

1 Lance P. Jasper
 Jenna P. Lyons
 2 REEP, BELL & JASPER, P.C.
 P.O. Box 16960
 3 Missoula, Montana 59808-6960
 Telephone: (406) 541-4100
 4 Email: jasper@westernmontanalaw.com lyons@westernmontanalaw.com

5 Matthew B. Hayhurst
 Forrest M. Crowl
 6 Boone Karlberg, P.C.
 P.O. Box 9199
 7 Missoula, MT 59807
 Telephone: (406) 543-6646
 8 Email: mhayhurst@boonekarlberg.com fcrowl@boonekarlberg.com

9 Attorneys for Defendant

10 MONTANA SEVENTH JUDICIAL DISTRICT COURT, PRAIRIE COUNTY

11 STATE OF MONTANA,) Cause No.: DC-40-2023-1
)
12 Plaintiff,) MOTION TO DISMISS RE:
) INVASIONS OF ATTORNEY-CLIENT
13 vs.) PRIVILEGE AND BRIEF IN
) SUPPORT
14 STERLING GLENN BROWN,)
)
15 Defendant.)

16 COMES NOW, Defendant Sterling Brown (“Sterling”), and
 17 respectfully submits his Motion to Dismiss charges against him and this
 18 case *in toto*. This motion is made due to serious invasions of attorney-client
 19 privilege by the State and is supported by the brief filed herewith.

20 For the reasons articulated herein, the Court should dismiss the

1 charges against Sterling Brown, with prejudice, given the State's intentional
2 invasion into Sterling's attorney-client privileged communications
3 concerning sensitive matters which cannot be considered as anything but
4 the most privileged information. Further, the invasion of attorney-client
5 privileged information extended to the most critical information related to
6 defense counsel's litigation strategy, discussions of facts, witnesses,
7 hearings; analysis of the State's investigations, and their deficiencies, and
8 an assessment of prosecutors' plans in the prosecution of this case.

9 Failure to dismiss the case *in toto* will result in **irreversible structural**
10 **error**, deprivations of rights to be free from unreasonable searches and
11 seizures, to refrain from self-incrimination, and to have effective assistance
12 of counsel. The Court must dismiss this case in its entirety.

13 INTRODUCTION

14 The State's Department of Criminal Investigation (DCI) investigated
15 allegations of invasions of the attorney-client privilege. The report detailing
16 the results of that investigation is attached hereto as Exhibit 1. Now, even
17 after Daniel Guzynski's and Agent Brad Tucker's investigation revealed that
18 there were many violations of the attorney-client privilege while Sterling
19 Brown was in custody, the Attorney General's office has continued to
20 investigate and prosecute this case. The result: An irreparable "fox

1 guarding the henhouse” situation. The involvement of the lead prosecutor,
2 Daniel Guzynski, and lead investigator, Brad Tucker, in the prosecution of
3 Sterling Brown, and their involvement in the investigation into the Attorney-
4 Client violations, created a conflict of interest and deprived Sterling Brown
5 of a fair investigation and allowed the entire prosecution team and
6 investigation team complete access to attorney-client protected information.
7 The nature of this investigation created a situation where there is no way
8 for Sterling Brown to receive a fair trial.

9 These violations were egregious and necessitate complete dismissal.
10 The invasions and the sequence of events occurring afterward have
11 resulted in deprivations of Constitutional rights that will result in irreversible,
12 structural error. There is no remedy aside from dismissal, and dismissal
13 should be the only result in order to prevent future prosecutions that find
14 their foundation in violations of one of the most sacrosanct rights known to
15 law and justice. This motion is supported by:

- 16 1. *A Statement of Undisputed Facts*;
- 17 2. Report of DCI investigation of attorney-client violations (SUF Exhibit
18 1); and
- 19 3. The *Affidavit of Lance P. Jasper* (SUF Exhibit 2);
- 20 4. The *Affidavit of Jim Nelson* (SUF Exhibit 3);

1 5. The *Affidavit of Colin Stephens*, (SUF Exhibit 4).

