
IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0185

IN RE: MONTANA STATE FUND'S
APPLICATION OF RELEASE OF
DEPARTMENT OF JUSTICE
CONFIDENTIAL CRIMINAL
JUSTICE INFORMATION
CONCERNING MATTHEW AILER,
CDC-2014-98

OPENING BRIEF OF DEFENDANT/APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, DDV-2016-110, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE CASE

December 11, 2015, Matthew was wrongfully convicted (Doc.3,P.4;CDC-2014-98:Doc.186). February 2, 2016, Montana State Fund (MSF) filed an Application For The Release Of Confidential Criminal Justice Information (CCJI). (Doc.1). February 5, 2016, the District Court (DC) granted the Application. (Doc.2). March 24, 2016, DC imposed a six year deferred sentence and ordered Matthew to pay restitution to MSF (Doc.3,P.4;CDC-2014-98:Sent.at52:23-24). April 11, 2016, Final judgment was entered (Doc.3,P.4;CDC-2014-98:Doc.207). February 6, 2018, this Court affirmed the wrongful conviction (*State v. Ailer*, 2018 MT 18, 390 Mont. 200). (Doc.3,P.5).

March 22, 2022, the State filed a Petition To Revoke (PTR) (CDC-2014-98:Doc.248). April 22, 2022, Brooke submitted his Motion To Dismiss PTR (**App.A**). May 26, 2022, State filed a Motion To Dismiss PTR (CDC-2014-98:Doc.264). May 27, 2022, DC dismissed the PTR. (CDC-2014-98:Doc.265,266).

August 3, 2022, an Opposed Rule 60(B) Motion and brief in support were filed. (Doc.3,4). No reply brief was submitted by MSF. September 2, 2022, an Opposed Motion To Take Judicial Notice was filed. (Doc.5). September 16, 2022, the Honorable Judge Christopher Abbott recused himself and the Honorable Judge Kathy Seeley assumed jurisdiction. (Doc.6). October 13, 2022, an Opposed Motion

For Relief From Final Order Because MSF Violated The Montana Rules Of Professional Conduct (MRPC) and brief in support were filed. (Doc.7,8). No reply brief was submitted by MSF. November 29, 2022, DC issued an Order denying the Rule 60(B) Motion. (Doc.12). December 22, 2022, an Opposed Motion For Reconsideration Of The Court's Order (Doc.17) was filed. No reply brief was submitted by MSF. March 6, 2023, DC issued an Order denying the Motion For Reconsideration and the Motion that MSF Violated The MRPC. (Doc.19).

STATEMENT OF THE ISSUES

1. The District Court Erred By Denying The Motion For Relief From Final Order Pursuant To Mont. R. CIV Pro 60(B)
2. The District Court Erred By Denying The Motion For Relief From Final Order Because Montana State Fund Violated The Montana Rules Of Professional Conduct
3. The District Court erred by failing to hold Montana State Fund accountable for their egregious misconduct, failing to maintain institutional integrity in deterring future misconduct and by failing to grant relief in the interest of justice and fundamental principles of fairness

STANDARDS OF REVIEW

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. 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. 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.

This Court has an inherent authority to take judicial notice: Mont.R.Evid. 202(b)(6) (Court may take notice of records from any MT court) and Mont.R.Evid.201(b)(2) (Court may take 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 notice if requested by a party and supplied with the information.") and be taken at any stage of the proceeding. (Mont.R.Evid.201(f)).

SUMMARY OF ARGUMENT

Montana State Fund conceded to Matthew and DC the facts and evidence in the Rule 60(B) Motion and the Motion That MSF Violated The MRPC were well taken and undisputed. Maberry v. Gueths (1989), 238 Mont.304,309 (“failure to file a brief in the time allowed is, under Rule 2(b), to be viewed as an admission by them that the motions are well-taken.”). DC denied relief from both the Rule 60(B) Motion and the Motion That MSF Violated The MRPC as untimely.

A Motion for relief on a violation of the MRPC has no time limits. A Motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3) no more than a year after the entry of the judgment, or order or the date of the proceeding. Mont.R.Civ.P.60(c).

However, pursuant to Rule 60(b)(3) authorizes the DC to set aside a judgment on the basis of fraud or other misconduct by a party. If it is fraud on the Court, the motion may be made at any time, but if it is just fraud on an opposing party, the motion must be made within a year after judgment becomes final.

