**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Cause No. DA 24-0732

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KATIE IRENE GARDING,

*Appellant,*

v.

STATE OF MONTANA,

*Appellee.*

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# APPELLANT'S OPENING BRIEF

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On Appeal from the Montana Fourth Judicial District Court, Missoula County,
Cause No. DC-32-2010-0160-IN
Honorable John W. Larson, presiding

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## STATEMENT OF THE ISSUES

1. Whether the failure to rule on Garding's motion to substitute deprived the District Court of jurisdiction to enter the appealed-from Order.
2. Whether the District Court's decision to reinstate Garding's conviction was wrong as a matter of law.
3. Whether convicting Garding by motion, rather than by jury trial, violated her rights.

## STATEMENT OF THE CASE

Garding appeals from an order of the Montana Fourth Judicial District Court reinstating her criminal conviction and judgment and requiring the Montana Department of Corrections to resume custody over her. (Doc. 195).

In 2011, Garding was convicted and sentenced to 40 years in prison in connection with a fatal hit and run near Missoula, Montana. Following exhaustion of state postconviction remedies, Garding sought federal habeas relief. In March 2023, a federal district court granted habeas relief after finding that Garding had received ineffective assistance of counsel. App. B. 421–474. The federal district court then offered the State a choice: retry Garding or release her. App. B. 473–474.

On April 19, 2023, the State chose to retry Garding. (Doc. 193). The next day, the District Court below vacated her criminal conviction and judgment and

released her from custody, and ordered that criminal proceedings were "renewed" and that the Amended Information first filed against Garding in May 2011 was "reinstated." (Doc. 195 at 1–2).

Proceedings were then continued for 19 months. (*See* Docs. 202, 205, 207, 209–210). On June 28, 2024, the Ninth Circuit Court of Appeals reversed the federal district court's grant of habeas relief. (Doc. 211 at Exhibit H). The Ninth Circuit issued its mandate on November 12, 2024. (Doc. 211 at Exhibit K).

On November 27, 2024, the State filed a Motion to Reinstate Conviction and Judgment. (Doc. 211). Garding objected and filed a response in opposition on December 6, 2024, (Doc. 214), followed by the State's reply, (Doc. 215). On December 16, 2024, the District Court issued an order titled "Reinstatement of Conviction and Judgment," (Doc. 216) (the "Order"). The Order "reinstated" Garding's criminal judgment and conviction, required the Montana Department of Corrections to "resume its supervision" of Garding, and directed Garding to "report to the nearest Montana Department of Corrections office[.]" (Doc. 216 at 1–2). This appeal follows.[1]

[1] Garding moved to stay the Order first in the District Court, which was denied on January 13, 2025, and then in this Court, which was denied on February 4, 2025.

## STATEMENT OF RELEVANT FACTS

This case arises from a fatal hit and run along Highway 200 in East Missoula, Montana, around 1:40 a.m. on January 1, 2008. Bronson Parsons and Daniel Barry were walking along the edge of the road when Daniel felt a "rush of wind" as a vehicle travelling "extremely fast" hit Parsons. App. B. 280, 287. Daniel did not think Parsons would survive because he was hit "so hard" and "too fast." App. B. 283. At the scene, Daniel told Montana Highway Patrol Trooper Andrew Novak the striking vehicle was travelling about 60 miles per hour. App. B. 383-384. Trooper Novak would later determine Parsons came to rest between 90 and 150 feet from the area of impact. App. B. 401, 408.

Montana Highway Patrol Trooper Richard Hader began searching for the vehicle that hit Parsons. App. B. 303. Roughly twelve hours after the accident, Trooper Hader initiated a traffic stop on a 1994 Chevrolet S10 Blazer 4DR (the "Blazer") with a custom steel bumper, driven by Garding. *See* App. B. 303–306, 317. Trooper Hader inspected the Blazer but found no evidence consistent with a hit and run. *See* App. B. 306–307. There was no observable impact damage to the hood, despite it being "thin" and "easily damaged," no observable impact damage to the windshield, and no damage to the passenger side door, the passenger side window, the passenger side mirror, or the passenger side front roof support post.

App. B. 138, 153. Even the radio antenna located on the passenger side at the base of the windshield was undamaged. App. B. 138.

A few days later, Montana Highway Patrol Trooper Robert Strauch used Total Station, an electronic distance measuring instrument, to "map the [crash] scene." App. B. 290–292. According to Total Station, Parsons travelled approximately 90 feet from the area of impact to where he came to rest. App. B. 295.

Law enforcement pursued other leads for nearly a year. Then, in December 2008, a jailhouse informant named Teuray Cornell contacted Trooper Hader. App. B. 314. Teuray was looking for a deal, and his story evolved until law enforcement found it useful. *See* App. B. 448–450. Teuray first told Trooper Hader that a man named James Bordeaux, who was dating Garding in January 2008, was driving the Blazer when they hit something on the night of the hit and run. App. B. 392. Then, after Teuray was placed in the same pod as James at the Missoula County Detention Center, he changed his story to say Garding was the driver. App. B. 404-405. Later, Teuray—whose testimony was the reason law enforcement shifted their focus to Garding in the first place—told Garding's defense counsel that he "made the whole thing up from the very git-go." App. B. 420.

Trooper Hader then contacted James, who was facing burglary charges. James first refused to talk but then later attempted to provide a statement.

Whatever James said was not useful, and Trooper Hader told him he needed "to say more[.]" App. B. 320–322.

James approached Trooper Hader with "more" information in May 2009. App. B. 322. James claimed that he, Garding, and McFarling had been driving in the Blazer around 1:40 a.m. near East Missoula when they hit something near where Highway 200 passes under the interstate, west of a bar named the Reno. App. B. 320–322, 360–363. Trooper Hader asked James about this sequence of events and the location of the crash six different times; James consistently denied travelling east of the Reno. App. B. 361–364, 368.

James's original story was not useful to law enforcement because he told Trooper Hader that the crash occurred in the wrong spot; Parsons was hit east, not west, of the Reno. App. B. 368. After Trooper Hader told James where the crash occurred—three hundred yards east of the Reno—James changed his story to match that location. App. B. 368. Two days later, James received a probationary sentence on the burglary charge, a deal conditioned on him testifying against Garding. App. B. 370–372.

Only two witnesses—James and Tueray—placed Garding behind the wheel of the Blazer in East Missoula and claimed it struck Parsons. Paul McFarling—the other individual also with James and Garding that night—adamantly maintained that Garding never hit anyone when he and James were with her. App. B. 355–356.

Jennifer Streano was the public defender assigned to represent Garding. The case went to trial in June 2011. Because Garding maintained her innocence, the trial's central issue became the identity of the striking vehicle. To prove the Blazer was involved in the hit and run, the State relied on the testimony of Troopers Strauch, Novak, and Hader.

The State introduced Trooper Strauch as a witness with "technical crash investigation training" who had gone to "reconstruction school." App. B. 290. He testified that Total Station could be used to "reconstruct a crash to determine speed [and] placement of objects" and that Total Station created "an accurate picture of what [crash] scene looked like at the time." App. B. 290–291. Trooper Strauch testified that, while the area where Parsons was struck had been identified, the exact location remained unknown. *E.g.*, App. B. 296.

The State introduced Trooper Hader as a "technical crash investigator" who had completed a "crash reconstruction course" and had responded to 1,600 crashes over his career. App. B. 300. Trooper Hader testified about the mechanics of the hit and run. *E.g.*, App. B. 308–310. He explained that he was initially searching for a vehicle with heavy front-end damage caused by a "full-frontal impact," but changed his focus to a "swerving" type collision based on the injuries the victim suffered and tire tracks in the snow. App. B. 302–303, 306–310. Because there was no observable damage on the Blazer, Trooper Hader told the jury that the

"swerving-type impact" would result in minimal damage to the striking vehicle, and that the Blazer's custom bumper would further minimize any damage. App. B. 308–311.