2 **I. THE STATE INTENTIONALLY ACCESSED STERLING’S**
3 **ATTORNEY-CLIENT PRIVILEGED INFORMATION, INCLUDING**
4 **LITIGATION STRATEGY, AND THERE IS NO OTHER**
5 **ADEQUATE REMEDY ASIDE FROM DISMISSAL.**

6 Government intrusion into the attorney-client privilege implicates an
7 accused’s fundamental constitutional rights to assistance of counsel and
8 due process. *Weatherford v. Bursey*, 429 U.S. 545, 554–55 (1977). The
9 right to assistance of counsel is preserved under the Sixth Amendment of
10 the U.S. Constitution and Article II, Section 24 of the Montana Constitution.
11 *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948 (citing
12 *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861); *State v.*
13 *Pizzichiello*, 1999 MT 123, ¶ 14, 294 Mont. 436, 983 P.2d 888. This right is
14 considered so fundamental that it has been recognized as “the right to
15 effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771
16 (1970) (emphasis added).

17 The attorney-client privilege is the oldest of the privileges for
18 confidential communications known to the common law. *Upjohn Co. v.*
19 *United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). It
20 is clear that government interference with a defendant’s relationship with
his attorney may render counsel’s assistance so ineffective as to violate his

1 Sixth Amendment right to counsel and his Fifth Amendment right to due
2 process of law. *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980).

3 The attorney-client privilege is near absolute, considering that it acts
4 as a shield and survives most situations, including death of a client who
5 consults with counsel. The Supreme Court described privilege as *sacred*
6 insofar as it is available to clients to “encourage full and frank
7 communication . . . and thereby promote broader public interests in the
8 observance of law and administration of justice.” *United States v. Zolin*, 491
9 U.S. at 562 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383
10 (1981)). It is widely known that it is not only a client’s right to have privilege
11 protected, but it is also the attorney’s *duty* to protect that privilege. See
12 ABA Formal Ethics Op. 94-385 (July 5, 1994) (“If a governmental agency,
13 or any other entity or person, subpoenas, or obtains a court order for, a
14 lawyer's files and records relating to the lawyer's representation of a current
15 or former client, the lawyer has a professional responsibility to seek to limit
16 the subpoena or court order on any legitimate available grounds so as to
17 protect documents that are deemed to be confidential under Rule 1.6.”);
18 *see also Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d
19 Cir. 1967) (“Not only may an attorney invoke the privilege in his client's
20 behalf when the client is not a party to the proceeding in which disclosure is

1 sought [...] **but he should do so**, for he is ‘duty-bound to raise the claim in
2 any proceeding in order to protect communications made in confidence.’”)
3 (internal citation omitted, and emphasis added).

4 The Constitutional right to counsel necessarily includes the right to
5 confer privately with counsel. *Baca*, ¶¶ 35, 36 (citing *United States v. Levy*,
6 577 F.2d 200, 202 (3d Cir. 1978)). “[T]he essence of the Sixth Amendment
7 right is, indeed, privacy of communication with counsel.” *U.S. v. Rosner*,
8 485 F.2d 1213, 1224 (2nd Cir 1973) (emphasis added) (citing *Glasser v.*
9 *U.S.*, 315 U.S. 60 (1942)), *cert den*, 417 U.S. 950 (1974). This is so
10 because “[f]ree two-way communication between client and attorney is
11 essential if the professional assistance guaranteed by the Sixth
12 Amendment is to be meaningful.” *Levy*, 577 F.2d at 210.

