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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES GEOFFREY SANTORO,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Ninth Judicial District Court,  
Toole County, the Honorable Jennifer B. Lint, Presiding

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## **STATEMENT OF THE ISSUES**

Issue one: On remand from appeal, and in a case about Appellant's conduct in response to strangulation, the new presiding judge prohibited Appellant from presenting expert testimony on strangulation and its effects that the former presiding judge had admitted. Did the court err by prohibiting relevant expert testimony?

Issue two: At the new sentencing hearing, the prosecutor additionally requested a complete prohibition on parole, attributed the request to the prior appeal and facts flowing therefrom, and falsely represented that the State's previous request was the same. The sentencing court fulfilled the new request. Did presumptive or actual vindictiveness violate Appellant's right to due process?

Issue three: Before the court imposed the maximum prison sentence and parole prohibition, it did not ask Appellant whether he wished to speak or provide him the opportunity to do so. Did the court violate Mont. Code Ann. § 46-18-115(3) and the right to allocution?

## **STATEMENT OF THE CASE**

This is an appeal of things gone wrong on remand from prior appeal.

A jury found Charles Geoffrey Santoro (“Geoff”) guilty of negligent homicide under Mont. Code Ann. § 45-5-104, which carries a maximum sentence of twenty years in prison. (D.C. Doc. 192.) The State recommended a twenty-year sentence and explicitly did “not ask[] for a parole restriction.” (5/26/17 Tr. (“First Sent.”) at 261.) The Ninth Judicial District Court, Toole County, imposed a twenty-year sentence to Montana State Prison (MSP), suspended five of the years, and placed no restriction on parole eligibility. (First Sent. at 288–89.) This Court reversed the conviction due to ineffective assistance of counsel. *State v. Santoro*, 2019 MT 192, 397 Mont. 19, 446 P.3d 1141.

A new judge took over the case on remand from appeal. (D.C. Doc. 317.) The new judge granted the State’s motion to prohibit Geoff from presenting expert testimony on strangulation and its effects—testimony that had been admitted at the prior trial. (D.C. Doc. 469 (App. A).) After eight to nine hours of deliberations and a dynamite instruction, the jury reached a guilty verdict. (6/21–6/25/21 Tr. (“Second Trial”) at 763, 776–77, 788; D.C. Doc. 472.)

At the new sentencing hearing, the State’s prosecutor requested an additional twenty-year restriction on parole eligibility. (9/7/21 Tr.

(“Second Sent.”) at 31.) The defense objected that the prosecutor was vindictively seeking to punish Geoff for exercising his right to appeal. (Second Sent. at 32.) The District Court delivered the State its requested sentence of twenty years, none suspended, with no possibility of parole—the maximum sentence of incarceration possible. (Second Sent. at 36–40 (App. B); D.C. Doc. 490 (App. C).) The judge did not ask Geoff whether he wished to speak before the judge imposed the sentence. (Second Sent. at 36.)

Geoff filed a timely notice of appeal. (D.C. Doc. 492.)

## **STATEMENT OF THE FACTS**

### **I. Underlying facts**

This Court’s prior opinion lays out the facts of Levi Rowell’s tragic death and Geoff’s first trial. *See Santoro*, ¶¶ 4–10. The underlying facts presented at the second trial were largely the same.

Levi and Geoff were at a bar. (*Santoro*, ¶ 4; Second Trial at 208.) Levi was very intoxicated, Geoff to a lesser extent. (Second Trial at 374, 541–42.) As Geoff was leaving, Levi said—loud enough for Geoff and others to hear—that Geoff was not a military veteran. Levi’s words upset Geoff because Geoff is a military veteran. (*Santoro*, ¶ 4; Second

Trial at 649–50.) Geoff threw his beer bottle on the sidewalk after exiting the bar. (*Santoro*, ¶ 4; Second Trial at 651.)

The shattering sound was audible back in the bar. Levi thought the sound was maybe Geoff damaging Levi’s vehicle. Levi got up to go outside. Levi’s wife and friend understood that Levi was going outside to pick a fight with Geoff, so they restrained Levi. They eventually let Levi go after a few minutes, believing Geoff had left. (*Santoro*, ¶ 5; Second Trial at 226, 247.)

Geoff was about to leave but hadn’t yet left. He was in his truck with the engine on, a strapped seat belt, and the truck in reverse. (*Santoro*, ¶ 5; Second Trial at 653.)

Levi was angry, and he charged toward Geoff. (Second Trial at 248.) Levi got inside of Geoff’s driver’s door,<sup>1</sup> said “you’re fucked now,” and clenched his hand around Geoff’s neck. (Second Trial at 653.) Levi’s friend came up behind Levi and braced his arm around Levi’s chest to restrain him, and Levi’s wife got close behind. Levi’s friend

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<sup>1</sup> Witnesses disputed whether Levi opened the door or whether Geoff hadn’t yet closed it. (*Santoro*, ¶ 5; Second Trial at 261, 618, 652.)

could hear Levi yelling but couldn't see what Levi was doing. (*Santoro*, ¶ 5; Second Trial 285–86, 291–92.)

Geoff pushed the gas pedal, sending the truck in reverse. (Second Trial at 679.) The truck's open doorframe caught Levi, Levi's friend, and Levi's wife. Levi's wife and friend were cast aside and injured. (*Santoro*, ¶ 5; Second Trial at 256–58.) But Levi went under the wheel as the truck reversed. That was the Montana Highway Patrol (MHP) crash investigation's conclusion, completed through hours of painstakingly measuring and marking the scene. (*Santoro*, ¶ 7; Second Trial at 457–459, 464.)

Geoff drove off before eventually calling the police to come pick him up. (Second Trial at 660–61.) Levi died in the parking lot. (Second Trial at 308.) When Geoff spoke with police, he was still wound up from what had occurred, made statements he regrets (*e.g.*, “I hope the fucker is dead”), and overstated some aspects of his military tenure. (Second Trial at 663–64, 670.)

## **II. Geoff appealed, and this Court reversed and remanded.**

The State charged Geoff with negligent homicide and two counts of criminal endangerment. *Santoro*, ¶ 3.

At the first trial, the State presented testimony that Geoff drove forward over Levi after Levi was already incapacitated on the ground. But it was dark out, there was a lot of dust in the air from the truck reversing, a gravel mound provided an alternative explanation for Geoff's truck bumping up as Geoff drove forward after reversing, and prior statements from the same witnesses had not referenced Geoff running over Levi in forward motion. (*Santoro*, ¶ 6; Second Trial at 298–99, 306, 434.) Also, the MHP investigation had concluded Levi was run over only in reverse. (Second Trial at 457–459, 464.)

The State did not call to the stand the MHP trooper whose investigation had concluded Levi was run over only in reverse. That left the defense in a bind because defense counsel had failed to subpoena the trooper. Defense counsel couldn't get the trooper's testimony or the crash report into evidence. *Santoro*, ¶¶ 7–8. Although the State's prosecutor Chad Parker knew the crash report's conclusion, he told the jury that the notion Levi was run over only in reverse was “a fantasy.” (8/8–8/11/16 Trial Tr. (“First Trial”) at 800.)

