

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0539

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GARY TEMPLE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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**BRIEF OF APPELLEE**

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

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## **STATEMENT OF THE ISSUE**

Whether the district court erred when it denied Temple's petition for postconviction relief.

## **STATEMENT OF THE CASE<sup>1</sup>**

In December 2019, Gary Wayne Temple, Jr., was convicted of felony distribution of dangerous drugs. (DC-Doc. 151; 12/5/19 to 12/6/19 Tr. (Tr.).)<sup>2</sup> The district court sentenced Temple as a persistent felony offender (PFO) to the Montana State Prison (MSP) for a term of 30 years with 10 years suspended, consecutive to any other sentence Temple was serving. (DC-Doc. 166; 2/24/20 Tr.)

Temple appealed, raising the following claims: ineffective assistance of counsel for failing to offer an accomplice jury instruction; improper admission of hearsay; erroneously denying two motions for mistrial; and cumulative error. *State v. Temple*, 2022 MT 251N. This Court rejected Temple's claims and affirmed his conviction on December 27, 2022. *Id.*

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<sup>1</sup>Citations to the instant record will be "Doc." Citations to the criminal case will be "DC-Doc."

<sup>2</sup>The trial transcript is consecutively paginated, so citations to the trial will be "Tr."

Temple timely petitioned for postconviction relief in August 2023. (Docs. 5-6.) The State filed its response in March 2024 and Temple submitted a reply in April 2024. (Docs. 34, 44.) The court denied Temple’s postconviction petition following an evidentiary hearing. (7/12/24 Tr. (Hr’g); Doc. 82.)

## **STATEMENT OF THE FACTS**

### **I. Criminal proceedings**

#### **A. Offense and Information**

In September 2018, the State charged Temple with two counts of criminal distribution of dangerous drugs based on two controlled drug buys that had been observed by law enforcement in November 2017. (Docs. 1-3; *Temple*, ¶¶ 3-8.) Derek Lohmeyer (Lohmeyer), acting as a confidential informant (CI), purchased methamphetamine from Danielle Wilson (Wilson), who obtained the drugs from Temple. (*Id.*)

Lohmeyer had recently been charged with distributing methamphetamine and Detective Thomas Lynch with the Russell County Drug Task Force had approached him about offering information about drug distribution in the area. (Tr. at 142-70, 324-39.) Lohmeyer wore a wire so officers could monitor his interactions with Wilson when he purchased drugs from her. (*Id.*) An undercover narcotics officer

with the Montana Department of Justice, Luke Smith, accompanied Lohmeyer during the controlled buy. (*Id.* at 146-49, 198-200, 324-39.)

Lohmeyer and Smith met with Wilson at Walmart, but she did not have the drugs with her. (Tr. at 145-70, 172-98, 201-14.) Wilson got into Smith's truck and directed them to a Town Pump casino. (*Id.*) Wilson met Temple in the parking lot and Smith observed the pair getting into Temple's gray Dodge Ram truck. (*Id.*) Wilson gave Temple the \$1,100 Lohmeyer had given her for the drugs and Temple gave Wilson approximately an ounce (29.4 grams) of methamphetamine. (*Id.* at 329; Ex. 6.) Wilson was gone for only a few minutes and returned with the drugs, which she gave to Lohmeyer. (*Id.*) Smith dropped Wilson off and then collected the drugs from Lohmeyer. (*Id.*)

Smith accompanied Lohmeyer for another buy with Wilson five days later. (Tr. at 152-70, 206-14, 324-39.) Just as the prior transaction, when Lohmeyer and Smith met Wilson, she did not have the drugs with her. (*Id.*) Lohmeyer gave Wilson \$1,100 and she went to the nearby Super 8 motel, parked next to Temple's truck, and went to his room. (*Id.* at 174-98.) Temple only had half an ounce (15.2 grams) of methamphetamine to sell Wilson. (*Id.* at 330; Ex. 7.) When Wilson returned, Lohmeyer went to her vehicle where she gave him the drugs and \$300 inside a cigarette container. (*Id.*) Lohmeyer turned the drugs over to Smith. (*Id.*) Detective Jack Hinchman with the Russell County Drug Task Force provided

surveillance for this controlled buy and he observed Temple nearby in his truck right after the transaction. (Tr. at 281-85.)

Wilson was arrested on December 19, 2017, and charged with two counts of criminal distribution of dangerous drugs. (Tr. at 171-98, 332.) When she was arrested, Wilson informed Detective Lynch that she supplied methamphetamine to Temple. (*Id.*)<sup>3</sup> Lohmeyer, who was present when Wilson was arrested, was jailed for violating the conditions of his release. (Tr. at 158-70, 331-39.) Lohmeyer asked Detective Lynch for a second chance at being a CI. (*Id.*) Lohmeyer reported he had relapsed and directly purchased a “ball” of methamphetamine (appx. 3.5 grams) from Temple at the same Town Pump where Wilson bought drugs from Temple on November 9, 2017. (Tr. at 156-70, 325-39.) After hearing Lohmeyer’s information, the State agreed to recommend Lohmeyer be given probation in his pending case if he testified truthfully against Temple. (*Id.*)

**B. Continued investigation and Amended Information**

During other investigations, Detective Lynch learned that in 2017, Brian Osborn (Osborn) had assisted Temple with transporting methamphetamine and Donny Ferguson (Ferguson) sold methamphetamine to Temple. (Tr. at 324-39.)

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<sup>3</sup>At trial, Wilson stated she did not remember saying anything about Temple when she was arrested, but agreed she was high at the time. (Tr. at 171.)

Ferguson had been charged in the United States District Court for the District of Montana (federal district court) with Possession with Intent to Distribute Methamphetamine and Possession of a Firearm in Furtherance of a Drug Trafficking Crime. (Doc. 15, Ex. 2A.) On February 21, 2019, the federal court sentenced Ferguson to a net term of incarceration of 128 months followed by 5 years of probation. (Doc. 6, Ex. 5.) Ferguson's defense attorney, Jason Holden, contacted Detective Jack Hinchman because Ferguson wanted to provide information about the drug trade in the Great Falls area. (Hr'g; Hr'g Ex. 1 (hereinafter Ex. 1).)<sup>4</sup>

In March 2019, Ferguson was accompanied by Holden when she was interviewed by Detective Hinchman. (Ex. 1 at 2-7.)<sup>5</sup> The Assistant United States Attorney prosecuting Ferguson's federal case, Jessica Betley, and the prosecutor for Temple's case, and Cascade Deputy County Attorney Stephanie Fuller, were also present. (*Id.*)

Ferguson was first asked about her interactions with Temple. (Ex. 1.) Ferguson explained that in 2017 she sold drugs to Temple several times a week,

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<sup>4</sup>The court ordered Exhibit 1 to be filed under seal when it was admitted as evidence at Temple's postconviction hearing. (Hr'g at 75.)

