submitted false information in their medical subpoena (**App.L**) that was not consistent with Poppler's investigation, Green's medical records, doctors findings, other exculpatory evidence.

The State submitted false information in the charging documents (Doc.1,3) that was not consistent with the aforesaid evidence. There is additional misconduct in the Motions that were filed. (Doc.242-245,249,250).

## ARGUMENT

Matthew has maintained his **innocence** since the beginning and through all legal proceedings. On April 10, 2014, Matthew pled "Not Guilty" (Doc.11). On April 30, 2015, Matthew declined the State's plea offer (Doc.78). On December 11, 2015, at trial and on March 24, 2016, during the sentencing hearing, Matthew continued to maintain his innocence. (Tr.at673:3-10;Sent.at41:21-23).

It is incumbent on the Courts to ensure that the criminal justice system promotes a public perception of legitimacy and impartiality. This is particularly true in the current cultural climate in which questions about the justness and fairness of the criminal justice system are being raised all across the country, as well as here in Montana.

Given the reality that Matthew has already wrongfully served a deferred sentence of six years, it is impossible to argue that an institution committed to the integrity of the judicial system would turn its eyes from the problematic questions underlying Matthew's trial.

Most notably, the DC's silence regarding a wrongful conviction that was secured through a bias investigation and prosecution, perjured testimony from witnesses, withheld Brady evidence, submitted altered medical records and bills, and

allowed perjured testimony on those altered medical records and bills in violation of the MRPC is of great concern.

A fulsome analysis is justified and required to maintain the integrity of the judicial system and our democracy. Denying Matthew a new trial and or to waive the unjust restitution at this stage would be a waste of judicial resources at best, and an unnecessary act of judicial cruelty at worst.

This Court is invaluable in ensuring both justice and the *appearance* of justice, which is of vital importance in ensuring that Montana citizens have faith in the Court system and remedy the injustice in this case.

The evidence of Matthew's innocence and the unconstitutional and unethical mishandling of his case are overwhelming, and this Court can and must do something about it. This case is a manifest injustice and the reality of Matthew's wrongful conviction threatens the integrity of the judicial system.

The DC concluded the Rule 60(B), the State violated the MRPC, and to waive Restitution Motions as moot because Matthew's deferred sentence had expired without revocation. (Doc.266). This Court should apply the exceptions to mootness for the issues raised and reach the merits of this appeal.

## I. The District Court erred by denying Matthew's requests for relief from his wrongful conviction and illegitimate restitution as moot because the sentence expired without revocation

### 1. Matthew's issues are not moot simply because the sentence expired

#### A. Expiration of a sentence cannot moot Matthew's Motions for relief and because he suffers collateral consequences

The US Supreme Court has held that a criminal case is not moot if there is a possibility that any collateral legal consequence will be imposed on the basis of the challenged conviction. Pollard v. U.S. (1957), 352 U.S. 384, 77 S.Ct. 481, 1 L.Ed.2d 393; and Pierre v. U.S (1943), 319 U.S 41, 63 S.Ct. 910, 87 L.Ed. 1199.

This Court held to the same effect in Town of White Sulphur Springs v. Voise (1959),136 Mont.1, 343 and State v. Standley, 192 Mont. 54 (1981). Also see: Fiswick v. US, 329 U.S. 211,67 S. Ct. 224,91 L. Ed. 196; Burris v. Davis, 46 Ariz. 127,46 Pac.1084, 1086; State v. Dawn, 41 Idaho 199,239 Pac. 279; Weaver v. Kimball, 59 Utah 72,202 Pac.9; State v. Jacobson, 348 Mo. 258, 262,152 S.W. (2d) 1061,1064,138 A.L.R. 1154; and NC v. Rice, 404 U.S. 244, 247 (1971).

In Walker v. State, 2003 MT 134, ¶¶41-43, 316 Mont.103 ("appeal is not moot merely because he has been released from custody"). See also Wier v. Lincoln Cnty. Sheriff's Dep't, 278 Mont. 473, 475-76 (1996).

