

**ORIGINAL**

**FILED**

03/31/2025

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 23-0668

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CAUSE NO. DA 23-0668

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STATE OF MONTANA,  
Plaintiff and Appellee,  
and  
CLAYTON DOUGLAS KIRN,  
Defendant and Appellant.

**FILED**

MAR 31 2025

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

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APPELLANT'S RESPONSE TO ANDERS BRIEF

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On Appeal from the District Court of the Second Judicial District  
of the State of Montana, Silver Bow County

Before the Honorable Robert J. Whelan  
Cause No. DC-19-259

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## INTRODUCTION

Appellant, upon review of Appellant's Attorney's Motion to Recluse himself based on said Attorney's belief that the Appellant's claims are "frivolous." Files this Appellant's Response To Anders Brief in contradiction of the Appellant's U.S. Const. Amend. XIV, right to legal assistance in the filing of legal filings, filed before this Court. (the Appellant is not an Attorney, and possess's no legal training, Training required to respond to such a complicated legal brief.).

Thus, based on Appellant's inability to properly respond, seeks this Court to assign new counsel, and sanction the Appellant's Attorney. In support of this request the Appellant with no assistance from counsel files this answer to his Attorney's attack (\*emphasis added).

## STATEMENT OF THE ISSUE

Should Appellant's Attorney be allowed to withdraw from representing the Appellant without sanction?

## STATEMENT OF THE CASE

Kirn was charged with Aggravated Burglary, and Obstructing a Peace Officer, and maintained his innocence throughout all ~~proceedings, eventually leading to a two day jury trial after~~ which he was found guilty on both charges. The District Court sentenced Kirn to 40 years in the Montana State Prison for the

Aggravated Burglary, and 6 months in county jail for Obstructing a Peace Officer, with the sentences run concurrently. As part of the basis for its sentence, the District Court noted that Kirn had ten prior felonies and was a registered violent offender.

Kirn appealed, DA 21-0381, alleging his right to speedy trial had been violated, several jury instructions misstated the criminal elements of the charged crimes, and the District Court relied upon incorrect information when imposing a sentence. This Court determined the first two issues by deciding Kirn's speedy trial right was not violated, and declining to exercise plain error review because the jury instruction issue was raised for the first time on appeal. However, this Court reversed and remanded for Kirn to be resentenced because the District Court relied upon incorrect information when imposing its sentence.

This Court specifically ruled, "the District Court used incorrect information when imposing its sentence." Yet, this was not the legal issue(s) the Appellant sought to have reviewed before this Court. The legal issue(s) directly related to the Appellant's sentencing that the Appellant wished to have reviewed (the issue(s) brought to the attention of his Appeal Attorney) was a question of P&P's legal authority to insert any past juvenile conviction(s) into the Appellant's P.S.I. report. Since P&P did not comply with the statutory requirements set forth in Mont. Code Ann. § 41-5-216(a).

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"Informal youth court records for a youth for whom formal proceedings have been filed must be phys-

ically sealed on the youth's 18th birthday or, in which Jurisdiction of the Court or any agency is extended beyond the youth's 18th birthday, upon termination of the extended jurisdiction and may be inspected only pursuant to subsection (5) \*emphasis added\*.

Mont. Code Ann. § 41-5-216(5)

"After formal and informal youth court records, law enforcement records, and department records \*emphasis added\* are sealed, they are not open to inspection except, on order of the youth court, for good cause \*emphasis added\*

to: (b) adult probation and parole staff preparing a presentence report \*emphasis added\*

The Appellant made clear his wish to challenge P&P accessing juvenile records that P&P had not sought permission from a youth court to inspect.

Furthermore, the Appellant wished to challenge the overall basis of the usage of youth records that are not fully explored by the District Court, since the Appellant believes this is a violation of the Montana due process clause. Since the District Court can clearly not decipher what occurred that resulted in the conviction.

As well the Appellant wished to challenge the overall legal authority of the State of Montana to use juvenile records in any way. Since clear science has established that a juvenile brain is not fully developed. Meaning the Appellant could not meet the legal requirements of mental competency required by

both the U.S. and Montana Constitutions. Questions ripe for the Court to review.