Trooper Novak was introduced to the jury as having responded to the scene of the hit and run just after it happened. App. B. 376–378. He told the jury that, according to Daniel's contemporaneous eye-witness account at the scene, the striking vehicle hit Parsons from behind at "about 60 miles an hour," and that it was a "dark-colored sport utility vehicle," a "pickup truck with a camper," or "a Dodge Durango." App. B. 378–380, 383–384. Trooper Novak stated that, when he first interviewed Daniel on the day of the crash, Daniel described the striking vehicle as quiet, rounded in shape, and stated that he felt a "rush of wind" and "heard more of a thump" when he saw Parsons "being carried away on the hood up by the windshield of the vehicle that hit him." App. B. 387–389. Trooper Novak also described aspects of the Blazer, including its custom bumper. App. B. 393. At trial, the prosecution referred to the Blazer's bumper as a unique identifier, like "DNA" tying the Blazer to Parsons. App. B. 419.

Streano did not call any witnesses capable of rebutting the Troopers' testimony describing the mechanisms of the hit and run.

The State also called Dr. Gary Dale as an expert witness. While Dr. Dale admitted that any vehicle with a bumper 15 to 18 inches high would have caused

similar injuries to Parsons, he testified the "location and size of Garding's bumper was consistent with the injuries sustained in Parsons' calves." App. B. 327, 330. The defense's forensic pathologist, Dr. Thomas Bennett, confirmed this testimony but observed that Parsons's injuries were more consistent with a rounded bumper. App. B. 416–417. However, Dr. Bennett was not offered as a crash scene expert and was not an accident reconstructionist, and he testified that crash biomechanics and occupant kinematics were not his field of expertise. App. B. 412–413. Without the assistance of an expert to reconstruction the accident, the defense was unable to point out that—as postconviction investigations would establish—the injuries suffered by Parsons were entirely inconsistent with the Blazer's custom bumper.

Garding was convicted and sentenced to 40 years in prison. This Court affirmed her conviction, *State v. Garding*, 373 Mont. 16, 315 P.3d 912 (Mont. 2013), and review was denied on October 6, 2014. *Garding v. Montana*, 574 U.S. 863 (2014).

Garding sought postconviction relief in state court seeking a new trial based on ineffective assistance of counsel, *Brady* violations, and newly discovered evidence of innocence. In support, Garding produced multiple experts along with new evidence of innocence disproving the State's trial theory—that the crash was a "swerving-type" collision where the striking vehicle sustained no damage but

resulted in the victim travelling 90 to 150 feet from the area of impact to where he came to rest—and establishing the Blazer was not involved in the crash.

Garding enlisted the services of KARCO Engineering, LLC, an automotive and safety testing facility, to conduct a physical accident reconstruction of the crash. App. B. 225–249. KARCO obtained a 1994 Chevrolet Blazer with a modified Bumper, just like the Blazer. App. B. 225–249. KARCO positioned a 198-pound dummy on a test track, outfitted the replica vehicle with weighted dummies consistent with the occupants in the Blazer that night, and reconstructed the crash at 35.31 miles per hour. App. B. 229. KARCO's crash reconstruction results exonerated Garding and demonstrated that the striking vehicle would have sustained significant damage to both its hood and windshield—damage that was absent on Garding's Blazer, App. B. 229, 244–249:

**Garding's Vehicle**

**KARCO Test Vehicle: Post-Crash**

(Doc. 211 at 125).

Garding retained Dr. Harry Townes, a mechanical engineer and accident reconstruction expert. App. B. 9–23, 166–180. Based on the lack of damage present on the Blazer, Dr. Townes opined that "it is beyond a reasonable doubt" that the Blazer did not strike Parsons. App. B. 166. Dr. Townes explained that the crash theory proposed by Troopers Hader and Novak at trial was fundamentally flawed, pointing out that—even if the "swerving-type" crash had occurred—the vehicle still would have sustained damage not present on the Blazer. App. B. 169–174. Further, Dr. Townes opined that for Parsons to travel 90 feet, the minimum distance established by the Total Station report and the Troopers, the striking vehicle would have been traveling between 37 mph and 40 mph. App. B. 175. As the KARCO results demonstrated, the Blazer would have sustained significant damage at that speed. App. B. 243–247.

Garding also retained Keith Friedman, an accident reconstructionist with over 35 years of experience. App. B. 24–134, 181–224. Friedman reviewed the evidence and the theories presented by the State at trial, and conducted virtual testing via computer simulations to replicate the hit and run. App. B. 24–77, 193–208. Friedman opined that, within a reasonable degree of engineering certainty, the Blazer was not the striking vehicle. App. B. 25–27, 207–208. Further, Friedman concluded that the damage present on the Blazer was "in no way consistent with a pedestrian impact sufficient to kill a walking adult person." App. B. 207.

Addressing the Trooper's trial testimony, Friedman opined that the Troopers' theories could not be correct and violated "both the laws of physics and impact mechanics." App. B. 202, 207–208. Friedman concluded that Trooper Novak's theory was physically impossible, and that the hit and run Trooper Novak described—where Parsons was hit from behind on both legs by the Blazer's bumper without contacting the body of the vehicle and flew forward 90 feet—could not have happened. App. B. 202.

And Friedman explained that Trooper Hader's crash theory—where Parsons was struck only in the left leg and yet was still projected forward approximately 90 feet—was also physically impossible. App. B. 202. He explained that—if the crash had occurred as Trooper Hader suggested—Parsons would not have been flung 90 feet from the point of impact. App. B. 202.

Friedman addressed the difference between the State's theory and Daniel's eyewitness account of the crash. App. B. 202–203. Daniel recalled that Parsons was carried along by the vehicle with his head and upper shoulders on the hood and windshield resulting in Parsons sliding off the side of the vehicle and landing on the ground. App. B. 202–203. Friedman pointed out that Daniel's testimony was "consistent with the results of the crash test and virtual testing" that he and KARCO had conducted and would have resulted in significant damage to the striking vehicle, damage that was not present on the Blazer. App. B. 202–203.

Finally, Garding retained David Rochford, an accident reconstructionist with 40 years of experience, who conducted an extensive investigation into the evidence and trial testimony. App. B. 135–165. Rochford also opined that the Blazer could not have been involved in the crash and provided detailed descriptions of the lack of damage to the Blazer based on evidence collected by the Troopers during their investigation. App. B. 135–139, 145–146.

The State responded to Garding's postconviction evidence by admitting that Garding was convicted based on an erroneous description of the crash. The State had prosecuted the case against Garding, and secured a guilty verdict, based on Troopers Hader and Novak describing the crash as a "swerving" type collision where Parsons was thrown 90 to 150 feet with eyewitness accounts describing a "rush of wind" as a car travelling "extremely fast" hit the victim "hard" and "fast."[2] But when postconviction evidence confirmed these theories were physically and scientifically impossible, the State admitted the Troopers' testimony was "incorrect." *E.g.*, App. B. 323–324.

To evade the indisputable evidence that such a crash would have resulted in significant damage to the striking vehicle, the State concocted an entirely new crash theory. The State produced an unsigned, unsworn report created by Montana Highway Patrol Trooper Philip Smart stating—for the first time—that the crash

[2] App. B. 280, 283, 287, 308–310, 396–397, 401, 408.

was a low speed, less than 20 miles per hour, "wrap and carry" collision. App. B. 250-258.