The first trial's jury found Geoff guilty of negligent homicide and two counts of criminal endangerment. (D.C. Doc. 192.) Geoff appealed

the negligent homicide conviction. *Santoro*, ¶ 1. This Court unanimously reversed that conviction because defense counsel had ineffectively failed to subpoena the trooper in order to introduce the MHP investigation’s conclusion. *Santoro*, ¶¶ 27–28.

### **III. For the second trial, the new judge excluded expert testimony that the prior judge had admitted.**

At Geoff’s first trial, the defense called Cat Otway, NP, to present expert testimony on strangulation and its effects. Otway is specialized in strangulation and has testified for both sides in Montana criminal cases. (First Trial 585–86, 587–88.) Otway testified at Geoff’s first trial that strangulation is the external obstruction of blood or oxygen through the neck. (First Trial at 590–91.) She testified even a relatively low level of pressure applied to the neck for a few seconds can cause a person to pass out. Such strangling often does not leave a mark. (First Trial at 591–92.) Otway also explained how strangulation squeezes the thyroid, releasing high levels of thyroxine in the body. This chemical response (known as a “thyroid storm”) can “cause the victim to become very erratic and panicky and agitated and combative.” (First Trial at 598.) The chemical response additionally can interfere with the victim’s recall. (First Trial at 598.)

The Honorable James A. Haynes presided over the first trial. (D.C. Doc. 299.) When the State moved to bar Otway’s testimony, Judge Haynes overruled the motion. (8/4/16 Tr. at 19–20; First Trial at 579–82.) The State was permitted to cross-examine Otway. (See First Trial at 600–15.)

After remand, the Honorable Jennifer B. Lint replaced Judge Haynes and assumed jurisdiction. (D.C. Doc. 317.) When the defense re-noticed Otway as an expert witness for the second trial, the State once again moved to exclude Otway’s testimony. (D.C. Docs. 347, 355.) Judge Lint issued a written order granting the State’s motion under Mont. R. Evid. 702. (D.C. Doc. 469 (App. A).) The written order defines strangulation as “the restriction of airflow into and out of the lungs.” (D.C. Doc. 469 at 6.) The court’s order concludes medical testimony on strangulation and its effects will not assist a jury because those matters are “common knowledge” and only Geoff could testify about what he felt when he was strangled. (D.C. Doc. 469 at 5–6.)

At trial, Geoff’s defense to the negligent homicide charge was that the State failed to prove he had grossly deviated from the conduct of a reasonable person in the situation of being strangled by Levi. (Second

Trial at 735–36, 748, 750–52; *see* D.C. Doc. 473, Instr. 15 (defining negligence by such a gross deviation).) In assessing that element, the jury was unaware of Otway’s prohibited testimony. (*See* Second Trial at 203–686.) In addition, the State disputed whether Levi even strangled Geoff. The State did so by arguing Geoff’s neck was not sufficiently marked and Geoff’s timeline of events was off—critiques that Otway’s prohibited testimony would have addressed. (Second Trial at 725; *see* Second Trial at 203–686.) It still took the jury eight to nine hours of deliberations and a dynamite instruction to find Geoff guilty. (Second Trial at 763, 776–77, 788; D.C. Doc. 472.)

**IV. At the pre-appeal sentencing, the prosecutor requested twenty years, none suspended, without any parole restriction. The court let Geoff speak and imposed twenty years, five suspended, without any parole restriction.**

At the first sentencing hearing in 2017, prosecutor Parker requested a sentence of twenty years in prison for the negligent homicide conviction and two ten-year terms for the two criminal endangerment counts, all running consecutively, for a total of 40 years, none suspended. (First Sent. at 261.) Parker recognized his request would make Geoff parole eligible after ten years. (First Sent. at 258.) Parker explicitly noted he was “not asking for a parole restriction.”

(First Sent. at 261.) Parker said of his requested sentence, “[W]e believe that is just and that would be justice.” (First Sent. at 261.)

Before Judge Haynes imposed sentence, he asked, “Mr. Santoro, do you have anything you would like to say?” (First Sent. at 269.) Geoff responded:

I’ve been waiting a long time to say sorry, and the time is due. I accept and take full responsibility for what happened that tragic night, and I truly do. . . . And I truly, truly do have remorse. . . . Again, I am truly and sincerely sorry for everyone’s pain, suffering, and loss.

(First Sent. at 269–70.)

After Geoff’s statement, the court imposed a twenty-year MSP sentence with five years suspended for the negligent homicide count and ten-year sentences with five years suspended for each criminal endangerment count, all running consecutively. The total sentence was forty years, with fifteen suspended. The court did not restrict Geoff’s parole eligibility. (First Sent. at 288–89; D.C. Doc. 299.)

**V. At the sentencing after remand, the court did not ask Geoff whether he wished to speak before the court fulfilled the prosecutor’s request for an increased sentence including no possibility of parole.**

At the sentencing hearing after remand, Parker requested twenty years, none suspended, for the negligent homicide, but with an

additional twenty-year prohibition on Geoff's eligibility for parole.

(Second Sent. at 31.)

Parker explicitly attributed the new recommendation and request to Geoff's appeal and the remand. According to Parker, "the case . . . being remanded for retrial" had "amplified many fold" "all of the fears, all of the stresses, all of the anxiety and hurt" to Levi's family. (Second Sent. at 26.) Parker had witnessed this "anxiety and stress" when he had to "reassure them that we will continue to fight to do what is just, to retry this case, as we did in June of this year, and that has been traumatic for them." (Second Sent. at 26.) "Above and beyond" those aspects of what "the remand had done to them," the reversal on appeal had led to Geoff receiving a parole hearing in 2020, which "weighed upon [Levi's family] very, very heavily" and "heightened the stress and anxiety again." (Second Sent. at 27.) Parker connected this all to the need for "closure" that a twenty-year parole restriction would provide. (Second Sent. at 27.)<sup>2</sup> Parker capped off his request by inaccurately representing that his new sentencing request was "the same thing we

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<sup>2</sup> Parker additionally alleged Geoff had not accepted responsibility. (Second Sent. at 28 (Parker: "Never once an I'm sorry. Not once."); *but see* First Sent at 269–70 (Geoff: "I am truly and sincerely sorry . . .").)

asked for the first time around” and “what we have always believed was appropriate.” (Second Sent. at 31.)

Defense counsel objected that Parker’s request was vindictive, explaining, “The state doesn’t seem to want justice here. It seems like they want vengeance. Mr. Santoro should not be punished for pursuing an appeal.” (Second Sent. at 32.)