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). 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.” See *Dausuel v. Dausuel*, 90 U.S.App.D.C. 275, 195 F.2d 774 (1952).

Additionally, the Court failed to take into consideration Rule 60(b)(6) – “any other reason justifying relief from the operation of the judgment.”

It is incumbent on the Courts to ensure that the criminal justice and civil system promotes a public perception of legitimacy and impartiality.

Given the reality that MSF conceded that they committed egregious misconduct on the Court, 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 and MSF’s Application for CCJI.

The DC’s silence on the misconduct by allowing the misconduct to occur without consequences but only judicial approbation is unconscionable and incomprehensible and is of a great concern.

A fulsome analysis is justified and required to maintain the integrity of the judicial system and our democracy. Denying Matthew relief from the misconduct that MSF has conceded 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 and facts that will be provided will clearly, obviously, and objectively prove the prejudicial and egregiously actions by MSF impugned Matthew's credibility and character which led to his wrongful conviction, allowed MSF to acquire the CCJI illegitimately, and allowed MSF to bypass the discovery procedures set forth in Workers' Compensation cases.

STATEMENT OF THE FACTS

1. BACKGROUND

A. 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.3:P.2,L.18-20).

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.3:P.2,L.20-23).

When Matthew was Owner of A & R Cleaning (2000-2009), his clients observed his respectfulness, politeness, honesty, and great work ethics. (Doc.3:P.2,L.24-25).

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.3:P.2,L.25-28).

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.3:P.2,L.28-30).

Agent Anthony Poppler (Poppler) (Doc.3:P.10-11,Ex.N), Former Assistant Attorney General Mary Cochenour (Cochenour), and DC (CDC-2014-98: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 conditions (CDC-2014-98:Doc.248:P.3-5).

B. 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.3:P.3,L.4-6). The State further alleged that Matthew continued to exaggerate or feign injuries to continue to receive medical benefits. (Doc.3:P.2,L.6-8).

C. 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. (CDC-2014-98: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.7:P.15,L.12-P.16,L.8).

On July 23, 2014, while Chafee was in Prison, Chafee struck the plea deal of a lifetime (Doc.4:P.19,Ex.EL) 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.4:P.17,L.5:Ex.DR).

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.

D. 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.4:P.19,Ex.EL).

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.4:P.17,L.5:Ex.DS).

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.

**E. 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).

**2. MSF VIOLATED THE MONTANA RULES OF PROFESSIONAL
CONDUCT AND ENGAGED IN RULE 60(B)(3)(6) UPON DISTRICT
COURT BY FAILING TO PROVIDE THE FOLLOWING
INFORMATION AND EVIDENCE TO DISTRICT COURT
WHEN SUBMITTING THEIR APPLICATION FOR CCJI**

A. Improper and inaccurate arguments

1. MSF improperly and inaccurately stated,
*“Presumably, much of the information sought has
already been publically disclosed during Mr. Ailer’s
criminal trial”*. (Doc.1: 2nd paragraph,L.10-11).

This misleading statement to the Honorable Judge Cooney allowed MSF to obtain all the information in the State’s file. MSF also declared that, *“The State’s prosecutor in that case, Mary Cochenour, has been contacted and has no objection to release of the information”* (Doc1: 1stparagraph,L.6-7).

FACTS: MSF and Former Assistant Attorney General Mary Cochenour, from December 7, 2015, to December 11, 2015, admitted only 23 exhibits from the State’s file during Matthew’s trial,

*“Judge, we’ve also been discussing the State’s evidence.
I think I have about 24, 25 pieces of evidence; most of them
are documents, some are videos, and we have some recordings
to play.”* (Tr.at6;Doc.3:P.8,L.1:Ex.K).

The State’s file contained a significant amount of information and evidence as Trial Counsel Marty Judnich (Judnich) and Cochenour explained in their filings and that was not submitted at trial:

- (i) On May 7, 2014, Judnich filed an Unopposed Motion To Extend Deadlines. (Doc.3:P.8,L.5:Ex.L). Judnich stated, *“The State has already turned over hundreds of pages of discovery as well as numerous compact discs containing gigabytes of information.”*
- (ii) From March 28, 2014 to January 28, 2016, Cochenour filed 21 notices of discovery which contained 4,117 pages in the investigative file, multiple discs with audio recordings, and interviews that contained gigabytes of information.
(Doc.3:P.8,L.10:Ex.M).

