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Case Number: DA 23-0185

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

REPLY 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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INTRODUCTION

A. Summary Of The Case

This case is about whether or not Montana State Fund (MSF) has the obligation to inform the District Court (DC) of their misconduct to gain access to Confidential Criminal Justice Information (CCJI) when filing their Application pursuant to §44-5-303, MCA.

Additionally, the case is about whether or not MSF can in bad faith request to declare Matthew a vexatious litigant without evidence and to try and damage Matthew's character and credibility as a defense in the MT Workers' Compensation Court, WCC 2013-3275. MSF clearly, objectively, and obviously violated Rule 60(B) and the Montana Rules Of Professional Conduct (MRPC).

B. Applicable Law

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

ARGUMENT

I. The District Court Erred By Denying The Motion For Relief From Final Order Pursuant To Mont. R. CIV Pro 60(B) And The Motion For Relief From Final Order Because Montana State Fund Violated The Montana Rules Of Professional Conduct

A. Inadequate Service; Rules 60(b)(1) and (4)

Reservation Operations Ctr.Ltd.Liab. Co. v. Scottsdale Ins.Co., 2018 MT 128,¶7,391 Mont.383,419 P.3d 121 (when considering relief granted under Rule 60(b)(4) and evaluating if service was properly effectuated, Court reviews the record de novo). This Court may undertake review of such an issue under the plain error doctrine in situations that implicate a defendant's fundamental constitutional rights, such as when failing to review the alleged error, may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Daniels,*2003 MT 247, P20,317 Mont.

As this Court has explained, "Rule 60(b) is an exception to the doctrine of finality of judgments only insofar as it allows relief from an otherwise final judgment 'where a party was wronged through no fault of its own.'" *Scottsdale Ins.,* ¶8 (citation omitted).

If the issuing court did not obtain jurisdiction prior to entering a judgment, that judgment is void under Rule 60(b)(4). *Scottsdale Ins.,* ¶8. "Personal jurisdiction is only obtained through 'strict compliance' with the rules of service" and "[d]efective service of process constitutes proper grounds to set aside a default judgment." *Id.*

The undisputed facts establish that MSF did not serve Matthew with their Application. MSF admitted that they did not serve Matthew but did serve a copy of the Application to Attorney Andy Huppert (Huppert) who is representing Matthew in his workers' compensation claims, and Attorney Marty Judnich who represented Matthew during the criminal proceedings in CDC-2014-98. (AnswerBrief:P.4).

In MSF's Application the certificate of service does not list Matthew as being served. (Doc.1). Matthew confirmed he was not served with the Application to DC. (Doc.17:P.9,17,19).

MSF filed the petition as a new case in the First Judicial DC with the Honorable Judge Cooney, separate from Matthew's criminal case and separate from the workers compensation case. (Doc.1). MSF filed their Application pursuant to §44-5-303,MCA. (Doc.1). Complaints or petitions filed under §44-5-303,MCA require compliance with the Montana Rules of Civil Procedure (M.R.Civ.P.) and Uniform DC Rules (UDCR) Rule 3.

As such, MSF was required to follow the requirements of M.R.Civ.P. 4 to commence a new suit, which include serving their petition and a summons upon Matthew pursuant to M.R.Civ.P. 4(d);(l) and UDCR Rule 3. A DC cannot acquire personal jurisdiction over Matthew until Matthew is properly served with the petition and summons. *See Mountain W. Bank, N.A. v. Glacier Kitchens, Inc.,*2012 MT 132, ¶16,365 Mont.276,281 P.3d 600. "[E]ven where a defendant has actual notice of the summons and complaint; knowledge of the action is not a substitute for valid service." *Mountain W. Bank,* ¶16 (quoting *Fonk v. Ulsher,*260 Mont.379,383,860 P.2d 145,147 (1993)).

There is no evidence in the DC record MSF served a summons and petition on Matthew. Even if this Court finds MSF did serve Matthew through his attorneys who was representing him on unrelated matters, MSF still did not follow the requirements pursuant to M.R.Civ.P.4(d) and (l) by serving a summons and petition on the attorneys. Matthew has established he was entitled to relief because the Application (Doc.1) and the DC's Order releasing the CCJI (Doc.2) was void because the DC had not obtained jurisdiction due to MSF's failure to properly serve Matthew and/or his attorneys pursuant to M.R.Civ.P.4 and UDCR Rule 3.

The DC failed to follow M.R.Civ.P.2 and UDCR in allowing Matthew or his attorneys to file a response within 14 days or 17 days to the petition.

B. Fraud, Misrepresentation, Or Misconduct; Rule 60(B)(3)(6)

MSF argues that Matthew's Rule 60(B) Motion was untimely and cited no extraordinary circumstances that would excuse the delay in filing with the DC. (AnswerBrief:P.5,6). MSF is incorrect in their analysis.

"Rule 60(b)(6) is a grand reservoir of equitable power." *Henson v. Fid. Nat'l Fin., Inc.,*943 F.3d 434,445 (9thCir.2019) (quoting *Harrell v. DCS Equip.Leasing Corp.,*951 F.2d 1453,1458 (5thCir.1992)). Under this clause, a DC has "power to vacate judgments 'whenever such action is appropriate to accomplish justice.'" Henson, 943 F.3d at 443 (quoting *US v. Sparks,*685 F.2d 1128,1130 (9th Cir.1982)). (Doc.17:P.3).