A case is not moot simply because the expiration of a sentence and that a defendant has the right to undo the disgrace and legal discredit of a conviction. (Commonwealth v. Fleckner, 167 Mass. 13, 44 N.E. 1053); see also Village of Avon v. Popa, 96 Ohio App. 147, 121 N.E. (2d) 254, 255,256; Barthelemy & De Bouillon v. People, 1842, 2 Hill, N.Y., 248,255,256; Roby v. State, 96 Wis. 667, 670, 71 N.W. 1046, 1047; In re Lincoln, 102 Cal. App. 733,736, 283 Pac. 965,968; Garabedian v. Commonwealth, 336 Mass. 119, 142 N.E.2d 777,778; Sloane v. Anderson, 57 Wis. 123, 13 N.W. 684. Wisconsin v. Constantineau, 400 U.S. 433,437 (1971); *In re Winship*, 397 U.S. 358,363-354 (1970).

In Minnesota v. Dickerson, 508 U.S. at 371 (1993) ("We have often observed...the possibility of a defendant's suffering" collateral legal consequences 'from a sentence already served' precludes a finding of mootness.") (quoting Pennsylvania v. Mimms, 434 U.S. at 108 (1977)).

A case is not moot despite completion of the sentence where the conviction may be used for impeachment, rebut character evidence by defendant and for sentencing purposes in future criminal proceedings. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Benton v. Maryland, 395 U.S. 784, 790-791 (1969); Pennsylvania v. Mimms, 434 U.S. 106,108 (1977); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 (1969); Dancy v. US, 361 F.2d 75 (D.C.Cir.1965);

Harrison v. Indiana, 597 F.2d II 5, 117 (7thCir.1979); US v. Morgan, 346 U.S. 502, 512, 513, 74 S.Ct. The Sibron court specifically stated, "We have concluded that the case is not moot...mere possibility that a conviction may result in collateral consequences is enough to preserve a criminal case from ending ignominiously in the limbo of mootness."). (Sibronat50,52,55).

If the defendant can point to some "disabilities or burdens (which)...flow from" his conviction even after his release from prison, then he retains "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" and therefore presents a justiciable controversy. Carafas v. LaVallee, 391 U.S. at 237 (1968) (quoting Fiswick v. US, 329 U.S 211, 222 (1946)). See also US v. Juvenile Male, 564 U.S. at 936 (2011); Evitts v. Lucey, 469 U.S. 387,391(1985); Hinkson v. Stevens 2020 VT 69 ¶18, 213 Vt. 32 239; In re Chandler, 2013 VT 10, ¶¶6,12-13, 193 Vt.; Chacon v. Wood, 36 F.3d 1459 (9thCir.1994); Ginsberg v. NY, 390 U.S. 629, 633-634; Chretien v. Chretien, 2017 ME 192, ¶9, 170; and Hinkson v. Stevens 2020 VT 69 ¶18 213 vt 32, 239 A.3d.

(i) **Matthew Still Faces Disabilities, And Collateral Consequences From The Wrongful Conviction**

(1) The discredit and stigma which wrongly rests on Matthew's name and reputation.

(2) The disgrace and legal discredit and the public morals and citizenship aspects of a conviction.

(3) The impeachment on future civil/criminal cases.

(4) Rebut an character evidence adduced by Matthew in future civil/criminal cases.

(5) Record of conviction would be made available to the Judge prior to imposition of any future sentence.

(6) Subsequent conviction may carry heavier penalties.

(7) It has prevented Matthew access to effective and expert treatment providers. (**App.M**).

(8) It has prevented Matthew access to workers compensation,disability, and social security benefits.

(9) It has prevented Matthew from returning to work because of his mental health and medical conditions that cannot be treated effectively due to the conviction.

