IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0539

GARY WAYNE TEMPLE,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT (REDACTED)

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

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INTRODUCTION

At closing argument in the December 2019 trial of Gary Temple for drug distribution, the prosecutor urged the jury to convict because witness Donny Ferguson had a pure motive for testifying: "And then, of course, Donny's motivation for testifying she said was that she's already taken responsibility for what she did." D.C. Doc. 7, 12/5/19 and 12/6/19 Trial Tr. at 388-89 (hereinafter "Trial Tr."). And indeed, the prosecutor had elicited that testimony during the trial, asking her directly why she was testifying that day. Ms. Ferguson's answer:

> "I've accepted responsibility for my actions for the last two and a half years that I've dealt drugs throughout the state of Montana. And I just feel that, you know, everybody else needs to accept their responsibility. I've taken the consequences for my actions."

Trial Tr. at 273. The prosecutor even went so far as to elicit that Ms. Ferguson had been prosecuted federally, that she had received a sentence of 128 months in prison, and asked Ms. Ferguson directly whether "the U.S. Attorney's Office [has] given you any deals to testify today?" To which Ms. Ferguson answered, "No."

Regrettably, that exchange did not include, as Paul Harvey used to say, "the rest of the story." In fact, Ms. Ferguson was indeed

expecting a reduction in her prison sentence under Rule 35 of the Federal Rules of Criminal Procedure, which makes no effort to hide its quid-pro-quo purpose as it is plainly named, "reducing a sentence for substantial assistance." Fed. R. Crim. P. 35(b). Ms. Ferguson had participated in a debrief interview with both the state and federal prosecutors a number of months earlier in March 2019. At that time Ms. Ferguson gave information about far more than just Mr. Temple. She gave information about drug dealing by several other people, and also about issues at the Cascade County Detention Center. And she did in fact receive a reduction in her sentence *for* her substantial assistance. That motion did not come until two weeks after her testimony in Mr. Temple's trial, however. That delay likely was not a concern to her, though. A number of years earlier she had also been prosecuted by the federal government for drug distribution and had received a break in her sentence in exchange for her cooperation in that case, too. Indeed, Ms. Ferguson's federal prosecutor testified that she had never failed to give a motion to reduce sentence after a defendant supplied substantial assistance.

It seems clear that Ms. Ferguson was not testifying merely for altruistic reasons, but that she was also working for a reduction in her sentence. We are not sure, though, because the defense was never informed of this ulterior motive. The defense was never told she had received a substantial assistance motion previously, nor that she had given additional information to the government, nor that she had received a 5K1 earlier that year, nor that any motion to reduce her sentence was being held in abeyance pending her testimony in Mr. Temple's trial. Had Mr. Temple's trial lawyer known any of this information, he would have cross-examined Ms. Ferguson about it. He believed her credibility was key to Mr. Temple's conviction and that he had no way of impeaching her. 7/12/24 Post-conviction Hrg. Tr. at 19. The prosecutor's efforts to bolster Ms. Ferguson's credibility before the jury using half-truths only underscores this conclusion.

Later, at Mr. Temple's sentencing, the Court relied on Ms. Ferguson's claim that Mr. Temple had participated in other drug deals adding up to substantial amounts of drugs to justify a 30-year prison sentence (ten of which was suspended). No other witness testified to weight anywhere close to what Ms. Ferguson claimed. By then, too, Ms.

Ferguson had received her reduction in sentence. Mr. Temple's counsel was not informed of that sealed document, either.

Thus, Mr. Temple's claim is rooted in *Brady*. The prosecution knew about exculpatory impeachment information and failed to provide it to the defense as required by the Constitution. Mr. Temple is therefore entitled to a new trial and a new sentencing hearing if convicted at trial.

STATEMENT OF THE ISSUES

1. Whether the prosecution violated the *Brady* rule by failing to tell defense counsel that a key witness was expecting a reduction in her federal sentence as a reward for testifying in state court, where the state had participated in a debrief with the witness and the federal prosecutor prosecuting the witness.
2. Whether the prosecution violated the *Brady* rule by failing to provide information for sentencing that the witness had in fact received a reduction in her sentence for her testimony against Mr. Temple and where the District Court used that witness's uncorroborated claim of substantial amounts of drug-dealing to mete out a substantial sentence.

3. Whether the prosecution violated Due Process by failing to correct a witness's claim that she had been promised no benefit for testifying and that she was only testifying in the interests of fairness and justice, when in fact a sentence reduction for her testimony was expected and later granted.

STATEMENT OF THE CASE

This is a case which comes to the Court on post-conviction review, claiming that the prosecution failed at the District Court level to disclose exculpatory and impeachment material to the defense.

Mr. Temple was convicted of distribution of dangerous drugs in December 2019, and was sentenced to 30 years in prison (ten suspended) in February, 2020. He appealed his conviction to this Court, raising several non-*Brady* issues (at the time of writing the appeal, the *Brady* information still had not been disclosed and Mr. Temple's counsel was still engaged in prying loose the facts), none of which succeeded. His appeal was denied by this Court in December 2022, in cause number DA 20-0221.

Mr. Temple filed a motion for post-conviction relief on August 28, 2023. After briefing the Court held a hearing on July 12, 2024, and

denied Mr. Temple's petition by written order on July 15, 2024. This appeal follows.

STATEMENT OF THE FACTS

Because this claim comes on *Habeas* review, the facts of Mr. Temple's conviction are not relevant and are not included. Instead, because this claim is focused on the State's failure to meet its *Brady* obligation, the facts and arguments are focused there.

Facts relevant to Temple's trial in district court

In September, 2018, the State charged Mr. Temple with two counts of criminal distribution of dangerous drugs. D.C. Doc. 7 at 2. The original charges were based on two controlled transactions in November, 2017. In April, 2019, the State amended the charges to one count of criminal distribution of dangerous drugs based on continuous conduct between July 2017 and February, 2018. *Id.*

At Temple's trial in December, 2019, the State offered testimony from four witnesses who had been involved in distributing methamphetamine in the Great Falls area. *See* Trial Tr. No law enforcement witnesses testified that they personally observed Mr. Temple distributing drugs. The only direct evidence that Mr. Temple

distributed drugs came from these witnesses, all of whom were felons convicted of distributing drugs themselves. The State presented no physical evidence such as seized drugs, surveillance video or recordings, or fingerprint or DNA evidence.