This relief "should be liberally applied to situations not covered by the [other 60(b)] clauses so that, giving due regard to the sound interest underlying the finality of judgments, the [DC], nevertheless, has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice." *Id.* at 443 (citing *Fleming v. Gulf Oil Corp.,*547 F.2d 908,912 (10thCir.1977). (Doc.17:P.3,4).

Relief under Rule 60(b)(6) is justified where plaintiffs show "extraordinary circumstances" warranting reopening a final judgment. *Henson,*943 F.3d at 443-44 (quoting *Jones v. Ryan,*733 F.3d 825,833 (9thCir.2013)).(Doc.17:P.4).

Rule 60(b)(6) is a catch-all provision, authorizing relief for "any other reason that justifies relief." Under Rule 60(b)(6) the movant must also show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby,*545 U.S. 524,535 (2005) (quoting *Ackermann v. US,*340 U.S. 193,199 (1950)). (Doc.17:P.4).

A DC must "evaluate the circumstances surrounding the specific motion before the court." *Id.* This "case-by-case inquiry...requires the DC 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." *Id.* at 444-45 (quoting *Stokes v. Williams,*475 F.3d 732,736 (6thCir.2007)). (Doc.17:P.4).

"The Ninth Circuit has also 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.'" *Id.* (quoting *Henson,*943 F.3d at 440). Rule 60(b) thus strikes a balance between justice and finality. (Doc.17:P.4).

Rule 60(b)(6) "has been used sparingly as an equitable remedy to prevent manifest injustice." *See Greenwalt v. Stewart,*105 F.3d 1268,1273 (9thCir.1997). (Doc.17:P.4). Relief under Rule 60(b)(6) is appropriate "only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an

erroneous judgment." *Id.; see also Picco v. Global Marine Drilling Co.,*900 F.2d 846,851 (5th Cir.1990) (relief under Rule 60(b)(6) "should be granted only if extraordinary circumstances are present"). (Doc.17:P.4).

Rule 60 does not affect courts' authority to grant certain other forms of relief, such as "an independent action to relieve a party from a judgment" to prevent grave injustice. *US v. Beggerly,* 524 U.S. 38,47 (1998). (Doc.17:P.5).

In *Community Dental Services v. Tani,* 282 F.3d 1164 (9thCir.2002) the court explained that Rule 60(b)(6) relief is appropriate when the movant establishes "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." *Id.* at 1168 (quoting *Martella v. Marine Cooks & Stewards Union,*448 F.2d 729, 730 (9thCir.1971)) (per curiam). (Doc.17:P.5,6).

With *Tani,* 282 F.3d at 1169 (holding that attorney gross negligence may serve as the basis for setting aside a default judgment pursuant to Rule 60(b)(6)). In determining the merits of the defendant's motion, the court reasoned that a party is due Rule 60(b)(6) relief if he can establish extraordinary circumstances preventing the proper litigation of the case. *Id.* at 1168 and the Court of Appeals acknowledged that an attorney's negligence ought to be imputed to the client, but the court held that a client who demonstrates that his attorney acted with gross negligence is entitled to Rule 60(b)(6) relief. *Id.* at 1168-69. (Doc.17:P.6).

Arguably of greater concern is the loss of prestige the judicial system suffers when a client's suit is dismissed solely because of the attorney's wrongdoing. *See Carter v. Albert Einstein Med. Ctr.,*804 F.2d 805,807,808 (3dCir. 1986)). (Doc.17:P.6).

As the court in *Einstein Medical* pointed out, such a dismissal reflects poorly upon the entire system because attorneys are officers of the court. *Id.* (Doc.17:P.5 6).

To put it slightly differently, "[w]hen an attorney is grossly negligent.., the judicial system loses credibility as well as the appearance of fairness, if... an innocent party is forced to suffer drastic consequences. *Tani,* 282 F.3d at 1170. (Doc.17:P.6). Attorney gross negligence, considering notions of judicial prestige, should be a valid basis for Rule 60(b)(6) relief. (Doc.17:P.5,6).

This Court stated, "A successful Rule 60(b)(6) motion requires that the movant demonstrate each of the following elements:

(1) extraordinary circumstances;

(2) the movant acted to set aside the judgment within a reasonable period of time; and

(3) the movant was blameless.

Skogen v. Murray, 2007 MT 104, ¶14,157 P.3d 1143,337 Mont.139.

1. Matthew Does Satisfy The Requirements For Relief Under Rule 60(B)(3)(6)

Matthew was unaware that MSF filed an Application and Judnich failed to inform Matthew and to provide the documents to him so that necessary steps could have been taken to timely file a objection to MSF's Application. (Doc.17:P.9).

As previously discussed there is no evidence in the DC record MSF served a summons and petition on Matthew pursuant to the requirements of M. R. Civ. P. 4(d) and (l). Even if this Court finds MSF did serve Matthew through his attorneys who was representing him on unrelated matters, MSF still did not follow the requirements pursuant to M. R. Civ. P. 4(d) and (l) by properly serving a summons and petition on attorneys Huppert and Judnich.

The State in the following cases have prevented Matthew from obtaining the necessary exculpatory evidence in order to file a Rule 60(b) Motion in a timely manner: *State v. Ailer,* CDC-2014-98, *Ailer v. State,* CDV-2019-514, and *Ailer v. State;* DV-21-480. (Doc.17:P.10).

MSF conceded they committed misconduct at Matthew's trial and at sentencing and provided improper and inaccurate arguments when filing their application to DC and Matthew by not filing any response briefs. The unrefuted exculpatory evidence and facts provided to DC clearly, obviously, and objectively

demonstrated the prejudicial and egregious 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).