<sup>5</sup>Information Ferguson provided about Temple during her March 29, 2019 interview was provided in discovery prior to trial (*see* DC-Docs. 87-89), so the information contained on pages 1-7 of Ferguson's interview is recounted here and not redacted despite the court's order to file Exhibit 1 under seal at the May 9, 2019 hearing.

starting with a couple ounces of methamphetamine at a time and increasing to a quarter pound and then half pound. (*Id.*) Ferguson stated that over the course of six months she sold Temple 10 to 15 pounds of methamphetamine. (*Id.*) Temple had stashed a key at the house he was sharing with his girlfriend, Whitney Berger, so Ferguson could meet him there with the drugs. (*Id.*) Ferguson knew Temple drove a Dodge pickup and green car and described her relationship with Temple as “pretty much drugs, hefty drugs.” (*Id.* at 7.) At this point in the interview, questions about Temple stopped and Ferguson discussed other drug dealers and conditions at the jail. (*Id.*)

During his interview, Osborn stated he had accompanied Temple to a house in Vaughn where Temple obtained approximately a pound of methamphetamine. (Tr. at 226-79.) Osborn also described accompanying Temple to the Market Place where Temple sold methamphetamine to a guy named Dana. (*Id.*) Temple gave Dana five separate quarter-pound baggies of methamphetamine and returned with a bag full of cash. (*Id.*)

On April 26, 2019, the State filed an Amended Information charging Temple with distributing dangerous drugs as part of a continuing course of conduct between July 1, 2017 and February 5, 2018. (DC-Docs. 51-54.)

The State filed a motion for permission to redact the portions of Ferguson’s and Osborn’s interviews that discussed issues/people unrelated to Temple or, in the

alternative, to have the court review the material *in camera* to determine what may be redacted. (DC-Doc. 62.) The district directed the State to submit the interviews for *in camera* review at the May 9, 2019 hearing. (DC-Doc. 66.)

On May 1, 2019, the State forwarded discovery to Temple that included a letter to Holden about Ferguson's interview and a copy of the cooperation agreement between Wilson and the State. (DC-Doc. 69, attached discovery log (hereinafter, Log).) The State filed notice that Ferguson would be a witness on May 3, 2019. (DC-Doc. 70.)

At the May 9, 2019 hearing, the State explained the proposed redactions of Ferguson's and Osborn's interviews concerned federal investigations unrelated to Temple. (5/9/19 Tr. at 11-18.) The court approved the State's redactions and ordered that the unredacted materials would be filed under seal to preserve the record for appeal. (*Id.*; DC-Docs. 87, 90.)

On May 14, 2019, unredacted and redacted copies of the documents were filed with the court.<sup>6</sup> (DC-Docs. 88-89, 91-92.) That same day, the State sent a discovery memo to Temple along with the orders permitting redactions and the State's proposed redactions. (Log.)

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<sup>6</sup>Exhibit 1, which was filed under seal during the July 12, 2024 postconviction evidentiary hearing, was the unredacted copy of Ferguson's interview. (Hr'g.)

Temple's defense counsel, Paul Neal, interviewed Ferguson on December 3, 2019. (12/4/19 Tr. at 46.) Holden and Detective Hinchman were present for the interview where Ferguson was cooperative and answered all of Neal's questions. (*Id.*)

**C. Jury trial; relevant testimony**

Detective Lynch and Smith explained the protocols for controlled buys with CIs such as Lohmeyer and what they observed during the buys with Wilson. (Tr. at 198-214, 285-87, 324-36.) Detective Lynch further corroborated Wilson's testimony, explaining that in January 2018, he observed Temple's car at the Bergen's residence and discovered several items in Bergen's trash indicating Temple was staying there. (*Id.* at 332-36.) The detective also discovered small plastic baggies that are commonly used to package methamphetamine at Bergen's house in early February 2018. (*Id.*)

Lohmeyer's testimony about the two drug transactions was consistent with the officers' and Wilson's testimony. (Tr. at 141-70.) Lohmeyer testified that he had agreed to be a CI because he was hoping for a lighter sentence for his charges of distributing drugs near a school zone, but acknowledged the State had made no promises prior to the controlled buys. (*Id.* at 144, 158-59, 169.) It was not until Lohmeyer had asked for a second chance as a CI and he reported he had purchased methamphetamine directly from Temple that the State agreed to recommend a

probationary sentence in his pending case if he testified truthfully at Temple's trial. (*Id.*)

Wilson's testimony supported Lohmeyer's and the officers' descriptions of the two drug transactions in November 2017, and she confirmed that Temple had supplied the methamphetamine for those sales. (Tr. at 172-98.) Wilson expressed open hostility towards Lohmeyer for having acted as a CI. (*Id.*) Wilson admitted that she purchased methamphetamine from Temple almost daily from October through December 2017. (*Id.*) Wilson explained that Temple arranged to meet her in different locations throughout Great Falls, including Bergan's residence and the Super 8 Motel. (*Id.*; Exs. 1, 2.) Wilson told the jury that in exchange for her truthful testimony about Temple, the State had agreed to recommend a probationary sentence for distribution of dangerous drugs charge, but her other case remained pending without any plea agreement in place. (*Id.*)

At trial, Ferguson estimated that she sold ten pounds of methamphetamine to Temple between July and December 2017. (Tr. at 254-78.) The transactions took place at Ferguson's apartment, the Super 8 motel, and Bergan's house. (*Id.* at 269-79; Exs. 1, 2.) Ferguson explained that the large amounts of methamphetamine Temple purchased from her were not single "user quantities." (*Id.* at 277-79.) Ferguson also testified that while she was in jail, she received a note from Temple. (*Id.* at 261-65; Ex. 5.) In his note, Temple asked Ferguson why

she was testifying at his trial, asserted that everything being said about him was bullshit, and opined that “D.W. told me that I was good.” (*Id.*)

Ferguson testified that she had been convicted in federal court with possession with intent to distribute and felon in possession of a firearm and had been sentenced to prison for ten years and eight months. (Tr. at 254-55.) The following exchange took place about any benefits Ferguson was receiving for testifying:

FULLER: And just to be clear, have you been promised anything by the State for your testimony here today?

FERGUSON: No.

FULLER: We’ve given you immunity, but you’re not pending any State charges; is that correct?

FERGUSON. No.

FULLER: Has the U.S. Attorney’s Office given you any deals to testify today?

FERGUSON: No.

FULLER: Why are you testifying today?

FERGUSON: 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.

(*Id.* at 273.) Neal cross-examined Ferguson about benefits she received for testifying, namely that the State gave her immunity. (*Id.* at 276.)