This claim, is clearly supported by the District Court's inability to fully grasp that the Appellant's juvenile convictions are non-violent, as this Court has already established.

"although the District Court did note that some of Kirn's previous felonies were violent offenses."  
Anders Brief, page 5, lines 18 & 19.

As well said convictions were based on a juvenile system in which due process is not on the same par as adult criminal convictions. since the aim of a youth court is very different than adult courts.

The Appellant attempted to support his above claim(s) via juvenile transcripts. Transcripts which would have demonstrated what level of mental competency existed at the time of the Appellant's juvenile convictions.

The Appellant was told the records would cost \$187.12, and thus the Appellant's Attorney refused to request. The Appellant argues that a P&P report should at a minimum require some kind of exploration of such convictions by the youth court. To keep the records controled and to remove any possibility of bias on the part of the adult court sentencing Judge.

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The District Court sentenced Kirn to 40 years to the Montana State Prison for the Aggravated Burglary, the obstruction count's sentence had already run by this time.

Kirn filed a second appeal, which the Appellant agrees is to be most likely limited to the record. Yet the Appellant argues that said record would not be solely based on the Appellant's resentencing. Since the Appellant's counsel failed to properly understand the non-attorney Appellant's wishes to challenge certain key trial issue's.

#### STATEMENT OF THE FACTS

On September 19, 2019, Kirn was charged by with:

Count I: Aggravated Burglary, in violation of Mont. Code Ann. § 45-6-204(2); and in support of this charge the State alleged:

On or about September 17, 2019, within the City of Butte, County of Silver Bow, Kirn knowingly entered or remained unlawfully in an occupied struction and with the purpose to commit an offense therein, and in the course of committting such offense Kirn jumped on top of M.L., an adult female and threatened to kill her.

Count II: Obstructing a Peace Officer, in violation of Mont. Code Ann. § 45-7-302; and in support of this charge the State alleged:

On or about September 17, 2019, within the City of Butte, County of Silver Bow, Kirn knowingly obstructed, impaired, or hindered the enforcement of the criminal law or the performance of a governmental function, including service of process, by running from police officers when they attempted to investigate an offense he was implicated in committing.

See Doc. 1 & 4.

Kirn maintained his right to remain silent and persist in his

plea of not guilty, and a two-day jury trial commenced on April 12, 2021. See Doc. 69 & 70, Minute Entries. At the end of the trial, Kirn was found guilty of both counts alleged. Doc. 74, Verdict.

On June 2, 2021, Kirn was sentenced to forty years imprisonment at the Montana State Prison for Count I: Aggravated Burglary, and six months in the county jail for Count II: Obstructing a Peace Officer. See Doc. 84, Judgment and Order of Commitment.

On August 4, 2021, Kirn appealed in DA 21-0381, alleging three errors:

1. Kirn's right to a speedy trial had been violated.
2. This Court should exercise plain error to review errors within the jury instructions.
3. The District Court relied upon incorrect information when it imposed sentence upon Kirn.

State v. Kirn, 2023 MT 98, ¶ 2, 412 Mont. 309, 530 P.3d 1.

Upon review this Court held that Kirn's right to speedy trial had not been prejudiced by the delay. Kirn, ¶40.

This Court also declined to exercise plain error review regarding the jury instructions. Yet the Appellant's Attorney was informed that he wished this Court to review the jury selection process, not the voir dire process. Thus, increasing the Appellant's denial of Counsel to assist him or to at a minimum explain the process in a satisfactory manner the the Appellant.

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Furthermore, the Appellant finds issue in this Court declining to apply the cumulative error doctrine, based on this Court's holding "that the evidence against Kirn was overwhelming." The

Appellant believes that this argument fails since the Appellant has always maintained his innocence, and if the process is corrupted in such a way that it creates the ora of absolute quilt, then clearly the cumulative errors biased the Appellant, and thus should be further briefed.