In *Klapprott v. United States,* 335 U.S. 601 (1949) the petitioner had been de-prived of his naturalization in a default judgment procured while the petitioner was ill and wrongfully incarcerated. More than four years later the petitioner sought, and was granted, relief under rule 60(b)(6). For the majority, Justice Black emphasized the exceptional circumstances of the case and the fact that the petitioner had not had a fair trial. 335 U.S. at 614-15. The Court granted a Rule 60(b)(6) motion for relief from a default denaturalization judgment based on extraordinary circumstances that included incarceration, illness, and poverty, *id.* at 613-16.

Relief pursuant to Rule 60(b)(6) is the proper court response when Matthew seeks relief from an adverse ruling caused by a former attorney's gross negligence. As the court in *Tani* stated, "relief under Rule 60(b)(6) may often constitute the only mechanism for affording a client actual and full relief from his counsel's gross negligence-that is, the opportunity to present his case on the merits." *Cmty. Dental Servs. v. Tani,*282 F.3d 1164,1172 (9thCir.2002). For the foregoing reasons, Matthew has demonstrated extraordinary circumstances exist, Matthew acted to set aside the judgment within a reasonable period of time, and Matthew is blameless.

2. Montana State Fund's Revocation Of Their Criminal Justice Status

MSF asserts they are not a criminal justice agency. (AnswerBrief:P.7).

On April 27, 2012 MSF President Laurence Hubbard, during a Board Of Directors Meeting, discussed the **revocation** of MSF criminal justice status and this Court's ruling in a writ of supervisory control questioning the use of surveillance tapes. (**App.A**:P.2).

3. Montana State Fund Is An Arm Of The State

MSF argues that the Department Of Justice (DOJ) prosecuted Matthew not MSF but does admit they investigated the case and turned it over to DOJ. (AnswerBrief:P.6,7). MSF is an arm of the State and therefore MSF along with the State prosecuted and wrongfully convicted Matthew and bears responsibility.

In order for this Court to determine whether MSF is an arm of the state, the following factors must be met: [1] whether a money judgment would be satisfied out of state funds; [2] whether the entity performs central governmental functions; [3] whether the entity may sue or be sued; [4] whether the entity has the power to take property in its own name or only the name of the state; and [5] the corporate status of the entity. *See Sato v. Orange Cty. Dep't of Educ.,* 861 F.3d 923, 928-29 (9thCir.2017).

This Court "must examine these factors in light of the way [Montana] law treat the governmental agency." *Belanger v. Madera Unified Sch. Dist.,* 963 F.2d 249,251(9thCir.1992).

This Court has recognized that the MT comprehensive insurance plan, not MSF itself, pays judgments against MSF. *See Birkenbuel v. Mont. State Compensation Ins. Fund,* 687 P.2d 700,704 (1984). The state comprehensive insurance plan "is funded by appropriations from the legislature." *Id.; see* §2-9-201 (1), MCA (requiring the Department of Administration to acquire insurance for protection of the state); §2-9-202(1),MCA (stating that costs of all insurance purchased under §2-9-201,MCA must come from the legislature). Thus, "blameless taxpayers bear the brunt of" judgments against the MSF. *Birkenbuel,* 687 P.2d at 704. The first factor is satisfied.

MT law states that it is the public policy of "this state" to "provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease." §39-71-105(1), MCA. Further, MSF operates on a statewide level and is required "to insure any employer in this state who requests coverage." *Id.* §39-71-2313(1), MCA. MT also exercises extensive governmental control over MSF. The Governor appoints all MSF executive board members, who control and manage MSF. *Id.* §2-15-1019(4), MCA; *id.* §39-71-2315, MCA.

Those members must then be confirmed by the MT Senate. *Id.* §2-15-1019(7), MCA; *see* §2-15-124(3), MCA. MT law requires the appointment of two legislative liaisons to the board. *Id.* §2-15-1019(8), MCA. These liaisons must be members of the Economic Affairs Interim Committee, a joint committee of the MT House and Senate. *Id.* These liaisons have a statutory right to attend meetings and receive information related to board meetings. *Id.* §2-15-1019(10)(a),(b), MCA. Given the statewide nature of the MSF's operations and the State's extensive control of the MSF, the second factor is satisfied.

MSF has the power to "sue and be sued." §39-71-2316(1)(b), MCA thus the third factor is satisfied.

MT law recognized that MSF may acquire "property and securities," but requires that the State Fund use this property or security "exclusively for the operations and obligations of MSF. §39-71-2320, MCA. MT law also states that MSF "is a nonprofit, independent public corporation." §39-71-2313(1), MCA.

The corporate status may by definition be "independent," but the centralized government control of MSF undercuts of that "independent" status. Thus, the fourth and fifth factors are satisfied.

Based on the aforementioned reasons MSF is an arm of the State and this Court has referred to MSF as a state agency. *See Birkenbuel,* 687 P.2d at 704.

4. The Exculpatory Evidence And Information Have Not Been Presented To This Court During Direct Appeal

MSF claims the exculpatory evidence/information provided to DC and this Court (OpeningBrief:P.6-45) has been presented to this Court for review when Matthew (represented by Brooke) appealed his criminal conviction (Direct Appeal) in *State v. Ailer,* 2018 MT 18, 390 Mont.200,410 P.3d 964. (AnswerBrief:P.7).

This is factually erroneous and in violation of the MRPC Rule 3.3: "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."

The following evidence/information in the Opening Brief at 6-45 have not been presented or reviewed in *State v. Ailer,* 2018 MT 18, 390 Mont.200.