2. MSF improperly and inaccurately stated,
“The reason for this request is: Matthew Ryan Ailer on November 25, 2013 filed a case in...WCC No. 2013-3275, seeking workers’ compensation benefits for injuries allegedly occurring on May 18, 2011 ([MSF] claim 041000691316) and October 16, 2011 ([MSF] claim 041000734924). (Exhibit 1). The activities and transactions involved in the recently concluded criminal case, CDC 2014-98, are directly related to the action filed by Mr. Ailer in the [WCC].” (Doc.1:2nd paragraph,L.1-7).

FACTS: The injuries related to the May 18, 2011 (MSF claim 041000691316) for workers compensation benefits were not alleged to have occurred because **MSF accepted liability and approved benefits for this claim.**

Cochenour (CDC-2014-98:Tr.at107:10-21;107:25-108:1;108:25-109:12), MSF Claims Examiner Robinson (Robinson) (CDC-2014-98:Tr.at164:11-15), Attorney Andy Huppert (Huppert) (CDC-2014-98:Tr.at553:14-21), and DCI Agent Butch Huesby (Huesby) (CDC-2014-98:Tr.at596:15-21;597:3-17) testified at trial that the first claim was not contested and was not subject of criminal charges.

B. IMPROPER VENUE

MSF failed to file their Application For CCJI in the Honorable Judge Seeley's Court. Seeley was the presiding Judge over Matthew's criminal trial and sentencing, which MSF was involved in both legal proceedings. MSF knew the proper venue would be Seeley's Court, but choose Cooney's Court.

C. MONTANA STATE FUND MISCONDUCT

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.4:P.15,L.20:Ex.DH).

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.4:P.15,L.20:Ex.DI).

3. Agent Anthony Poppler (Poppler)

In Poppler's preceding report: Poppler identifies that MSF falsely claimed without evidence that Matthew confessed to the crime. However, Poppler investigated those allegations and found no evidence to support the egregious claim. Poppler and Cochenour determined that MSF and Buchanan mishandled the case, failed to provide exculpatory evidence provided by Miller, and lacked evidence to prosecute the case.

A. 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.3:P.10,L.22:Ex.N).

B. Poppler's May 22, 2012 Interview with Miller

During that interview, Miller provided exculpatory evidence to Poppler and the evidence was provided to Buchanan. However, Buchanan did not include any of the exculpatory evidence in his report. Furthermore, MSF and Buchanan withheld a recorded interview with Miller from DOJ during their investigation. 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.3:P.12,L.18:Ex.O).

C. 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 was a sketchy witness; and Poppler determined there was no reason for charges to validate a fraud allegation. (Doc.4:P.15,L.21:Ex.DJ).

4. 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.

A. 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 is 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.4:P.15,L.21:Ex.DK).

B. 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. (CDC-2014-98:Tr.at595,602,633).

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

William Stratford, MD, (2012;Ex.EM) Lennard Wilson, M.D (2011;Ex.EN), Stephen Powell, M.D (Powell) (2012;Ex.EO), John Harrison, PhD (2013;Ex.EP) diagnosed Matthew with CD. (Doc.4:P.20,L.7-9).

Eric Ravitz, DO (2014;Ex.EQ), Sean Tollison, PhD (2014;Ex.ER), Holly Schleicher, PhD (2015;Ex.ES), Jocelyn Head, PT (2015;Ex.ET), Brent Dodge, PT (2015;Ex.EU), Sherry Reid, MD (2016;Ex.EV), Kelly Pearce, PhD (2016;Ex.EW), Susan Swierc, PhD (2017;Ex.EX), Katie McCall, PhD (2017;Ex.EY), Mary Frank, PT (2017;Ex.EZ), Meadow Summers, PA-C (2018;Ex.FA), Heather Kroll, MD (2018;Ex.FB), Sean Tollison, PhD (2018;Ex.FC), Jennifer Roy, OT (2018;Ex.FD), Kerrigan O'Connell, ST (2018;Ex.FE) and Eric Ravitz, DO, (2022;Ex.FF) 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.4:P.20 L.9-15). They observed similar observations of inconsistent cane and right arm use by State witnesses and still continued to diagnose CD. (Doc.4:P.1,L.29:Ex.BI)

A. 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.4:P.4,L.13-14: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.4:P.15,L.23:Ex.DM). 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**).