Garding's postconviction experts eviscerated Trooper Smart's opinion and the State's new theory. Rochford explained that Trooper Smart's low speed wrap and carry hypothesis would have still resulted in damage to the striking vehicle that was not present on the Blazer.[3] App. B. 147–149, 445. Likewise, Dr. Townes established that Trooper Smart's hypothesis was internally contradictory because a less than twenty mile per hour collision could not have resulted in a "wrap and carry." App. B. 17. And Friedman demonstrated that Trooper Smart's hypothesis was based on a fundamental misunderstanding of the victim's injuries. App. B. 28–31.

After exhausting state postconviction remedies, Garding timely filed a federal habeas petition under 28 U.S.C. § 2254.[4] The federal district court granted habeas relief on Garding's *Strickland* claim but denied her *Brady* claims. App. B. 473. The federal district court then issued a conditional writ, ordering as follows:

> Within thirty (30) days of the date of this Order, the State may move to vacate the state criminal judgment and renew proceedings against Garding in the trial court. If the proceedings are renewed in state court, the State must promptly file notice in this action.

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[3] Rochford detailed numerous other inconsistencies between the Smart Report and the trial evidence. App. B. 147–149, 152.

[4] On February 3, 2022, Garding was released from the Montana Women's Prison on parole. Doc. 211 at Exhibit B.

> If the State does not file notice on or before April 21, 2023, at 12:00 p.m., Respondents shall immediately and unconditionally release Garding from all custody based on the Judgment entered in *State v. Garding*, Cause No. DC-2010-160 (Mont. Fourth Jud. Dist. Court, Oct. 25, 2011), and Garding may not be retried.

App. B. 473–474.

On April 19, 2023, the Missoula County Attorneys' Office filed a Motion to Renew Proceedings, initiating the instant criminal proceedings. (Doc. 193). The case was assigned to Judge Larson. On April 20, 2023, the Department filed a notice informing the federal district court that the State had complied with the conditional habeas writ and had chosen to retry Garding. App. B. 1–3.

Hours later that same day, Judge Larson issued an order setting Garding free. (Doc. 195). Judge Larson's order had three components: first, he vacated the underly criminal conviction and judgment at issue in Garding's federal habeas proceeding; second, he re-instated the Amended Information filed against Garding on May 16, 2011, and renewed that criminal proceeding; and third, he released Garding from custody. (Doc. 195 at 1–2).

On April 24, 2023, Garding filed a Motion to Substitute Judge. (Doc. 197). The District Court never ruled on that motion to substitute, which remained pending at the time Garding's appeal was filed.

On June 28, 2024, the Ninth Circuit reversed the federal district court's grant of habeas relief.[5] Then, on November 27, 2024, the State filed a Motion to Reinstate Conviction and Judgment, asking the District Court to "reinstate Garding's conviction and judgment and order her to be placed back under the parole supervision of the Department of Corrections to serve the remainder of her sentence." (Doc. 211 at 8). Garding objected on numerous grounds. (Doc. 214).

On December 16, 2024, the District Court entered an order titled "Reinstatement of Conviction and Judgment." (Doc. 216). The Order was bereft of any analysis save a single sentence: "This Court finds the Mandate from the United States Court of Appeals for the Ninth Circuit controlling[.]" (Doc. 216 at 1). The District Court then ordered Garding's criminal conviction and judgment "reinstated," ordered the Montana Department of Corrections to "resume its supervision of the Defendant," and ordered Garding to "report to the nearest Montana Department of Corrections office[.]" (Doc. 216 at 1–2).

## STANDARD OF REVIEW

A district court's decision on a motion to substitute a judge is a question of law that this Court reviews for correctness. *City of Missoula v. Mountain Water*

[5] Garding's petition to the United States Supreme Court for review of the Ninth Circuit's decision is pending.

*Co.*, 2021 MT 122, ¶ 8, 404 Mont. 186, 487 P.3d 15; *Labair v. Carey*, 2017 MT 286, ¶ 11, 389 Mont. 366, 405 P.3d 1284.

This Court exercises de novo review over the application of Montana's Constitution, a district court's conclusions of law, the interpretation of statutes, and questions concerning subject matter jurisdiction. *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, 68 P.3d 756; *State v. Henderson*, 2015 MT 56, ¶ 9, 378 Mont. 301, 343 P.3d 566; *Comm'r of Pol. Pracs. for State ex rel. Motl v. Bannan*, 2015 MT 220, ¶ 7, 380 Mont. 194, 354 P.3d 601.

This Court reviews a district court's imposition of sentence for legality only. *State v. Kroll*, 2004 MT 203, ¶ 12, 322 Mont. 294, 95 P.3d 717. The question is one of law and the determination is whether the district court interpreted the law correctly. *State v. Megard*, 2006 MT 84, ¶ 16, 332 Mont. 27, 134 P.3d 90.

## SUMMARY OF THE ARGUMENT

"This case is a miscarriage of justice. It is clear from the trial and postconviction record that Garding is innocent."

*– Judge Fletcher, Ninth Circuit Court of Appeals*

There are three reasons to reverse the District Court's order below. The first is straightforward. Garding filed a motion to substitute the district court judge four days after the District Court ordered a new trial. Despite Garding's repeated requests, the District Court never ruled on that motion. And, because the District

Court never ruled on that motion, a "presiding district court judge" was never assigned. As a result of that failure, all the orders entered by the District Court—including the order Garding appeals from—must be vacated under this Court's precedent.

The second reason to reverse arises from the Ninth Circuit Court of Appeals' decision issued in June 2023, following the State's appeal from a federal district court's determination that Garding had received ineffective assistance of counsel. After the Ninth Circuit issued that decision, it also issued a mandate—a piece of paper telling the federal district court that its decision was final. Here, the sole grounds for the District Court's decision, and the only argument presented by the State in support, was that said mandate was "controlling." Because the mandate was "controlling," the District Court concluded that the mandate required Garding's conviction to be reinstated. That conclusion is entirely devoid of factual support and is wrong as a matter of law.

The third reason to reverse the District Court's decision is the most important. For over a decade, Garding has navigated the unforgiving waters of postconviction relief. Such proceedings are sharply tilted against the petitioner. The grounds for relief are narrow and the standards are exceedingly high. The proceedings below should have been different. After the District Court vacated her criminal judgment and released her from custody in April 2023, the Montana

Constitution restored Garding's "full rights." She regained the presumption of innocence. She regained her right to know and confront witnesses. She regained the right to a speedy trial and to a unanimous verdict from a jury of her peers. She regained the right to require the government to prove, beyond a reasonable doubt, every element of the charges levied against her. And she regained the right to receive due process before being deprived of her liberty. The District Court abrogated all those rights, and more. In an unprecedented decision, the District Court allowed the State to convict Garding on motion, without any evidentiary showing, and before she had been provided even the most basic elements of criminal procedure required under Montana law. The District Court's order resulted in a conviction obtained in violation of both the Montana Constitution and the United States Constitution and cannot withstand review.

## ARGUMENT

### I. The District Court lacked jurisdiction because of the pending Motion to Substitute.

Garding filed a motion to substitute on April 24, 2023. (Doc. 197). That motion was never ruled on by the District Court. Further, no substitute district court judge was ever assigned, as required by § 3–1–804(10), MCA. As a result, the District Court lacked jurisdiction to rule on the State's request to reinstate Garding's conviction and to enter the subsequent Order. § 3–1–804, MCA; *City of*

*Missoula*, ¶ 12 (vacating all orders or rulings made by the district court after a timely motion to substitute).