13 Given the fundamental importance of this right, the government may
14 not access a criminal defendant’s attorney-client privileged communications
15 and then simply disclaim that any prejudice resulted. Instead, prejudice to
16 the defendant is presumed when, as here, “government enforcement
17 agencies responsible for investigating and prosecuting the case” gain
18 access to a defendant’s attorney-client privileged information. *Baca*, ¶¶ 34-
19 36 (quoting *Levy*, 577 F.2d at 209). The Montana Supreme Court
20 recognized this principle in a case where the defendant argued that

1 someone at the jail had accessed certain letters he had written to his
2 attorney. *Id.*, ¶ 33. The Court noted that “[p]ursuant to [the Third Circuit’s
3 decision in] *Levy*, . . . prejudice from the disclosure of attorney/client
4 communications must be presumed. . . .” *Id.*, ¶ 36 (emphasis added).

5 Although the defendant in *Baca* failed to make the threshold showing
6 that the information was accessed by investigators working on the case.
7 *Id.*, ¶¶ 33, 36. There was only evidence that “someone perhaps recovered
8 these letters from the computer Baca used.” *Id.* Given these facts, the
9 Montana Supreme Court did not presume prejudice or find a Sixth
10 Amendment violation but indicated it would do so if the defendant showed
11 privileged information had been obtained by the prosecution or
12 investigators. *Id.*

13 As we will explain and as is set forth in the Statement of Undisputed
14 Facts and Exhibits attached thereto, there is undisputed evidence that DCI
15 law enforcement officers investigating this case, detention officers, other
16 law enforcement agencies and agents of the State of Montana accessed
17 privileged materials. Further, because Attorney General, Daniel Guzynski
18 and DCI Agent, Brad Tucker elected to conduct the investigation, they
19 obtained access and control of attorney-client information and Sheriff Lewis
20 obtained access to all attorney-client phone calls as evidenced by his letter.

1 Exhibit 1. As such, prejudice is actual and presumed, and the State's
2 constitutional violations are established as a matter of law. See *Id.*

3 The Third Circuit's decision in *Levy*, relied upon by the Montana
4 Supreme Court in *Baca*, sheds more light on the appropriate analytical
5 framework in Montana. In *Levy*, a lawyer jointly represented two criminal
6 defendants, one of whom, unknown to the other defendant or the lawyer,
7 was a government (DEA) informer. 577 F.2d at 202-03. The district court
8 found that although some privileged communications had been accessed
9 by the DEA through the informer, there was no evidence the DEA gained
10 any information that was pertinent and prejudicial to the case, and thus no
11 evidence of a Sixth Amendment violation. *Id.* at 207. The Third Circuit
12 reversed, finding the district court had not employed the correct standard:

13 Where there is a knowing invasion of the attorney-client
14 relationship and where confidential information is disclosed
15 to the government, we think that there are overwhelming
16 considerations militating against a standard which tests the
17 sixth amendment violation by weighing how prejudicial to
18 the defense the disclosure is. . . . [I]t is highly unlikely that a
19 court can, in such a[n evidentiary] hearing, arrive at a certain
20 conclusion as to how the government's knowledge of any
part of the defense strategy might benefit the government in
its further investigation of the case, in the subtle process of
pretrial discussion with potential witnesses, in the selection
of jurors, or in the dynamics of trial itself. . . .

Id. at 208.

The *Levy* court went on to note that although it could obviate these

1 problems by adopting a “severe” definition of prejudice, it would be
2 inappropriate to do so given the Constitutional rights involved:

3 . . . [T]he interests at stake in the attorney-client relationship
4 are much different than the expectations of privacy that
5 underlie the fourth amendment exclusionary rule. The
6 fundamental justification for the sixth amendment right to
7 counsel is the presumed inability of a defendant to make
8 informed choices about the preparation and conduct of his
9 defense. Free two-way communication between client and
10 attorney is essential if the professional assistance
11 guaranteed by the sixth amendment is to be meaningful.
12 The purpose of the attorney-client privilege is inextricably
13 linked to the very integrity and accuracy of the fact finding
14 process itself. Even guilty individuals are entitled to be
15 advised of strategies for their defense. In order for the
16 adversary system to function properly, any advice received
17 as a result of a defendant’s disclosure to counsel must be
18 insulated from the government. No severe definition of
19 prejudice, such as the fruit-of-the-poisonous-tree
20 evidentiary test in the fourth amendment area, could
accommodate the broader sixth amendment policies. We
think that the inquiry into prejudice must stop at the point
where attorney-client confidences are actually disclosed to
the government enforcement agencies responsible for
investigating and prosecuting the case. Any other rule would
disturb the balance implicit in the adversary system and thus
would jeopardize the very process by which guilt and
innocence are determined in our society.