B. 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.4:P.4,L.14-17: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.4:P.15,L.23:Ex.DL).

C. 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.

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. (CDC-2014-98:Tr.at349:12-24;343,346,347,367,368).

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

Cochenour (CDC-2014-98:Tr.at107:10-21;107:25-108:1;108:25-109:12), Robinson (CDC-2014-98:Tr.at164:11-15), Huppert (CDC-2014-98:Tr.at553:14-21), and Huesby (CDC-2014-98: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.(CDC-2014-98:Tr.at159:6;161:20-162:2).

7. 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 (CDC-2014-98:State's Tr.Ex.4).

Miller and Matthew discussed his injuries and Smith's recommendations. (Doc.4:P.4,L.25:Ex.BQ).

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.4:P.4,L.27:Ex.BR). 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.4:P.5,L.3:Ex.BS).

On August 16, 2011, Matthew had an MRI conducted, still had pain in the neck and right arm, and proceed with PT (CDC-2014-98: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.4:P.4,L.21:Ex.BP).

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.4:P.5,L.3:Ex.BS).

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. (CDC-2014-98: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. (CDC-2014-98: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 sustained in his 5/18/2011 MVA. (CDC-2014-98: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.4:P.3,L.5:Ex.BL). 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. (CDC-2014-98:Tr.at238:3-21).

8. 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 and finished burnishing the floors at 7:45 PM. (Doc.4:P.18,L.20-22).

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) (CDC-2014-98: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.

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.4:P.18,L.25:Ex.EG). CMC medical documentation showed the

buffer accident occurred at 7:45PM. (Doc.4:P.18,L.26:Ex.EH). The arrival and departure times were verified. (Doc.4:P.18,L.28:Ex.EI).

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 (CDC-2014-98:Tr.at471:22-474:16;445:22-446:10). But when Matthew went CMC, he showed no discernable injuries, bruising or otherwise (CDC-2014-98: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 (CDC-2014-98:Tr.at293:1-24).

Chafee admitted to lying to police in past cases (CDC-2014-98: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 (CDC-2014-98:Tr.at506:8-11;521:2-8).

Russell could not explain the inconsistencies of the many statements he gave (CDC-2014-98:Tr.at447:1-24).

Huesby could not explain the inconsistencies of Chafee and Russell's story (CDC-2014-98: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.4:P.17,L.3-5:Ex.DN-DS;Doc.4:P.17,L-6:Ex.O).

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 stated 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.4:P.6,L.8:Ex.CC;Doc.4:P.5,L.30:Ex.BZ).

On October 19, 2011, Robinson claim policy notes stated, "TW Cory...Cory was notified of injury right away." (Doc.4:P.5,L.23:Ex.BX). October 24, 2011, Matthew filled out his First Report truthfully as Chafee was listed a witness and no safety equipment was provided. (Doc.4:P.6,L.10:Ex.CD).

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.4:P.6,L.24:Ex.CF).

The State persuaded DC that Miller failing to ensure the safety and welfare of his employees was inadmissible “character evidence.” (CDC-2014-98: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.” (CDC-2014-98: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.4:P.15,L.6:Ex.DF).

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.4:P.14,L.29:Ex.DE).

9. Altered Medical Records Of Jerry Davis and Dr. Powell

A. Altered Medical Records Of Davis

On February 14, 2014, MSF submitted Notice Of Exchange (NOE) in WCC (Doc.3:P.15,L.29:Ex.P). The exhibits “Ex.18-001” (Doc.3:P.15,L.16:Ex.Q). through “Ex.18-029” (Doc.3:P.15,L.16:Ex.Q) show Davis’ unaltered medical records (MR) under the **first uncontested claim**. Davis’ unaltered Health Insurance Forms (HIF) (Doc.3:P.16,L.1:Ex.R) and Robinson’s Explanation Of Benefits (EOB’s) (Doc.3:P.16,L.2:Ex.S) 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.3:P.16,L.6:Ex.T) 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.3:P.16,L.10:Ex.U).

B. Altered Medical Records Of Powell

MSF submitted NOE in WCC (Doc.3:P.16,L.19:Ex.P) The exhibit “Ex. 8-006” (Doc.3:P.16,L.19:Ex.V) shows the unaltered Powell’s 10/20/11 MR under the

first uncontested claim, the exhibit “Ex. 8007” (Doc.3:P.16,L.21:Ex.W) shows the unaltered Powell’s 10/20/11 second page MR under the **first uncontested claim**, and the exhibit “Ex.8-008” (Doc.3:P.16,L.22:Ex.X) 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.3:P.16,L.26:Ex.Y) 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.3:P.16,L.28:Ex.Z).