The State's first two witnesses, who were involved in two controlled buys for small amounts of meth, admitted that they had received probationary sentences in exchange for their testimony. One expected a favorable outcome in another pending drug possession case. Trial Tr. at 144, 182-83, 185.

Brian Osborn also testified for the prosecution. He claimed he was not receiving any benefits for his testimony in this case, as he similarly claimed when testifying at other trials. Trial Tr. at 226, 229; *see also* D.C. Doc. 36, Ex. 6L at 8, 11-12. Nevertheless, three weeks after Mr. Temple's trial, Mr. Osborn's pending drug possession charge was dismissed by the prosecutor. *See* D.C. Doc. 36, containing Ex. 6 and Ex. 6H. Fifty days after the trial, one of his pending petitions to revoke was dismissed by her as well. D.C. Doc. 36, Ex. 6I. And three months after the trial, Mr. Osborn received a suspended sentence on his remaining petition to revoke. D.C. Doc. 36, Ex. 6J.

Donny Lynn Ferguson was the State's key witness. The prosecutor described her as "the queen bee of methamphetamine dealing." Trial Tr. at 382. Ms. Ferguson had pled guilty in federal court in August, 2018, for possession of 50 grams of meth with intent to distribute, as well as felony possession of a firearm. Trial Tr. at 254.[1] In February, 2019, she had been sentenced to 128 months in federal prison. Trial Tr. at 255; D.C. Doc. 7, Ex. 5, Ferguson Original Judgment.

At Temple's trial, Ms. Ferguson testified that she distributed to Mr. Temple at least ten pounds of drugs (5000 grams) during the period of summer 2017 through November 2017. Trial Tr. at 260. No other witness corroborated this testimony.

The prosecutor had Ms. Ferguson tell the jury that she had not received any deals from the government for testifying against Mr. Temple. She elicited testimony from Ms. Ferguson that her only motivation for testifying was to hold Mr. Temple accountable for drug dealing.

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[1] *See also* Ferguson plea agreement, available at pacer.uscourts.gov. Petitioner asks this Court to take judicial notice of Ferguson's 8/30/18 plea agreement, United States v. Donny Lynn Ferguson, Case 4:18-cr00056-BMM, which states on page 3 that she admits to possession with intent to distribute only 50 grams of meth.

> Q. We've given you immunity, but you're not pending any State charges; is that correct?
> A. No.
> **Q. Has the U.S. Attorney's Office given you any deals to testify today?**
> **A. No.**
> Q. Why are you testifying today?
> A. I've accepted responsibility for my actions for the last two and a half years that I've dealt drugs throughout the state of Montana. And I just feel that, you know, everybody else needs to accept their responsibility. I've taken the consequences for my actions.
>
> Trial Tr. at 273.

The prosecutor emphasized Ms. Ferguson's testimony heavily in closing, referring to it at least eight (8) times and arguing that the large amounts of drugs Ms. Ferguson had sold Mr. Temple were powerful evidence that he had distributed drugs throughout this period. Trial Tr. at 382-390, 396-403. The prosecutor also told the jury that Ms. Ferguson's only motive for testifying against Mr. Temple was that he should be held accountable just as she had been.

> So let's talk for a minute about some of these witnesses' motivation for testifying…
> And then, of course, **Donny's motivation for testifying she said was that she's already taken responsibility for what she did.** Okay. She pleaded guilty and she's been sentenced on a possession with intent to distribute. And her

> motivation was that she thinks the Defendant should also be held accountable for his role in all of this.
>
> Trial Tr. at 388-89.

On December 6, 2019, a jury found Mr. Temple guilty of distribution of dangerous drugs.

Impeachment evidence that the State failed to disclose

What Ms. Ferguson and the prosecutor failed to mention to the jury was that Ms. Ferguson had already received significant breaks on her federal sentence in exchange for cooperation, and that she had a good expectation of receiving further reductions for testifying against Mr. Temple. When Ms. Ferguson had been charged in 2018 with possession of meth with intent to distribute, as well as with being a felon in possession of a gun, she had been looking at a federal sentence in the guideline range of [redacted]. D.C. Doc. 18, Ex. 2B, at 2 (hereinafter App. B). (This was because she had a prior federal drug distribution conviction from 2006).

Ms. Ferguson did not tell the jury about how she had spent the earlier part of 2019 cooperating with law enforcement and offering information on anyone and everyone she could. Despite her guideline

range of [redacted] in February, 2019, she was sentenced to only 128 months, far below her guideline range, [redacted] 7/12/24 Post-conviction Hrg. Tr. at 62, 64 (hereinafter App. D—AUSA testimony).

After Ferguson's February 2019 sentencing, she and her attorney continued to work to get her to receive further sentencing reductions through the Rule 35 mechanism available to federal defendants who continue to provide information in the first year after they are sentenced. U.S.C.S. Fed. R. Crim. Proc. R. 35. Ms. Ferguson met with the state prosecutor and law enforcement more than once, in an effort to disclose everything she could about other defendants in the drug world.

Ms. Ferguson was familiar with the Rule 35 process because she had benefited from it during her first go-around in federal court in 2006. At that time, she had been sentenced to 120 months on her first federal drug distribution charge. D.C. Doc. 76, Ex. 7B at 1-2. Because she had offered information to the government, however, the AUSA had filed a Rule 35 motion on her behalf. *Id*. In May, 2006, Ms. Ferguson wrote a letter to U.S. District Judge Haddon, complaining that her

attorney wasn't doing enough to facilitate her Rule 35 sentencing hearing. D.C. Doc. 76, Ex. 7A (hereinafter App. E). She explained to the judge that she was hoping for a sentence reduction because she had provided substantial assistance and was annoyed that her attorney wasn't doing enough to set up her Rule 35 resentencing. Judge Haddon appointed her a new attorney, and Ferguson's sentence was reduced to 84 months. D.C. Doc. 76, Ex. 7C. So Ms. Ferguson knew all about the federal Rule 35 sentence reduction process.