Judge Lint gave Parker the last word. Parker “took umbrage” with the suggestion that his request was vindictive. (Second Sent. at 34.) Parker doubled down that his request had never changed, saying, “We believe that the 20 years that we asked for back in 2017 as well as now is fully appropriate given what happened here.” (Second Sent. at 36.)

Before choosing and imposing a sentence, the court did not ask Geoff whether he wished to speak. (*See* Second Sent. at 36.) The court never asked that earlier in the hearing either. (*See* Second Sent. at 1–36.) The court jumped straight from Parker’s words to pronouncing the sentence. (Second Sent. at 36 (App. B).)

The District Court fulfilled Parker’s request. (Second Sent. at 38.) The court noted the “exhaust[ion]” of Levi’s family, alleged Geoff had an

“accountability problem,” and indicated a belief that Geoff had purposely not availed himself of classes at MSP.<sup>3</sup> (Second Sent. at 37–38; *see also* D.C. Doc. 490 (written judgment) (App. C) (alleging Geoff “demonstrate[d] his continued lack of accountability for his actions” by “not taking advantage” of programming, being “only marginally apologetic,” and failing “to accept that his actions alone caused the death of Levi”).) The Court strangely said it was “not agreeing with the state because I’m agreeing with the state.” (Second Sent. at 38.) The court fulfilled the State’s sentencing request of twenty years in prison, none suspended, consecutive to other sentences, with a “full parole restriction.” (Second Sent. at 38 (App. B); *accord* D.C. Doc. 490 (App. C).)

### **STANDARDS OF REVIEW**

This Court exercises plenary review over matters of constitutional interpretation, *State v. Walsh*, 2023 MT 33, ¶ 9, 411 Mont. 244, 525 P.3d 343, statutory interpretation, *State v. Henderson*, 2015 MT 56, ¶ 9, 378 Mont. 301, 343 P.3d 566, and interpretation of the rules of evidence,

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<sup>3</sup> The presentence investigation report said Geoff had not yet gotten into classes, not that he had intentionally forgone them. (*See* D.C. Doc. 483 at 12.)

*State v. Pingree*, 2015 MT 187, ¶ 9, 379 Mont. 521, 352 P.3d 1086.

Insofar as an evidentiary ruling does not qualify for de novo review, it is reviewed for an abuse of discretion. *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991. “An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice.” *Pelletier*, ¶ 12.

### **SUMMARY OF THE ARGUMENT**

This Court has repeatedly and unambiguously directed trial courts to construe liberally the rules of evidence to admit relevant expert testimony. The District Court did the opposite in excluding relevant and material expert testimony on strangulation and its effects that went well beyond common experience. The prohibited expert testimony was relevant to refute the State’s arguments disputing the fact of Levi strangling Geoff. It was also relevant to educate jurors on how the human body processes strangulation, which informs how a reasonable person might react in Geoff’s situation. The excluded expert testimony thus went straight to the trial’s central issue—whether

Geoff's conduct grossly deviated from the conduct of a reasonable person in the same situation. In a close case requiring extensive deliberations for the jury to reach a guilty verdict, the District Court unfairly tipped the scales by precluding the defense from presenting relevant and material expert testimony. The error requires reversal.

If this Court does not reverse the trial error, it should reverse the sentence. Due process prohibits a prosecutor from vindictively seeking to punish a defendant for exercising the right to appeal. Prosecutor Parker couldn't stop himself. In contrast to Parker's pre-appeal requested sentence, on remand from appeal Parker requested no possibility of parole for the negligent homicide conviction. In requesting that harsher sentence, Parker pointed to facts flowing directly from Geoff's successful appeal, and Parker falsely represented that he had made the same request before the appeal. The District Court fulfilled Parker's vindictive request, imposing a twenty-year prison sentence with no possibility of parole. Parker was both actually and presumptively vindictive, and that vindictiveness unconstitutionally taints Geoff's sentence.

Also tainting Geoff's sentence is the District Court's failure to ask Geoff whether he wished to speak at sentencing. The law unambiguously requires a sentencing court to ask a defendant personally whether the defendant wishes to address the court before the court decides upon and imposes a sentence. The District Court never did that. The District Court unfairly faulted Geoff for an alleged lack of contrition, and imposed the maximum sentence with no possibility of parole, all while not permitting Geoff the opportunity to express his contrition. The court's failure to provide Geoff the opportunity to speak compromised the sentencing hearing's fairness and integrity and necessitates reversal even under plain error view.

If this Court does not reverse the trial error, the sentencing errors authorize this Court to restore status quo ante by reducing Geoff's sentence to what it was before to the first successful appeal. Otherwise, resentencing should occur before a different judge.

## ARGUMENT

### **I. A new trial is necessary because the District Court erred by excluding relevant expert testimony on strangulation and its effects.**

Under Mont. R. Evid. 702, a qualified expert witness may testify about “scientific, technical, or other specialized knowledge” that will “assist the trier of fact to understand the evidence or to determine a fact in issue.” The “test for admissibility” under this rule “is whether the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue.” *State v. Price*, 2007 MT 269, ¶ 23, 339 Mont. 399, 171 P.3d 293.

This Court has repeatedly instructed trial courts to “construe liberally the rules of evidence,” including Rule 702, “so as to admit all relevant expert testimony.” *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604 (citation omitted). “[I]t is better to admit relevant . . . expert testimony and allow its weight to be attacked by cross-examination and refutation.” *Price*, ¶ 23.

The District Court did not heed this Court’s command. Instead, at the State’s behest, the District Court prohibited Geoff from presenting

expert testimony the prior judge had correctly deemed admissible. The District Court erred because the evidence was relevant to the determination of central facts in dispute and comprised matters largely beyond common experience.

**A. The expert testimony was relevant to respond to the State’s arguments disputing the fact of Levi strangling Geoff.**

Despite not having any evidence that Levi did not strangle Geoff, the State still disputed that fact. (Second Trial at 725.) The State did so by appealing to unscientific understandings of strangulation.

Because the prohibited expert testimony would have countered the State’s arguments, the expert testimony was “sufficiently beyond common experience” that it would have “assist[ed] the trier of fact to understand the evidence or to determine a fact in issue.” *Price*, ¶ 23.

For instance, the State argued the bruising on Geoff’s neck was not extensive enough for strangulation to have occurred. (*See* Second Trial at 725 (arguing the strangulation “didn’t happen” and “couldn’t have happened” because “[h]is neck, there are no injuries to his neck, no real injuries to his neck”).) Otway, however, would have testified that many strangulation victims do not have external marks after being

strangled. (First Trial at 592.) This knowledge was sufficiently beyond the common experience of jurors that it would have helped them better understand the evidence.

The State also elicited testimony that as Geoff gassed the truck in reverse he said, “Fuck this.” The State then provocatively asked, “So if he’s able to say, Fuck this, was his airway blocked off?” (Second Trial at 621.) Otway, however, would have testified that strangulation “is pressure on [blood] vessels or the airway or both” and a person being strangled through pressure on blood vessels may be able to speak. (First Trial at 593.) Again, this was knowledge beyond jurors’ common experience, and it would have helped them understand the evidence.