(10) The conviction has been used against Matthew in *State v. Ailer,* CDC-2014-98; Appeal (DA 16-0240);

*Ailer v. State,* DV-21-480 (DA 21-0367;DA 23-0155); Ailer v. State, CDV-2019-514 (DA 22-0346); DDV-2016-110 (DA 23-0185); and will be used in this appeal.

(11) Jury Duty: challenge for cause; unable to hold public office

(12) Restrictions on employment, housing, and adoption.

(13) Any MT licenses will be denied when the 1) the conviction "relates to the public health, welfare, and safety as it applies to the occupation for which the license is sought," and 2) the licensing agency finds, after investigation, that the applicant has not been "sufficiently rehabilitated." See §37-1-203, MCA.

(14) Denial Of Permits. *See Smith v. County of Missoula*, 297 Mont. 368 (Mont. 1999)(record of dismissed deferred charges became CCJI, rather than expunged material, and thus sheriff was authorized to review his file in determining whether to grant or deny his

application for permit).

(15) The conviction will be used against Matthew in WCC 2013-3275. The State agreed that the CCJI file and conviction can be used against Matthew for MSF to defend their case. (Doc.243:P.18,Ex.FE,FF).

(16) Matthew's conviction and CCJI file related to his case can be accessed by any Judge, law enforcement, to those authorized by law to receive it, and to those authorized to receive it by a DC order pursuant to 44-5-303, MCA and 46-18-204, MCA. The conviction and the CCJI file can be used against Matthew for any proceeding and anyone can have access to it because MSF easily obtained the CCJI file. Additionally, Matthew's individual privacy will continue to be violated.

(17) The news articles of the arrest, conviction, charging documents are also online.

(18) The State has acknowledged that Matthew would suffer collateral consequences, "due to the fact that

a finding of guilty would negatively affect his medical treatment and payment of bills.(Doc.75:P.3).

(19) Loss of presumption of innocence:"[a]fter a judgment of conviction has been entered, however, the defendant is no longer protected by the presumption of innocence." McCoy v. Ct. of Appeals of Wis., Dist. 1, 486 U.S. 429, 436 (1988).

(20) Obligated to pay illegitimate restitution

### B. The Continued Existence Of The Wrongful Conviction Violates Matthew's Right's To Due Process And Right To Equal Protection

The continued existence of Matthew's conviction, despite the expiration of his sentence, violates his right to due process and equal protection of the law under the Fifth and Fourteenth Amendments of the US Constitution and without an opportunity for relief, exoneration, a fair trial, expungement or other relief, is arbitrary and deprives Matthew of a fundamental liberty interest in a clean slate and equal access to employment, housing, medical and government benefits, and other opportunities.

The right to due process of law includes the right to be free from arbitrary government action that deprives an individual of their fundamental liberty interests.

See Zinermon v. Burch, 494 U.S. 113, 125 (1990). The purpose of criminal punishment is to deter future criminal conduct and protect public safety. See US v. Bajakajian, 524 U.S. 321, 335 (1998).

However, The Supreme Court has long recognized that the Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated individuals equally under the law. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Matthew is being treated differently from other individuals who have never been convicted of a crime. Unlike individuals who have never been convicted, Matthew is subject to various collateral consequences as a result of his conviction.

The purpose of collateral consequences is to deter criminal conduct and protect public safety. However, once Matthew has served his sentence there is no longer any need to deter his conduct or protect public safety through continued existence of his conviction and the imposition of collateral consequences.

Matthew's conviction violates his right to equal protection of the law under the Fourteenth Amendment because Matthew is being treated differently from other individuals who have never been convicted of a crime, and that this differential treatment is not supported by any legitimate State or DC interest.

The Fourteenth Amendment also guarantees the rights to a fair trial. It cannot be said that Matthew received a fair trial.

### 2. If This Court Determines The Issues Are Moot Then This Court Should Apply The Exceptions To The Mootness Doctrine

Matthew brought this case to challenge his wrongful conviction and restitution. Although Matthew's deferred sentence has expired without revocation, this Court should decide the merits of this case because three exceptions to mootness doctrine apply. This Court recognizes several mootness exceptions, including "public interest," "voluntary cessation," and "capable of repetition, but evading review." Havre Daily News, LLC v. City of Havre, 2006 MT 215, ¶¶1-48.