However, the Court did find error in the District Court's sentencing of Kirn, specifically, the District Court incorrectly listed as part of its reasons for imposition that Kirn had ten prior felonies and was a "registered violent offender." Id., ¶58. This Court determined Kirn had only nine felonies and that Kirn's requirement to register as a violent offender had expired because more than ten years had passed since Kirn's last conviction requiring registration. Id., ¶58. This Court noted Kirn's felony history was contained within the presentencing investigation report and was comprised of five adult felonies and four juvenile felonies. Id., ¶14. Yet, as discussed above, this was not the question the Appellant sought review of by this Court.

The Court then remanded Kirn's case for resentencing "based on correct sentencing information." Id., 59.

On remand, Kirn was sentenced on September 5, 2023, after argument by both parties, the District Court explained its reasoning and imposed the same sentence as previously imposed on Kirn:

"THE COURT: Well, I've reviewed this matter at length And, with regards to the conditions, I will strike Condition No. 13 and Condition No. 29 -- I think those are appropriate to be taken out -- and any other

financial conditions that are set forward in the pre-sentencing investigation.

The Court does find it appropriate that the defendant receive time credit -- or credit for time served in the amount of 1,457 days.

However, what's troubling for the Court is the fact that I'm looking at this very long and detailed history with regards to offenses. And we're talking -

THE DEFENDANT: Can I say something about that?

THE COURT: NO, sir. You had your chance to talk, and now it's my turn. There's been an assault on a peace officer. Although a misdemeanor, there's battery of a family member. You know, and I understand that you take anger management classes. But the simple fact of the matter is that this has been going on for a long, long time. There have been numerous prison sentences here that have had no -- you know, 4- and 5-year prison sentences that have had no effect.

And so we've got a long history of criminal conduct with violent offenses. We've got a high risk to re-offend. And the defendant has been given numerous opportunities to correct these behaviors and it has not occurred. And this is very troubling for the Court.

I recognized that the last time I sentenced the defendant I had stated that there were ten prior felonies. Apparently, there were only nine. It was the long history of criminal conduct that was the most disturbing to the Court.

And I recognize some of those offenses have to do with criminal possession of drugs and addiction. However,

others are violent offenses that put the community at risk. And that is, as I spoke to the last time, it's not a chance I'm willing to take for the community. The community is what needs protection. And I appreciate the fact that Mr. Kirn is taking steps to rehabilitate himself while he's in prison.

Obviously, a 40-year sentence is not going to be 40 years of time served. If Mr. Kirn does everything right, he's going to be eligible for parole after ten years.

And so it is the sentence and judgment of this Court that the sentence imposed will be the sentence recommended by the State. It will be a 40-year sentence.

Mr. Kirn will get credit for the time served as mentioned, 1,457 days, and will be eligible for parole as soon as he completes a certain portion of that sentence. And, as long as he continues down the path that he is currently doing, he will be eligible for parole. And, hopefully, at that point in time, upon his release, he will become a productive member of society.

That is going to be the sentencing of the Court here today. Thank you."

Transcript of Proceedings, Sentencing, September 5, 2023, 18:4-10

Kirn then spoke up, objecting to the District Court's sentence alleging the number of felonies the District Court relied upon was still incorrect:

"THE DEFENDANT: Judge, I only have seven felonies. I don't have nine. I don't know where you guys are getting these nine felonies. I only have two prior felonies as a juvenile and five as an adult. All of my

last convictions are for drugs.

THE COURT: Well, sir, I believe that your criminal offense history shows four as a juvenile.

THE DEFENDANT: No, there's not.

THE COURT: Well, sir, sir, listen to me. Mr. Kirn. Mr. Kirn. I'm not going to debate the issue with you. It's in the presentencing investigation report that even your own counsel -

THE DEFENDANT: The presentence investigation is wrong. That's what I'm saying. I object to this.

THE COURT:--even your own counsel --okay. Well, you can object to it. But the simple fact of the matter is I don't care if it's seven felonies, nine felonies. I'm looking more at the most recent history. And then the lengthy history here. You have a criminal history-

THE DEFENDANT: Drugs.

THE COURT:-- dating back from 1990 and it has gone on through 2019. I have looked at all that and I have considered it all. And I'm looking at this, and it never changes.

THE DEFENDANT: All that is drugs, Your Honor.

THE COURT: And it never changes, Mr. Kirn. And I'm hopeful that this will be the last. Thank You."