Id. at 209 (emphasis added).

After presuming prejudice on the basis of “an actual disclosure of
defense strategy” and rejecting “the proposed rule that the damage done
by such disclosure be weighed on a case-by-case basis,” the court
concluded “the only appropriate remedy is the dismissal of the indictment.”

1 *Id.* at 210.

2 The *Levy* approach, followed by the Montana Supreme Court in
3 *Baca*, recognizes the State’s intrusion into a criminal defendant’s attorney-
4 client privileged communications presents a risk so severe that it would be
5 unjust and, in many cases, impossible to attempt to determine whether
6 actual prejudice resulted. See *id.* The Tenth Circuit has taken a similar
7 approach, finding that when there is a purposeful intrusion into privilege,
8 “prejudice in these circumstances is so likely that case-by-case inquiry into
9 prejudice is not worth the cost.” *Shillinger v. Haworth*, 70 F.3d 1132, 1142
10 (10th Cir. 1995).

11 Although *Baca* and *Levy* supply the applicable standard here, it is
12 noteworthy that the vast majority of other jurisdictions also recognize a
13 presumption of prejudice arising from the government’s accessing
14 privileged materials. *E.g.*, *State v. Greenwood*, 2024 Ore. App. LEXIS 530
15 (Or. App. 2024) (summarizing cases). Whereas some courts find the
16 presumption to be rebuttable, at least where the access is claimed to be
17 nondeliberate, those courts generally require a high standard of proof—
18 typically “beyond a reasonable doubt” or “clear and convincing evidence”—
19 to overcome the presumption. See, *e.g.*, *State v. Peña Fuentes*, 318 P.3d
20 257, ¶ 3 (Wash. 2014) (“[W]e hold that eavesdropping is presumed to

1 cause prejudice to the defendant unless the State can prove *beyond a*
2 *reasonable doubt* that the eavesdropping did not result in any such
3 prejudice.” (emphasis original)); *State v. Moody*, 94 P.3d 1119, 1143 (Ariz.
4 2004) (once the defendant shows an interference in the attorney-client
5 relationship, “the state bears the burden of demonstrating that the
6 defendant was not prejudiced by the interference and must convince the
7 court beyond a reasonable doubt that the defendant received a fair trial.”);
8 *Greenwood*, 2024 Ore. App. LEXIS 530 (upon a prima facie showing of a
9 Sixth Amendment violation, “[t]he burden then shifted to the state to show,
10 by clear and convincing evidence, that defendant was not prejudiced by the
11 violation”); *State v. Lenarz*, 22 A.3d 536, 550 (Conn. 2011) (holding
12 disclosure of trial strategy is presumptively prejudicial, shifting the burden
13 to the state to disprove prejudice through clear and convincing evidence);
14 *State v. Bain*, 872 N.W.2d 777, 790-91 (Neb. 2016) (holding disclosure of
15 trial strategy gives rise to a presumption of prejudice that is rebuttable by
16 clear and convincing evidence “at least when the State did not deliberately
17 intrude into the attorney-client relationship”). Here, the State deliberately
18 continued to violate Attorney-Client privilege, as is established in the
19 Statement of Undisputed Facts and exhibits attached thereto.