This Court "consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance." Ramon v. Short, 2020 MT 69, ¶22, 399 Mont. 254, 460 and *Walker*, ¶¶ 41-43. Ramon, ¶24 (noting that a ruling would benefit the government officers at issue by providing "authoritative guidance on an unsettled issue" in the absence of an existing [MSC] ruling on the matter). This Court "reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law." See *Walker,* ¶41.

The State's same egregious misconduct has previously and still continues in multiple legal proceedings: *State v. Ailer,* CDC-2014-98; *State v. Ailer,* DA-16-0240 (Direct Appeal); *Ailer v. State,* CDV-2019-514 (on appeal: DA 22-0346) and *Ailer*

*v. State,* DV-21-480 (on appeal: DA 23-0155); MSF Application For CCJI: DDV-2016-110 (on appeal: DA 23-0185); and presumably in this appeal.

This misconduct applies to three mootness exceptions discussed below.

**A. The Capable of Repetition, Yet Evading Review Exception** This exception applies where: (1) the challenged action is too short in duration to be fully litigated prior to cessation; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. Skinner Enters, Inc. v. Lewis & Clark City-County Health Dep't., 1999 MT 106, ¶18, 294 Mont.

This exception requires that "the challenged action must be too short in duration to be fully litigated prior to cessation." Gateway Opencut Mining Action Group v. Bd of County Comm'rs, 2011 MT 198, ¶22, 361 Mont. 398, 260.

This case was too short in duration before this Court could fully adjudicate this matter on appeal and the State's misconduct still continues in the aforementioned cases.

While this mootness exception often involves "a reasonable expectation that the same complaining party would be subject to the same action again," Gateway Opencut, 2011 MT 198, ¶22, that is not an absolute requirement.

When fundamental issues are at stake, this Court applies the exception where it is clear the challenged practice is likely to recur and evade review as to someone,

even if not Matthew. See *Walker,* ¶¶39,44; *Wier,*475-76; In Matter of N.B. (1980), 190 Mont. 319, 322-323; see also, In re Mental Health of K.G.F., 2001 MT 140, ¶¶18-20, 306 Mont.; Matter of D.L.B., 2017 MT 106, ¶12, 387 Mont.

**B. Voluntary Cessation Exception**

"A defendant's voluntary cessation of conduct **cannot** moot a case unless it is **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur." Wilkie v. Hartford Underwriters Ins. Co., 2021 MT 221, ¶10, 405 Mont. 259.

This exception addresses the concern that defendants may seek to evade judicial review and "manipulate the litigation process." Havre Daily News, ¶34.

It also addresses the concern that defendants will "attempt to moot only a plaintiff's meritorious claims" and avoid an undesirable judgment on the merits, "particularly ... in situations when one would expect the same defendant to encounter substantially identical future controversies." Wilkie, ¶9.

A defendant who voluntarily ceases its challenged conduct and argues mootness therefore must carry a "heavy burden" to show that the conduct "cannot reasonably be expected to start again." Havre Daily News, ¶34; Wilkie, ¶10.

In this case, the State strategically filed a Motion To Dismiss PTR. (Doc.264). DC dismissed the PTR. (Doc.265). This allowed the DC to moot Matthew's Motions

(Rule 60(B):Doc.242,243;State violated MRPC:Doc.244,245) in DC's Order On All Pending Motions (Doc.266) and for the State to avoid an adverse ruling.

This action does not moot the case because the misconduct still continues. See Heisler v. Hines Motor Co., 282 Mont. 270, 937 (1997); Montana-Dakota Util. Co. v. City of Billings, 2003 MT 332 ¶ 8, 318 Mont. 407, 80. A final adjudication would provide useful guidance that may obviate future violations.