1. Matthew's History Good Character: (OpeningBrief:P.6)

2. Chelsea Chafee (Chafee) PFO Status/Plea Agreement: (OpeningBrief:P.8-9)

3. Chafee's July 18, 2014 Prison Phone Call: (OpeningBrief:P.9-10)

4. Chafee's Interview With Judnich: (OpeningBrief:P.10)

5. Jeff Russell (Russell) Plea Agreement: (OpeningBrief:P.11-12)

6. MSF Coordinator Tom Disburg's (Disburg) Deposition: (OpeningBrief:P.15)

7. MSF Investigator Gaylen Buchanan's Deposition: (OpeningBrief:P.16-17)

8. DCI Agent Anthony Poppler Investigation including his report, interview with Former Garden City Janitorial Owner Cory Miller (Miller) and his deposition: (OpeningBrief:P.17-23)

9. DCI Agent Butch Huesby Deposition: (OpeningBrief:P.24-27)

10. Majority Of Matthew's medical providers from 2011-2023 diagnosing Matthew with Conversion Disorder: (OpeningBrief:P.28)

11. Dr. Sean Tollison's Deposition: (OpeningBrief:P.29-30)

12. Events Leading Up To The Buffer Accident: (OpeningBrief:P.31-33)

13. Vocational Supervisor Jerry Davis' deposition regarding his conversation with Miller that there were no ramps: (OpeningBrief:P.35-36)

14. Loretta Wisse and her neighbors who did not see/hear anything regarding the alleged staged accident on October 16, 2011: (OpeningBrief:P.36)

15. Altered medical records and perjured testimony on those records: (OpeningBrief:P.37-38)

16. False testimony by MSF Claims Examiner Cecelia Robinson (Robinson) and Huesby regarding the first uncontested claim medical records and bills: (OpeningBrief:P.39-41)

17. False Testimony By MSF Claims Examiner Suzanna Simmons during the sentencing hearing: (OpeningBrief:P.41)

18. Brady Violations: (OpeningBrief:P.41-42)

19. Exculpatory Evidence that the were no ramps available: (OpeningBrief:P.42)

20. MSF withheld exculpatory surveillance videos: (OpeningBrief:P.43)

21. MSF's agreement with Miller: (OpeningBrief:P.44)

22. MSF's additional misconduct: (OpeningBrief:P.45)

5. Montana State Fund Had Control Over The Admission And Exclusion Of Evidence During Matthew's Criminal Trial And Had Institutional Knowledge Of Their Misconduct

MSF claims they had no control over the admission or exclusion of any evidence during Matthew's trial and had no institutional knowledge of the exculpatory evidence/information or their misconduct. (AnswerBrief:P.7,8). This is factually erroneous.

Disburg testified in a deposition that there was a fraud unit which he described as a "two man band" with him doing the administrative duties and Buchanan doing the investigation. (Doc.4:Ex.DH). Buchanan deposition revealed that his investigation did not warrant a theft charge or a referral to DOJ. *See* OpeningBrief:P.16-17 and Doc.4:Ex.DI.

Poppler's investigation confirmed no evidence of Theft and that MSF mishandled the case: "Included with Disburg's referral was an investigative report and case file prepared by [Buchanan]...[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] told [Disburg] that it appeared there was not enough sufficient evidence to obtain a search warrant and questioned the credibility of the informant...[Poppler] noted after reading the case file and related documents that the only evidence regarding the case was the new statement provided by Russell...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 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." (Doc.3:Ex.N;**App.B**).

Additionally, MSF falsely claimed without evidence Matthew confessed to the alleged theft and MSF failed to provided exculpatory evidence. (Doc.3:Ex.N).

Furthermore, in Poppler's interview with Miller (Doc.3:Ex.O) and Poppler's deposition (Doc.4:Ex.DJ,**App.C**), Poppler discussed the lack of evidence and no recorded confession call. It is also revealed that MSF withheld a exculpatory recorded interview between Buchanan and Miller.

However, despite the overwhelming evidence of Matthew's innocence and no evidence to support a Theft charge, MSF testified at Matthew's trial.

Robinson failed to tell the jury that she withheld medical records from Dr. William Stratford for his evaluation and knew that Stratford was not qualified to diagnose or treat individuals suffering from a closed heady injury. (Doc.4:Ex.DL).

MSF submitted the original unaltered medical records of Davis and Dr. Stephen Powell to WWC, paid those bills under the **first uncontested** claim. However, those same records were altered and submitted under the second contested claim at trial and were not submitted by MSF during the restitution hearing as a loss benefits. (OpeningBrief:37-38).

Robinson provided false testimony regarding the first uncontested claim medical records and bills; MSF withheld exculpatory videos; Simmons provided false testimony during the sentencing hearing; and failed to tell the jury they withheld an agreement with Miller. (OpeningBrief:P.39-45).

It is clear that MSF had institutional knowledge of the exculpatory evidence and information. Also, MSF had every opportunity not to testify at Matthew's trial, submit altered medical records, provide false testimony regarding those records, and not provide false testimony at the sentencing hearing knowing that this would be violation of MRPC 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; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."(Rule 8.4).

MSF doesn't argue against the evidence of their misconduct rather they argue that their misconduct doesn't violate the MRPC or Rule 60(B).

6. Montana State Fund Was Properly Served

MSF alleges without evidence that they were not properly served. This is factually erroneous. MSF was properly served with every filing via email and by mail (**App.D**). Assistant Attorney General Mark Meyer (Meyer) was served twice and made no argument to Matthew or to DC that they were not properly served or did not receive the filings. Notably, Meyer recused himself from this case and MSF did not attached an affidavit from him that he was not properly served as evidence in their answer brief. Finally, MSF refused to even communicate with Matthew on whether or not they objected to the filings. (**App.E**).