Fast-forward to 2019. Ms. Ferguson had apparently mentioned Mr. Temple in debriefings before the one in March 2019, possibly even before the 5K1 motion was filed and she was sentenced on February 21, 2019 to 128 months. A post-sentencing debriefing was set up for Ms. Ferguson on March 30, 2019, which the Cascade County prosecutor attended, as well as Detective Lynch and AUSA Betley. 7/12/24 Post-conviction Hrg.; Petitioner's Ex. 1 (March 2019 debrief unredacted transcript). The debriefing began with Ms. Ferguson offering to tell the State prosecutor and Detective Lynch about her relationship with Mr. Temple. This time, speaking under a grant of immunity and with her own guilty plea safely behind her, she was far less reticent about the

amount of drugs she had distributed. She claimed that she had given Mr. Temple "ten" or "I'm sorry, about fifty pounds" of meth to distribute. *Id.* at 5.

Around this time, and at some point after Ms. Ferguson had been sentenced for the first time in February, 2019, AUSA Betley told Ferguson's attorney that if she provided substantial assistance, then she would file a Rule 35 motion on her behalf. App. D at 58. Betley later testified that she always filed Rule 35 motions if a defendant offered substantial assistance. *Id.* at 65.

Ms. Ferguson testified at Mr. Temple's trial on December 6, 2019. Temple was convicted. [redacted]

[redacted]

None of this information was disclosed to Mr. Temple's jury, his trial attorney, Paul Neal, or the district court. Meanwhile, Mr. Temple had not yet been sentenced.

At his sentencing on February 24, 2020, the Cascade County prosecutor argued for a 30-year sentence for the single count of drug distribution. She contended that the sentence was justified because Mr. Temple had distributed "at a minimum, 10 pounds of meth" to the Great Falls community, at least according to Ms. Ferguson. 2/24/20 Sentencing Tr. at 9-10.

The prosecutor did not mention that at the time Ms. Ferguson had made the statement, she was hoping for a sentencing break. She also failed to mention that Ms. Ferguson had in fact already received a four-year sentencing break, a month after testifying. The district court expressly relied on Ms. Ferguson's "ten-pound allegation" in giving Mr. Temple a 30-year sentence. "This was a substantial, overwhelming amount of drugs, methamphetamines specifically, that was introduced

into our community." 2/24/20 Sentencing Tr. at 15; see also Temple's Judgment Order, cited in D.C. Doc. 6.

Procedural history following Temple's conviction

After Mr. Temple was convicted, his direct appeal was denied. Undersigned counsel, who was his appellate counsel on direct appeal, was skeptical about Ms. Ferguson's testimony. She then filed a motion to unseal Rule 35 documents in the U.S. District Court in Great Falls. [redacted] The documents were disclosed to Mr. Temple's counsel with an order that they remain sealed. Temple's counsel thus obtained these *Brady* impeachment materials long after his direct appeal had been denied.

[redacted]

[redacted]

Mr. Temple filed his petition for post-conviction relief on August 31, 2023. On July 12, 2024, the district court held a post-conviction hearing on Temple's petition.

Temple's post-conviction hearing

At the post-conviction hearing, Temple's trial counsel, Paul Neal, testified that he had never been made aware that Ms. Ferguson was expecting, or that she had received, a four-year reduction in her sentence shortly after testifying against Mr. Temple. He also stated that Ms. Ferguson had told him, in his pretrial interview, that she was expecting to receive no benefits whatsoever in exchange for her testimony. 7/12/24 Post-conviction Hrg. Tr. at 19. Mr. Neal also testified that Ms. Ferguson was the witness who was the most damaging to the defense case, and that during trial he felt that he had no way of impeaching her. *Id*. at 16.

AUSA Betley testified that she had told Ms. Ferguson's attorney prior to Mr. Temple's trial that she would file a Rule 35 motion on her behalf if she provided substantial assistance. App. D at 58. She stated

that she always filed such motions if defendants provided substantial assistance. *Id.* at 65. She agreed that a federal defendant who debriefs with law enforcement after sentencing has an expectation of a Rule 35 sentencing reduction. *Id.* at 66.

The district court denied Mr. Temple's petition on July 15, 2024. See Order denying petition (hereinafter App. A).

SUMMARY OF THE ARGUMENTS

First, the district court used a legally incorrect, overly narrow, definition of "impeachment evidence" for *Brady* claims. The court required Mr. Temple to prove that a "quid pro quo" agreement for Ferguson's sentence reduction existed and was executed prior to trial. In doing so, the court did not follow U.S. Supreme Court decisions stating that "impeachment evidence" means any evidence showing that the witness had an expectation of a sentencing benefit. The federal decisions cited by the district court – *Giglio and Alderman v. Zant* – expressly do not require proof of a pretrial "quid pro quo" agreement.

In denying Temple's *Brady* claim, the court also erred in determining that the State did not possess the impeachment evidence. Montana's discovery statute, MCA § 46-15-322 (4), requires the State to

disclose "material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case." The State prosecutor knew Ms. Ferguson expected a break on her sentence; that is why the federal prosecutor was present for the State's March interview of Ms. Ferguson in the first place.

Second, the court erred in denying Mr. Temple's *Brady* claim for his sentencing. Mr. Temple's 30-year sentence for drug distribution was based on Ms. Ferguson's "ten-pound" allegation. Ms. Ferguson was the only witness who offered this evidence, and Mr. Temple should have been permitted to impeach her with her motive to obtain leniency for herself.

The district court devoted little analysis to this *Brady* sentencing claim, determining that it was "record-based" and should have been raised on direct appeal. This analysis was unsupported by any evidence. Mr. Temple's claim was based on the Rule 35 motion and sentencing order that Temple's counsel did not obtain until August, 2023, long after his direct appeal was denied.