Transcript of Proceedings, Sentencing, September 5, 2023, 20:12-:21:17.

After being resentenced, Kirn timely appealed. See Doc. 116, Notice of Appeal.

## ARGUMENT

### I. COUNSEL VIOLATED HIS CODE OF ETHICS

The gravamen of the disqualification of an attorney or firm is not that an attorney or firm violated one of the conflict of interest rules under the Montana Rules of Professional conduct (such as Mont. R. Prof. Conduct 1.7, 1.8, 1.9, 1.10, 1.16); rather, disqualification must offer sufficient proof that the continued representation of a party by the attorney or firm will prejudice or adversely impact the rights of another party in the matter pending before the Court. Evidence that an attorney or firm did, in fact, violate a professional conduct rule merely serves as additional weight that may tip the scales in favor of disqualification.

Mont. R. Prof. Conduct 1.20(b) does not require an attorney use a verbatim transcript of the information obtained during a prospective client consultation in order for it to construe a violation of the rule. Nor does Rule 1.20(b) require that the information used or revealed be significantly harmful, as would be required to form the basis for disqualification under Rule 1.20(c). Rule 1.20(b) places an absolute prohibition against using or revealing any information learned in the consultation. It should be clarified that the mere use of information learned in a prospective client consultation, if advertant or harmless may not by itself form the basis for disqualification. Yet, for some reason(s) unknown to the Appellant, the Appellant's attorney decided to rely on a 9th Circuit precedent. A precedent not in-acted, or even relied upon by the Montana Judicial body. Anders,

clearly has not worked it's was through the federal appeals process to a complete conclusion. A conclusion that would allow the Appellant's attorney to clearly reveal confidential information. Information obtained via attorney client consultation's. Said attorney can't hide behind his big federal precedent(s) to validate his behavior before this Court. Behavior that has now placed the Appellant's judicial decision making process on full display to the State.

The Appellant for clear reason(s) has lost all confidence in his current attorney, but argue's that said attorney's behavior is unquestionably a violation of his code of ethics.

Thus, the Appellant asks this Court to Sanction his current attorney, and assign the Appellant an attorney he can establish a safe and developmental environment of attorney client discussion with.

## II. THE RECORD SUPPORTS A CLAIM KIRN SUFFERED FROM INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

Montana utilizes the two-part test first articulated in Strickland to determine whether a criminal defendant's trial counsel was unconstitutionally ineffective. Under that test, a defendant must show:

(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant.

An attorney's performance is deficient if it falls below an objective standard of reasonableness considering prevailing pro-

fessional norms, and in the context of all circumstances. A defendant must overcome a strong presumption that, under the circumstances, the challenged action might be sound trial strategy.

In this matter, the Appellant previously discussed under the legal vale of Attorney-client privileged discussion, with the Appellant's appeal attorney concerns of his trial counsels ineffective behavior during, prior to, and after trial. These concerns are numerous and record based.

The first issue brought to the attention of the Appellant's Appeal counsel was the clear record based issue of the Appellant's trial counsel engaging in his pretrial hearing, a hearing that was directly related to the Appellant's trial, without the Appellant being present.

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THE COURT: "Well, as we're waiting with regards to Mr. Kirn, Ms. Shea, you're still on line, correct? (Final Pretrial Proceedings, Page 3, lines 12-14

MS. SHEA: "And, just for clarification, the State had a type in the response to the Defendant's Fourth Motion in Limine. It inadvertently stated that we would not call law enforcement. However, the next sentence said specifically as to what law enforcement was going to testify." (Final Pretrial Proceedings, Page 4, lines 9-14)

THE COURT: "Okay. Mr. Kirn is now present." (Final Pretrial Proceedings, Page 5 line 1).