### C. The Public Interest Exception Applies

The public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer will guide public officers in the performance of their duties. *Gateway*, ¶14.

The following are questions of utmost public importance and are recurring issues for Matthew and other defendants. An answer would benefit prosecutors, judges and officers by providing the "legal power of a public official", "providing authoritative guidance on unsettled issue regarding their authority...particularly given there is no [MSC] ruling addressing this issue." *Ramon,*¶22-25.

Whether a prosecutor has the authority to wrongfully convict Matthew and other defendants by violating the MRPC and Rule 60(B) by conducting a bias investigation and prosecution; using perjured testimony from witnesses; withholding Brady evidence; submitting altered medical records and bills; and improperly using a

PFO against the co-defendants to encourage cooperation to provide perjured testimony at trial.

Whether a Judge has the authority to moot a case where the State conceded that they committed misconduct in violation of the MRPC and Rule 60(B); violated the Montana Code of Judicial Conduct (MCJC) by failing: to take appropriate action against the prosecutor that violated the MRPC; to hold a mandated waiver of restitution hearing and for Matthew to be heard; and not enforcing the Brady rule, statutory requirements, and MRPC.

## II. The District Court erred by denying the Motion For Relief Pursuant To Mont. R. CIV PRO 60(B) and the Motion the State Violated The Montana Rules Of Professional Conduct as moot and judicial approbation of the State's egregious misconduct

Cochenour interviewed all doctors and witnesses in this case. (**App.N**). The State conceded to Matthew and DC as the facts and evidence were well taken and undisputed.

The State served subpoenas (Doc.222-228) to State's witnesses but none of them provided an affidavit to dispute the facts and evidence that they committed perjury that is identified in the Rule 60(B) and the State violated the MRPC.

### 1. Motion For Relief Pursuant To Mont. R. Civ PRO 60(B)

The State committed egregious misconduct, misrepresentation, deceit and fraud upon the DC and Matthew. (Doc.242:P.4-Doc.243:P.20)

Mont. R. Civ. Pro Rule 60(B) permits a party to be relieved from a final judgment order or proceeding on motion for (3) fraud, misrepresentation, or misconduct by an opposing party, and (6) any other reason that justifies relief. See Skogen v. Murray, 2007 MT 104, ¶13.

Pursuant to Rule 60(b)(3), "A court may set aside a judgment if a party engaged in fraud, misrepresentation, or misconduct by an opposing party." Wickens v. Shell Oil Co., 620 F. 3d 747, 758 (7thCir.2010). Since fraud on the court is more serious than fraud on the opposing litigant, the party complaining about the fraud is not bound by the one-year limitation on motions to vacate a judgment because of fraud. Fed.R.Civ.P. 60(b).

Since attorneys are officers of the court, if dishonest, would constitute fraud on the court. Kupferman v. Consolidated Research Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir.1972). The fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 (1944).

A saving clause in Rule 60(b) provides: "This rule does not limit the power of a court to entertain an independent action...to set aside a judgment for fraud upon the court." to prevent grave injustice. Dausuel v. Dausuel, 90 U.S.App.D.C. 275, 195 F.2d 774 (1952); US v. Beggerly, 524 U.S. 38, 47 (1998).

This case is similar to Klapprott v. US, 335 U.S. 601, at 613-16 (1949) in which the petitioner sought and was granted relief under Rule 60(B) four years later after the judgment due to the exceptional circumstances of the case and the fact that the petitioner had not had a fair trial.

The policy of deterring misconduct which threatens the fairness and integrity of the fact finding must outweigh considerations of finality. See Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir.1978).

This Court "need to maintain institutional integrity and the desirability of deterring future misconduct." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1stCir.1989).

The DC failed to hold the State accountable for the egregious misconduct by not following the unambiguous language dictated in Rule 60(B). The unrefuted exculpatory evidence provided to DC (Doc.242:P.4-Doc.243:P.20) clearly demonstrated the misconduct met the criteria under Rule 60(B) and would permit the DC to grant relief in the form of a new trial.