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.3:P.16,L.31:Ex.AA) 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.3:P.17,L.5:Ex.U).

**10. 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. (CDC-2014-98: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. (CDC-2014-98: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 (CDC-2014-98:Tr.at623). Huesby testified that Stratford's bill was a loss to MSF. (CDC-2014-98: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.3:P.17,L.26:Ex.U)

1. CMC. Robinson paid \$4,042.50. (Doc.3:P.17,L.29:Ex.AB)
2. Missoula Radiology. Robinson paid \$195.84.
(Doc.3:P.18,L.3:Ex.AC)
3. Stratford's office called Robinson inquiring about
what claim number should be used for billing. Robinson
responded to use the first claim.(Doc.3:P.18,L.6:Ex.AD)
Stratford submitted his HICF. (Doc.3:P.18,L.8:Ex.AE)
Robinson paid Stratford \$4,750. (Doc.3:P.18,L.10:Ex.AF)
4. Capps. Robinson paid \$1,350. (Doc.3:P.19,L.4:Ex.AO)
5. Davis. Davis submitted his June 15, 2012 MR
(Doc.3:P.19,L.13:Ex.AP), HIF (Doc.3:P.19,L.15:Ex.AQ)
and Robinson paid \$975.61 (Doc.3:P.19,L.17:Ex.AR).
Davis submitted his 7/15/12 MR (Doc.3:P.19,L.20:Ex.AS),
HIF (Doc.3:P.19,L.22:Ex.AT)and Robinson paid \$819.00
(Doc.3:P.19,L.24:Ex.AU).
Davis submitted his 8/22/12 MR
(Doc.3:P.19,L.26:Ex.AV), HIF
(Doc.3:P.19,L.28:Ex.AW) and Robinson paid
\$793.00 (Doc.3:P.19,L.30:Ex.AX). Davis submitted

his 1/22/14 MR (Doc.3:P.20,L.3:Ex.AY), HIF
(Doc.3:P.20,L.5:Ex.AZ) and Robinson paid \$67.20
(Doc.3:P.20,L.7:Ex.BA).

Davis submitted his 12/20/13 MR
(Doc.3:P.20,L.10:Ex.BB), HIF
(Doc.3:P.20,L.12:Ex.BC) and Robinson paid
\$243.60 (Doc.3:P.20,L.15:Ex.BD).

11. False Testimony During The Sentencing Hearing

MSF Claims Examiner Suzanna Simmons falsely testified that all bills were paid on the second claim. (CDC-2014-98:SentTr.at17:1-5;20:23-21:1). However, Missoula Radiology, CMC, Stratford, Capps, Davis and Powell's 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.3:P.17,L.26:Ex.U).

12. Brady Violations

The State and MSF 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).

13. False Allegations That There Were Ramps Available

Cochenour (CDC-2014-98:Tr.at111:8-16;112:16-17;656:1-4;719:13-19), Miller (CDC-2014-98:Tr.at211:11-23;234:14-15), and Russell (CDC-2014-98: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 available only a two person lift of heavy equipment. (Doc.242:P.5,Ex.K,L,M).

14. False Testimony By Robinson Regarding

Conversion Disorder Treatment

Robinson provided false testimony during trial, "Q. Okay. And if those medical records say that he was being treated for conversion disorder, then that's what the service was for, fair? A. He was never treated for conversion disorder. Q. Okay. It's—so it's your belief that he was never being treated for conversion disorder. A. Correct." (CDC-2014-98:Tr.at187:5-11). However in State Discovery, Robinson had approved multiple claims for treatment of Conversion Disorder.

(Doc.4:P.1,L.12: Ex.BE). Robinson never denied Matthew's medical treatment for Conversion Disorder: "Under the Montana workers compensation law, it is appropriate to deny medical treatment benefits when treatment being rendered is for a non-compensable body part or injury...If an injured worker is seeking treatment for an unrelated condition, a bill or a service may be denied." See Montana Utilization & Treatment Guidelines. Robinson's policy notes prove that Robinson authorized the treatment of Conversion Disorder because it was related to Matthew's claims, "Closure anticipated by 12/2013 if we are not liable for conversion disorder. If we are liable, I do not plan on settlement, but will auth recommended treatment as reasonable to the claim." (Doc.4:P.2,L.3:Ex.BF).