The State also attacked Geoff for his timeline being slightly different than other witnesses. Otway, however, would have testified that strangulation often impairs a victim’s ability to recall the event as a “straight story” with an “exact timeline.” (First Trial at 598–99.) Expert testimony has been introduced and admitted at other Montana trials to establish this effect of strangulation. *State v. Ritesman*, 2018 MT 55, ¶ 8, 390 Mont. 399, 414 P.3d 261. Strangulation’s effect on memory is beyond common experience and would have assisted jurors

in understanding the evidence and judging the strength (or lack thereof) of the State's arguments.

In all these regards, Otway's expert testimony met "the test for admissibility." *Price*, ¶ 23. But that's just the half of it.

**B. The expert testimony would have assisted jurors in ascertaining a reasonable person's response to strangulation and if Geoff's response was a gross deviation from that—the trial's central issue.**

Geoff's trial concerned negligent homicide under § 45-5-104. The charged offense required the State to prove Geoff's conduct was a "gross deviation from the standard of conduct that a reasonable person would [have] observe[d] in [Geoff's] situation." (Mont. Code Ann. § 45-2-101(43); D.C. Doc. 473, Instr. 15.) Geoff's defense was that his conduct did not grossly deviate from that of a reasonable person in the same situation. (Second Trial at 735–36, 748, 750–52.)

Otway's prohibited testimony on strangulation and its effects was acutely relevant to the jury determining how a reasonable person would have responded in Geoff's situation of being strangled by Levi. Otway would have testified that, by squeezing the thyroid and releasing high levels of thyroxine into the bloodstream, strangulation causes a "thyroid storm" and induces "extreme behavior changes" such as panic,

agitation, combativeness, and “very erratic” responses. (First Trial at 598.) It’s no stretch to believe regular folks not versed in strangulation will not know about the chemical processes and responses strangulation unleashes. Such knowledge, however, informs how one would figure a reasonable person would respond upon being strangled. The prohibited expert testimony would have assisted the jury in its assessment of what a reasonable person’s conduct would have been in Geoff’s situation and whether Geoff’s conduct grossly deviated from that. That basis alone was sufficient for the expert testimony’s admission.

Further, the District Court instructed Geoff’s jury on justifiable use of force. (D.C. Doc. 473, Instr. 19–20.) That defense requires a jury to assess the “reasonabl[eness]” of a defendant’s belief that his “conduct [was] necessary for self-defense” and “to prevent . . . serious bodily harm.” (Mont. Code Ann. § 45-3-102; D.C. Doc. 473, Instr. 19–20.) This defense requires the jury to assess “what a reasonable person would believe under the same circumstances.” *State v. Collins*, 178 Mont. 36, 45, 582 P.2d 1179, 1184 (1978).

The prohibited expert testimony would have provided information to help jurors determine what a reasonable person in Geoff’s situation

would have believed about the threat from Levi's strangulation and the necessity of Geoff's conduct. Otway would have testified about the comparatively low pressure and time it can take to cut off a strangulation victim's blood flow to the point of unconsciousness. (First Trial at 591–92, 596–97.) Additionally, Otway's testimony about the chemical processes that make a strangulation victim erratic and panicky inform what a reasonable person under the circumstances would believe about the necessity of gassing a truck in reverse to get away from being strangled. This was all outside the ken of common jurors and would have assisted jurors in determining facts at issue. Otway's expert testimony met the test for admissibility.

**C. The District Court's order misunderstands strangulation and the nature of admissible expert testimony.**

The District Court's order barring Otway's expert testimony asserted the testimony was "not relevant" because self-defense "relies on the *Defendant's reasonable belief*," and Otway "cannot testify as to the Defendant's reasonableness or his belief." (Order at 4 (emphasis in original).) But whether an expert can or will testify as to the ultimate fact at issue is not the standard for the admissibility of expert

testimony. Rather, the standard is whether the expert's specialized knowledge will *assist* the jury in determining ultimate issues. *Price*, ¶ 23. Rule 702 permits "an expert to give testimony which need not be in the form of opinion, but which informs the jury so they may render the correct decision." *State v. Jay*, 2013 MT 79, ¶ 27, 369 Mont. 332, 298 P.3d 396 (citations omitted). That may include the expert "describ[ing] recognized principles of their specialized knowledge" or "provid[ing] general background." *Jay*, ¶ 27 (citations omitted). Otway's testimony providing the jury her specialized knowledge on strangulation and its effects would have refuted the State's arguments disputing the fact of Levi strangling Geoff and would have helped jurors understand how a reasonable person would respond in Geoff's situation. These were relevant and material facts in deciding whether Geoff was guilty of the charged offense. Otway not being able to testify directly to the reasonableness of Geoff's conduct did not render her expert testimony inadmissible.

Furthermore, in concluding strangulation is "a common concept" and "easily understandable," the District Court exhibited a common yet incorrect understanding of strangulation. The court asserted

strangulation “is[] the restriction of airflow into and out of the lungs.” (D.C. Doc. 469 at 6.) That definition is, at once, both too broad and too narrow, and aligns with neither strangulation’s medical nor legal definition. Otway would have testified strangulation is defined as an “external force on the neck that can close the blood vessels of the neck and/or the airway of the neck,” which is to be contrasted with “choking,” which is “an internal obstruction in the airway.” (First Trial at 590–91.) Montana Code Annotated § 45-5-215(1) similarly defines strangulation as “a person . . . imped[ing] the normal breathing or circulation of the blood” of another. The District Court’s definition, by contrast, would exclude the restriction of blood and would include internal obstruction like choking.<sup>4</sup> That the District Court itself misunderstood strangulation illustrates that strangulation is not such a common concept that further education on it could not assist jurors.

In at least two prior cases, this Court has noted the admission of expert testimony on strangulation. *See State v. Torres*, 2021 MT 301,

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<sup>4</sup> Judge Haynes, who correctly admitted the expert testimony, understood the distinction that Judge Lint missed, explaining, “In ultimate fighting championships, they talk about choking them out. But . . . they really should be saying they strangle them out.” (See First Trial at 577–78.)

¶ 12, 406 Mont. 353, 498 P.3d 1256; *Ritesman*, ¶ 8. By contrast, none of this Court’s cases note a trial court excluding such testimony.

Likewise, in Geoff’s first trial, Judge Haynes admitted the expert testimony over the State’s objection. The State was permitted to explore and test the expert testimony through cross-examination. That is what this Court has directed: to “construe liberally the rules of evidence so as to admit all relevant expert testimony,” *McClue*, ¶ 23, because “it is better to admit relevant . . . expert testimony and allow its weight to be attacked by cross-examination and refutation,” *Price*, ¶ 23.