### 2. Motion the State Violated The Montana Rules Of Professional Conduct

The State violated the Montana Rules Of Professional Conduct "MRPC": Preamble and Rules 3.3, 3.4, 3.8, 4.1, 8.3 and 8.4. (Doc.244:P.2-4). The State disregarded their ethical and moral obligations and the oath to abide by the Rules. The DC failed to hold the State accountable for the egregious misconduct by not following the plain language dictated in the MRPC.

The unrefuted exculpatory evidence provided to DC (Doc.244:P.7-Doc.245:P.20) clearly demonstrated that the misconduct met the criteria under the MRPC and would permit the DC to grant relief in the form of a new trial.

## III. The District Court erred by denying the Motion For The Court To Waive Restitution Pursuant To §46-18-26, MCA by failing to hold a hearing and waive restitution as unjust to require payment as imposed

Section §46-18-246, MCA provides "[a]n offender may at any time petition the sentencing court to adjust or otherwise waive payment of any part of any ordered restitution or amount to be paid." A Motion to waive restitution was filed. (Doc.249,250). Pursuant to §46-18-246, MCA, where adjustment or waiver of payment of restitution is sought, the court is required to set a hearing and give the victim opportunity to be heard. State v. Lodahl, 2021 MT 156, ¶26, 404 Mont.

First, the DC failed to follow §46-18-246, MCA, by not holding a hearing as required, not giving notice to MSF, not allowing MSF an opportunity to be heard, and not allowing Matthew to challenge and put on evidence that it would be unjust to require payment as imposed. Second, the DC erred by not adjusting or waiving restitution as unjust to require payments as imposed.

In *State v. Erickson*, 2018 MT 9, ¶16, 390 Mont. 146, 408, this Court explained the "four conditions that would permit a court to adjust or waive restitution: (1) the circumstances upon which the court based the imposition of restitution no longer exist; (2) the amount of the victim's pecuniary loss no longer exists; (3) the method or time of payment no longer exists; or (4) that it otherwise would be unjust to require payment as imposed." and held that an offender bears the burden "to request and factually demonstrate his eligibility for relief under at least one of the four conditions." *Erickson*, ¶ 17.

Matthew clearly raised and demonstrated that the criteria under the fourth condition had been met with unrefuted exculpatory evidence: the State acquired the restitution illegitimately through misconduct; Matthew has no income, no assets, and has been on medical leave and unable to return to work because of his conditions; and the wrongful conviction has prevented access to benefits, and because of these issues it would be unjust to require payment. (Doc.249:P.5-Doc.250:P.18).

The State conceded to Matthew and DC as the facts and evidence were well taken and undisputed in that the restitution should be waived.

During the sentencing hearing, DC was fully aware that Matthew has no income (Doc.199:PSI) and Probation Officer Monty Warrington testified that Matthew is unemployed, having conditions not allowing return to work, no income, and financial dependent on his family. (Sent.at9:7-19). DC confirmed that Matthew did not have income. (Sent.at52:12-17).

On January 23, 2017, the DC made a determination that it was unjust to require payment for probation supervision because Matthew had limited funds (lack of income) and being taken care of financially by his parents. (Doc.219).

On February 25, 2022, Bakerowski asserted that Matthew had done well on supervision, had not violated any of his conditions, and has not missed a payment of $50 while on supervision since March 24, 2016. (Doc.248:P.3-5).

Bakerowski declared that Matthew paid $250 in supervision fees, $370.00 in restitution fees, $3,330 in restitution, and that co-defendant Chafee paid $0 in restitution. (**App.O**).

Bakerowski informed Brooke that Matthew has no ability to make a larger payment towards restitution; is not employed; has no discernable income; and payments made towards restitution have come exclusively from his parents. (**App.P**).

The DC concluded the waiver of restitution was moot because Matthew's deferred sentence had expired. (Doc.266). This conclusion is illogical and unfair to impose on innocent Matthew. DC ignored the uncontroverted evidence of Matthew's critical financial situation, the misconduct by the State and MSF in obtaining the restitution illegitimately, and then failed to appropriately apply §46-18-246, MCA, to waive restitution as unjust.