20 The rationale for holding the State to a high burden of proof when it

1 accesses privileged information is self-evident. When the State seeks to
2 deprive an American of his liberty and, in so doing, intrudes upon his
3 fundamental right to confidential communications with counsel, it must bear
4 the greater burden of error in gauging prejudice. As the Nebraska Supreme
5 Court aptly explained:

6 In cases involving individual rights, whether criminal or civil,
7 the principle consideration in determining the proper
8 standard of proof is whether the standard minimally reflects
9 the value society places on individual liberty, because the
10 function of legal process is to minimize the risk of erroneous
11 decisions. . . [O]ur society necessarily places a high value
12 on ensuring that criminal trials are not tainted by disclosures
13 that unfairly advantage the prosecution and threaten to
14 subvert the adversary system of criminal justice. And
15 requiring a defendant to share a roughly equal risk of error
16 in determining whether the State used his confidential
17 information to his detriment does not reflect those values.

18 *Bain*, 872 N.W.2d at 792 (internal quotation marks and footnotes omitted).

19 Applying these principles here, Sterling's charges should be
20 dismissed.

A. As in *Levy*, the Court Must Find a Per Se Violation.

As in *Levy*, the uncontroverted facts require a finding that the State
committed a per se Sixth Amendment violation, warranting dismissal. There
is no dispute that the State's invasion of Sterling's attorney client privilege
was (1) intentional, (2) accomplished by the very individual responsible for
investigating the case, and (3) resulted in the disclosure of litigation

1 strategy and facts. Under these facts, a non-rebuttable presumption arises
2 that Sterling was prejudiced. *Levy*, 577 F.2d at 208, 209.

3 Unlike the situation in *Baca*, where there was only evidence that
4 “someone perhaps recovered [attorney-client] letters from the computer
5 Baca used,” *id.*, ¶¶ 33, 36, here we know for a fact Sterling’s phone
6 conversations and letters to his attorneys were intentionally accessed and
7 reviewed by the State. We know it was not just jail personnel who accessed
8 the communications, but the people responsible for investigating and
9 building the case against Sterling—law enforcement officers working under
10 supervision and direction of lead investigator, Brad Tucker, and Daniel
11 Guzynski, lead prosecutor. We also know the communications did not
12 consist of idle banter or non-substantive housekeeping matters—they
13 consisted of highly-privileged litigation strategy and highly privileged
14 communications surrounding events and facts occurring on June 23, 2022
15 and more.

16 The State may attempt to argue that, irrespective of its egregious
17 intrusion into Sterling’s constitutional rights, it has not or will not use
18 Sterling’s privileged information. Any such assurance is empty. As the *Levy*
19 court correctly pointed out, where there is a knowing invasion of the
20 attorney-client relationship, courts should not engage in an attempt to

1 “weigh[] how prejudicial to the defense the disclosure is” because it is
2 highly unlikely a court can determine “how the government’s knowledge of
3 any part of the defense strategy might benefit the government in its further
4 investigation of the case, in the subtle process of pretrial discussion with
5 potential witnesses, in the selection of jurors, or in the dynamics of trial
6 itself” *Id.* at 208.

7 The State will attempt to minimize the effect of the disclosure, but
8 where DCI, law enforcement, detention officers and other agents
9 intentionally accessed a criminal defendant’s litigation strategy, the Court
10 should decline to engage in the largely speculative exercise about how the
11 defendant might escape prejudice from the disclosure. Of course, Sterling
12 will suffer prejudice. It was the State that made the conscious decision to
13 trample on Sterling’s rights, and the State is not entitled to any benefit of
14 the doubt on the issue. As in *Levy*, the State’s violation is established, and
15 prejudice should be presumed.

16 **B. The Invasions of Privilege Have Resulted in Irreversible,
17 Structural Error and Deprivations of Constitutional Rights Under
18 the Fourth, Fifth, and Sixth Amendments. Prejudice is
19 Presumed.**

18 In *State v. Strommen*, 2024 MT 87, 547 P.3d 1227, the Court
19 discussed the difference between structural error and other types of trial
20 error. Structural error “is typically of constitutional dimensions” and

1 “undermines the fairness of the entire trial proceeding.” *State v. Strommen*,
2 2024 MT 87, ¶ 29, 547 P.3d 1227, 1242 (citing *State v. Van Kirk*, 2001 MT
3 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735). Structural error is thus
4 “presumptively prejudicial and ... reversible.” *Id. Van Kirk*, ¶¶ 38-39.