At the second trial, however, the State requested and received the new judge’s help in, as defense counsel accurately put it, “enjoin[ing] the Defense from presenting the complete and thorough defense that Mr. Santoro is constitutionally entitled to present by seeking to exclude his expert witness.” (D.C. Doc. 366 at 7.) The District Court’s order does not recognize this Court’s command of liberal construction to admit relevant expert testimony. (*See* D.C. Doc. 469.) The District Court’s order wrongly excludes evidence that would have responded to the State’s arguments and informed the jury’s assessment of whether Geoff grossly deviated from the conduct of a reasonable person under the

circumstances—the central matter in dispute at trial. Because the District Court’s wrongful ruling prejudiced Geoff’s substantial rights, it requires reversal of the negligent homicide conviction.

**II. Alternatively, this Court should reverse Geoff’s sentence because it rests upon prosecutorial vindictiveness and a violation of Geoff’s right to address the court.**

The Fourteenth Amendment to the United States Constitution guarantees due process of law. So does Article II, Section 17 of the Montana Constitution. Due process applies at sentencing. *State v. McCoy*, 2021 MT 303, ¶ 39, 406 Mont. 375, 498 P.3d 1266.

The Montana Constitution’s due process right is a “separate and enforceable constitutional right insofar as the jurisdiction of the State of Montana extends.” *State v. West*, 2008 MT 338, ¶ 27, 346 Mont. 244, 194 P.3d 683 (cleaned up). In mandating due process, the drafters of the Montana Constitution mandated a “flexible concept,” *West*, ¶ 32, without a “static definition,” *State v. Koon*, 2017 MT 283, ¶ 16, 389 Mont. 322, 405 P.3d 1254. The enshrined due process right “calls for such procedural protections as the particular situation demands,” *West*, ¶ 32 (citation omitted), and “expresses a requirement of fundamental fairness,” *Koon*, ¶ 16. This Court’s “paramount obligation” includes

“interpret[ing]” and “protect[ing]” the Montana Constitution’s due process right. *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 214, 215 (1996).

**A. The prosecutor was presumptively and actually vindictive, and violated due process, in requesting a harsher sentence after appeal.**

**1. Applicable law**

“To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’” *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). If the law provides a defendant the opportunity to appeal or otherwise attack and overturn a conviction, due process does not permit the government to interfere with or penalize the exercise of that right. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). In such circumstances, a due process violation may be demonstrated through a prosecutor’s or judge’s actual vindictiveness or through facts sufficient to give rise to a presumption of vindictiveness. *State v. Roundstone*, 2011 MT 227, ¶ 38, 362 Mont. 74, 261 P.3d 1009.

The seminal case in this area of law is *North Carolina v. Pearce*. Pearce and another defendant succeeded in getting their convictions reversed but, upon being reconvicted for the same offenses, they received longer sentences. *Pearce*, 395 U.S. at 713–15.

The U.S. Supreme Court reversed the sentences as violating due process. *See Pearce*, 395 U.S. at 714–15, 726. “[D]ue process . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” *Pearce*, 395 U.S. at 725. “[D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation.” *Pearce*, 395 U.S. at 725. Accordingly, a presumption of unconstitutional vindictiveness applies when a court imposes a harsher sentence after a defendant succeeds in getting a former sentence set aside. *Pearce*, 395 U.S. at 726. To overcome that presumption, an increased sentence must be based on “identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding” and the “factual data upon which the increased sentence is based must be a part of the record.” *Pearce*, 395 U.S. at 726.

In *Blackledge v. Perry*, the U.S. Supreme Court determined a presumption of vindictiveness applies in other situations “pos[ing] a realistic likelihood of vindictiveness.” *Blackledge*, 417 U.S. at 27. Perry was convicted of a misdemeanor and appealed for a trial de novo, after which the prosecutor charged Perry, for the same conduct, with a felony. *Blackledge*, 417 U.S. at 22–23. The Court determined these facts demonstrated a realistic likelihood of vindictiveness necessitating a presumption of vindictiveness. A “prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing . . . , since such an appeal will clearly require increased expenditures of prosecutorial resources . . . , and may even result in a formerly convicted defendant’s going free.” *Blackledge*, 417 U.S. at 27. “And, if the prosecutor has the means readily at hand to discourage such appeals” by “upping the ante,” then the prosecutor can “insure that only the most hardy defendants will brave the hazards of a de novo trial.” *Blackledge*, 417 U.S. at 27–28. The Court concluded the prosecutor’s harsher charge following the defendant’s appeal was presumptively vindictive and unconstitutional, even in the absence of evidence of actual vindictiveness. *Blackledge*, 417 U.S. at 27–28.

This Court applied the *Pearce/Blackledge* framework in *State v. Knowles*, 2010 MT 186, 357 Mont. 272, 239 P.3d 129. Knowles’s jury hung on the charged offense and, following the mistrial, the prosecutor charged the same conduct as a more serious offense. *Knowles*, ¶¶ 9–10. This Court concluded the facts presented an “appearance and reasonable likelihood of vindictiveness,” triggering a presumption of vindictiveness that required the Court to reverse the conviction for the more serious offense. *Knowles*, ¶¶ 35–36. Chief Justice McGrath dissented, but only because he concluded the threat of vindictiveness after a mistrial is distinguishable from the threat of vindictiveness following appeal. *Knowles*, ¶ 62 (McGrath, C.J., dissenting).

Here, prosecutor Parker’s harsher sentencing request on remand from appeal was actually and presumptively vindictive and violated due process.

**2. The prosecutor’s request meets the threshold for vindictiveness because it responded to the exercise of a right with harsher treatment.**

The threshold for an unconstitutional vindictiveness claim is that the government or a court treats the defendant more harshly following the defendant’s exercise of a right. *See State v. Jackson*, 2007 MT 186,

¶¶ 14–16, 338 Mont. 344, 348–49, 165 P.3d 321 (determining first whether the post-appeal sentence was “more burdensome”). Many courts have concluded an otherwise identical sentence placing a greater restriction on parole eligibility creates a more burdensome sentence and establishes the threshold for a vindictiveness claim. *E.g.*, *U.S. v. Steele*, 988 F.2d 998, 999 (9th Cir. 1993); *U.S. v. Bello*, 767 F.2d 1065, 1068 (4th Cir. 1985); *State v. Thomas*, 214 A.3d 132, 145–46 (Md. 2019).

Here, the prosecutor’s sentencing request following the appeal was more burdensome because the prosecutor requested that Geoff receive no possibility of parole for the Count I negligent homicide. Prosecutor Parker’s former sentencing request (twenty-years flat, without any parole restriction) would have made Geoff statutorily eligible for parole on Count I after serving five years. *See* Mont. Code Ann. § 46-23-201(3) (stating a defendant becomes parole eligible after serving one-fourth of a prison sentence). The District Court’s initial sentence (twenty years, five suspended, without a parole restriction) had it so Geoff would be statutorily eligible for parole on Count I after serving 3.5 years. *See* § 46-23-201(3). By contrast, Parker after appeal requested that Geoff be completely ineligible for parole and necessarily have to serve a full

twenty-years in prison for Count I. Parker thus requested an extra 15 years behind bars that Parker did not request before, or an extra 16.5 years compared to Geoff's initial sentence. The prosecutor's sentencing request after Geoff's appeal was considerably more severe and burdensome than the prosecutor's sentencing request before Geoff exercised his right to appeal, meeting the threshold for an unconstitutional vindictiveness claim.