7. Montana State Fund Was Obligated To Provide Evidence/Information Pursuant To §44-5-303

MSF admits they made the request they considered to be appropriate and permissible pursuant to §44-5-303(6), MCA and the evidence/information and their misconduct was not required to be provided to DC pursuant to §44-5-303, MCA. (AnswerBrief:P.7,9). MSF's argument is misplaced. §44-5-303, MCA, is restricted to criminal justice agency which MSF admits they are not (AnswerBrief:P.7); to those authorized by law to receive it and be appropriate and permissible which given the extent of the evidence, information and misconduct MSF would not be authorized to receive it and MSF had the obligation to inform the DC.

II. THE MONTANA SUPREME COURT SHOULD NOT DECLARE MATTHEW AS A VEXATIOUS LITIGANT

Article II, Section 16 of the Montana Constitution guarantees every person access to the courts of Montana: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character ... Right and justice shall be administered without sale, denial, or delay." *Stokes v. First Am. Title Co. of Mont., Inc.,*2017 MT 275, ¶3, 389 Mont.

Restricting access to the courts is a serious matter. "[T]he right of access to the courts is a fundamental right protected by the Constitution." *Delew v. Wagner,* 143 F.3d 1219,1222 (9thCir.1998).

The First Amendment "right of the people...to petition the Government for a redress of grievances," which secures the right to access the courts, has been termed "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Const. Co. v. NLRB,* 536 U.S. 516,524–25 (2002) (internal quotation marks omitted, alteration in original).

The Court further recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights" *Mine Workers v. Illinois Bar Assn.,*389 U.S. 217,222 (1967), and have explained that the right is implied by "the very idea of a government, republican in form" *US v. Cruikshank,* 92 U.S.

542,552 (1876). ...We based our interpretation in part on the principle that we would not "lightly impute to Congress an intent to invade...freedoms" protected by the Bill of Rights, such as the right to petition. Id., at 138."

In *Christopher v. Harbury, 536 U.S. 403,* 415 n.12 (2002) the court noted (that the Supreme Court has located the court access right in the Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause).

The use of pre-filing orders could infringe these important rights, *Molski v. Evergreen Dynasty Corp.,*500 F.3d 1047,1057 (9thCir.2007) (per curiam), as the requirement imposes a substantial burden on the free-access guarantee. "Among all other citizens, [the vexatious litigant] is to be restricted in his right of access to the courts...We cannot predict what harm might come to him as a result, and he should not be forced to predict it either. What he does know is that a Sword of Damocles hangs over his hopes for federal access for the foreseeable future." *Moy v. US,* 906 F.2d 467,470 (9thCir.1990).

Pre-filing orders are an extreme remedy and should rarely be used since such sanctions can tread on a litigant's due process right of access to the courts. *Molski v. Evergreen Dynasty Corp.,* 500 F.3d 1057 (9thCir.2007).

This Court utilizes the following five-factor test to determine whether a pre-filing order against a vexatious litigant is justified:

> (1) the litigant's history of litigation and, in particular, whether it has entailed vexatious, harassing, or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation; e.g., whether the litigant has an objective good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and court personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

*McCann v. McCann,*2018 MT 207, ¶38,392 Mont.385,425 P.3d 682.

MSF has failed to prove that all five factors are satisfied, therefore Matthew should not be declared a vexatious litigant.

A. Matthew Has No History Of Vexatious, Harassing, Or Duplicative Suits

MSF provided a history of Matthew's *pro se* cases as evidence Matthew should be declared a vexatious litigant.(AnswerBrief:P.15).

MSF has identified the following cases which is not a basis for Matthew to be declared a vexatious litigant:

(1) State v. Ailer (CDC-2014-98), on Appeal: DA-22- 0347.

(2) Ailer v. State (CDV-2019-514), on Appeal: DA-22-0346.

(3) Ailer v. State (DV-21-480), on Appeal: DA-23-0155.

(4) MSF's Application (CDV-2016-110), on Appeal: DA-23-0185.

1. The Number Of Lawsuits And Appeals Is Not Evidence

"[T]he simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as 'vexatious.'" *Molski v. Evergreen Dynasty Corp.,*500 F.3d. 1047,1061 (9thCir.2007).

"[l]itigiousness alone will not support an injunction restricting filing activities." *Tripati v. Beamani,*878 F.2d 351,353 (10thCir.1989). Litigiousness alone is insufficient to support a finding of vexatiousness. *See Moy v. US,* 906 F.2d 467,470 (9thCir.1990) (the plaintiff's claims must be not only numerous, but also be patently without merit).

The focus is on the number of suits that were frivolous or harassing in nature rather than on the number of suits that were simply adversely decided. *See De Long v. Hennesey,* 912 F.2d at 1147-48 (9thCir.1990) (before a [DC] issues a pre-filing injunction against a pro se litigant, it is incumbent on the court to make substantive findings as to the frivolous or harassing nature of the litigant's actions).

The Ninth Circuit has defined vexatious litigation as "without reasonable or probable cause or excuse, harassing, or annoying." *Microsoft Corp. v. Motorola.,* 696 F.3d 872, 886 (9thCir.2012). For these reasons, the mere fact that Matthew is involved in several suits is an insufficient ground upon which to make a finding of vexatiousness under Ninth Circuit precedent.