5 In contrast, other types of trial errors that do not undermine the
6 fundamental fairness of the entire trial process are non-structural, and thus
7 subject to comparative “qualitative assessment” of the “prejudicial impact”
8 of the error in relation to the untainted trial evidence. *Van Kirk*, ¶ 40. Non-
9 structural trial error is thus harmless “only if there is no reasonable
10 probability that the erroneously admitted evidence contributed to the
11 conviction.” *Id.* (citing *Van Kirk*, ¶ 46).

12 In this vein, the Sixth Circuit, for example, in *Am. C.L. Union Fund of*
13 *Michigan v. Livingston Cnty.*, 796 F.3d 636, 643 (6th Cir. 2015), discusses
14 the importance of the attorney-client privilege as it relates to
15 correspondence and mail exchanged while an accused or a client is in
16 custody. In *ACLU Fund v. Livingston County*, the Court highlighted the
17 notion that “[t]he right of a prisoner to receive materials of a legal nature,
18 which have impact upon or import with respect to that prisoner's legal rights
19 and/or matters, is a basic right recognized and afforded protection by the
20 courts.” *Id.* (citing *Kensu v. Haigh*, 87 F.3d at 174). Accordingly, the loss of

1 constitutional privileges for even minimal periods of time unquestionably
2 constitutes irreparable injury—and by extension, structural error. “Indeed,
3 both attorneys and inmates have a strong interest in keeping
4 communications relating to the initial investigative stages of a legal matter
5 confidential such that the correspondence is not disclosed to Jail personnel
6 or other inmates.” *Am. C.L. Union Fund of Michigan v. Livingston Cnty.*,
7 796 F.3d 636, 644 (6th Cir. 2015).

8 In *United States of America v. Pedersen*, 2014 WL 3871197 (D.
9 Oregon 2014), the Court found that the “case was mishandled by the
10 prosecution team and Filter Team One, very nearly jeopardizing this case
11 altogether.” *Id.* at *1. The government violated defendants’ rights to confer
12 with their attorneys in confidence, and a taint team¹ (Filter Team) was
13 assigned to handle the matter. The purpose of a taint team is to prevent the
14 disclosure of privileged information to the government and to protect the
15 attorney client privilege. *United States c. SDI Future Heath Inc.*, 464
16 F.Supp.2d 1027, 1037-38 (D.Nev.2006). The use of a taint team does not
17 allow the government to intentionally obtain and review attorney-client
18 privileged material and when the government chooses to do so, it is a *per*

19 _____
20 ¹ “To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a ‘privilege team’ should be designated, consisting of agents and lawyers not involved in the underlying investigation.” Justice Manual § 9-13.420.

1 se violation of the privilege. *United States v. Neill*, 952 F.Supp. 834, 840-41
2 (D.D.C. 1997).

3 The Court found in *Pedersen* that the performance of the filter team
4 was grossly deficient where it allowed filter team members to intentionally
5 review privileged material and where it allowed AUSA to work on both the
6 filter team and the prosecution team, and did nothing to protect privileged
7 calls despite the fact that the government had intercepted the calls.

8 *Pedersen*, *29.

9 Here, where Agent Tucker was allowed to work on the prosecution
10 team and in an investigatory capacity and where he was charged with
11 investigating the attorney-client invasions, and where the investigation of
12 attorney-client calls did not provide for the protection of the calls, the same
13 scenario that occurred in *Pedersen* has occurred, and a similar remedy is
14 warranted.