### A. The Motion to substitute was timely.

There are no talismanic requirements for a motion to substitute. By statute, all the moving party must do is file a written motion and move for substitution of the district court judge. § 3–1–804(2)(b), MCA. If the motion is timely, the moving party "is not required to specify a reason for the requested substitution." *Swan v. State*, 2006 MT 39, ¶ 23, 331 Mont. 188, 130 P.3d 606. Garding's motion was timely and met those minimal requirements.

"Each adverse party is entitled to one substitution of a district judge." § 3–1–804(1), MCA. In a criminal case, like this, "a motion for substitution . . . by the defendant must be filed within 10 calendar days of the defendant's arraignment." § 3–1–804(1)(b), MCA. Further, "[w]hen a new trial is ordered by the district court, each adverse party shall be entitled to one motion for substitution of district judge," which must be filed "within 20 calendar days after the district court has ordered a new trial." § 3–1–804(11), MCA. Both of subsection (1)(b) and subsection (11) of § 3–1–804, MCA, apply here.

First, § 3–1–804(11), MCA, applies because the District Court's order dated April 20, 2023, ordered a new trial. The text of that Order is clear: "IT IS FURTHER ORDERED that the Amended Information filed on May 16, 2011, is

re-instated and criminal proceedings are renewed." (Doc. 195 at 2). To that end, the State concurrently represented to the federal district court that the purpose of these "renewed" proceedings was to retry Garding and continually represented to the Ninth Circuit that her retrial was pending. App. B. 1 ("the State intends to retry Petitioner Katie Garding for the offense of vehicular homicide in the Montana Fourth Judicial District Court."); Doc. 3-1, *Motion to Stay* at 16–17 (Cause No. 23-35272 (9th Cir.)); Doc. 24, *Third Brief on Cross Appeal* at 27–28, 30 (Cause No. 23-35272 (9th Cir.)); Doc. 52, *State's Response to Motion to Stay the Mandate* at 3 (Cause No. 23-35272 (9th Cir.)). The State is judicially estopped from arguing that a new trial was never ordered. *See Saddlebrook Invs., LLC v. Krohne Fund, L.P.*, 2024 MT 68, ¶¶ 34-35, 416 Mont. 150, 546 P.3d 195.

Second, § 3–1–804(1)(b), MCA, applies because either Garding has not yet been arraigned or the District Court's order dated April 20, 2023, had the effect of renewing these proceedings as effective after Garding's prior arraignment, (*see* Doc. 10).

Either way, Garding's motion is timely regardless of whether § –804(1)(b)'s 10-day limitation applies or § –804(11)'s 20-day limitation applies because her motion to substitute was filed on April 24, 2023—four days after the District Court's April 20, 2023, order requiring a new trial. (Doc. 197).

This Court's precedent makes that conclusion clear. First, as a factual matter, Garding was never arraigned after the District Court "renewed" criminal proceedings against her. An arraignment is "the formal act of calling the defendant into open court to enter a plea answering a charge." § 46–1–202(2), MCA. An arraignment "must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge." § 46–12–201(1), MCA; *Collins v. Montana Eighth Jud. Dist. Ct.*, 2018 MT 125, ¶ 6, 391 Mont. 378, 418 P.3d 672.

Because Garding was never arraigned, the "definitive moment" triggering the 10-day deadline for Garding to file a motion to substitute has still not occurred. *Collins*, ¶¶ 6–7. This Court addressed similar circumstances in *Collins*. There, this Court concluded that until a defendant "is formally called into open court to enter a plea answering the charge," the 10-day time period set by § 3–1–804(1)(b), MCA, does not begin to run. *Id.*

But even if an arraignment was not required, Garding's motion was still timely because it was filed within twenty days of the District Court ordering a new trial. § 3–1–804(11), MCA. This Court's precedent makes that clear, too. In *Kasem v. Harada*, the defendant moved for a new trial pursuant to § 46–16–105(2), MCA, and filed a motion to substitute within twenty days. *Kasem v. Harada*, 2021 MT 317, ¶¶ 5–6, 406 Mont. 482, 500 P.3d 594. This Court concluded that once the

District Court had "reset the matter for another jury trial," the defendant had a right to substitute under § 3–1–804(11), MCA. *Kasem*, ¶¶ 10–13.

**B. The Order should be vacated.**

Because Garding's motion to substitute was timely, this Court's precedent requires that all subsequent orders entered by the District Court be vacated. In a criminal case, a motion to substitute judge is effective upon filing. § 3–1–804(3), MCA. Thus, as of April 24, 2023, the District Court lacked the "the power to act on the merits of the case or to decide legal issues in the case." § 3–1–804(5), MCA.

Here, the Order addressed a legal issue, as well as the merits of this case, because the District Court reinstated Garding's prior criminal judgment and conviction and placed her back into custody. But until a new judge was assigned, the District Court lacked authority to review the Motion that led to the Order or grant the requested relief. *See City of Missoula*, ¶ 12.

Pursuant to § 3–1–804, MCA, and under *City of Missoula*, this Court should vacate the Order, and all other orders entered by the District Court after April 24, 2023, as void for lack of jurisdiction.[6]

[6] Garding repeatedly raised the issue of the pending motion to substitute with the District Court, but those requests (including a request that the District Court call in a presiding district court judge) went ignored. (Doc. 214 at 4–7; Doc. 218 at 10–11).

### C. A presiding district court judge was never assigned.

Even if the Order did not address the merits of the case, the District Court still lacked jurisdiction because a subsequent, presiding district court judge was never assigned. If a motion to substitute is timely, a District Court may retain jurisdiction to address issues unrelated to the merits of the case "if authorized by the presiding district judge." § 3–1–804(10), MCA. But that exception cannot apply here because the District Court never received any such authorization. Thus, all actions—even those addressing non-merits issues—taken by the District Court are void for lack of jurisdiction following Garding's motion to substitute on April 24, 2023. (Doc. 197). In other words, even if this motion sought a "ministerial act" as the State may contend, the lack of authorization from "the presiding district judge" as required under § 3–1–804(10), MCA, renders all orders entered after April 24, 2023, void for lack of jurisdiction.

## II. The District Court's Order should be reversed because it was wrong as a matter of law.

Setting aside the issues arising from Garding's unresolved motion to substitute, the legal basis for the District Court's Order reinstating Garding's criminal judgment cannot withstand review.

The District Court's analysis in support of the Order reinstating Garding's criminal judgment consisted of a single sentence: "This Court finds the Mandate from the United States Court of Appeals for the Ninth Circuit controlling[.]" Doc.

216 at 1. That conclusion—that the Ninth Circuit's mandate required the District Court to reinstate Garding's conviction—is wrong as a matter of law.

### A. A "mandate" from the Ninth Circuit is a ministerial document indicating a decision is final and cannot compel a state court to take any action.

First, a mandate from the Ninth Circuit is a mechanism to tell parties when the court of appeals judgment becomes final. *See* Fed. R. App. B. P. 41; *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1203 (9th Cir. 2013) ("No opinion of this circuit becomes final until the mandate issues[.]").

Second, the "mandate" at issue here was directed to the United States District Court for the District of Montana, not to any state district court, because a mandate is a mechanism to identify when jurisdiction over the appeal returns to the district court from where the appeal came. *See In re Thorp,* 655 F.2d 997, 998 (9th Cir.1981) (Once a notice of appeal is filed, "[t]he district court is divested of authority to proceed further, ... until the mandate has been issued by the court of appeals."). In other words, "[t]he effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came." *Ostrer v. U.S.*, 584 F.2d 594, 598 (2d Cir. 1978).