**3. The prosecutor's statements supply objective proof he was actually vindictive and sought to punish Geoff based on the appeal and remand.**

Proving actual vindictiveness requires "objective proof" of the prosecutor acting in "bad faith" or being "motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do." *Roundstone*, ¶ 39.

Here, prosecutor Parker's statements at sentencing supply such objective proof. Geoff had a right to appeal, to receive a new trial, and to be parole eligible as statute permits. Yet, in requesting twenty years in prison with a twenty-year parole restriction, Parker explicitly identified the exercise of all of these rights as justifying an increased sentence. "[T]he case . . . being remanded for retrial" by the appeal

“amplified many fold” “all of the fears, all of the stresses, all of the anxiety and hurt.” The necessity of retrying the case was “traumatic” and caused “anxiety and stress.” Geoff’s parole hearing “heightened the stress and anxiety again.” (Second Sent. at 27.) In the prosecutor’s own words, this all was “what the remand”—*i.e.*, the appeal—“had done.” (Second Sent. at 27.) The prosecutor capped it off with the bad faith of misrepresenting that his new sentencing recommendation was “the same thing we asked for the first time around,” “what we have always believed was appropriate,” and doubling down on that falsity even after the defense raised the issue of vindictiveness. (Second Sent. at 31, 36.)

Prosecutorial vindictiveness doesn’t come much more blatant. Whereas the prosecutor in 2017 believed his recommendation of twenty years without any restriction on parole “is just and that would be justice,” the prosecutor after Geoff’s successful appeal upped the ante by a twenty-year parole restriction and identified the appeal and occurrences flowing from the appeal as justification. (First Sent. at 261; Second Sent. at 26–27.) The prosecutor was apparently “motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do.” *Roundstone*, ¶ 39. And the prosecutor’s

repeated false representations illustrate that “bad faith.” *Roundstone*,

¶ 39. This is a case of established, actual vindictiveness.

**4. The appearance or reasonable likelihood of vindictiveness necessitates a presumption of vindictiveness.**

“[S]ince the fear of . . . vindictiveness may unconstitutionally deter a defendant’s exercise of [his] rights,” *Blackledge*, 417 U.S. at 28, the “appearance and reasonable likelihood of vindictiveness” necessitates applying a presumption of vindictiveness. *Knowles*, ¶¶ 35–36. Here, if the facts don’t establish actual vindictiveness, the facts surely establish its appearance or reasonable likelihood, which necessitates applying a presumption of vindictiveness.

This situation has the appearance of vindictiveness because, after Geoff successfully appealed, the prosecutor “upp[ed] the ante” and requested a substantially more severe sentence. *Blackledge*, 417 U.S. at 27–28; *Knowles*, ¶ 36. If that were not enough, the prosecutor attributed that increased request to Geoff’s appeal and misrepresented that the new request was the same as what the prosecutor previously requested. Left unchecked, such prosecutorial conduct provides “the means readily at hand to discourage” defendants from exercising the

right to appeal as law provides. *Blackledge*, 417 U.S. at 27–28.

Defendants should “be freed of apprehension of such a retaliatory motivation.” *Pearce*, 395 U.S. at 725. At the very least, this case has the appearance or reasonable likelihood of vindictiveness necessitating a presumption of the same. And because the prosecutor explicitly identified the appeal as supposedly justifying an increased sentence, the State cannot overcome a presumption of vindictiveness.

**5. The prosecutor’s vindictive request was apparently effective because the court fulfilled the request.**

“[V]indictiveness must play no part in a prosecutorial or sentencing decision.” *U.S. v. King*, 126 F.3d 394, 397 (2d Cir. 1997). It does appear, however, that the prosecutor’s vindictiveness played a part in Geoff’s sentence. After all, the District Court fulfilled Parker’s vindictive request to the tee, imposing a twenty-year unsuspended sentence with no possibility of parole.

The court giving the prosecutor what he vindictively requested illustrates a much relied upon truth in our system of justice: A prosecutor’s sentencing request has great power. Defendants regularly trade away their constitutional rights and the chance at acquittal in

order to secure a more favorable request from the prosecutor, even if that request is not binding on a sentencing court. This Court should not blink at the reality of how important a prosecutor's words at sentencing can be. Indeed, this Court has previously been "unwilling to conclude" a prosecutor's recommending words had no effect "[a]bsent some reason in the record for second guessing th[e] government attorney's evaluation of the possible effect of his advocacy." *State v. Rardon*, 2002 MT 345, ¶ 24, 313 Mont. 321, 61 P.3d 132 (quoting *U.S. v. Taylor*, 77 F.3d 368, 371 (11th Cir. 1996)). The prosecutor, after all, thought his recommendation and request "might influence the judge, or else there would have been no point in making" the request. *Rardon*, ¶ 24 (quoting *Taylor*, 77 F.3d at 371).

The District Court's statements at sentencing do not dispel the appearance that the prosecutor's vindictive request played a part in the sentence imposed. The District Court echoed Parker regarding the appeal's effects by noting the "exhaust[ion]" of Levi's family (as Parker explicitly noted, due to the appeal) and strangely said, "I'm not agreeing with the state because I'm agreeing with the state." (Second Sent. at 38.) The court then precisely fulfilled Parker's vindictive sentencing

request. (Second Sent. at 38.) The appearance and reasonable possibility of the prosecutor’s vindictive request influencing the District Court’s imposition of a maximally harsh sentence demands that this Court reverse the sentence.

**6. The unconstitutional vindictiveness claim is preserved. If not, it qualifies for plain error review.**

Geoff preserved the issue of the prosecutor’s vindictiveness by objecting that the State’s sentencing request sought “vengeance” and Geoff “should not be punished for pursuing an appeal.” (Second Sent. at 32.) But even if the error were unpreserved, the error would warrant reversal under plain error review.

This Court has a “paramount obligation” to “interpret the constitution, to protect individual rights, and, correspondingly, to review lower court decisions and actions for error.” *Finley*, 276 Mont. at 137, 915 P.2d at 214–15 (1996). Thus, this Court may review unpreserved errors that implicate substantial rights when failing to do so “may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or

may compromise the integrity of the judicial process.” *Finley*, 276 Mont. at 137, 915 P.2d at 215.