15 As the Court stated in *Pedersen*, “the government mishandled this
16 case badly.” *Pedersen*, * 32. In *State v. Irby*, 3 Wash. App. 2d 247 (2018),
17 jail guards infringed on the defendant’s Sixth Amendment right to counsel
18 when they opened and read the defendant’s privileged attorney-client
19 communications, which constituted governmental misconduct within the
20 meaning of the dismissal rule, creating a presumption of prejudice to the

1 defendant. The State submitted a declaration in response to a motion to
2 dismiss similar to this motion, and the Court determined that their
3 declaration was insufficient to eliminate the possibility that the defendant's
4 right to a fair trial was prejudiced by the guards' misconduct. *Id.*

5 In the event that this Court determines that a remedy short of
6 dismissal is warranted, vacation of any judgment will be necessary. In
7 addition, other remedies might include—singularly or in combination—
8 suppression of evidence, disqualification of specific attorneys from
9 Sterling's prosecution, disqualification of the Attorney General's Office from
10 further participation in the case, or exclusion of witnesses tainted by the
11 government's misconduct (Agent Tucker). *State v. Irby*, 3 Wash. App. 2d
12 247 (2018).

13 Sterling Brown has a right to protection against unreasonable
14 searches and seizures under the Fourth Amendment of the Constitution, a
15 right against self-incrimination under the Fifth Amendment, and a right to
16 counsel under the Sixth Amendment. All three of these *inalienable* rights
17 have been irreversibly denied to him by virtue of the demonstrable and
18 inexcusable violations of the attorney-client privilege in the pretrial stages
19 of this case.

20 **C. Alternatively, In the Event the Court Uses a Harmless Error
Analysis, the State Cannot Prove an Absence of Prejudice.**

1 Even if the Court applied a different standard than the one recognized
2 by the Montana Supreme Court in *Baca*, finding the facts of this case only
3 give rise to a rebuttable presumption that Sterling was prejudiced, this
4 should not change the result. The undisputed facts demonstrate the State
5 cannot meet its burden in proving Sterling was not prejudiced. The dangers
6 surrounding this issue and the presumed prejudice that results from an
7 egregious violation(s) such as the violations that occurred here, are
8 articulated and explained in the *Affidavit of Jim Nelson*, filed
9 contemporaneously herewith.

10 The State carries a heavy burden in this regard, and it cannot be the
11 Defendant's burden to prove prejudice, because in order to do so, the
12 attorney would necessarily be required to divulge privileged material to the
13 Court, which places the attorney in an impossible ethical scenario,
14 contravening all of the existing law on the attorney-client privilege and the
15 attorney's duty to safeguard and withhold privileged communications at all
16 costs.

17 As the Washington Supreme Court held in *Peña Fuentes*, because
18 "[t]he constitutional right to privately communicate with an attorney is a
19 foundational right," courts "must hold the State to the highest burden of
20 proof to ensure that it is protected." 318 P.3d at 262 (requiring the State to

1 show beyond a reasonable doubt that no prejudice resulted). Under the
2 undisputed facts of this case, the State cannot meet its burden beyond a
3 reasonable doubt, or indeed any lower standard of proof.

4 Again, there is no dispute DCI, law enforcement, detention officers
5 and agents of the State of Montana intentionally accessed privileged
6 materials, including litigation strategy, and the most sensitive information a
7 client can provide. Moreover, they continued to do so, despite repeated
8 requests by defense counsel to stop the Attorney-Client violations by
9 informing the prosecution team.

10 As a matter of law, even if the State could present evidence allowing
11 for speculation as to the degree of prejudice Sterling suffered, it cannot
12 sustain its burden—much less beyond a reasonable doubt—that no
13 prejudice was suffered. Sterling is entitled to a dismissal.