Third, the Ninth Circuit's mandate did not—and could not—direct the District Court below to order the resumption of custody and the reinstatement of a

criminal conviction and judgment. The reason is simple: that relief was never ordered by any court, let alone the Ninth Circuit, in the federal habeas proceeding. In those proceedings, the federal habeas court never ordered the State of Montana to release Garding from custody and vacate her criminal judgment and retry her. Instead, the federal court told the State it could choose one or the other. App. B. 473–474. Again, the State filed notice that it intended to retry Garding in state court on April 20, 2023. App. B. 1–3.

Implicit in the State's argument is the contention that federal habeas decisions routinely result in state court criminal judgments being vacated and reinstated. That is incorrect. Federal habeas may be used only to challenge custody. *In re Medley*, 134 U.S. 160, 173 (1890). A federal habeas court does not, and cannot, vacate an unconstitutional criminal judgment. *Fay v. Noia*, 372 U.S. 391, 430–431 (1963) (citations omitted). In reversing the federal district court, the Ninth Circuit acknowledged that limitation and noted that all the Circuit Court's decision could do was remove "the current federal court impediment to any state court reinstatement of the judgment and cancellation of the new trial." *Garding v. Montana Dep't of Corr.*, 105 F.4th 1247, 1255 (9th Cir. 2024) (emphasis added).

That recognized limitation also explains why the State cannot obtain the relief it seeks based solely on the Ninth Circuit's mandate. Again—the Ninth Circuit stated its belief that it could remove the current federal *court* impediment to

reinstating Garding's conviction. The Ninth Circuit did not, and could not, remove the state *law* impediment to reinstating Garding's conviction, nor did the Ninth Circuit purport to remove the current federal *law* impediment to the same, *see* infra § III.A, III.C (*i.e.*, the state and federal constitutional provisions and statutes discussed below).

Here, it was the State's actions, rather than anything the federal district court did, that led to the vacatur of Garding's criminal judgment and her release from custody. On April 19, 2023, the State asked the District Court to vacate Garding's criminal judgment and renew proceedings against her. (Doc. 193 at 1–2). But then, the District Court did something else and granted relief that was not required by the federal district court or requested by the State in its motion. Specifically, the District Court (1) vacated Garding's criminal conviction and judgment, (2) reinstated the Amended Information filed on May 16, 2011, (3) "renewed" criminal proceedings against Garding, and (4) ordered that Garding "remain at liberty without bail and is ordered to obey all laws, attend all court appearances unless excused by the Court, and to not communicate with State's witnesses." (Doc. 195 at 1–2).

The Ninth Circuit has been clear: "[u]pon return of its mandate, the district court cannot give relief beyond the scope of that mandate, but it may act on 'matters left open by the mandate.'" *Caldwell v. Puget Sound Elec. Apprenticeship*

*& Training Tr.*, 824 F.2d 765, 767 (9th Cir. 1987) (quoting *In re Sanford Fork & Tool Co.,* 160 U.S. 247, 256 (1895)). So, even assuming the mandate was directed at the state district court, because the federal district court never ordered the relief that was granted to Garding by the District Court below, the mandate cannot serve as the basis to modify that relief.

### B. *Eagles v. U.S. ex rel Samuels* and *Calderon v. Moore* have no application here.

Garding expects the State to argue that either *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946) or *Calderon v. Moore*, 518 U.S. 149 (1996) (per curiam) provide support for the District Court's action here. They do not. Nevertheless, the State will likely argue that *Eagles* and *Calderon* stand for the premise that reversal of a federal district court's grant of habeas undoes what the habeas court did and makes lawful a resumption of custody. That is wrong for at least two reasons.

First, the United States Supreme Court has held opposite. *E.g.*, *Zimmerman v. Walker*, 319 U.S. 744 (1943) (finding a case moot where the federal habeas petitioner has been released from respondent's custody); *Weber v. Squier*, 315 U.S. 810 (1942) (finding a case moot where the petitioner had been released by a parole board and was no longer in respondent's custody); *Tornello v. Hudspeth*, 318 U.S. 792 (1943) (finding a case moot where petitioner had been pardoned by the President and was no longer in respondent's custody); *Innes, U S ex rel., v. Crystal,*

319 U.S. 755 (1943); *U.S. ex rel. Lynn v. Downer*, 322 U.S. 756 (1944). *Zimmerman, Weber*, and *Tornello* make clear why every other federal appellate court that has reached this question has disagreed with the State's proposed interpretation of *Eagles* and *Calderon*. *E.g.*, *Brown v. Vanihel*, 7 F.4th 666 (7th Cir. 2021); *Eddleman v. McKee*, 586 F.3d 409 (6th Cir. 2009).

Second, at most, *Eagles* and *Calderon* stand for the unremarkable premise that, on direct appeal, an appellate court may reverse the decision of a lower court. That is of no consequence here. A district court cannot sit in appellate review of its own orders, absent express statutes or rules to the contrary.

For example, in *Eagles*, Jacob Samuels filed a writ of habeas corpus seeking release from federal military custody. *Eagles*, 329 U.S. at 306. The federal district court denied the writ and the Circuit Court of Appeals reversed and remanded with directions to "discharge" Samuels from custody. *Id.* Subsequently, and while a petition for writ of certiorari to the United States Supreme Court was pending, Samuels was unconditionally released from military custody but "without prejudice to further lawful proceedings[.]" *Id.* The Supreme Court determined the case was not moot, despite the petitioner's release from custody, because the federal appellate court had ordered said release through "the assertion of judicial power" and the Supreme Court, on direct review, could reverse that exercise of judicial power allowing the resumption of custody. *Id.* That did not, and could not,

happen here because a federal habeas court lacks the power to modify a state court judgment. *Fay*, 372 U.S. at 430–431 (citations omitted).

*Calderon* provides no support for the State's position, either. There, the Supreme Court was reviewing—again on direct appeal—a federal district court's order vacating a petitioner's state court judgment. *Calderon*, 518 U.S. at 149. Because it was the federal court that had vacated the underlying state court judgment, the Supreme Court had the power to reverse the federal court's order on direct review and, as a result, functionally reinstate the conviction. *Id.* at 150. As a result, *Calderon* provides no support for a state district court's authority to reinstate a state court judgment after that judgment has been vacated and after the time to appeal from that vacatur has expired. *See id.* at 149–150.

Here, the State failed to seek appellate review of the District Court's prior order. As a result, *Calderon*, just like *Eagles*, is inapplicable.

## III. The Order violates Garding's constitutional and statutory rights.

This Court should reverse the District Court not just because the Order lacked a legal basis, but also because the Order convicts Garding without due process and violates her constitutional and statutory rights.

When the District Court released Garding from all state supervision on April 20, 2023, her "full rights" were restored. Mont. Const., art. II, § 28(2); § 46–18–801(2), MCA. Those "full rights" include Garding's rights under the Montana

Constitution and the United States Constitution, as well as those rights granted to her by Montana law.

### A. Convicting Garding of a crime by motion and without a trial violates due process and abrogates her constitutional rights.

*First*, under both the Montana Constitution and the United States Constitution, Garding has the right to the presumption of innocence and the right to require the government to prove every element of a charged offence beyond a reasonable doubt. Mont. Const., art. II, § 16; U.S. Const. amend. XIV; *State v. Miller*, 2022 MT 92, ¶ 21, 408 Mont. 316, 510 P.3d 17. She also has the right to a fair trial before an impartial jury before being found guilty of a crime. Mont. Const., art. II, § 24; Mont. Const., art. II, § 26; U.S. Const., amend. VI; U.S. Const., amend XIV; *State v. Smith*, 2021 MT 148, ¶ 42, 404 Mont. 245, 488 P.3d 531.[7] By convicting her on motion, without meeting any evidentiary burden and without a jury verdict, the State deprived her of those rights. Indeed, the State's motion is predicated on its attempt to presume Garding guilty because she had been previously convicted—a direct violation of Article II, Section 28(2)'s guarantee that Garding's "full rights" were restored upon termination of State supervision on April 20, 2023. (*See* Doc. 195).