Third, the court erred in denying Mr. Temple's *Napue* claim that Ms. Ferguson testified falsely at his trial and that the State failed to correct her testimony. The court erred in concluding that Mr. Temple had to prove the State did not know the testimony was false. In fact, Ninth Circuit precedent provides that a petitioner need only prove the State "should have known" the testimony was false.

STANDARD OF REVIEW

This Court reviews a district court's denial of a petition for post-conviction relief to determine whether the district court's findings of fact are clearly erroneous, and whether its conclusions of law are correct. *Stock v. State*, 2014 MT 46, ¶9, 347 Mont. 80, 318 P.3d 1053.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING TEMPLE'S *BRADY* CLAIM THAT THE STATE FAILED TO DISCLOSE A KEY WITNESS' EXPECTATION OF RULE 35 BENEFITS FOR TESTIFYING AGAINST HIM.

Mr. Temple was denied his right to Due Process under the Fourteenth Amendment of the U.S. Constitution and under Article II, section 17, of the Montana Constitution because the State failed to disclose a key witness' expectation of Rule 35 benefits.

Under the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the suppression by the prosecution of material evidence favorable to the accused violates the defendant's Fourteenth Amendment guarantee of due process. *See Brady,* 373 U.S. at 86; *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 422 P.3d 1219. The prosecution is constitutionally obligated to provide any exculpatory or impeachment evidence in its possession to the defense. *State v. Weisbarth*, 2016 MT 214, ¶19, 384 Mont. 424, 378 P. 3d 1184.

This duty applies to impeachment evidence. The prosecution may violate the principles set forth in *Brady* by failing to disclose agreements with a prosecution witness in exchange for testimony. A promise or binding agreement is not required. *See United States v. Bagley,* 473 U.S. 667, 683 (1985) (government should have disclosed the "possibility of a reward" for its witnesses even though the reward was "not guaranteed by an express, binding contract"). In *Wearry v. Cain*, the U.S. Supreme Court summarized the rule in *Napue* as follows: "(*Napue*, supra, at 270) ***(even though the State had made no binding promises***, a witness' attempt to obtain a deal before testifying was material because the jury 'might well have concluded that [the

witness] had fabricated testimony in order to curry the [prosecution's] favor'"). *Wearry v. Cain*, 577 U.S. 385, 394 (2016).

This Court has explained that a party seeking to establish a *Brady* violation must establish: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *McGarvey v. State*, 2014 MT 189, ¶ 16, 375 Mont. 495, 329 P.3d 576. Evidence that affects a witness' credibility has been held to be material. *Giglio v. U.S.*, 405 U.S. 150,154 (1972).

A. The district court did not apply the correct legal standard for determining what constitutes "impeachment evidence" under *Brady* that must be disclosed.

1. The district court erred by requiring proof of a pretrial "quid pro quo" agreement.

The district court erred by using a definition of *Brady* impeachment evidence that was too narrow. The court required that Mr. Temple prove the existence of a "quid pro quo" agreement between the county attorneys and the witness prior to trial, in which the State

had expressly promised in writing sentencing benefits to the witness in exchange for her testimony. App. A at 8-9, citing *Gollehon v. State*, 1999 MT 210, ¶ 14, 296 Mont. 6, 986 P.2d 395. "There is no evidence of a pre-trial agreement, and thus there was no *Brady* violation."

The district court's analysis ignores U.S. Supreme Court precedent. According to *Napue v. Illinois* and subsequent precedents, all Petitioner needs to show to prove a *Brady* violation is that the witness had an "expectation of a benefit" and that the State failed to disclose that information. A written, *quid pro quo* agreement, in which benefits have been conferred prior to trial, is not required. *See Wearry v. Cain*, *supra*, 577 U.S. at 394.

The Ninth Circuit has held that a tacit agreement between a prosecution witness and a prosecuting attorney constitutes exculpatory material subject to disclosure under *Brady*. *See Sivak v. Hardson*, 658 F.3d 898, 910 (9th Cir. 2011), citing *United States v. Shaffer,* 789 F.2d 682, 690 (9th Cir. 1986) (stating "[w]hile it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness's] credibility, it is equally clear that facts which ***imply*** an agreement would also bear on [the witness's] credibility and would have

to be disclosed"). *See also Douglas v. Workman*, 560 F.3d 1156, 1185-87 (10th Cir. 2009) (collecting cases on "tacit agreements" from the 9th, 7th, 8th, and 6th circuits); *LaCaze v. Warden La. Correctional Institute for Women*, 645 F.3d 728, 735 (5th Cir. 2011), explaining that "the Supreme Court has never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a *bona fide*, enforceable deal."

Here, the district court erred by ignoring U.S. Supreme Court and federal circuit court precedents interpreting *Brady/Giglio* claims. The court also erred because the cases it relied on do not actually support the purported legal principle of "where there is no agreement, there is no duty to disclose." According to the district court (and the State), *Gollehon* requires a "quid pro quo" agreement to prove a *Brady* impeachment violation. App. A at 8. The court also cited *Giglio* and *Alderman v. Zant* in support of this conclusion. App. A at 8 n. 4.

But *Gollehon* also speaks of the requirement to disclose an "understanding with tangible benefits" (not merely an "agreement"). *Gollehon*, ¶14. Moreover, the decisions on which *Gollehon* and the district court relied – *Giglio* and *Alderman v. Zant* – do not require a

"pre-trial *quid pro quo* agreement." *Giglio* states that the the existence of "some understanding for leniency" constitutes impeachment evidence that should have been disclosed under *Napue*. *Giglio* at 155. *Giglio* involved a fact pattern in which one prosecutor told the witness he would not be prosecuted if he testified, while another trial prosecutor suggested to the witness that he would have to "rely on the good conscience of the government not to prosecute" if he did testify. The *Giglio* decision noted that "The Hoey affidavit [of the trial prosecutor], standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of *some understanding for leniency*." *Giglio* at 155 n.4.