Osborn described his interactions with Temple in the summer of 2017, including when he accompanied Temple on two occasions where he bought/sold methamphetamine. (Tr. at 227-49.) When asked if he was “receiving any benefits for testifying,” or had been offered any plea agreements, Osborn said, “no.” (*Id.* at 226, 247.) During cross-examination, Osborn admitted this was the third time he had testified for the State. (*Id.* at 234.) When asked if he was “hoping for a favorable outcome” in his pending cases, Osborn replied, “no,” adding that he did not believe “the State is going to be favorable at all.” (*Id.* at 239.)

Temple testified that he lost his job in the summer of 2017, and began using methamphetamine again. (Tr. at 339-59; *Temple*, ¶ 9.) Temple admitted that he bought methamphetamine from Ferguson, but denied he bought “pounds” of the drug. (*Id.*) Temple claimed he and Wilson had an on-and-off sexual relationship and sometimes used methamphetamine together, but he denied selling any drugs to either Wilson or Lohmeyer. (*Id.*) Temple claimed that Osborn had never been in his vehicle. (*Id.*)

During closing remarks, to counter Temple’s claim that he only bought methamphetamine from Ferguson for his own personal use, the State referenced Ferguson’s testimony that she had sold Temple “about ten pounds of methamphetamine” over a six-month period. (Tr. at 386, 397, 401.) The State also addressed any motives the witnesses may have had to testify, noting there was no

evidence to suggest all four witnesses—who independently identified Temple as a drug dealer—had reason to target Temple. (Tr. at 388-89.) The State pointed out that Lohmeyer had acted as a CI and Wilson had provided information about Temple before either were offered any benefit from the State and Osborn had not been promised any benefit. (*Id.*) The State further argued:

And then, of course, Donny [Ferguson'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.

And then speaking of taking responsibility for their roles in this, Derek Lohmeyer pleaded guilty to criminal distribution of dangerous drugs, already been sentenced. Danielle Wilson also pleaded guilty to criminal distribution of dangerous drugs. These people have already pleaded guilty. They've already said that they did what we charged them with.

(*Id.* at 389.)

#### **D. Sentencing**

At the sentencing hearing, the court took judicial notice of Temple's judgments and sentences for his 2009 and 2010 cases wherein he had been sentenced as a PFO. (2/24/20 Tr.) The State pointed out that Temple was on parole in his 2010 case when he distributed methamphetamine to Lohmeyer and committed PFMA. (*Id.*)

The district court followed the State’s recommendation and sentenced Temple as a PFO to MSP for a term of 30 years with 10 years suspended. (Tr. at 13-15.) When describing the reasons for the sentence, and in response to Temple’s argument that his criminal history was just that of a substance abuser, the court noted that Temple had failed to take advantage of the multiple treatment opportunities and in this case he did not simply distribute “private use” amounts of drugs, but rather had introduced “a substantial, overwhelming amount of drugs, methamphetamines specifically, . . . into our community.” (Tr. at 14-15.) In the judgment and sentence the court recited the same reasons for the sentence it pronounced at the hearing, including Ferguson’s estimation that she sold Temple about 10 pounds of methamphetamine, that Temple had been convicted of 7 felonies, and had been sentenced as a PFO twice. (DC-Doc. 166 at 2-3.)

## **II. Postconviction proceedings**

Temple filed a petition for postconviction relief and supporting memorandum on August 30, 2023. (Docs. 5-6.) Temple asserted the following relevant claims:

1. Temple is entitled to a new trial because the State violated his due process rights by withholding *Brady/Giglio*<sup>7</sup> information about potential benefits a key witness might receive for

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<sup>7</sup>*Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972)

testifying against Temple. Ferguson testified that she had been offered no benefits, but a month later received a 38% reduction in her federal sentence after the AUSA filed a Rule 35 motion. Temple’s counsel was never informed of this plan for Ferguson.

2. Temple is also entitled to a new trial under *Napue*,<sup>8</sup> because when Ferguson testified falsely that she had been offered no benefits from testifying, the prosecutor did not correct her testimony and instead endorsed it in her closing argument.

3. In the alternative, Temple is entitled to re-sentencing. The State misled this Court and defense counsel by failing to disclose Ferguson’s sentence reduction, which occurred shortly after trial and prior to Temple’s sentencing. This Court relied on Ferguson’s “ten-pounds of meth” allegation in sentencing Temple to thirty years.

(Doc. 6 at 1-2.)<sup>9</sup>

Temple attached several documents to his memorandum in support of his postconviction petition, including Ferguson’s February 2019 judgment and sentence. (Doc. 6, Exs. 2A-2D, 5.) Exhibit 2B was a motion that the United States (herein after, Government) filed pursuant to Fed. R. Crim. P. 35(b) (Rule 35(b))<sup>10</sup> and under seal on December 22, 2019. (*Id.*) In this motion, the Government advised the federal district court that [REDACTED]

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<sup>8</sup>*Napue v. Illinois*, 360 U.S. 264 (1959).

<sup>9</sup>Since Temple does not challenge the district court’s order denying relief related to the fourth claim about Osborn, it will not be discussed. (Opening Brief (Br.).)

<sup>10</sup>Rule 35(b)(1) provides that, “[u]pon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”

[REDACTED]  
[REDACTED]  
[REDACTED] (*Id.*) The Government further advised that [REDACTED]

[REDACTED] (*Id.*) Exhibit 2A was the [REDACTED]  
[REDACTED]

[REDACTED] (*Id.*)

In its order granting discovery, the court ordered the State to produce “records of communications between and among the State” and counsel for Osborn and Ferguson, including discussions “about benefits” Ferguson might receive in federal sentencing if she testified in Temple’s trial. (Doc. 21 at 4.) On January 16, 2024, the State advised that no emails or other communications concerning possible benefits to either Osborn or Ferguson were discovered in the State’s emails or files. (Doc. 22.)

The State filed its response to the petition on March 8, 2024, and Temple filed his reply on April 8, 2024. (Docs. 34, 44.) The court conducted an evidentiary hearing on July 12, 2024, where the following people testified: Neal, Detective Hinchman, Fuller, Betley, Holden, and Osborn.<sup>11</sup> (Hr’g.)

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<sup>11</sup>Temple withdrew his arguments concerning Osborn, so his testimony will not be summarized. (Hr’g at 87; Doc. 82 at 11-12.)