[7] These rights do not just benefit the accused, they also impose restrictions on prosecutors. *See Miller*, ¶¶ 22, 28 (addressing such limitations imposed in the context of statements made at trial).

*Second*, Garding has a constitutional right to enjoy her life and liberty and to be afforded due process of law before she is deprived of the same.[8] She has the right to appear and defend against criminal charges in person and by counsel, to demand the nature and cause of the accusation, to meet witnesses, to have a speedy public trial, and to have a trial by a jury of her peers.[9]

These are necessary and constitutionally required predicates to a criminal conviction. Garding received none of them, to her prejudice. Consider, for example, the benefit to the State, and corresponding prejudice, that arose from denial of Garding's right to know and confront witnesses. Whose testimony provides the basis for Garding's current conviction? If Troopers Hader's and Novak's testimony is operative, because the original trial governs, then the State's own expert, Trooper Smart, has established that testimony was false. If Trooper Smart's testimony is operative, because that is the State's most recent description of the hit and run, then how can the State be allowed to convict Garding without confronting the evisceration of Trooper Smart's opinions by Garding's own postconviction experts. Finally, leaving aside the fact that a jury has never been

[8] Mont. Const. art. II, § 3; Mont. Const., art. II, § 4; Mont. Const., art. II, § 17; U.S. Const., amend. XIV.

[9] Mont. Const. art. II, § 24; Mont. Const., art. II, § 26; U.S. Const., amend. VI.

given the opportunity to weigh the competing theories, which theory of the crash did the District Court rely on when reinstating the conviction?

*Third*, Garding has the constitutional right to be free from cruel and unusual punishment.[10] The Montana Supreme Court has recognized the Montana Constitution provides more protection against cruel and unusual punishment than its federal counterpart, *Walker v. State*, 2003 MT 134, ¶¶ 52–56, 73–75, 81, 84, 316 Mont. 103, 68 P.3d 872. The prohibition against cruel and unusual punishment, coupled with due process, shields an individual from arbitrary imposition of punishment at the whims of the State. But arbitrary imposition of punishment like, as here, the State's unilateral decision to reinstate a conviction—without any statutory or common law support—and the District Court's decision to sentence Garding to parole conditions, again without any statutory authority, violates the prohibition against arbitrary punishment.

Taken together, these myriad constitutional violations demonstrate how far outside the bounds of criminal procedure the State went to obtain a conviction against Garding.[11] And, for its part, the District Court rubber stamped the State's approach.

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[10] Mont. Const., art. II, § 4; Mont. Const., art. II, § 22; U.S. Const., amend. VIII; U.S. Const., amend XIV.

[11] The District Court's decision to convict Garding based upon the State's motion also deprived Garding of the ability to be present at a proceeding where her liberty was be taken away. Here, that decision was made by the District Court outside of

The District Court offered no rationale for its decision to abrogate Garding's constitutional rights. Entirely absent from the Order is any analysis aside from a single sentence stating that the Ninth Circuit's mandate was "controlling." If the State seeks a conviction, the State must obtain that conviction by meeting its evidentiary burden in front of an impartial jury through the means provided by statute, and within constitutional boundaries. *See* § 46–1–103(1), MCA; Mont. Const., art. II, § 24; Mont. Const., art. II, § 26. Simply "reinstating" her conviction and criminal judgment on motion of the State wrongfully deprived Garding of those rights and violates due process.

And there is more to due process than just certain criminal procedures. Under *Napue v. Illinois*, 360 U.S. 264 (1959), a due process violation occurs when the prosecution knowingly allows false testimony to go uncorrected after it appears. *Id.* at 269; *Glossip v. Oklahoma*, 145 S. Ct. 612, 626 (2025). The State has violated *Napue* here: Garding has now been re-convicted based on a trial theory that has been discredited by the State itself.

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her presence. Mont. Const. art. II, § 24; *State v. Bird*, 2001 MT 2, ¶ 24, 308 Mont. 75, 43 P.3d 266; U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338 (1970). As the Montana Supreme Court recognized over 100 years ago, "[n] o principle of law, relating to criminal procedure, is better settled than that, in felony cases, nothing should be done in the absence of the prisoner." *State v. Reed*, 65 Mont. 51, 58, 210 P. 756, 758 (Mont. 1922).

The State violated due process by moving to convict Garding without correcting materially false trial testimony upon which that original conviction was based. *Glossip*, 145 S. Ct. at 626 ("To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it 'to go uncorrected when it appear[ed].'") (emphasis added).

The State knew Garding's original conviction had been obtained using false testimony at the time it moved to reinstate Garding's conviction. First, during postconviction proceedings, the State completely abandoned the testimony Troopers Hader and Novak had offered at trial against Garding. At trial, the Troopers had described the hit and run as a "swerving type" collision where Parsons was thrown 90 to 150 feet with eyewitness accounts describing a "rush of wind" as a car travelling "extremely fast" hit the victim "hard" and "fast." App. B. 280, 283, 287, 308–310, 396–397, 401, 408. But then, conceding that theory was wrong, the State described the hit and run as a low speed, less than 20 miles per hour, "wrap and carry" collision. App. B. 250–254.

Additionally, the State's own expert opined that specific elements of Trooper Hader's and Trooper Novak's testimony, used to support the State's theory of the crash, were false:

| Troopers' Opinions at Trial | Trooper Smart's Opinion |
|---|---|
| Trooper Hader explained away the lack of damage to the hood and windshield of the Blazer by testifying that it would be impossible for Daniel to see Parson's wrapped onto the hood of the striking vehicle. App. B. 310. | Trooper Smart opined that "[t]he taper of the cab of a vehicle makes it easy to observe a person riding on the hood." App. B. 255 |
| Trooper Novak testified that the Blazer was undamaged because the collision was "more of a clip." App. B. 256. | Trooper Smart opined that "[t]he reason the damage and injuries are minimal is not due to a clip[.]" App. B. 256. |
| Trooper Hader testified on tire tracks in the snow established the crash was a "swerving" type collision. App. B. 309–310. | Trooper Smart opined that "no tiremarks on the main-traveled portion of the road [could] be definitively tied to the event." App. B. 251. |

Once the State knew that trial testimony used to obtain Garding's first conviction was incorrect, *Napue* required that the State correct that false testimony. *Napue*, 360 U.S. at 269. The State never did. In fact, the State took steps to deprive Garding of the ability to address that false testimony with the District Court by not filing a new information and not providing Garding with an initial appearance, an arraignment, or the opportunity for a probable cause hearing, and by seeking a conviction via motion.

### B. To the extent they apply, *Wagner v. State*, *State v. Mount*, and *State v. Gafford* should be overruled.

The Mont. Const., art. II, § 28(2) is unambiguous: "Full rights are restored by termination of state supervision for any offense against the state." However, in

prior decisions, this Court has excluded certain enumerated rights from the constitutional guarantee provided by Article II, Section 28(2). *E.g.*, *Wagner v. State*, 2004 MT 31, 319 Mont. 413, 85 P.3d 750,[12] *State v. Mount*, 2003 MT 275, 317 Mont. 481, 78 P.3d 829, and *State v. Gafford*, 172 Mont. 380, 563 P.2d 1129 (Mont. 1977). To the extent those decisions apply, they are manifestly wrong and should be overruled.[13] *See State v. Hinman*, 2023 MT 116, ¶¶ 28–49, 412 Mont. 434, 530 P.3d 1271 (McGrath, C.J., concurring) (explaining that *Wagner* and *Mount* are manifestly wrong).