Similarly, *Alderman v. Zant* explains that a "promise" is not required; what is required is that "the jury know the facts that might motivate a witness in giving testimony." *Alderman v. Zant*, 22 F.3d 1541, 1554 (11th Cir. 1994).

> As this Circuit has explained, "*Giglio* does not require that the word 'promise' is a word of art that must be specifically employed." *Brown v. Wainwright*, 785 F.2d 1457, 1464-65 (11th Cir. 1986). Nor is the phrase "any understanding or agreement" limited to bona fide enforceable

> grants of immunity. *Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985). "Even mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence since it constitutes an informal understanding which could directly affect the witness's credibility before the jury." *Id.* This Circuit has emphasized that "the thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony." *McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir. 1985).

Alderman v. Zant, 22 F.3d 1541, 1554 (11th Cir. 1994). *Alderman* does not support the district court's order.

Thus, *Gollehon*, *Giglio* and *Alderman v. Zant* all indicate that a witness' expectation of a benefit must be disclosed to satisfy *Brady*, *Giglio* and *Napue*. These cases do not require proof of a "quid pro quo" agreement. The district court erred in citing these cases as authority for its conclusion that a pretrial "quid pro quo" agreement is required.

Finally, the district court should have distinguished the facts of *Gollehon* from this case. *Gollehon* involved "gratuitous, post-trial benefits" to witnesses, which were never expressly linked to their testimony. *Gollehon*,¶¶ 22, 42 . Here, by contrast, Petitioner presented a Rule 35 motion, filed only two weeks after Temple's trial, expressly

stating that Ms. Ferguson should receive a sentence reduction ***because*** she had testified against Mr. Temple at his trial. Ex. 2A at 5. The Rule 35 motion was not gratuitous, but was consideration in return for Ferguson's testimony against Mr. Temple.

The district court also unreasonably gave credence to the State's idea that an expectation of a benefit in the form of a Rule 35 motion from the AUSA was not a "tangible benefit" because even then only the U.S. District Court judge could modify the defendant's sentence. App. A at 10. But in *Napue*, the U.S. Supreme Court held that a prosecutor's promise of making a "***recommendation*** for a reduction of [the witness's] sentence" was impeachment evidence that should have been disclosed to the defense. *Napue* at 266. Here, the AUSA told Ms. Ferguson's attorney she would make a recommendation to the U.S. district court for a reduced sentence if Ms. Ferguson provided substantial assistance.

2. Petitioner proved that AUSA Betley had given Ferguson a tangible expectation of having a Rule 35 motion filed on her behalf as a reward for her assistance in testifying.

At the July 2024 post-conviction hearing, former AUSA Betley testified that she had told Ms. Ferguson's counsel that Ms. Ferguson

had an expectation of a possible sentencing benefit if she provided substantial assistance in testifying against Mr. Temple.

> Q. With respect -- with respect to this case, Mr. Temple, did you have any conversations with his -- or, excuse me -- with Donny Ferguson's attorney about reducing her sentence?
> A. With Mr. Holden?
> Q. Yeah.
> A. Well, I would have had conversations with Mr. Holden…. I would have told Mr. Holden we will evaluate what she told law enforcement. ***If we consider that to be substantial assistance, we will make a recommendation to the Court and we'll file those motions***. I know in this case with Ms. Ferguson we did file a Rule 5k and a Rule 35. I don't remember what the recommendations were for the reduction. But my conversation with Mr. Holden would have been, again,just the logistics and that we can absolutely make you no promises whatsoever ***of what reduction she will receive, if any***. That's ultimately up to the sentencing judge, Judge Morris.
>
> App. D. at 57-58.
>
> A. And, again, in my role as -- my role as when I was with the U.S. Attorney's Office was really to arrange the logistics of a lot of that, of: Okay, defense attorney -- and that's why I'm saying with Mr. Holden I can't remember the exact conversations --
> Q. Right.
> A. -- I had with him. But it would have been:

> Okay, we'll arrange this -- these debriefs or debrief --
> Q. Right. But it --
> A. -- and we'll provide you the reports, ***and then we will file a motion***, if it's appropriate.
>
> App. D. at 60-61.

She also agreed that defendants like Ms. Ferguson could expect something after debriefing if their assistance is substantial.

> Q. Is it fair to say that when a defendant seeks a debrief with law enforcement they are seeking a reduction in sentence?
>
> A. I think it's fair to say they would expect something if the assistance is substantial.
>
> App. D. at 66.

She also confirmed that she always filed Rule 35 motions if a defendant offered substantial assistance. "I mean, if someone provided substantial assistance, we would -- I mean, I would file a motion." App. D. Tr. at 65.

AUSA Betley also agreed that she would have had a conversation with Cascade County law enforcement after Ms. Ferguson testified at trial – confirming that she had testified – before she filed her Rule 35 motion recommending a sentence reduction. App. D. at 61-62.

Ms. Ferguson's "expectation" that a Rule 35 motion could be filed for her was not disclosed to Paul Neal, Temple's counsel. Instead, Mr. Neal testified that Ms. Ferguson expressly told him in her pretrial interview that she was not expecting to receive any benefits whatsoever from the government. 7/12/24 Post-conviction Hrg. Tr. at 19. As a result, Mr. Neal did not cross-examine Ms. Ferguson vigorously about any expectation of benefits. Trial Tr. at 276.

The district court erred in disregarding this evidence and insisting on proof of a written, pretrial "quid pro quo" agreement that had already been executed.

3. The district court also erred in not finding that a tangible, "quid pro quo" agreement existed and was executed by the time the AUSA filed the Rule 35 motion two weeks after Temple's trial.

The court also overlooked the fact that Ferguson's expectation of a sentencing benefit undeniably became a tangible "quid pro quo" benefit on December 22, 2019, only two weeks after trial, when the AUSA filed her Rule 35 motion.[2] Indeed, the statute itself is nothing more than a

[2] The court's order denying Temple's petition erroneously states that the Rule 35 motion was filed two months after Temple's trial, when in fact it was filed two weeks after Temple's trial. App. A. at 9. This error was created by an erroneous statement by the State's attorney, Kory

quid-pro-quo procedure as is evident in its heading: "reducing a sentence for substantial assistance." Fed. R. Crim. P. 35(b). *Quid* (reducing a sentence); *pro* (for); *quo* (substantial assistance).