In Neal's opinion, Ferguson's testimony was "very important" to the State's case and asserted that Ferguson was the only witness that provided information about the large quantities of methamphetamine that Temple was dealing. (Hr'g at 8-24.) Neal was unfamiliar with Rule 35 Motions and asserted that had he known Ferguson "was getting a benefit out of [her] testimony, [he] would have, of course, crossed her on that because it would have been relevant." (*Id.* at 15.) Neal confirmed that he had interviewed Ferguson prior to trial and asked her if there was an agreement giving her some benefit from testifying to which she replied there was none. (*Id.*)

Detective Hinchman explained that he had not approached Ferguson about providing information, but rather Holden had reached out to him. (Hr'g at 27-39.) The detective confirmed he made no promises to Ferguson for her cooperation in Temple's case, explaining that he is not permitted to make any deals. (*Id.*) The most the detective could do was report to the prosecutor how a witness may have assisted in a case as it is the prosecutor's decision to provide any benefit or deal. (*Id.*)

Fuller's testimony corroborated Detective Hinchman's statement that other than immunity from state charges, the State had offered no benefits to Ferguson. (Hr'g at 41-52.) Fuller testified that she knew motions could be filed in federal

criminal cases to request reductions of sentences, but she had no knowledge of what circumstances were required to file such a motion. (*Id.*)

Fuller explained the State had sought court approval to redact Ferguson's interview, of which the court took judicial notice. (Hr'g at 41-52.) Temple questioned Fuller about a specific exchange during Ferguson's interview concerning her providing helpful information about circumstances in the detention facility and Fuller's comment that Ferguson needed to "weigh that." (*Id.* at 48-49.) Fuller explained the comment related to Ferguson possibly being threatened in jail and whether she wanted to share specific information about that. (*Id.*) When asked if Fuller was offering Ferguson a benefit to provide information, Fuller replied "[a]bsolutely not," and further explained that:

[Ferguson] was being prosecuted by the U.S. Attorney's Office. I have zero control over what the U.S. Attorney's Office does, says, ultimate sentence, or anything like that. So . . . I wouldn't have told [Ferguson], you know, you need to weigh if you think you're going to get a good deal or anything like that.

(*Id.* at 49.) Fuller testified that she had no knowledge about any benefit Ferguson received and stated she had not talked to anyone about making a deal with Ferguson. (*Id.* at 50-52.) When asked who would have told the U.S. Attorney's Office about Ferguson's testimony at Temple's trial, Fuller noted Holden was present when Ferguson testified and explained that she had only communicated

with Betley about the logistics of getting Ferguson moved from federal custody to come testify. (*Id.*)

Betley described the process of filing a Rule 35(b) Motion, which is filed under seal, and explained there is no guarantee that a Rule 35(b) Motion will impact a sentence since the decision rests solely with the court. (Hr'g at 53-71.) (*Id.*) Specific to Ferguson, Betley explained she would have talked to Holden about his client offering information and advised that she could “absolutely make you no promises whatsoever of what reduction [in sentence] she will receive, if any.” (*Id.* at 58.) Betley testified that she filed Rule 5K<sup>12</sup> and Rule 35(b) Motions in Ferguson’s case, but emphasized that she had made it clear to Holden that “there [were] absolutely no promises whatsoever” of a reduction in sentence if Ferguson provided information. (*Id.* at 66, 68-69.)

Holden confirmed there were no guarantees that his client would receive any benefit if she provided information to law enforcement. (Hr'g at 71-80.) Holden also confirmed that the State had not promised Ferguson that in exchange for testifying at Temple’s trial her federal sentence would be reduced. (*Id.*)

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<sup>12</sup>When imposing a sentence, a federal court may depart from the sentencing guidelines if the Government files a motion pursuant to U.S.S.G. § 5K1.1 explaining that “the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” The 5K Motion filed in Ferguson’s federal case had nothing to do with Temple’s case, as Ferguson had been sentenced before Holden approached the State about her being interviewed. (Hr'g at 68.)

The district court heard arguments from the parties and engaged in open-court discussions on the issues. (Hr’g at 80-91.) In response to the court stating there was no evidence that Ferguson was promised a reduction in her federal sentence or even excepted any such benefit, Temple argued that the court should “read between the lines” to reasonably infer there was a “wink and a nod” agreement. (*Id.* at 83.) The State countered that absent testimony from Ferguson that she expected a benefit, Temple could not overcome the consistent testimony from each witness that no promises had been made to Ferguson that her sentence could be reduced if she testified against Temple. (*Id.* at 85-86.) In rebuttal, Temple asserted that the State should be required to “find out and to turn over any potential benefits that may be coming” for a defendant who testifies in a criminal trial. (*Id.* at 89.) The court disagreed that that was required under *Brady*. (*Id.*)

On July 15, 2024, the court denied Temple’s postconviction petition. (Doc. 82.) The court found that there was no evidence that the State possessed any information about the Rule 35(b) Motion filed in Ferguson’s case or that her sentence had been reduced. (*Id.*) The court further observed that the federal documents had been sealed from public view. (*Id.*) The court found there was no evidence that Fuller knew about any benefits Ferguson may receive in her federal case or had any reason to believe Ferguson testified falsely. (*Id.*) The court held

the State’s reference to Ferguson’s stated reasons for testifying during its closing remarks was not improper. (*Id.*)

The court explained that it could not, as Temple suggested, “read between the lines” to legally conclude that the State had failed to provide information about the possible reduction in Ferguson’s federal sentence. (Doc. 82, at 8.) The court pointed out that Temple did not call Ferguson to testify at the hearing and held that “[a]bsent evidence of a pre-trial agreement with tangible benefits” to Ferguson, Temple’s petition fails on the first claim. (*Id.* at 9.) The court further held that the State had no access to the Rule 35(b) Motion which was filed under seal in Ferguson’s case and reiterated that regardless of the Government choosing to file the motion, “reductions in sentences are entirely at the discretion of the [federal district c]ourt.” (*Id.* at 10.) Similarly, the district court denied relief for the second and third claims, concluding that Temple had failed to establish Ferguson testified falsely about any expected benefits, so the State had nothing to correct. (Doc. 82, at 10-11.)

### **STANDARD OF REVIEW**

District court orders denying postconviction relief are reviewed “to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct.” *Main v. State*, 2024 MT 215, ¶ 14, 418 Mont. 159,

556 P.3d 940 (citation omitted). “Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been made.” *Id.*

### **SUMMARY OF THE ARGUMENT**

The district court applied the appropriate law and did not make any erroneous findings of fact when it concluded that Temple had not established all three *Brady/Giglio* factors.

First, the court correctly determined that Temple presented no evidence that the State and Ferguson entered into a cooperation agreement. The court also correctly found that Temple failed to present evidence that Ferguson expected the Government to file the Rule 35(b) Motion, or even that she hoped the motion would be filed.

Second, the court correctly determined that Fuller had no knowledge about the potential for a Rule 35(b) Motion to be filed in Ferguson’s case, let alone that Ferguson may have expected/hoped for such a thing. Temple also failed to establish that Betley had promised any potential benefit to Ferguson. Thus, even if Betley’s actions in Ferguson’s federal case could be imputed to Fuller—which they are not—there was nothing for Fuller to disclose since no agreement existed.