15. Montana State Fund Withheld Exculpatory Surveillance Videos

MSF hired private investigator Robert Barney from Day and Associates located in Helena, MT. Barney provided MSF with video surveillance videos taken on August 6 and 7, 2012; October 25 and 26, 2012; and March 21, 2013. MSF only provided the August 6 and 7, 2012 videos to Cochenour and to Matthew on August 24, 2014. MSF withheld the October 25 and 26, 2012 and March 21, 2013 videos. However, on November 25, 2015, after one year and 3 months, MSF finally provided Cochenour the October 25 and 26, 2012, and March 21, 2013 videos even though MSF possessed them on August 24, 2014. (Doc.4:P.2,L.12:Ex.BG).

16. Montana State Fund Agreement With Miller

On 7/19/2011 - 9/17/2011, Miller hired Russell to work for GCJ but did not report him as an employee to MSF (Doc. 4:P.13,L.25:Ex.CZ). Russell confirmed he was hired by GCJ in the summer of 2011. (CD 3Track;1:00 to1:07). Poppler's investigation revealed that Russell's employment records proved that he did not report his income while working for GCJ and did not pay taxes for the employment quarter 3 in 2011. (Doc.4:P.13,L.29:Ex.DA). Chafee confirmed Russell was working for GCJ and it was authorized by Miller. (CD 3Track5;1:30to5:00).

Miller confirmed that he hired Russell to work for GCJ in the summer of 2011 but did not report him as an employee to MSF. (CD2Track2;9:32to9:50). On 7/10/2012, Miller officially hired Russell reporting him to MDOLAI and MSF as an employee of GCJ. (Doc.4:P.14,L.17:Ex.DB).

On 2/5/2013, Miller falsely reported to Agent Huesby, "Ah, I didn't know Jeff until a week before we brought him on ah, when Chelsea went to jail [October 7, 2011]." (Doc.4:P.14,L.19:Ex.DC). On 7/23/2014, Chafee informed Huesby how Miller paid Russell while working for GCJ, "Because Corey would put, we would make out a list for the hours that we did, the hours that Jeff did, the hours that I did and the hours that Jeff did would be put on my paycheck. And then it was my responsibility to pay him for those hours." (Doc.4:P.17,L.4:Ex.DP).

Huesby reviewed the information and realized that he had a case of, “45-7-501.Employer misconduct. (1)(a)(b) (c)(2) so an agreement was made between MSF,DOJ, Cochenour, Huesby and Miller. (Doc.3:P.14,L.25-27).

17. Additional Misconduct By Montana State Fund

Please see the Rule 60(B) Motion and brief in support (Doc.3,4) and the Motion that MSF violated the MRPC and brief in support (Doc.7,8) for the complete list of MSF’s misconduct.

ARGUMENT

It is incumbent on the Courts to ensure that they promote a public perception of legitimacy and impartiality. Here, DC failed to promote public confidence in the independence, integrity, and impartiality of the judiciary and apply the law, and perform all duties of judicial office fairly and impartially and without bias or prejudice. MSF conceded they committed misconduct at Matthew’s trial and at sentencing and provided improper and inaccurate arguments to DC when filing their Application For CCJI.

The DC’s silence on the misconduct by allowing the misconduct to occur without consequences but only judicial approbation is unconscionable and incomprehensible and is of a great concern. A fulsome analysis is justified and required to maintain the integrity of the judicial system and our democracy.

I. The District Court Erred By Denying The Motion For Relief From Final Order Pursuant To Mont. R. CIV Pro 60(B)

MSF committed egregious misconduct, misrepresentation, deceit and fraud and the unrefuted exculpatory evidence and facts provided to DC clearly, obviously, and objectively demonstrated the prejudicial and egregiously actions by MSF impugned Matthew's credibility and character which led to his wrongful conviction, allowed MSF to acquire the restitution illegitimately, and in violation of Rule 60(B). (Doc.3,4). MSF conceded to Matthew and DC as the facts and evidence were well taken and undisputed.