In *State v. Gafford*, this Court interpreted § 28(2) as referring to "those rights commonly considered political and civil rights incident to citizenship such as the right to vote, the right to hold public office, the right to serve as a juror in our courts and the panoply of rights possessed by all citizens under the laws of the land." *Gafford*, 172 Mont. at 389–390. Then, *Mount* interpreted *Gafford* to conclude that Mont. Const., art. II, § 28(2) did not encompass the restoration of a defendant's right of privacy under Mont. Const., art. II, § 10. *Mount*, ¶¶ 92–99. A year later, *Wagner* expanded on *Mount* to conclude that Article II, Section 28(2)

[12] *Wagner* was overruled on other grounds by *State v. Azure*, 2008 MT 211, ¶ 13, 344 Mont. 188, 186 P.3d 1269.

[13] In motion practice before this Court, the State appeared to concede that *Mount*, *Wagner*, and *Gafford* are distinguishable and the limitations on Mont. Const. art. II, § 28(2), do not apply here.

"protects only such civil and political rights of citizenship as may have been abridged by supervision following a criminal conviction" and that "[r]ights of citizenship do not include or equate to individual rights enumerated in either the Montana or United States Constitutions." *Wagner*, ¶ 16.

There is no textual support for any limitation on the restoration of rights guaranteed by Article II, Section 28(2). In the absence of any ambiguity, the plain text of a constitutional provision governs. *City of Missoula v. Cox*, 2008 MT 364, ¶ 9, 346 Mont. 422, 196 P.3d 452 ("[W]henever the language of a [constitutional provision] is plain, simple, direct and unambiguous, it does not require construction, but construes itself."); *Woirhaye v. Montana Fourth Jud. Dist. Ct.*, 1998 MT 320, ¶ 15, 292 Mont. 185, 972 P.2d 800 ("The intent of the framers should be determined from the plain meaning of the words used. If that is possible, no other means of interpretation are proper."). There is no ambiguity in Article II, Section 28(2)'s command that "[f]ull rights are restored by termination of state supervision for any offense against the state."

But even assuming ambiguity, the Constitutional Convention Transcripts make clear that the Delegates did not intend a latent limitation that would, for example, exclude a person from the right to a unanimous jury verdict in criminal proceedings under Article II, Section 26. When introducing Section 28 to the Constitutional Convention, Delegate James explained its purpose: "once a person

who has been convicted has served his sentence and is no longer under state supervision, he should be entitled to the restoration of all civil and political rights, including the right to vote, hold office, and enter occupations which require state licensing." Const. Con. Tr. Vol. V at 1800. Delegate James added further detail, explaining that Section 28 was meant to restore a person released from supervision "to the same rights, privileges and immunities as other citizens." *Id.*

*Wagner* contains only terse analysis of the constitutional text or the Delegates views of the same. But even if it was proper to follow *Wagner* and focus on the former comment by Delegate James and ignore the latter, as *Mount* did, this Court should overrule those decisions and hold that the rights restored by Article II, Section 28(2), include those rights expressly guaranteed by other Article II provisions. As former Chief Justice McGrath recently noted, "[t]here is simply no support for the conclusion that, while the term 'full rights' includes professional state licensing, it does not extend to rights so fundamental to our conception of individual freedom as to have been explicitly enshrined in the Montana Constitution's Article II Declaration of Rights." *Hinman*, ¶ 41 (McGrath, C.J., concurring).

### C. Garding was deprived of statutorily required procedures guaranteed to every criminal defendant.

Every criminal defendant is entitled to certain criminal procedures. Here, Garding was deprived of every procedure identified under Montana law—she

received no due process. These procedures are vitally important but also function as limitations on the power of prosecutors and judges who must ensure they are provided. *State ex rel. Fletcher v. Dist. Ct. of Nineteenth Jud. Dist.*, 260 Mont. 410, 415, 859 P.2d 992, 995 (1993) (citing *Halladay v. State Bank of Fairfield*, 66 Mont. 111, 118, 212 P. 861, 863 (Mont. 1923)) (holding that from the time a criminal action is commenced, a county attorney is limited by any restrictions imposed by law). The State's failure to follow the law and decision to obtain a conviction at the expense of Garding's rights requires reversal. *Id.*

### 1. The State's prosecution of Garding was invalid from the start.

The District Court should be reversed because the State was proceeding pursuant to an invalid information. By law, a prosecution can only be commenced in one of four ways. § 46–11–101, MCA. By "reinstating" the Amended Information from 2011, the District Court violated § 46–11–101, MCA, and allowed the State to commence prosecuting Garding in a manner not allowed by statute.

If the State wishes to pursue charges for conduct related to a criminal judgment that has been dismissed, it must file new charging documents. *See State v. Mosby*, 2022 MT 5, ¶ 29, 407 Mont. 143, 502 P.3d 116. That did not happen here. Instead of requiring the State to file a new information, the District Court simply reinstated the Amended Information from 2011. (Doc. 193). To be clear, a

district court lacks jurisdiction to "reinstate" an information. *State ex rel. Torres v. Montana Eighth Jud. Dist. Ct., Cascade Cnty.*, 265 Mont. 445, 452, 877 P.2d 1008, 1012 (1994). Because the State failed to proceed under a valid, new information, the "subsequent trial, conviction and sentence under the reinstated information [are] invalid." *Mosby*, ¶ 29 (citations omitted).

The State's failure to follow procedure prejudiced Garding. The State has the burden of proof. But Garding has been deprived of the opportunity confront that evidence. Further, by reinstating the Amended Information from 2011, the District Court allowed the State to avoid confronting the new evidence it would have faced at trial. For example, the State must overcome the testimony from Dr. Harry Townes, a mechanical engineer and accident reconstruction expert, who opined that it is beyond a reasonable doubt that Garding's vehicle was not involved in the fatal hit and run that killed Parsons. App. B. 166. The State must overcome the testimony of Keith Friedman, an accident reconstructionist with over 35 years of experience. App. B. 24–134, 181–224. Mr. Friedman opines that, within a reasonable degree of engineering certainty, Garding's vehicle was not the vehicle that struck Parsons, that the damage present on Garding's vehicle was "in no way consistent with a pedestrian impact sufficient to kill a walking adult person," and that the crash theory presented by Montana State Highway Patrol Troopers at the original trial could not be correct and violated both the laws of physics and impact

dynamics. App. B. 25–27, 202, 207–208.The State must also overcome the testimony of David Rochford, an independent accident reconstructionist with 40 years of experience who provides detailed opinions regarding the lack of damage to Garding's vehicle based on evidence collected by law enforcement during their initial investigation. App. B. 135–139, 145–146.

Finally, the State will have to explain to a jury why it presented one crash theory at the original trial, a "swerving type" collision where Parsons was thrown 90 to 150 feet with eyewitness accounts describing a "rush of wind" as a car travelling "extremely fast" hit the victim "hard" and "fast," and then presented another crash theory after trial describing a low speed, less than 20 miles per hour, "wrap and carry" collision years later. App. B. 250–254, 280, 283, 287, 308–310, 396–397, 401, 408.

In summary, by "reinstating" the Amended Information, the District Court prejudiced Garding by allowing the State to avoid confronting all of this evidence.

### 2. If the "reinstated" Amended Information is valid, then Garding's right to a speedy trial was violated.

The State's choice to deprive Garding of statutorily required procedure also deprived Garding of substantive rights, too. As this Court recognized in *Mosby*, the requirement that the State file new charging documents is "not merely a formality; it is integral to protecting the due process rights of the accused, and it affects . . . analysis of speedy trial rights." *Mosby*, ¶ 29. On appeal, the State has a choice: it

can claim the "reinstated" amended information is valid or concede that it is invalid. Either way, the Order must be reversed.