Lastly, Temple failed to demonstrate that not cross-examining Ferguson about the possibility her federal sentence could be reduced created a reasonable belief that the outcome of her trial or sentencing would have been different. Ferguson's testimony simply corroborated Wilson's and Osborn's testimony that Temple had sold methamphetamine by explaining where Temple obtained the drugs that he sold. Her testimony did not establish any of the required elements of distribution of dangerous drugs, thus, it would not have impacted the verdict. Nor was it the sole reason for Temple's sentence. There were ample other reasons for the 30-year sentence with 10 years suspended. Namely, Temple's significant criminal history, two prior PFO sentences, and given that he was still serving his 20-year sentence with 10 years suspended when he sold methamphetamine in 2017.

Finally, the district court also correctly concluded Temple failed to establish the three *Napue* factors since Ferguson had not testified falsely, so there was nothing for Fuller to correct.

## **ARGUMENT**

### **I. The district court correctly concluded that the State had not withheld impeachment evidence material to either Temple's guilt or the sentence he received.**

“In all criminal cases the prosecution has a long-established duty to provide to the defense any exculpatory or impeachment evidence in its possession.”

*McGarvey v. State*, 2014 MT 189, ¶ 16, 375 Mont. 495, 329 P.3d 576 (citation omitted). Independent of criminal discovery statutes, and implied from the fundamental fair trial rights guaranteed to criminal defendants under the Due Process Clause of the Fourteenth Amendment, prosecutors have an affirmative duty to disclose all information and materials known to the prosecutor that are favorable to the accused and constitutionally material to the determination of his or her guilt or punishment. *Brady*, 373 U.S. at 87-88.

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

*Brady*, 373 U.S. at 87. Pursuant to *Brady* and its progeny, criminal prosecutors have a due process obligation to disclose to the defendant knowledge of material evidence favorable to the defendant either because it is exculpatory or because it can serve to impeach a key witness. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Impeachment evidence includes promises that the prosecution makes to key witnesses in exchange for their testimony. *Giglio*, 405 U.S. at 154-55.

To establish a *Brady/Giglio* violation, the defendant must establish the following factors: (1) the State possessed evidence favorable to the defense; (2) the State suppressed/withheld that evidence; and (3) “had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings

would have been different.” *Main*, ¶ 22 (citation omitted); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

A petitioner for postconviction relief has the burden of proving by a preponderance of the evidence that he is entitled to relief. *Oliphant v. State*, 2023 MT 43, ¶ 38, 411 Mont. 250, 525 P.3d 1214. In postconviction proceedings, the weight of evidence and the credibility of witnesses are exclusively within the province of the district court as the trier of fact. *Garrett v. State*, 2005 MT 197, ¶ 35, 328 Mont. 165, 119 P.3d 55; *Weer v. State*, 2010 MT 232, ¶ 18, 358 Mont. 130, 244 P.3d 311 (Court will not disturb district court’s determination of witness credibility).

Temple argued that the State withheld impeachment evidence material to his guilt and the sentence he received by not informing him about a potential benefit Ferguson may have received, or expected, in exchange for testifying at his trial. To prevail on this claim, Temple had to establish, by a preponderance of the evidence, that: (a) Ferguson received/expected a reduction of her federal sentence in exchange for testifying; (b) the State was aware of Ferguson’s expectation; and (c) not being able to cross-examine Ferguson about her expectation/hope created a reasonable belief that the outcome of his trial and sentencing would have been different.

**A. Temple did not establish that Ferguson expected (or even hoped for) a reduction of her federal sentence in exchange for testifying.**

A cooperation agreement is interpreted the same as a plea agreement using contract principles. *See United States v. Carrillo*, 709 F.2d 35, 35-37 (9th Cir. 1983). The “nature and scope of an agreement between the government and [the defendant]” are a factual determination that the court makes. *Id.* The burden is on the movant to persuade the factfinder that an agreement existed. *United States v. Helmandollar*, 852 F.2d 498, 502 (9th Cir. 1988).

This Court has held that regarding alleged benefits promised to a witness for the State, “[t]he duty of disclosure is dependent [] upon an agreement or understanding with tangible benefits. Where there is no agreement, there is no duty to disclose.” *Gollehon v. State*, 1999 MT 210, ¶ 14, 296 Mont. 6, 986 P.2d 395, writ of certiorari denied *Gollehon v. Montana*, 529 U.S. 1041 (2000) (citing *Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir. 1994), cert. denied, 513 U.S. 1061 (1994)). This Court concluded that just like alleged pretrial agreements between the State and a prosecution witness, for any alleged “post-trial” benefits to be considered *Brady* material, there must have been an agreement/understanding in place before trial. *Gollehon*, ¶ 27.

Here, the court correctly found that Temple presented no evidence that the State made any pretrial promise to Ferguson that she would receive a reduction in

her federal sentence (*i.e.*, tangible benefit) in exchange for testifying. *See Gollehon*, ¶ 14. Temple does not challenge that determination. Rather, Temple asserts that the district court used an improper definition of cooperation agreement by requiring “quid pro quo” and argues that impeachment evidence also includes “evidence showing that the witness had an *expectation*” of a benefit. (Br. at 17, 21-26 (emphasis added).) Thus, Temple faults the court for requiring proof of a “tangible” cooperation agreement.

However, Temple’s argument fails to acknowledge that, in addition to finding that the State had made no pretrial offer to reduce Ferguson’s federal sentence as discussed in *Gollehon*, the court also found that Temple failed to establish that Ferguson may have even *hoped*, let alone expected, a benefit. To do so, as Temple had essentially conceded, the court would have had to “read between the lines.”

The court was correct when it declined to do so. The court also properly declined Temple’s request to “read between the lines” to find there had been a “wink and nod” agreement with Ferguson. “Unsupported allegations and conclusions are not a basis for granting postconviction relief.” *McGarvey*, ¶ 20 (citation omitted).

The district court found that “Temple argues that Ferguson testified for the benefit reflected by the Rule 35 motion but presented no evidence to support this

argument. Temple did not call Ferguson and the record is silent as to Ferguson's motive to testify." (Doc. 82 at 9.) These findings are not clearly erroneous. The court's determination that no evidence established that Ferguson expected any benefit beyond immunity from State charges comports with *Alderman*, the Eleventh Circuit case this Court relied upon in *Gollehon*.

In *Alderman*, the Eleventh Circuit concluded that while prosecutors must disclose "any agreements entered into between the prosecutor and the witness which may motivate the witness to testify and which may affect the outcome of the trial," the *Giglio* rule did not "require the disclosure of all factors which may motivate a witness to cooperate." *Alderman*, 22 F.3d at 1555.