This motion expressly rewarded Ms. Ferguson for her testimony in Mr. Temple's trial, by telling the federal judge Ms. Ferguson had provided substantial assistance, and requesting that Ms. Ferguson be resentenced to a lower sentence. This motion should have been disclosed as part of the prosecutor's continuing obligation to disclose impeachment evidence. Had it been disclosed, Mr. Temple's counsel could have filed a motion for a new trial since the one-month deadline for such motions had not yet expired.

A prosecutor has a "continuing duty to promptly disclose any additional, discoverable evidence." *State v. Jackson,* 2009 MT 427, ¶ 52 354 Mont. 63, 221 P.3d 1213 (citing § 46-15-327, MCA). The State's

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Larsen, at the post-conviction hearing, referring to Temple's trial as ending in October, 2019. 7/12/24 Tr. at 68. In fact, Temple's trial ended on December 6, 2019. [redacted] These correct dates were referred to numerous times in Petitioner's filings. *See* Memorandum in Support of Petition, D.C. Doc. 6 at 2; D.C. Doc. 7, trial transcript.

affirmative obligation to disclose *Brady* material continues after the jury verdict. *Burkhart v. State*, 2016 Mont. Dist. LEXIS 42, citing *Fields v. Wharrie*, 672 F.3d 505, 515 (7th Cir. 2012) ("[A] prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness.") *See also Thomas v. Goldsmith,* 979 F.2d 746, 749-750 (9th Cir. 1992).

B. The district court also erred in assuming that *Brady* only requires disclosure of "quid pro quo" agreements, rather than *any* evidence impeaching a witness' credibility.

"Brady and its progeny require more than just the disclosure of quid pro quo agreements; they require that the prosecution disclose any evidence impeaching a witness's credibility." *Jimenez v. Graham*, 2022 U.S. Dist. LEXIS 125819 *; 2022 WL 2789217 (S.D.N.Y.) at 9, citing *Wearry v. Cain*, 577 U.S. 385, 394 (2016) (explaining that jurors "might have thought differently" about a witness had they known of "the possibility of a reduced sentence on an existing conviction.")

Here, the *Brady* evidence that was not disclosed to trial counsel amounted to more than just the Rule 35 motion filed two weeks after

his trial and the January 7, 2020 order reducing her federal sentence by 38%. In fact, Petitioner presented to the district court several documents showing that Ms. Ferguson was making ongoing efforts to reduce her sentence *before* Mr. Temple's trial. All of this evidence showed Ms. Ferguson's primary motivation and preoccupation was to reduce her federal sentence. These documents were *Brady* evidence that was in the possession of Betley (and by extension, the State prosecutor), prior to Mr. Temple's trial on December 5, 2019. Mr. Temple was deprived of Due Process because his counsel could have used this information to cross-examine Ms. Ferguson about her motives for testifying.

This *Brady* impeachment evidence includes the following:

1. Ferguson's 5K1 sentencing break—a reduction from her guideline range of 168 to 210 months to an initial sentence of 128 months—given to her on February 21, 2019. [3]

[3] Ferguson's 5K1 sentence reduction was discussed by former AUSA Betley/Burrows at Temple's post-conviction hearing, as well as by her attorney, Jason Holden. 7/12/24 Post-conviction Hrg. Tr. at 58, 62, 72. It was also referred to implicitly in her Rule 35 motion (App. B) because Ferguson's original guideline range was 168 to 210 months, and she was originally sentenced to 128 months for substantial assistance. (App. B). The 5K1 motion itself has not been disclosed Temple by either the U.S. District Court or the U.S. Attorney's Office.

This 5K1 benefit showed Ferguson's knowledge that she had an expectation of benefits in exchange for her cooperation. Moreover, Temple's counsel should have been told that Ferguson's "substantial assistance" for purposes of the follow-up Rule 35 motion would be evaluated by AUSA Betley and Judge Morris, both of whom had recently rewarded her with the 5K1 sentencing break. Ferguson's 5K1 break was part of a continuum of her efforts to cooperate with the government and be rewarded. The State's efforts to distinguish her 5K1 break and her Rule 35 break create an artificial distinction between the two benefits. Both motions from the AUSA illustrate Ferguson's motive and bias and should have been disclosed to Temple's counsel.

2. Ferguson's 2006 letter to U.S. District Judge Haddon explaining her understanding that she hoped to receive a Rule 35 sentencing reduction in exchange for her substantial assistance (App E.) and motion and order showing her Rule 35 sentencing break in the 2006 case.

Ms. Ferguson showed that she understood exactly what a Rule 35 break was in 2006 when she wrote to U.S. District Court Judge Sam Haddon: "When is my Rule 35 reduction hearing?" (App. E).

After she mailed this letter on May 14, 2006, the AUSA filed a Rule 35 motion on June 5, 2006, and on July 25, 2006, her sentence was

reduced from 120 months to 84 months. D.C. Doc. 56, Ex. 7B and Ex. 7C. This was *Brady* material because it showed that Ms. Ferguson had previously expected benefits in exchange for her testimony, and that she had been rewarded by receiving them. Most importantly, she stated expressly in the letter that she understood that she had an expectation of a possible Rule 35 sentencing benefit in exchange for her testimony.

3. Redacted portions of Ferguson's March 30, 2019, debriefing, not provided to Temple's counsel.[4]

Prior to trial, Temple's lawyer, Mr. Neal, was provided only with Ms. Ferguson's statements about Mr. Temple. Most of the debriefing session between Ms. Ferguson, the State prosecutor, and Detective Hinchman was never disclosed to Mr. Neal.