This Court determined that the DC failed to appropriately apply §46-18-246, MCA by ignoring and misapprehending the uncontroverted evidence of Lodahl's dire financial situation and reversed and remanded to waive Lodahl's payment of restitution imposed. Lodahl, ¶¶31,32.

This Court should waive restitution in this case as in *Lodahl* or reverse and remand this case back to DC and direct the DC to hold a hearing and then make a determination on the merits before making final decision on whether or not to waive restitution.

## IV. The District Court erred by failing to hold the State accountable for their egregious misconduct that influenced the jury and the Court by failing to maintain institutional integrity in deterring future misconduct and by failing to grant a new trial and waive restitution in the interest of justice and fundamental principles of fairness

The DC judge shall comply with the law including the MCJC. *Rule 1.1*.

A judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law. *Rule 2.6(A)*.

The DC failed to follow this rule by not holding a mandated waiver of restitution hearing and for Matthew to be heard as mandated pursuant to §46-18-246, MCA; striking the unrefuted exculpatory evidence from the record (as "unduly burdensome") and failing to send the evidence to this Court.

Pursuant to Mont. R. Evid. 202(b)(6); 201(b)(2); 201(d); 201(f) the exhibits for the Rule 60(B) Motion (**App.Q**), State violated MRPC Motion (**App.R**), and the Motion to waive restitution (**App.S**) have been provided on a DVD-R to reconstruct the exhibits and for this Court to review when determining the merits of this appeal.

A judge: shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary *Rule 1.2;* who receives information indicating a substantial likelihood that a lawyer has committed a violation of the [MRPC] shall take appropriate action *Rule 2.16(D);[1];* shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially *Rule 2.2; and* shall perform the duties of judicial office without bias or prejudice. *Rule 2.3(A);[1].* The DC violated these rules by the following means:

The DC failed to waive restitution as the unrefuted exculpatory evidence provided to DC (Doc.249:P.5-Doc.250:P.18) clearly demonstrated that it would be unjust to require payment as imposed.

The DC failed to hold the State accountable for the egregious misconduct in the Rule 60(B) and State violated MRPC Motions. (Doc.242-245). The unrefuted exculpatory evidence provided to DC (Doc.242:P.4-Doc.243:P.20;Doc.244:P.7-Doc.245:P.20) clearly demonstrated that the misconduct met the criteria under the MRPC and Rule 60(B) would permit the DC to grant relief in the form of a new trial.

DC failed to grant a new trial and hold the State accountable for wrongfully convicting Matthew that was secured through the following means:

**Submitted Altered Medical Records And Bills**

Miller v. Montgomery County, 494 A.2d 761, 768 (Md.App.1985) (the government's action in altering evidence to conceal a defect "may be taken as an indication of consciousness of the weakness of the county's case and a belief that its defense would not prevail without the aid of such improper tactics"). See also District of Columbia v. Perez, 694 A.2d 882 (D.C.1997)

"A deliberate deception on the part of the prosecution by the presentation of known false evidence is not compatible with the 'rudimentary demands of justice.'" US v. Antone, 603 F.2d 566, 569 (5thCir.1979).

## Perjured Testimony

("[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair."). US v. Agurs, 427, 569 U.S. 97, 103 (1976). Pyle v. Kansas, 317 U.S. 213, 216 (1942) (granting relief to defendant who established that prosecution knowingly presented perjured testimony and suppressed favorable evidence).

## Withheld Brady Evidence

Most notably, DC failed to enforce the Brady Rule and other discovery obligations dictated in Doc.242:P.15-17. The DC failed to grant Matthew a new trial as the State conceded they violated Brady v. Maryland, 373 U.S. 83 (1963).