Prior to *Alderman*, the Eleventh Circuit had recognized that a discoverable cooperation agreement may not necessarily require a "promise," see *Brown v. Wainwright*, 785 F.2d 1457, 1464-65 (11th Cir. 1986), and had noted that "[e]ven mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence." *Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985).<sup>13</sup> However, that court had also found that some promises, agreements, or understandings did not need to be disclosed, because they are too ambiguous, or too loose or are of too marginal a

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<sup>13</sup>See also *United States v. Bagley*, 473 U.S. 667, 683 (1985) (noting that the "possibility of a reward" in exchange for testimony need not be "guaranteed through a promise or binding contract" to constitute a *Brady* violation).

benefit to the witness to count. *See, e.g., McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir. 1985) (a promise to “speak a word” on behalf of the witness did not need to be disclosed); *Depree v. Thomas*, 946 F.2d 784, 797-98 (11th Cir. 1991) (prosecutor’s statement that he would “take care” of the witness did not need to be disclosed).

Thus, in *Alderman*, the circuit court concurred that the record had not established the existence of an “understanding in exchange for or motivating” the witness to testify. *Alderman*, 22 F.3d at 1555 (defendant’s attorney’s hope that testifying against a codefendant may place him in better standing to negotiate a reduced sentence “is not an agreement within the purview of *Giglio*.” *See also Tarver v. Hopper*, 169 F.3d 710, 771 (11th Cir. 1999); *United States v. Curtis*, 380 F.3d 1311, 1315 (11th Cir. 2004) (“mere fact that the government subsequently filed a motion for substantial assistance in [witness’ federal case] does not prove that it had promised to do so”).

The Ninth Circuit also requires that to establish a *Brady/Giglio* violation, the defendant must at least prove the witness believed he would receive a benefit for testifying. *See, e.g., Williams v. Woodford*, 384 F.3d 567 (9th Cir. 2002) (evidence showing only that the prosecution witness hoped his testimony would result in a reduced sentence was insufficient to establish the existence of agreement between witness and prosecution); *Williams v. Calderon*, 52 F.3d 1465, 1475 (9th Cir.

1995) (denying the petitioner’s claim that the prosecution failed to disclose a deal with a testifying witness when the petitioner could not show the existence of the alleged deal). Other circuit courts have come to similar conclusions: to establish a *Brady/Giglio* violation, the record must contain evidence that prior to testifying, there was at least some expectation on the part of the witness that he would receive some benefit.<sup>14</sup>

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<sup>14</sup>*Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) (“prosecutor afford[ing] favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony.” Prosecutors are “free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony.”) (emphasis in original); *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 298 n.1 (3d Cir. 2021) (“[P]ost-trial favorable treatment of a witness is not within the scope of Brady disclosures.”); *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000) (deferring to the state court’s finding that the prosecution “did not make a deal with [the witness] in exchange for his testimony, did not fail to disclose an offer to [the witness], and did not offer false testimony;” record reflected only a “unilateral hope on [the witness’s] part rather than a deal, whether implicit or explicit, between [the witness] and the State.”); *Hill v. Johnson*, 210 F.3d 481, 486 n.1 (5th Cir. 2000) (“a witness’[s] ‘nebulous expectation of help from the state,’” does not constitute Brady material); *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (en banc) (“witness’s expectation of a future benefit is not determinative of the question of whether a tacit agreement subject to [Brady] disclosure existed,” but rather there must also be evidence of a corresponding assurance or promise from the prosecutor); *Collier v. Davis*, 301 F.3d 843, 849 (7th Cir. 2002), *cert. denied*, 537 U.S. 1208, 154 L. Ed. 2d 1054, 123 S. Ct. 1290 (2003) (witnesses’ “general and hopeful expectation of leniency is not enough to create an agreement or an understanding” under *Brady*); *Mastrian v. McManus*, 554 F.2d 813, 823 (8th Cir. 1977) (declining to read *Giglio* “to support [the] claim that a crucial witness’s expectation of leniency must be revealed absent evidence of an express or implied promise”).

As the Sixth Circuit explained, “[t]he fact that [the witness] desired favorable treatment in return for his testimony in [the petitioner’s] case does not, standing alone, demonstrate the existence of an implied agreement with [the prosecutor].” *Bell*, 512 F.3d at 233. The court further explained that while a “tacit” mutual agreement must be disclosed,

it is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady* . . . To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement.

*Id.*

Although courts have focused on nuances between formal and informal (*i.e.*, tacit or implied; agreement or promise), all agree that a *Brady/Giglio* violation requires, *at a minimum*, evidence that the witness believed or hoped for benefit for testifying for the prosecution. Here, that is exactly what was missing.

The court’s finding that Holden, Betley, and Fuller testified that there was no agreement with Ferguson for reduction of her federal sentence was not clearly erroneous. Nor was the court’s finding that Temple presented no evidence showing that, other than immunity from state charges, Ferguson believed she would benefit from testifying at Temple’s trial. Based on its findings, the district court correctly concluded that absent evidence that Ferguson believed she would

receive some benefit for testifying, Temple failed to establish the first *Brady* factor.

Temple misstates the proper inquiry here. The issue is not whether Ferguson eventually received a reduction in her federal sentence. Rather, the relevant inquiry is whether the State made an undisclosed promise to seek a reduction in Ferguson's federal sentence in exchange for her cooperation. Contrary to Temple's argument, the mere fact that Betley filed a Rule 35 Motion that the federal court accepted does not provide sufficient evidence of any such promise. *See Woodford, supra* (witness' hopes insufficient under *Giglio/Brady*); *Bell, supra*.

Temple's reliance on Ferguson's prior treatment in federal district court cannot establish that she absolutely expected a reduction of her federal sentence in exchange for her testimony. At most, the record shows Ferguson might have hoped the Government would file a Rule 35 Motion. That is insufficient to establish a *Brady/Giglio* claim.

Temple's claim that evidence established Ferguson's "primary motivation and preoccupation" to be interviewed in March 2019 was to "reduce her federal sentence" (Br. at 32) is not supported in the record. References to Ferguson's prior federal prosecutions do not establish what Ferguson believed at the time she testified at Temple's trial. Temple is incorrect that the evidence established Betley made any promise to reduce Ferguson's federal sentence. (Br. at 26.) Betley's

testimony was clear: she made “no promises whatsoever” of a reduction in sentence if Ferguson provided information. (Hr’g at 66, 68-69.) Even if Ferguson nonetheless hoped that a Rule 35 Motion would be filed, as the court correctly noted, the record is void of any evidence establishing that.

Finally, Temple’s claim that redacted comments from Ferguson’s March 19 interview constituted evidence of the State offering benefits for her testimony (Br. at 34-36) is not compelling. Not only did Fuller explicitly reject this suggestion during the hearing, but Temple’s claim also improperly suggests that the State would keep someone safe in jail only if they cooperated. Read in context, the discussion was about possible assaults occurring in the jail and the State’s appreciation of Ferguson’s reticence to report. Detective Hinchman’s comments demonstrate their interest was in protecting all the inmates and ensuring detention staff were not turning a blind eye to problems.