MSF alleges that Matthew should be declared a vexatious based upon the aforementioned cases (4 DC cases and 4 appeals on those cases with this court).

Those cases are far fewer than what other courts have found "inordinate." *See, e.g., Molski,*500 F.3d at 1060 (roughly 400 similar cases); *Wood v. Santa Barbara Chamber of Commerce, Inc.,*705 F.2d 1515,1523,1526 (9thCir.1983) (thirty-five actions filed in 30 jurisdictions); *In re Oliver,*682 F.2d 443,444 (3dCir. 1982) (more than fifty frivolous cases); *In re Green,*669 F.2d 779,781 (D.C.Cir. 1981) (per curiam) (between 600 and 700 complaints).

*In Motta v. Granite County Commr 's,*2013 MT 172, ¶ 21,304 P.3d 720 (Motta had filed 13 separate actions); *In Stokes v. First American Title,*2017 MT 275, ¶ 5, 406 P.3d 409, (Stokes had filed 10 appeals, many without counsel, that were found to be insufficiently presented, including a failure to provide a sufficient record or a failure to raise cognizable arguments, and have usually been affirmed in a memorandum opinion).

In Grigg v. Beaverhead EMS, 2022 MT 206, ¶7 (This Court's latitude toward Grigg as a self-represented litigant has been completely exhausted by his repeated, and wholly frivolous, appearances in this Court over the past two years, including eleven appeals or attempted appeals...none of Grigg's resolved appeals have been meritorious). Additionally, *In Grigg v. Beaverhead EMS,* 2022 MT 206, ¶8 this Court cautioned and warned Grigg several times that his pleadings were disrespectful and that his appeals were frivolous that wasted judicial resources before declaring him a vexatious litigant.

This Court or DC's have not cautioned or warned Matthew that his pleadings were disrespectful or that his lawsuits, filings or appeals were frivolous without merit, harassing or vexatious. Also, Matthew is of good character. (OpeningBrief:P. 6-7,28-30). MSF has not shown that Matthew's litigation history warrants the conclusion that a vexatious litigant order should be issued.

2. Matthew's Lawsuits And Appeals Have Legal Merit Not Frivolous, Harassing Or Vexatious And Have A Good Expectation Of Prevailing

State v. Ailer, CDC-2014-98 (First Judicial District Court)

Matthew was represented by Judnich including the trial and sentencing. (Doc.1-207). Brooke filed several documents with the Court for his representation

of Matthew for Direct Appeal. (Doc.208-218,220). Matthew through his probation officer filed a Supervision Fee Waiver Request and the DC **granted** the request. (Doc.219). March 21, 2022, a Rule 60(B), the State violated MRPC, and to have the charges dismissed pursuant to 46-18-204 Motions were filed by Matthew (Doc.242-247). March 22, 2022, the State filed a Petition To Revoke (PTR) (Doc.248). On March 23, 2022, a Motion to waive restitution was filed by Matthew. (Doc.249,250).

On March 25, 2022, DC issued a Notice To Appear. (Doc.251). Brooke filed a Notice Of Appearance (Doc.252) and handled the PTR issue. (Doc.253-254,256-263). April 22, 2022, Brooke submitted his Motion To Dismiss PTR. On May 26, 2022, the State filed a Motion To Dismiss PTR (Doc.264). On May 27, 2022, DC dismissed the PTR. (Doc.265). On June 2, 2022, DC filed an Order (Doc.266). In that Order the DC dismissed the charge against Matthew and denied the Motions filed by Matthew as moot because the charge was struck from the record and dismissed pursuant to 46-18-204, MCA. Notably, DC did not state in her Order that Matthew's Motions were without merit, frivolous or harassing; the State conceded to Matthew and DC as the facts and evidence were well taken and undisputed; and Matthew filed the Motions with a good faith expectation of prevailing. Matthew provided DC with a Notice Of Appeal (Doc.269).

State v. Ailer, DA 22-0347 (MT Supreme Court): On Appeal From CDC-2014-98

Matthew filed a Opposed Motion For Leave To File An Over-Length Brief and provided this Court with four separate issues that had legal merit and Matthew believed the issues were of first impression. This Court **granted** the request over the objection from the State and authorized Matthew to file his Opening Brief not to exceed 12,500 words. Also, this Court **granted** a Motion To Seal.

In the State's response to the Opening Brief they did not argue that Matthew's appeal or Motions at DC level were without merit, frivolous or harassing. Notably, the State stated, "...the [DC] correctly granted Ailer's Motion to Dismiss." and "Thus, the [DC]'s order dismissing the case effectively granted Ailer's Restitution Motion." confirming not only the Motions had legal merit but the State believed and argued that the DC granted the Motions.

Additionally, the State did not file a Motion To Dismiss the appeal or request to have Matthew declared a vexatious litigant. Matthew filed this appeal with a good faith expectation of prevailing.

MSF's Application For CCJI, CDV-2016-110 (First Judicial District Court)

February 2, 2016, MSF filed an Application For CCJI (but failed to the follow the requirements of M. R. Civ. P. 4(d) and (1) to commence a new suit, which include serving their petition and a summons upon Matthew. (Doc.1).

DC granted the Application. (Doc.2).

August 3, 2022, Matthew filed a Rule 60(B) Motion with a supporting brief. (Doc.3,4). On September 16, 2022, Judge Seeley relieved the Honorable Christopher Abbott from this case. (Doc.6).