The error here meets the criteria of plain error. The prosecutor’s vindictive recommendation violates fundamental fairness and due process by seeking to punish the exercise of constitutional rights. *Goodwin*, 457 U.S. at 372. The judicial process required Geoff’s sentence to be determined based on relevant factors rather than vindictiveness. The prosecutor’s vindictive request compromised the integrity of that judicial process. Left unchecked, that same vindictiveness will compromise the judicial process in other cases by unconstitutionally discouraging defendants from raising meritorious appeals for fear of prosecutors vindictively upping the ante. *See Blackledge*, 417 U.S. at 27–28. As fulfilled and imposed by the District Court, the prosecutor’s vindictive sentencing request represents a miscarriage of justice. This Court should not stand for it.

**B. The District Court violated § 46-18-115(3) and the right to allocution by failing to ask Geoff whether he wished to speak before the court imposed sentence.**

**1. Applicable law**

In 1991, the Legislature passed “An Act to Generally Revise the Laws Relating to Criminal Procedure.” 1991 Montana Laws Ch. 800 (S.B. 51). Among other things, the Act created a new statute, § 46-18-115(3), meant to “embody due process constitutional law” at sentencing. Criminal Law Commission Comments, § 46-18-115(3).

Section 46-18-115(3) states, “[b]efore imposing sentence . . . the court *shall* address the defendant personally to ascertain whether the defendant wishes to make a statement and to present any information in mitigation of punishment.” Then, “[i]f the defendant wishes to make a statement, the court *shall* afford the defendant a reasonable opportunity to do so.” (Emphasis supplied.)

It is apparent that § 46-18-115(3)’s language was styled off of Federal Rule of Criminal Procedure 32(4). In 1991, Rule 32(a)(1)(c) likewise required, “Before imposing sentence the court shall . . . address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant’s own behalf and to present any

information in mitigation of punishment.”<sup>5</sup> Just as the U.S. Supreme Court has held when interpreting Rule 32, § 46-18-115(3) plainly communicates that a trial judge must “unambiguously address” the defendant and “leave no room for doubt that the defendant has been issued a personal invitation to speak.” *Green v. U.S.*, 365 U.S. 301, 305 (1961) (plurality opinion) (Frankfurter, J).

The process required by § 46-18-115(3) and Rule 32 is the right to allocution. Allocution entails a “trial judge’s formal address to a convicted defendant, asking whether the defendant wishes to make a statement” and a defendant’s responding “statement . . . to the sentencing judge.” *Black’s Law Dictionary*, ALLOCUTION (11<sup>th</sup> ed. 2019). As this definition suggests, allocution is “a peculiar right. In a sense, it is the right to be advised of another right.” *New Mexico v. Setser*, 932 P.2d 484, 489 (N.M. 1996) (citation omitted). While perhaps peculiar, the right is “ancient” and “elementary.” *U.S. v. Behrens*, 375 U.S. 162, 165 (1963); *Behrens*, 375 U.S. at 167 (Harlan, J., concurring).

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<sup>5</sup> Rule 32 has since been revised to communicate the same thing in slightly different language, stating, “Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence.”

“As early as 1689, it was recognized that the court’s failure to ask the defendant if he had anything to say before sentence was imposed required reversal.” *Green*, 365 U.S. at 304 (citing *Anonymous*, 3 Mod. 265, 266 (K.B. 1689)).

While much has changed since 1689, the importance of allocution has not. Allocution has endured as a centerpiece of criminal sentencing through the centuries because it “serves several interrelated purposes.” *U.S. v. Abney*, 957 F.3d 241, 250 (D.C. Cir. 2020). It “elicit[s] information relevant to mitigation or mercy.” *Abney*, 957 F.3d at 250; accord *Connecticut v. Strickland*, 703 A.2d 109, 112 (Conn. 1997); *U.S. v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991). It “demonstrat[es] to the public that the courts treat criminal defendants in an individualized, fair, and openminded manner.” *Abney*, 957 F.3d at 250; accord *Strickland* 703 A.2d at 112; *Barnes*, 948 F.2d at 328. It “simply acknowledg[es] the defendant’s humanity.” *Abney*, 957 F.3d at 250; accord *Strickland* 703 A.2d at 112; *Barnes*, 948 F.2d at 328. And “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” *Green*, 365 U.S. at 304.

Allocution's continued importance is reflected in the Montana Legislature enshrining the right in statutory text in 1991. It is also reflected in this Court holding allocution is required even where no statute applies to command it so. *See Malee v. Second Jud. Dist. Ct.*, 275 Mont. 72, 79–80, 911 P.2d 831, 835 (1996) (holding the denial of allocution in direct contempt proceedings requires reversal). Indeed, courts throughout the country have concluded a sentencing court's failure to address the defendant and to permit the defendant the opportunity to speak requires reversal of the sentence. *U.S. v. Bustamante-Conchas*, 850 F.3d 1130, 1144 (10th Cir. 2017) (en banc); *U.S. v. Adams*, 252 F.3d 276, 288–89 (3d Cir. 2001); *North Dakota v. Lott*, 921 N.W.2d 428, 431 (N.D. 2019); *Colorado v. Smalley*, 369 P.3d 737, 751 (Colo. 2015).

This Court most recently addressed the right to allocution in *State v. McCoy*. McCoy argued the sentencing court violated § 46-18-115 and due process by sentencing him without allocution. This Court noted McCoy had not raised this issue before his trial court, so this Court's review of the claim would have to run through plain error review. *See McCoy*, ¶ 41 (citing *State v. Abel*, 2021 MT 293, ¶ 4, 406 Mont. 250, 498

P.3d 199 (referring to plain error review); *but see U.S. v. De Alba Pagan*, 33 F.3d 125, 129 n. 4 (1st Cir. 1994) (reasoning that because “[u]nder Rule 32(a)(1)(c), it is the court's obligation to invite the defendant’s remarks,” a “defendant ordinarily will not be held to have waived the right of allocution merely because he did not seek to address the court”). This Court denied McCoy’s claim and affirmed because of the specific facts of what occurred at McCoy’s sentencing: The trial court “asked and ascertained whether McCoy wanted to make a statement, and directed counsel to decide the timing of the statement, for which there were . . . reasonable[] opportunities to do so during the hearing,” and a sentencing memorandum separately provided the sentencing court with “Defendant’s Statement.” *McCoy*, ¶ 43.

**2. The District Court did not ask Geoff whether he wished to speak before the court brought down the hammer on Geoff.**

Here, the District Court violated § 46-18-115(3) and denied allocution. At no point during Geoff’s sentencing hearing did the District Court do what it “shall” do: “address the defendant personally to ascertain whether the defendant wishes to make a statement” and

“afford the defendant a reasonable opportunity to do so.” Section 46-18-115(3).

The District Court did ask the parties about whether they would present witnesses at the sentencing hearing. (Second Sent. at 4, 10.) But no one versed in criminal sentencing proceedings would have understood this as asking whether Geoff, the defendant, would address the court through allocution. By its terms, § 46-18-115(3) does not permit leaving to guesswork whether the court has invited the defendant to speak. The sentencing court must “address the defendant *personally* to ascertain whether the defendant wishes to make a statement.” Section 46-18-115(3) (emphasis supplied). The court’s words must “leave no room for doubt that the defendant has been issued a personal invitation to speak.” *Green*, 365 U.S. at 305. The District Court, however, did not ask or provide Geoff with the opportunity to speak before imposing the maximum sentence with no possibility of parole.