The district court courtly found that Temple provided no compelling evidence about what Ferguson believed, expected, or even hoped at the time she testified. *See Helmandollar*, 852 F.2d at 502 (burden on defendant to show agreement existed). Temple has not established the court’s findings were clearly erroneous or that its legal conclusion, that Temple failed to establish the first prong of *Brady/Giglio*, was incorrect. *Main*, ¶ 14.

**B. Temple did not establish that the State had any reason to know Ferguson expected or hoped for a reduction of her federal sentence in exchange for testifying.**

In determining if the State possessed and suppressed *Brady* evidence, “[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.” *McGarvey*, ¶ 16 (citation omitted). *See also State v. Chavis*, 2019 MT 108, 395 Mont. 413, 440 P.3d 640 (county attorney deemed aware and in constructive possession of photographs taken of defendant through system controlled by the county detention center). These cases align with *Giglio*, 405 U.S. at 152-54, where the Court found that a promise made by one attorney in the prosecution office is attributed to that entire prosecution office. *See also, Kyles*, 514 U.S. at 437 (“prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”).

However, Temple does not dispute that other than immunity from state charges, neither Fuller nor Detective Hinchman actually possessed, or were even aware of, any possible benefit Ferguson received, or even hoped to receive, in her federal case. Instead, Temple asserts that Betley’s knowledge about the possibility of filing a Rule 35(b) Motion in Ferguson’s federal case was imputed to Fuller. Temple’s argument fails for at least two independent reasons.

First, as established above, Betley did not promise Ferguson that she would file a Rule 35(b) Motion and Temple failed to present any evidence that Ferguson may have hoped for such a filing. Thus, there was no “agreement/understanding” to be imputed to Fuller. Second, Fuller had no obligation under *Brady/Giglio* to search for information known or possessed by Betley because the Government was not involved in Temple’s prosecution.

The State is under no affirmative obligation to “take initiative or even assist the defendant with procuring exculpatory evidence.” *State v. Wagner*, 2013 MT 47, ¶ 26, 369 Mont. 139, 296 P.3d 1142; *McGarvey*, ¶ 16. Generally, “the State’s obligation to disclose information under *Brady* does not impose a duty on the prosecutor or investigators to learn of information possessed by other jurisdictions or agencies that have no involvement in the investigation or prosecution at issue.” *McGarvey*, ¶ 16 (citing *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996)).

These holdings align with the Ninth Circuit. See *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (“government ‘has no obligation to produce information which it does not possess or of which it is unaware’”); *United States v. Fort*, 478 F.3d 1099, 1102 (9th Cir. 2007) (prosecutors “deemed to have ‘possession and control’ over material in the possession of other federal agencies as long as [the prosecutors] have ‘knowledge’ of and ‘access’ to that material”).

It is undisputed that Fuller had no knowledge about the Rule 35(b) Motion filed in Ferguson’s case, nor did she have access to the document as it was filed under seal. *See Cano*, 934 F.3d at 1025 (no constructive possession absent “knowledge of and access to the documents sought by the defendant”). Nor did Temple establish that Betley was acting on the State’s behalf when she filed the Rule 35 Motion. *See State v. Ilk*, 2018 MT 186, ¶ 34, 392 Mont. 201, 422 P.3d 1219 (“[P]rosecutor[s] [have] a duty to learn of any favorable evidence known to the others acting on the government’s behalf . . .”). Betley’s presence at Ferguson’s March 2019 interview was not as part of the prosecution of Temple. Betley was present to hear about the other people Ferguson implicated in possessing and distributing drugs and firearms. Nor was any evidence presented that Betley ever acted on behalf of the State in her dealings with Holden or Ferguson.

Temple has not established that Fuller, as the State prosecutor, should have known or accessed information from the Government’s records. Significantly, except when a state law enforcement agency is the “lead investigative agent” in a federal prosecution, *see United States v. Price*, 566 F.2d 900, 908-09 (9th Cir. 2009), federal prosecutors are not deemed to have access to material held by state agencies. *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) *cert. denied*, 515 U.S. 1162 (1995); *United States v. Dominguez-Villa*, 954 F.2d 562 (9th Cir.

1992) (government not obligated to review state law enforcement files not within its possession or control); *United States v. Gatto*, 763 F.2d 1040, 1048 (9th Cir. 1985) (federal prosecutors are never deemed to have access to material held by state agencies).

The same logic should apply to the inverse scenario: state prosecutors are generally not deemed to have access to material held/known to federal prosecutors. *See Reddy v. Jones*, 572 F.2d 979, 982-83 (4th Cir. 1977) (refusing to impute knowledge of federal investigators to state prosecutors); *United States v. Geames*, 427 F.3d 1333, 1337 (10th Cir. 2005) (prosecutor is not charged with knowledge of charges that have been filed against a witness in another jurisdiction).

The district court's findings that Fuller had neither knowledge of, nor access to, any alleged understanding/agreement Betley may have made to Ferguson were not clearly erroneous and its conclusion that Temple failed to prove the second prong of a *Brady* violation was correct. *Main*, ¶ 14.

**C. Temple did not establish that not being able to cross-examine Ferguson about her alleged expected benefit created a reasonable belief that the outcome at her trial or sentencing would have been different.**

For the third *Brady* factor, a “reasonable probability” that the outcome would have been different, is a question of whether such information could “reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 434-35; *City of Bozeman v.*

*McCarthy*, 2019 MT 209, ¶ 14, 397 Mont. 134, 447 P.3d 1048 (“Nonexculpatory information is constitutionally material only if nondisclosure would be reasonably likely to ‘undermine confidence’ in the fairness of the trial or sentencing determination under the totality of the circumstances.”) Courts evaluate the significance of withheld/suppressed information in light of all the evidence presented at the trial. *Kyles*, 514 U.S. at 435; *United States v. Agurs*, 427 U.S. 97, 112 (1976) (materiality “must be evaluated in the context of the entire record”).

In *McCarthy*, when addressing discovery of an arresting officer’s personnel record for impeachment purposes, this Court further explained that “[n]onexculpatory impeachment evidence is thus constitutionally material only where the subject witness provides the key ‘evidence linking the defendant(s) to the crime, or where the likely impact on the witness’s credibility would . . . undermine[] a critical element of the prosecution’s case.’” *McCarthy*, ¶ 14 (citing *United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995); *Kyles*, 514 U.S. at 441-54 (holding that contemplated impeachment of government eyewitnesses would have undermined their testimony and weakened effect of other untainted evidence essential to proof of guilt); *Giglio*, 405 U.S. at 154-55; *United States v. Dent*, 149 F.3d 180, 191 (3rd Cir. 1998) (finding police misconduct in an unrelated drug case constitutionally material impeachment evidence in later drug case but denying discovery upon *in camera* review)).