On October 13, 2022, Matthew filed a Motion For Relief Because MSF Violated The MRPC with a supporting brief. (Doc.7.8). November 7, 2022, Matthew filed a Notice and Reminder Of Submittal regarding the Rule 60(B) Motion. (Doc.9,10). On November 29, 2022, DC **only denied** the Rule 60(B) Motion as untimely but did not make a ruling on the MRPC Motion and acknowledged the Rule 60(B) Motion was filed pursuant to M.R.Civ.P. (Doc.12).

December 8 and 22, 2022, Matthew filed a Notice and Reminder Of Submittals regarding the MRPC Motion. (Doc.13-16). On December 22, 2022, Matthew filed a Motion For Reconsideration. (Doc.17). On February 17, 2023, Matthew filed a Notice and Reminder Of Submittal Regarding Motions: Doc.7,8,11 and 17. (Doc.18). On March 6, 2023, DC denied the remaining Motions including the MRPC Motion, and that it would not accept any further filings and the case was deemed closed. (Doc.19).

Notably, MSF conceded to Matthew and DC the facts and evidence in the Rule 60(B) Motion and the MRPC Motion were well taken and undisputed.

MSF also did not file any request to have Matthew declared a vexatious litigant. Noteworthy, Matthew's Motions with accompanying briefs followed the DC Rule 5(A)(E) and filed several "Notice Of Submittal" and "Reminder Of Submittal" pursuant to DC Rule 5(F). *See* DC Rules. (**App.F**).

All of Matthew's Motions followed the DC Rules and have legal merit, not frivolous or harassing and Matthew has a good faith expectation of prevailing.

MSF's Application For CCJI, DA 23-0185 (MT Supreme Court):

On Appeal From CDV-2016-110

This Appeal has legal merit, not frivolous or harassing and Matthew has a good faith expectation of prevailing as dictated in the Opening Brief and this Reply Brief. Notably, Matthew filed a Opposed Motion For Leave To File An Over-Length Reply Brief. This Court **granted** the request over the objection from MSF and authorized Matthew to file his Reply Brief not to exceed 7,825 words. Also, this Court **granted** a Motion To Seal and **granted** a Motion To Waive Mediation filed by Matthew.

Matthew's Application For CCJI, DV-21-480 (Fourth Judicial District Court)

April 23, 2021, Matthew filed an Application For CCJI. (Doc.3). On May 17, 2021, the State filed a Rule 60(B) Motion alleging they were not properly served. (Doc.5,6). On May 18, 2021, DC granted the State's Request. (Doc.8)

On May 28, 2021, Matthew filed a Motion For Reconsideration. (Doc.9,10). On July 1, 2021, DC denied the request. (Doc.11).

On July 28, 2021, Matthew appealed DC's Order denying the Motion For Reconsideration to this Court. (Doc.12,13). On June 7, 2022, this Court determined Matthew failed to properly serve his Application pursuant to Mont. R. Civ. Pro 4(d) and (1) and the DC never had jurisdiction over the matter. *See Ailer v. State,* 2022 MT 115N.

August 11, 2022, Matthew filed an Application For CCJI. (Doc.17,18). On September 2, 2022, the DC denied the the Application, without prejudice. (Doc.20). On September 2, 2022, the State filed their response to the Application. (Doc.21-25). On September 20, 2022, Matthew filed a Motion For Reconsideration. (Doc.29-32). On September 28, 2022, the State filed their response to the Motion For Reconsideration. (Doc.34). On October 13, 2022, Matthew filed a reply brief to the State's reply response. (Doc.39).

On November 18, 2022, DC issued an Order **granting** Matthew's Motion For Reconsideration and **vacating** its Order denying the Application Without Prejudice; but then denied the Motion in camera review and denied the Application because it was barred by the doctrine of res judicata. (Doc.40). On December 9, 2022, Matthew filed a Motion For Reconsideration. (Doc.41).

On December 23, 2022, Matthew filed a Rule 60(B) Motion. (Doc.42). On January 3, 2023, the State filed their response to the Rule 60(B) Motion. (Doc.43,45). On February 9, 2023, Matthew filed a reply brief to the State's responses. (Doc.46). On February 14, 2023, DC issued its Final Order denying Matthew outstanding Motions and ordered that no additional pleadings be filed without a leave of court in regards to this cause. (Doc.47). Notably, the Honorable Judge Deschamps did not state in his Order's that Matthew's Motions were without merit, frivolous or harassing. Matthew filed the Motions and the Application For CCJI with a good faith expectation of prevailing.

Matthew's Application For CCJI, DA 23-0155 (MT Supreme Court):

On Appeal From DV-21-480

On appeal, the issues that are being argued are if the doctrine of res judicata apply and whether or not Matthew met the threshold burden pursuant to §44-5-303,MCA and if public disclosure outweighs Matthew's privacy interest. In the State's response they do not argue that Matthew's appeal was meritless, frivolous or harassing. Additionally, the State did not file a Motion To Dismiss the appeal or request to have Matthew declared a vexatious litigant. This Court **granted** a Motion To Seal and **granted** a Motion To Waive Mediation filed by Matthew. Furthermore, Matthew filed the appeal with a good faith expectation of prevailing.

Ailer v. State, CDV-2019-514 (First Judicial District Court)

Brooke wrote a letter after the Direct Appeal was final that discussed the issues that can be raised in a PCR that he could not raise during Direct Appeal. Brooke wanted Matthew to succeed so he personally found a attorney to file the PCR and worked with them. (**App.G**).

Attorney Brianna Kottke (Kottke) represented Matthew for his PCR. Kottke filed the Petition For PCR, Brief In Support And Affidavit. (Doc.1-6).