"A lawyer shall not: (a) unlawfully obstruct another party's access to evidence..having potential evidentiary value..." (MRPC:3.4). "The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor.." (MRPC: 3.8). §46-15-322, MCA requires the prosecutor make available for examination and reproduction all material within the prosecutor's possession or control. The prosecution also has a continuing statutory duty to provide information to Matthew. §46-15-327, MCA. "The prosecution is constitutionally obligated to provide any exculpatory or impeachment evidence in its possession to the defense." State v. Weisbarth, 2016 MT 214, ¶20, 384 Mont.

"A defendant must show:

(1) the State possessed evidence, including impeachment evidence, favorable to the defense;

(2) the prosecution suppressed the favorable evidence; and

(3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different."

State v. Reinert, 2018 MT 111, ¶17, 391Mont. 263.

The unrefuted exculpatory evidence provided to DC (Doc.242:P.13-17;Ex.BR-CK) clearly demonstrated the State possessed and suppressed the Brady evidence and that it would change the outcome of the case. "We are doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial."). US v. Jackson, 780 F.2d 1305, 1311 (7thCir.1986).

"Once a court finds a Brady Violation, a new trial follows as the prescribed remedy, not as a matter of discretion." US v. Oruche, 484 F.3d 590, 595-96 (D.C.Cir.2007). See also State v. Kaiser, 486 N.W.2d 384 (Minn.1982); US v. Kojayan, 8 F.3d at 1315,1323,1324. (9thCir.1993).

The State continues to withhold the evidence as they successfully blocked Matthew from accessing it in *Ailer v. State,* DV-21-480 which is now under appeal in this Court in DA 23-0155.

The consequences for the State to abide by the Brady Rule and other discovery obligations is much less than withholding Brady evidence and so it will continue to happen.

This Court's ruling in Garding v. State, MT 163, (2020) is a prime example on why the State will continue to withhold evidence. The Honorable Justice's Ingrid Gustafson and Laurie McKinnon gave rational and compelling arguments on why the State violated Garding's due process rights under Brady and that she was entitled to a new trial in their dissent opinion. However, recently U.S. District Court Judge Dana Christensen overturned Garding's conviction and DOJ has until April 21 to either appeal, retry, or be exonerated.

The State will gladly pay the small price of a verbal disapprobation from the Courts as the Brady Rule and other statutes are pretend rules for them to follow as the Honorable Judge Jerome Frank explained in his dissent. U.S. v. Antonelli Fireworks Co. (2dCir.1946) 155 F.2d 631, 661.

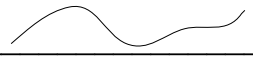
The Honorable Judge Alex Kozinski (US v. Olsen, 9th Cir.2013) explained why the State disregarded the Brady Rule and Montana Law: "Some prosecutors don't care about Brady because the courts don't make them care...There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it".

## CONCLUSION

Find truth, seek justice in that order because you cannot seek justice without first knowing the truth. And, if the truth is hidden, or obscured, by falsehoods and outright lies, you will never find justice. You will never achieve justice and, therefore, you will never fix what happened to Matthew.

If Matthew's Constitutional rights and the fundamental principles of fairness matter, this Court should exonerate Matthew from his wrongful conviction, or at a minimum this Court should reverse and remand, granting Matthew a new trial, waive the illegitimately restitution, or have the DC hold a hearing as mandated in §46-18-246, MCA and hold the State accountable for the egregious misconduct to deter future misconduct in the interest of justice.

Respectfully submitted this 27th day of March, 2023.

By: 

Matthew Ryan Ailer
Defendant and Appellant

## 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 Times New Roman, 14-point font; is double spaced except for lengthy quotations, footnotes, and for quoted and indented material; and does not exceed 12,500 words. The exact words count is 12,499 words as calculated by Microsoft Word software excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, Appendix and Attachments.

## CERTIFICATE OF SERVICE

I certify that I have filed this Opening Brief with the Clerk of the Supreme Court and that I have mailed and/or emailed a copy to each attorney of record and any other party not represented by counsel as follows:

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