Temple cannot establish either option for materiality under *McCarthy*: Ferguson’s testimony was not “key evidence” linking Temple to the crime and telling the jury that a Rule 35(b) Motion may be filed, but was not promised, would have had little impact on Ferguson’s credibility or “undermine[] a critical element of the prosecution’s case.” *McCarthy*, ¶ 14. Contrary to Temple’s argument, Ferguson was not a “key” witness for the State. In fact, the State’s case did not depend on Ferguson at all. Ferguson provided only corroborating testimony; first, by explaining that she supplied the drugs to Temple that he then distributed to Wilson and Lohmeyer; and second, by describing the note she received from Temple that confirmed his relationship to Wilson (D.W.) and his incriminating statement that he thought he was in the clear.

Temple has also failed to meet the materiality standard under *Kyles*. Even assuming Ferguson had hoped a Rule 35(b) Motion would be filed and further hoped the federal court would grant some relief, the tentative nature of this “benefit” would not have put the “whole case in such a different light” that it would “undermine the confidence in the verdict.” *Kyles*, 514 U.S. at 435. Not only was the alleged benefit ambiguous and far from guaranteed, but as established, Ferguson’s testimony was ancillary and merely corroborative and did not establish any element of distribution of dangerous drugs.

The facts presented here are unlike what occurred in *Wearry v. Cain*, 577 U.S. 385, 393 (2016). In *Wearry*, a key prosecution witness had actively sought a deal with the State in exchange for testifying against Wearry, and police told the witness he would “talk to the [prosecutor] if he told the truth.” The Court found the State’s trial evidence was a house of cards built on the jury crediting the witnesses. *Id.* That is far from the situation presented here. Ferguson’s testimony was not a linchpin to the State’s case. She simply provided corroboration that Temple possessed methamphetamine to sell to the witnesses whose testimony established the actual elements of the offense charged.

Temple has failed to establish how not being able to cross-examine Ferguson about her alleged expected benefit created a reasonable belief that the outcome at trial would have been different. *See Kyles, supra; McCarthy, supra.*

Finally, Temple has also failed to establish that he would have received a more lenient sentence had the court been aware that Betley had filed a Rule 35(b) Motion in Ferguson’s case after Temple’s trial.

Although Temple is correct that the court referenced Ferguson’s estimation that she sold ten pounds of methamphetamine to Temple at sentencing, for the same reasons the trial outcome would not have been different, Temple cannot demonstrate that the court would have given Ferguson’s testimony less credibility had it been aware of the Rule 35(b) Motion. Additionally, the quantity of

methamphetamine Ferguson estimated Temple purchased was only one factor the court referenced when explaining the reasons for sentencing Temple.

First, Temple's criminal history was significant. Temple's lengthy history included 6 prior felony convictions beginning in 1995 with aggravated assault. (DC-Doc. 160.) Since that time, Temple had been convicted of criminal possession of dangerous drugs in 2001, 2002, and 2010. (*Id.*) He had also been convicted in 2007 of felony criminal endangerment and failure to register as a violent offender. (*Id.*) In 2018, Temple was convicted of misdemeanor partner/family member assault (PFMA). (*Id.*) Temple's most recent prison sentence, imposed in 2010, was a 20-year term at MSP with 10 years suspended and he committed PFMA and distributed methamphetamine to Lohmeyer while on parole. (*Id.*)

Second, Temple had already been sentenced as a PFO twice before. (2/24/20 Tr.; DC-Docs. 160, 166.)

Third, despite going through two drug treatment programs, Temple continued to use dangerous drugs and admitted he was an addict. (DC-Docs. 160, 166.) The court noted that history when it rejected Temple's argument at sentencing that his criminal history was simply that of a substance abuser, explaining that Temple had failed to take advantage of the multiple treatment opportunities and in this case he did not simply distribute "private use" amounts of drugs. (2/24/20 Tr. at 14-15.)

Finally, in addition to referencing the amount of drugs Temple had distributed, the court reminded Temple that he had already heard it “describe[] illegal drugs as being a scourge to our community and destroying lives and families,” and added that “we have to stop this distribution of these drugs to the people, not only in our community but other communities. And I have to send a clear message that I’m not going to tolerate it.” (2/24/20 Tr. at 14-15.) Moreover, Osborn testified that he had observed Temple purchase a pound of methamphetamine and distribute over a pound of methamphetamine.

There were ample reasons for the court to impose a 30-year sentence with 10 years suspended, even if Ferguson’s estimate of 10 pounds of drugs was not considered. Temple’s most recent sentence as a second PFO for simply possessing dangerous drugs was a 20-year sentence with 10 years suspended. The doctrine of escalating consequences alone supports the court imposing a 30-year sentence with 10 years suspended as PFO for distributing drugs.

Temple has not met his burden to prove the State withheld alleged impeachment evidence that had any impact on either his jury trial or sentencing.

*Main*, ¶ 22.

**II. The district court did not err when it concluded Temple had not established Ferguson provided false testimony so there was nothing for the State to correct at either the trial or during sentencing.**

“[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Giglio*, 405 U.S. at 153. “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue*, 360 U.S. at 269. A claim under *Napue* will succeed when “(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material.” *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal quotation marks and alteration omitted).

Determining materiality under *Napue* differs from a *Brady/Giglio* claim. A *Napue* violation requires that the conviction be set aside whenever there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Hayes*, 399 F.3d at 985 (internal quotation marks omitted). When sentencing is at issue, the test is whether there is “any reasonable likelihood” that the sentencing court’s decision making “would have been different” without the *Napue* error. *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008).

As the court correctly found, Temple did not establish that a tangible pretrial cooperation agreement existed between the State and Ferguson. Nor did he present

evidence that Ferguson expected, or even hoped that, the Government would file a Rule 35(b) Motion. Thus, the court correctly determined Temple failed to establish the first *Napue* factor.

Next, since there was no evidence Ferguson testified falsely or that Fuller had any reason to even know a Rule 35(b) Motion may be filed, Fuller had no reason to correct her statement. In order to establish a *Napue* claim, petitioner must show the prosecutor knew or should have known the testimony was false. *Agurs*, 427 U.S. at 103. Finally, Temple has also failed to show that had the jury heard that Ferguson failed to disclose the possibility of a Rule 35(b) Motion during her testimony that there was a “reasonable likelihood that the false testimony could have affected” the verdict. *Hayes*, 399 F.3d at 985.

Temple did not carry his burden to establish the court erred when it denied his postconviction claim pursuant to *Napue*. *Main*, ¶ 14.

**CONCLUSION**

The district court’s order denying Temple’s petition for postconviction relief should be affirmed.

Respectfully submitted this 26th day of February, 2025.

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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 Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,987 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-26-2025:

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