Unfortunately, Kottke accepted a position with the Federal Public Defender's Office In Guam and withdrew as counsel of record. (Doc.7-9).

Matthew made several requests for Appointment Of Counsel (AOC) informing the DC he suffered from verified mental health and medical conditions and that he was an impecunious person and these facts would constitute extraordinary circumstances that an AOC would be warranted to prevent a miscarriage of justice. (Doc.17-18,32-33,376-377). DC denied the requests. (Doc.51,467).

Prior to the filing to the Amended Petition, a law firm was hired on behalf of Matthew to review the record, research applicable case law, and to provide Matthew an Amended Petition (Research Memorandum) that Matthew could file under his name. (**App.H**).

Additionally, the law firm contacted DC several times requesting an extension of time to allow enough time for them to finish the Amended Petition. (**App.H**).

Matthew and his attorneys had a good faith expectation of prevailing when filing the PCR, the Amended Petition, and the Motions. These filings did have merit and were not frivolous or harassing.

Ailer v. State, DA 22-0346 (MT Supreme Court): On Appeal From CDV-2019-514

Matthew is entitled to file a PCR pursuant to §46-21-101 and believes there are issues of first impression for this Court to consider. For example, can a DC dismiss a PCR simply because Matthew's sentence expired without revocation. Matthew provided this Court several MT/Federal cases where a DC cannot moot the PCR based upon Matthew's expiration of his sentence. This issue is of public importance because defendants need to know if they need to unfortunately violate their probation/parole in order to preserve their constitutional rights to a PCR and not seek dismissal of the charges pursuant to §46-18-204.

Additionally, the DC erred by not holding an evidentiary hearing when witnesses and doctors would have testified that Matthew did not commit theft, did not stage an accident, and that he does suffer from Conversion Disorder. Matthew has a good faith expectation of prevailing.

In the State's response they do not argue that Matthew's appeal was without merit, frivolous or harassing. The State also contends if this Court finds that Matthew's Amended Petition is not moot or that an exception to the mootness doctrine applies then it should be remanded back to the DC to consider instead of Matthew's request for this Court to rule on the merits of his claims and remand for a new trial. Also, this Court **granted** a Motion To Seal, **granted** a Motion To Supplement The Record filed by Matthew.

3. Violates Matthew's Fourteenth Amendment

The Fourteenth Amendment to the US Constitution provides in pertinent part:

"All persons born or naturalized in the US, and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the US; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*In DeJonge v. Oregon,*299 U.S. 353, 364-65 (1937) the court expressly protected the right to petition against State interference, through incorporation of the right to petition into the Fourteenth Amendment Due Process Clause.

4. Violates Matthew's Right Under The Privileges And Immunities clause

The Privileges And Immunities Clause provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be followed by each state to the citizens of all other states to the same extent that is allowed to its own citizens. *Citizens v. Balt. & Ohio R.R.,*207 U.S. 142, 148 (1907); *Mcknett v. St.Louis & S.F. Ry.,* 292 U.S. 230, 233 (1934); *Christopher v. Harbury,* 536 U.S. 403, 415 n.12 (2002).

The US Supreme Court has repeatedly recognized that access to court was a fundamental liberty within the meaning of the Privileges and Immunities Clause. *See Blake v. McClung,* 172 U.S. 239, 252 (1898) ("[T]he privileges and immunities, which the citizens of the same state would be entitled to under like circumstances,...includes the right to institute actions."); *Cole v. Cunningham,* 133 U.S. 107,113-14 (1890) ("The intention of [the Privileges and Immunities Clause] was to confer on citizens of the several States a general citizenship...and this

includes the right to institute actions."); See also *Ward v. Maryland,* 79 U.S. (12 Wall.) 418, 430 (1870) "The right to sue and defend in courts is the alternative of force. In an organized society it is the right conservative of all of other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens." *See Chambers v. Baltimore & Ohio R.R. Co.,*207 U.S. 142,148 (1907).

5. Violates Matthew's Eight Amendment

The Eighth Amendment to the US Constitution provides in pertinent part: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

6. Violates Matthew's First Amendment

The First Amendment to the US Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The US have long viewed a person's ability to gain access to court as a fundamental element of our democracy. *See Marbury v. Madison,* 5 U.S. (1

Cranch) 137 (1803) as Chief Justice Marshall described the ability to obtain civil redress as the "very essence of civil liberty" and recognized that a person who has suffered a legally cognizable injury has a right to obtain a remedy in court.

In *California Motor Transp. Co. v. Trucking Unlimited,*404 U.S. 508,513 (1972) the Court determined, ("That right, [the right of access to the courts] is part of right of petition protected by the First Amendment."); *NAACP v. Button,* 371 U.S. 415,433 (1963) (that First Amendment freedoms, including the right to petition, are "delicate and vulnerable, as well as supremely precious in our society" and demand exacting protection). "The filing of a lawsuit carries significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts." *Hoeber v. Local 30, United Slate,Tile & Composition Roofers,Damp and Waterproof Workers Ass'n,AFL-CIO,*939 F.2d 118,126 (3dCir.1991).

CONCLUSION

If Matthew's Constitutional rights and the fundamental principles of fairness matter, this Court should **not declare** Matthew a vexatious litigant and should remand to DC to have MSF return the CCJI in the interest of justice. Respectfully submitted this 10th day of August, 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 Reply 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 7,825 words as directed by the Montana Supreme Court in granting an Over-Length Reply Brief.

The exact words count is 7,825 words as calculated by Microsoft Word excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

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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