The redacted portions provided valuable impeachment evidence because they showed that Ms. Ferguson was making repeated, ongoing efforts to cooperate with the government. Ms. Ferguson referred to previous meetings with the State prosecutor and/or Lynch. Petitioner's Ex. 1 for Post-conviction Hrg. at 7, 10, 13, 21. The redacted material

[4] The fact that those portions were redacted pursuant to a district court order does not mean they were not *Brady* material. The district court erred in determining that the redacted portions were not covered by *Brady* because they were withheld pursuant to its own order. App. A at 8-9.

also revealed promises from the State prosecutor and Lynch that they would ensure Ferguson's safety in jail. *Id.* at 19.

The district court ruled that the redacted part of the briefing did not violate *Brady* because it was redacted pursuant to court order. App. A at 8-9.

The court never addressed Petitioner's argument that all of the other pretrial documents constituted *Brady* evidence that should have been disclosed. The court erred in applying an incorrect legal definition of *Brady* evidence, limiting it to pretrial "quid pro quo" agreements, rather than any and all evidence that showed Ferguson's strong motivation to say whatever was necessary to the authorities in order to reduce her own federal sentence.

C. The district court erred in finding that the State did not possess the impeachment evidence and did not have a duty to seek out and disclose the evidence to the defense.

The district court's order also stated that the state prosecutor was not required to disclose the federal Rule 35 motion or the sentencing order reducing Ms. Ferguson's sentence because "such motions are sealed and not accessible to the public, including the Cascade County Attorney." App. A. at 9. The court also implied that a state prosecutor should not have to disclose federal benefits pending for a witness who testifies in a state court trial. *Id*. The court stated that it would be

imposing too much of a burden on state prosecutors to expect them to find this kind of impeachment evidence. “So asking them to do something else, to investigate now the federal government which never provides information to anyone else, I think that's a big ask.” 7/12/24 Post-conviction Hrg. Tr. at 90.

The district court’s analysis of this point is legally incorrect. First, it is contrary to Montana’s discovery statute, MCA § 46-15-322(4), which provides that "[t]he prosecutor’s obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff ***and of any other persons who have participated in the investigation or evaluation of the case***." MCA § 46-15-322(4).

AUSA Betley was a person who participated in the investigation and evaluation of Temple’s case. She was present at the debriefing of Ms. Ferguson on March 31, 2019. She provided assistance by arranging for Ms. Ferguson’s presence as a witness. She had numerous communications with Cascade County about arranging for Ms. Ferguson to be transported by U.S. Marshals to Cascade County. Ms. Betley knew that Ms. Ferguson had an expectation of a Rule 35 motion

being filed if she provided substantial assistance. She had communicated that possibility to Ms. Ferguson's attorney.

Moreover, Cascade County law enforcement knew about the Rule 35 motion. AUSA Betley agreed that law enforcement likely called her about the fact that Ms. Ferguson had testified, prior to her filing the Rule 35 motion after trial. App. D. at 61-62. She needed to communicate with Cascade County law enforcement about the occurrence of Ms. Ferguson's testimony in order to file her Rule 35 motion.

The district court's analysis was also incorrect in that it disregarded the legal rule that prosecutors have a "duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including law enforcement." *State v. Chavis*, 2019 MT 108, ¶ 6, 396 Mont. 413, 440 P.3d 640 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). *Kyles v. Whitley* held that "the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Id.* at 421.

The district court's conclusion that state prosecutors cannot obtain such evidence regarding federal witnesses runs contrary to this legal standard. The district court would impose a rule that if a federal

witness testifies in state court, there is no need for state prosecutors to determine whether or not the witness is expecting federal benefits for her testimony.

II. THE DISTRICT COURT ERRED IN DENYING TEMPLE'S *BRADY* CLAIM THAT THE STATE FAILED TO DISCLOSE IMPEACHMENT EVIDENCE PRIOR TO HIS SENTENCING.

At his sentencing, Mr. Temple also was denied his constitutional rights to Due Process under the Fourteenth Amendment and under Article II, section 17, of the Montana Constitution because of the State's *Brady* violations. The State violated *Brady* by not informing the district court prior to Mr. Temple's sentencing that Ms. Ferguson had already received a 38% (four-year) reduction in her federal sentence as a reward for testifying against Mr. Temple at his December trial. At the same time, the State prosecutor argued for a thirty-year sentence because of Ferguson's allegation that she had given ten pounds of meth to Mr. Temple. The district court expressly relied on Ms. Ferguson's "ten-pound allegation" in giving Mr. Temple a 30-year sentence. The State misled the district court.

Mr. Temple's counsel did not challenge Ms. Ferguson's allegation at sentencing because he did not know Ms. Ferguson had benefited from

her allegation. 7/12/24 Hrg. Tr. at 19. The suppressed impeachment evidence—that Ms. Ferguson had received a four-year sentencing break in exchange for that testimony—would have allowed Mr. Temple's counsel to challenge it by showing Ms. Ferguson's bias and motivation for making that allegation.

In its post-conviction order denying this claim, the district court devoted little analysis to it. The court stated: "This claim is record based and could have been raised on direct appeal." App. A. at 11.

In fact, the claim was not record-based. "Record-based" claims refer to those that could have been made using the record on direct appeal. *State v. Pelletier*, 2020 MT 249, ¶39, 401 Mont. 454, 473 P.3d 991.

Here, there was nothing in the record on direct appeal that would have supported this *Brady* claim. The direct appeal record did not contain the Rule 35 motion, nor was there any order or reference to the fact that Ms. Ferguson had received a new sentence on January 7, 2020.[5] Petitioner did not obtain these materials (which were under seal in federal court) until August, 2023, long after his direct appeal had

[5] *See* the direct appeal record in DA 20-0221, State v. Gary Temple.

been denied on December 27, 2022. *See* D.C. Doc. 17, Ex. 2C (U.S. District Court Judge Morris' 8/23/23 order granting Petitioner's motion to unseal).

In denying Petitioner's *Brady* claim in the context of his sentencing, the district court also failed to acknowledge the fact that the "quid pro quo" benefit to Ms. Ferguson had in fact taken place by the time of Mr. Temple's sentencing. Ms. Ferguson had received a fully executed benefit, pursuant to an agreement, on January 7, 2020, long before Mr. Temple was sentenced on February 24, 2020.