### **3. The error qualifies for plain error review.**

Many courts have concluded a court’s failure to invite the defendant to speak before imposition of sentence requires reversal, even

under plain error review. *See, e.g., Bustamante-Conchas*, 850 F.3d at 1142 (holding the denial of allocution as an error warranting reversal under plain error review absent “extraordinary circumstances”); *Adams*, 252 F.3d at 288–89 (concluding, with “little difficulty,” that it is appropriate to use plain error review to reverse the trial court’s failure to ask the defendant whether he wished to speak before imposing the sentence); *Lott*, 921 N.W.2d at 431 (reversing the court’s failure to ask defendant whether she wished to speak under the jurisdiction’s equivalent to plain error review); *Smalley*, 369 P.3d at 751 (reversing the trial court’s failure to address the defendant, thereby denying him the right to speak, because it “so undermined the fundamental fairness of the sentencing proceeding as to cast serious doubt on the reliability of the sentence”). The District Court’s denial of allocution and violation of § 46-18-115(3) likewise qualifies for reversal under plain error review.

Allocution serves purposes at the center of our system for meting out punishment for crimes. “The defendant’s right to speak, and the court’s corresponding ‘duty to listen and give careful and serious consideration to what the defendant says,’ provide essential recognition of the seriousness of the event for the sentenced individual, and for the

broader community” and “reaffirms human dignity in the face of severe punishment.” *Abney*, 957 F.3d at 253–54 (citation omitted). To deny that right “undermines the legitimacy of the sentencing process.” *Abney*, 957 F.3d at 253–54. The legitimacy and fairness of Geoff’s sentencing was so undermined, authorizing plain error review. See *Finley*, 276 Mont. at 137, 915 P.2d at 215.

Indeed, the denial of allocution in this case implicates a manifest miscarriage of justice. Had the District Court provided Geoff the opportunity to speak, he may well have said several things in mitigation of the maximum sentence the District Court imposed. For instance, Geoff may have accepted responsibility and accountability for the offense, refuting the District Court’s assertion (unfairly made without giving Geoff a chance to speak) that Geoff had an “accountability problem.” (Second Sent. at 37.) Indeed, when Geoff had the opportunity to speak at his previous sentencing hearing, he explained that he accepted and took “full responsibility for what happened that tragic night” and he was “truly and sincerely sorry for everyone’s pain, suffering, and loss.” (First Sent. at 269–70.) As such, this case provides an unintentional experiment in the efficacy of

allocution. Unlike Judge Hayes, who imposed a lesser sentence after providing Geoff the opportunity to express that he accepted responsibility, Judge Lint never provided Geoff such an opportunity before wrongly accusing Geoff of an accountability problem and giving Geoff a much harsher sentence.

Survey data agrees with these results. 80.3% of federal judges think allocution is at least “somewhat important” for arriving at a final sentence, and only 1.8% think allocution “not important at all” for arriving at a final sentence. Mark W. Bennett, Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges’ Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735, 757 (2014). Given allocution’s accepted importance for arriving at a final sentence, the District Court’s failure to ask Geoff whether he wished to speak “so undermined the fundamental fairness of the sentencing proceeding as to cast serious doubt on the reliability of the sentence.” *Smalley*, 369 P.3d at 751.

The denial of allocution in this case is also easily distinguished from *McCoy*. The court in *McCoy* asked the defense whether the defendant wished to make a statement and left it to the defense when

that statement would occur. *McCoy*, ¶ 43. Here, the District Court did no such thing.

The District Court's allocution error and violation of § 46-18-115(3) seriously affected the fairness, integrity, and outcome of Geoff's sentencing. Other courts have held such an error warrants reversal under plain error review. This Court should hold the District Court's error warrants reversal under plain error review.

**C. The Court should reduce Geoff's sentence to the status quo ante of the original sentence. Alternatively, resentencing should occur before a different judge.**

Montana Code Annotated § 46-20-703(4) authorizes this Court to "reduce the punishment imposed by the trial court." This authorization is intended to permit this Court to (1) reduce "expense," "massive compilation of records," and "numerous appeals of the same case," (2) "give a complete answer to the parties," and (3) "do complete justice." Criminal Law Commission Comments, § 46-20-703.

If this Court does not reverse based on the District Court's trial error, it will serve the interests behind § 46-20-703(4) for this Court to reduce Geoff's sentence on appeal to the sentence he had before his first appeal: Twenty years, five suspended, and without any restriction on

parole. There is reason for concern that, if this case were remanded for a new sentencing hearing, either the State or the District Court will reframe justifications for Geoff's increased sentence in a way that is a subterfuge for previous and/or continued vindictiveness. By contrast, if this Court reduces the sentence as proposed, it will remove the possibility of future vindictiveness—silent or explicit—and return this case to status quo ante, leaving the parties in neither a worse nor better position than they were before the original appeal. In remedying the sentencing errors, this Court is authorized to do complete justice, give the parties a complete answer, and eliminate the time and expense of another sentencing hearing, possibly followed by another appeal. This Court should exercise that authority to reduce Geoff's sentence.

Alternatively, this Court should remand for resentencing before a different judge. “[U]nusual circumstances” may warrant a different judge presiding over resentencing, particularly when that will serve the appearance of justice and fairness. *State v. Webber*, 2019 MT 216, ¶ 21, 397 Mont. 239, 448 P.3d 1091 (citing *Bauer v. State*, 1999 MT 185, ¶ 32, 295 Mont. 306, 983 P.2d 955); accord *State v. Rambold*, 2014 MT 116, ¶¶ 21-22, 375 Mont. 30, 325 P.3d 686. What occurred at Geoff's

sentencing hearing qualifies as unusual. The court fulfilled a presumptively and apparently vindictive sentencing request and denied Geoff the basic dignity of being able to speak before imposition of the maximum sentence available. After the vindictiveness and disregard for procedural fairness exhibited below, remanding to the same judge to potentially reinstate the same sentence will not be or appear fair or just. If this Court remands for resentencing, it should be a resentencing before a different judge.

### **CONCLUSION**

The District Court erred by prohibiting relevant and material expert testimony. The error requires reversing the conviction. If this Court does not reverse the conviction, it should reduce the sentence to remedy the prosecutor's presumptive and apparent vindictiveness and/or the District Court's violation of § 46-18-115(3).

Respectfully submitted this 9th day of June, 2023.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,788, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle  
ALEXANDER H. PYLE

**APPENDIX**

Order Prohibiting Expert Testimony.....App. A  
Oral Pronouncement Without Allocution .....App. B  
Written Judgment.....App. C

## CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-08-2023:

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