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). Fed.R.Civ.P. 60(b)(3) applies to both intentional

and unintentional misrepresentations. *Plattner v. Strick Corp.*, 102 F.R.D.612,614 (N.D.Ill.1984). 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). In *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115,1118 (1st Cir.1989) plaintiffs' allegations amounted to a claim of "fraud on the court"...A 'fraud on the court' occurs where...a party has...set in motion some unconscionable scheme calculated to...improperly influenc[e] the trier [of fact], or unfairly hamper [] the presentation of the opposing party's claim or defense." *Id.*

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 after the judgment due to the exceptional circumstances 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 (5thCir.1978). The Ninth Circuit emphasized that, ‘courts must consider all of the relevant circumstances surrounding the specific motion before the court in order to ensure that justice be done in light of all the facts.’” Henson v. Fid. Nat’l Fin., Inc., 943 F.3d 440 (9thCir.2019). A district court must in a “case-by-case inquiry...requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” Stokes v. Williams, 475 F.3d 732,736 (6th Cir.2007).

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 full argument for relief under Rule 60(B)(3) and Rule 60(B)(6) can be found in the Motion For Reconsideration Of The Court’s Order. (Doc.17).

II. The District Court Erred By Denying The Motion For Relief From Final Order Because Montana State Fund Violated The Montana Rules Of Professional Conduct

MSF was admitted to practice law, at which time they took the oath to abide by the MRPC, the Disciplinary Rules adopted by this Court, and the highest standards of honesty, justice and morality, including but not limited to, those outlined in parts 3 and 4 of Chapter 61, Title 37, MCA. This Court has approved and adopted

MRPC, governing the ethical conduct of attorneys, which these Rules were in effect at all times in this case. MSF disregarded their ethical and moral obligations and the oath to abide by the Rules. A lawyer shall always pursue the truth. (Preamble). A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal; (3) offer evidence that the lawyer knows to be false. (Rule 3.3).

A lawyer shall not: (a) unlawfully obstruct another party's access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act; (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. (Rule 3.4).

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other

law. (Rule 8.4). The unrefuted exculpatory evidence and facts provided to DC clearly, obviously, and objectively demonstrated the prejudicial and egregiously actions by MSF impugned Matthew's credibility and character which led to his wrongful conviction, allowed MSF to acquire the CCJI illegitimately, and in violation of the MRPC. (Doc.7,8). MSF conceded to Matthew and DC as the facts and evidence were well taken and undisputed.

III. The District Court erred by failing to hold Montana State Fund accountable for their egregious misconduct, failing to maintain institutional integrity in deterring future misconduct and by failing to grant relief in the interest of justice and fundamental principles of fairness

The DC judge shall comply with the law including the Montana Code Of Judicial Conduct (MCJC). (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. (MCJC:Rule 2.6(A)).A judge: shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary (MCJC:Rule 1.2); having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall

inform the appropriate authority. A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action. (MCJC:Rule 2.16(B)(D)); shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially (MCJC:Rule 2.2); and shall perform the duties of judicial office without bias or prejudice. (MCJC:Rule 2.3(A);[1]). The DC violated these rules by the following means:

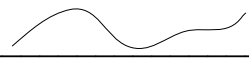
The DC failed to hold MSF accountable even after they conceded the egregious misconduct when filing their Application For CCJI and during Matthew's trial and at sentencing. DC failed to promotes public confidence in the independence, integrity, and impartiality of the judiciary by not holding MSF accountable, granting relief and deterring future misconduct. DC failed uphold and apply the law, and perform all duties of judicial office fairly and impartially by not granting relief because the MSF violated the MRPC, Rule 60(B) and not taking an independent action to set aside a judgment for fraud on the Court. 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). 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.” See Dausuel v. Dausuel, 90 U.S.App.D.C. 275, 195 F.2d 774 (1952). Finally, DC failed to perform the duties of judicial office without bias or prejudice because DC still views Matthew as a convict who is not entitled to any relief despite the overwhelming evidence of Matthew’s innocence and MSF conceding their misconduct.

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. This case exhibits exactly the type of “miscarriage of justice or manifest injustice” which this Court has an inherent authority to prevent. As such, this Court should exercise that authority here and if Matthew’s Constitutional rights and the fundamental principles of fairness matter, this Court reverse and remand to DC to have MSF immediately return the CCJI that was acquired illegitimately in the interest of justice.

Respectfully submitted this 15th day of May, 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 10,000 words. The exact words count is 9,995 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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