"A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution." *State v. Ariegwe*, 2007 MT 204, ¶ 20, 338 Mont. 442, 167 P.3d 815; Mont Const., art. II, § 24; U.S. Const. amend. VI; U.S. Const. amend. XIV; *Klopfer v. North Carolina*, 386 U.S. 213, 223–224 (1967).

The Amended Information was first filed on May 16, 2011. If the State claims that information is valid to avoid the consequences of failing to file a new information, then the State took 4,963 days to convict Garding.[14] Such a delay violates Garding's right to a speedy trial. But, because of the procedure used to re-convict Garding, including the lack of an omnibus hearing, she was deprived of the opportunity to fully present this issue to the District Court.

### 3. If the "reinstated" Amended Information is construed as being "new" as of April 20, 2023, then the statutes of limitation barred the State's prosecution of Garding.

The Amended Information charges Garding with three felonies: vehicular homicide while under the influence, § 45–5–106, MCA; failure to stop immediately at accident scene, § 61–7–103(1)(b) (2007), MCA; and tampering

[14] Due to the word limitation, counsel is unable to provide a full *Ariegwe* analysis here. However, the length of delay and Garding's detention of more than ten years of that time makes the speedy trial violation obvious under any analysis.

with or fabricating physical evidence, § 45–7–207, MCA. The statute of limitations for each of those felonies is five years. § 45–1–205(2)(a), MCA. The accident occurred on January 1, 2008, and, as a result, the State was time-barred from seeking the reinstatement of the 2011 Amended Information and asserting those charges. Further, the Amended Information also charged one misdemeanor: driving without a valid driver's license, § 61-5-102(1) (2007), MCA—the State was time-barred from asserting that charge, too. § 45–1–205(2)(b), MCA. This issue alone warrants reversal of the Order.

**4. Garding was deprived of critical pre-trial procedures.**

Montana law imposes numerous requirements on the prosecution once it makes the decision to charge an individual with a crime.

*First*, Garding was entitled to an initial appearance. A person who has been arrested "must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance." § 46–7–101(1), MCA; *State v. Norvell*, 2019 MT 105, ¶ 16, 395 Mont. 404, 440 P.3d 634. An initial appearance is critically important because that is how a defendant is informed of her "essential rights." *Norvell*, ¶ 17. Garding was never taken before the District Court for an initial appearance. And depriving Garding of an initial appearance allowed the State to circumvent the attendant rights that attach at that time—including the right to a probable cause determination, § 46–7–102(1)(g), MCA. As a result, the State

was allowed to avoid answering how probable cause to charge Garding existed when its own expert had, in June 2016, disclaimed the crash theory the State had presented at Garding's original trial five years earlier.

*Second*, Garding was entitled to a preliminary examination. § 46–10–105, MCA. The preliminary examination ensures that "there is an independent judicial determination of probable cause." *State v. Higley*, 190 Mont. 412, 419, 621 P.2d 1043, 1048 (Mont. 1980) (citations omitted); *see also State v. Seyler*, 2024 MT 300, ¶ 7, __ Mont. __, 560 P.3d 608. By moving to reconvict Garding by motion before an initial appearance, the State deprived Garding of a preliminary examination. This is substantial because the State proceeded on the Amended Information, which contained a crash theory that was refuted by the State's own experts, in addition to Garding's experts, during postconviction proceedings.

*Third,* Garding was entitled to an arraignment. § 46–12–201, et seq., MCA. An arraignment is not optional. § 46–12–201(1), MCA. Garding was entitled to an arraignment because the Amended Information had been dismissed and then reinstated. And yet, Garding was never arraigned on the reinstated Amended Information.

*Fourth*, Garding was entitled to an omnibus hearing, § 46–13–110, MCA. By law, an omnibus hearing must be held "not less than 30 days before trial." *State*

*v. Adkins*, 2009 MT 71, ¶ 14, 349 Mont. 444, 204 P.3d 1. No omnibus hearing was held before the District Court convicted Garding.

*Fifth*, Garding's right to a unanimous verdict by a jury of 12 persons before being convicted of a crime was violated by the District Court's order reinstating her criminal judgment. § 46–16–110, MCA; § 46–16–603, MCA.

These errors are structural and require reversal. A "structural error" is the type of error that "'[a]ffects the framework within which the trial proceeds.'" *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). A structural error is "automatically reversible and requires no additional analysis or review." *Id.* at ¶ 39. Almost all of the errors identified above are structural and require automatic reversal: the failure to proceed on a valid information requires reversal, *see Mosby*, ¶ 29; the failure to conduct an initial appearance requires reversal, *State v. Strong*, 2010 MT 163, ¶ 20, 357 Mont. 114, 236 P.3d 580; the failure to provide a preliminary examination requires reversal, *Seyler*, ¶ 7; and, the failure to arraign a defendant requires reversal, *see State v. Crawford*, 2016 MT 96, ¶¶ 37–38, 383 Mont. 229, 371 P.3d 381.[15]

[15] Additionally, here, the failure to hold an omnibus hearing constitutes reversible error because Garding was prejudiced by the State's ability to ignore the new evidence of her innocence as well as the State's own contradictory evidence submitted during postconviction proceedings. § 46–20–701(1), MCA; *Adkins*, ¶ 14.

Each of those failures occurred here. Garding was not charged with a valid information, she was not provided an initial appearance, she was never arraigned, and she was deprived of a preliminary examination. By moving to convict Garding on motion, before she had initially appeared, before she had been arraigned, before any preliminary examination had been completed, and before she had been provided an omnibus hearing, the State functionally deprived Garding of her ability to assert any of these challenges to the State's case.

### 5. The District Court lacked jurisdiction to order Garding back into custody.

A district court lacks the power to "impose a sentence unless authorized by a specific grant of statutory authority." *State v. Burch*, 2008 MT 118, ¶ 23, 342 Mont. 499, 182 P.3d 66. A sentence that is "not based on specific statutory authority is an illegal sentence." *State v. White,* 2008 MT 464, ¶ 22, 348 Mont. 196, 199 P.3d 274.

Garding's sentence is illegal because the District Court lacked statutory authority to place Garding on parole status. As this Court recognized in *Burch*, a district court lacks authority to impose conditions on parole. *Burch*, ¶ 26. If a District Court lacks statutory authority to impose parole conditions, it similarly lacks authority to place a criminal defendant on parole status.

## CONCLUSION

Error infests this proceeding. For that reason, Garding respectfully makes several requests for relief from this Court:

Because the Order violates Montana law, *see* Section III.C.1, *supra*, and because the State was proceeding on an invalid information, Garding requests that this Court remand this case to the District Court with instructions to dismiss the charges against her without prejudice.

Alternatively, Garding requests that this Court vacate the District Court's Order on the grounds that the District Court lacked jurisdiction to review the Motion or grant the requested relief following Garding's timely motion to substitute and remand for further proceedings. *See* Section I, *supra*.

Alternatively, for the reasons stated in Sections II, III.A, and III.C.2-5, *supra*, Garding requests that this Court reverse the District Court's Order, vacate the reinstated criminal judgment, and remand for further proceedings.

Finally, if this Court vacates or reverses the District Court's Order, Garding requests that this Court order the State to immediately release her from all custody pending trial.

Respectfully submitted this 28th day of March, 2025.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. B. P. 11(4)(e), I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and that the word count calculated by Microsoft Word is 10,849 excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and the appendix.

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## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document to the following through the e-service platform on March 28, 2025:

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