This *Brady* violation was material because Ms. Ferguson was the only witness who had made the "ten-pound" allegation. 7/12/24 Tr. at 18; *see also* Trial Tr. at 145, 156, 260, 386, 397, 400. No other evidence at trial supported this allegation regarding the amount of drugs.

In its post-conviction order, the district court also stated that Petitioner had presented no evidence that Ms. Ferguson had testified falsely about the "ten pounds" of meth. App. A at 11. This misapprehends the standard for evaluating the materiality of *Brady* violations. Petitioner is not required to prove that Ms. Ferguson's statement was false; he only need show that the withheld impeachment

would have called into question the evidence offered by the State's key witness (who was the only witness on this issue). *See Giglio v. United States*, 405 U.S. at 154 (when the reliability of a given witness may well be determinative of guilt or innocence, "nondisclosure of the evidence affecting credibility" justifies a new trial under *Brady).*

In this case, Mr. Temple should receive a new sentencing hearing in which he would be permitted to demonstrate Ms. Ferguson's self-interested motivation for making the "ten-pound" allegation, one that was not supported by any other witnesses or evidence presented at his trial.

III. THE DISTRICT COURT ERRED IN DENYING TEMPLE'S *NAPUE* CLAIM THAT THE STATE FAILED TO CORRECT FERGUSON'S FALSE TESTIMONY.

Mr. Temple's right to Due Process under the U.S. and Montana Constitutions was also violated when Ms. Ferguson testified falsely by omission, telling the jury that she had not "been given any deals for her testimony" by the U.S. Attorney's office. Under *Napue*, "the knowing use of false testimony to obtain a conviction violates Due Process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared." *U.S. v. Bagley*,

473 U.S. at 680. The *Napue* rule applies not only to false testimony that is inculpatory but to testimony that bears on the testifying witness's credibility. *Napue*, 360 U.S. at 269.

Here, the prosecutor had Ms. Ferguson tell the jury that she had not received any deals from the government for testifying against Mr. Temple. She elicited testimony from Ms. Ferguson that her only motivation for testifying was to hold Mr. Temple accountable for drug dealing. Trial Tr. at 273. Then, in closing argument, she endorsed Ms. Ferguson's claim to be motivated solely by the desire to "hold others accountable." Trial Tr. at 388-89. She also told the jury that Ms. Ferguson had already been sentenced, suggesting that Ferguson's sentence was final.

The district court denied Temple's *Napue* claim, finding that "Temple has not shown that Ferguson testified falsely at Temple's trial about benefits she would receive for testifying." App. A at 10. The district court also stated that "There is no evidence that [the prosecutor] knew about benefits Ferguson would eventually receive or that Ferguson testified falsely at the trial." *Id*. at 3.

A. The district court erred in determining that Ferguson did not testify falsely.

Ms. Ferguson's testimony was false by omission. It was false because it omitted the expectation that Ms. Ferguson had of having a Rule 35 motion filed on her behalf for providing substantial assistance. It hid her major motivation for testifying.

Ferguson's testimony also was affirmatively false because it suggested that she had already been sentenced and therefore had no expectation of any benefit in the future: "I've taken the consequences for my actions."

The jury was not given the opportunity to consider whether Ms. Ferguson was motivated by the possibility of a sentencing reduction for herself. Ms. Ferguson did not tell "the truth, the whole truth, and nothing but the truth."

B. The district court erred in requiring Temple to prove that the prosecutor "knew that Ferguson testified falsely" rather than that the prosecutor "should have known" that Ferguson testified falsely.

The district court did not apply the correct legal rule in interpreting this claim. Under Ninth Circuit cases interpreting *Napue* claims, Mr.

Temple only needs to show that the prosecutor "should have known" that Ms. Ferguson testified falsely.

"Napue applies whenever a prosecution 'knew *or should have known* that the testimony was false.'" *Jackson v. Brown*, 513 F. 3d 1057, 1075 (2008), citing *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005 (en banc) (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

Here, the prosecutor should have known that Ms. Ferguson had an expectation of a Rule 35 motion being filed. When she decided to ask her witness the question "Has the U.S. Attorney's office given you any deals to testify today?" she had a duty to find out what a truthful answer would be. How difficult would it have been for a prosecutor using a federal defendant as a witness to email the federal prosecutor?

Jackson v. Brown explained that a prosecutor's obligation under *Kyles v. Whitley*—the duty to seek out impeachment material—applies in *Napue* "false testimony" cases: "If the prosecutor has a duty to investigate and disclose favorable evidence known only to the police, he "should know" when a witness testifies falsely about such evidence." *Jackson v. Brown*, 513 F.3d at 1075.

Here, the prosecutor did not live up to this duty.

This Court has reversed a drug case in which a prosecutor failed to disclose evidence of benefits and then exploited the absence of that evidence. In *Flowers*, this Court criticized the State for exploiting its witness' claim not to have gotten favorable treatment from the State, when the witness actually was hoping for a benefit from testifying. *State v. Flowers*, 2018 MT 96, ¶19, 391 Mont. 237, 416 P.3d 180. "The State exploited this in its closing argument when it stated that Hill had 'taken responsibility for being in that truck with the Defendant that night,' that she had 'stepped up to the plate,' and that she had 'nothing to lose' because she already had pleaded guilty."

Here, the prosecutor similarly exploited Ms. Ferguson's false testimony by emphasizing that Ms. Ferguson had already pled guilty and been sentenced, suggesting that her case was finished. This was false in light of Ms. Ferguson's expectation that a Rule 35 motion might be filed on her behalf. The prosecutor knew this fact or should have known it.

CONCLUSION

For all of the above reasons, Mr. Temple's petition for post-conviction relief should be granted and the case remanded to district court for a new trial and/or new sentencing.

Respectfully submitted this 30th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 less than 10,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed

APPENDIX

CERTIFICATE OF SERVICE

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-30-2024:

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