14 It is easy to understand why the invasions of the privilege and the
15 resulting constitutional deprivations require dismissal *in toto*. The sanctity of
16 the attorney-client privilege is intended for situations just like this: Without
17 divulging the contents of the conversations with Sterling Brown to the
18 prosecution or lead investigator, or Court, which attorney Jasper or any of
19 Sterling's other attorneys cannot and will not do, there is no possible way
20 that the defense can establish that the State used the information to

1 establish probable cause for their case or to gain access to information to
2 prove their case. The prejudice is presumed in an egregious case like
3 this—and for good reason. The attorney-client privilege must be protected
4 at all costs.

5 **D. Dismissal is the Only adequate Remedy.**

6 This court may rule on any defense “that is capable of determination
7 without trial.” Mont. Code Ann. § 46-13-101. Dismissal is appropriate when
8 supported by good cause and in furtherance of justice. Mont. Code Ann. §
9 46-13-401(1). In making this determination, the Court weighs “the
10 constitutional rights of the defendant and the interests of society.” *State v.*
11 *Schwichtenberg*, 237 Mont. 213, 217, 772 P.2d 853, 856 (1989). That
12 analysis requires dismissal under the facts of this case.

13 Most importantly, there are no remedies apart from dismissal that
14 would adequately ameliorate the prejudice caused by the State’s intentional
15 intrusion into Sterling’s attorney-client privileged communications. Having
16 gained direct access to defense counsel’s view of the case and strategy,
17 the bell cannot be unrung. No evidentiary limitation or change in
18 investigators/prosecutors would correct the problem. Allowing the case to
19 proceed to trial in light of the disclosure would be a grave miscarriage of
20 justice. Weighing the constitutional rights of the defendant and the interests

1 of society, dismissal of the complaint, with prejudice, is supported by good
2 cause and would further the ends of justice. No other remedy would
3 adequately account for the State's misdeeds. Even if the Court determined,
4 first, that the presumption of prejudice is merely rebuttable, despite *Baca*
5 and *Levy*, and second, that the State can conceivably raise some genuine
6 issue of disputed fact on the question of prejudice, this would not resolve
7 the matter in favor of the State. At the very least, the Court should schedule
8 an evidentiary hearing at which the State must prove, beyond a reasonable
9 doubt, that its access to Sterling's privileged information resulted in no
10 prejudice.

11 **CONCLUSION**

12 For the reasons stated, Sterling's Motion to Dismiss should be
13 granted. The State's actions demonstrate an invasion of the attorney-client
14 privilege, which presents the inevitable threat of an irreversible, structural
15 error and a deprivation of sacrosanct constitutional rights which cannot be
16 remedied. In the event that the Court does not deem a complete dismissal
17 to be the appropriate remedy for an irreversible, structural error, then the
18 undersigned would request the Court to order that a new taint team be
19 appointed and directed to investigate the attorney-client violations
20 described herein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

DATED this 1st day of July, 2024.

REEP, BELL & JASPER, P.C.

&

BOONE KARLBERG, P.C.

By: /s/ Lance P. Jasper
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Jenna Penielle Lyons, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion to the following on 07-01-2024:

Forrest Michael Crawl (Attorney)
201 W. Main Street, Suite 300
Missoula MT 59807
Representing: Sterling Brown
Service Method: eService

Lance Patrick Jasper (Attorney)
Reep, Bell & Jasper, P.C.
P.O. Box 16960
Missoula MT 59808
Representing: Sterling Brown
Service Method: eService

Matthew B. Hayhurst (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Sterling Brown
Service Method: eService

Daniel M. Guzynski (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Daniel Z. Rice (Govt Attorney)
PO Box 564
217 W. Park
Terry MT 59349
Representing: State of Montana
Service Method: eService

Meghann Ford Paddock (Govt Attorney)
215 N. Sanders
PO Box 201401
Helena MT 59620-1401

Representing: State of Montana
Service Method: eService

Michael Joshua Gee (Govt Attorney)
2225 11th Ave.
Helena MT 59601
Representing: State of Montana
Service Method: eService

Electronically signed by Jayden Beed on behalf of Jenna Penielle Lyons
Dated: 07-01-2024