The Confrontation Clause of the Sixth Amendment provides a criminal defendant the right to be present at all criminal proceedings against him. Illinois v. Allen [\*\*\*162]. (1970), 397 U.S. 337, 338, 90. S. Ct. 1057, 1058, 25 L. Ed. 2d 353, 356. The

Constitution includes express language aimed at protecting this right, providing that, "[I]n all criminal prosecutions the accused shall have the right to appear and defend in person and by counse..." Article II, Sec. 24, Mont. Const. We have established [\*\*\*\*6] that the right to appear and defend is a fundamental right which may only be waived through an informed, intelligent, and recorded waiver. State v. Tapson, 2001 Mt. 292, PP 15, 28, 307 Mont. 428, 432, 436, 41 P.3d 305, 308, 310; State v. Kennedy, 2004 Mt. 53, P29, 320 Mont. 161, P29, 85 P.3d 1279, P29.

iii. KIRN'S APPELLATE ATTORNEY AND TRIAL ATTORNEY BOTH FAILED TO PROPERLY CHALLENGE THE JURY SELECTION PROCESS.

A criminal defendant has the constitutional right to a trial "by an impartial jury of the state and district wherein the crime was committed." U.S. Const., Amend. VI, Article II, section 24.

Montana's constitution goes further, "the right to a trial by jury is secured to all and shall remain inviolate." Mont. Con. Art. II, §26.

The individual right to trial by jury is a prized shield against oppression and the approaches of arbitrary power dating back to the time of the Magna Carta.

While the statutory jury selection procedures-- including those regarding alternate jurors contained in Mont. Code Ann. § 46-16-118 are designed to protect against violations of the defendant's constitutional right to a fair and impartial jury, "not every violation of the statutory process must result in reversal. Tech-

nical departures from the jury selection statutes and violations which do not threaten the goals of random selection and objective disqualification do not constitute a substantial failure to comply." State v. Lamare, 2000 Mt. 45, 28, 292.

Yet in this case multiple violations of the jury selection have admittedly occurred. Juries must be selected and drawn in substantial compliance with the law. Where the disregard for legislative mandates amounts to more than technical irregularity substantial compliance is not achieved. Thus, any deviation from Montana statutory mandates does not demonstrate a "technical error." Which can be deemed "harmless error." Since this Court can not hold a criminal defendant to the regulations of the Montana Legislative intentions while it ignores those Legislative intentions. It is not the right of the individual necessarily involved, but rather the entire jury system and the selection procedures, which must be protected, and when a showing is timely, as it is in this matter, it will be remiss in its duties if this Court is permitted material deviation or departure from the procedures spelled out by the Legislature.

Thus, this Court has a legal duty to comply with the Montana Legislative Jury Selection intentions, and for this Court to deviate, or to construe those statutes to assist the state after the state violated the jury selection process is paramount to a "terminal illness" in the entire judicial system.

Therefore, based on the record, the Appellant's request for his current appeal attorney to challenge such discrepancies is a valid request. A request ignored by the Appellant's current

attorney, or at a minimum misunderstood by said attorney, and labeled a challenge to voir dire. When the Appellant wanted to challenge the selection process in its entirety.

#### IV. JUVENILES ARE CONSTITUTIONALLY DIFFERENT FROM ADULTS.

State v. Johnson, 2023 Mt. 167

Juveniles are constitutionally different from adults in their level of culpability. These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and needless risk taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime producing settings. And third, a child's character is not as well formed as an adult's, his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

The Youth Court Act lists nearly two dozen felonies requiring an information be filed directly in district court for youths who are at least 16 years of age at the time of the offense. These offenses are the most serious offenses under Montana law and, absent consideration of the youth's individual characteristics and transient immaturity, will frequently dictate that the nature of the offense is serious and that Mont. Code Ann. § 41-5-206(3)(b) cannot be met. Because the legislature has designated those off-

enders charged with these specific crimes be first treated as adults - - .

M.C.A. § 41-5-216(5)(b) After formal and informal youth court records, and department records are sealed, they are not open to inspection except, on order of the youth court, for good cause to: (b) adult probation and parole staff preparing a presentence report on an adult with an existing sealed youth court record.

V. THE RECORD SUPPORTS KIRN'S CLAIM THAT HE WAS RESENTENCED BASED UPON INCORRECT INFORMATION.

THE COURT: "Okay, Mr. Bunitsky did you have any additions or corrections to the ---" (Sentencing, June 2, 2021, page 4, line 5).

MR. BUNITSKY: "No, Your Honor." (Sentencing, June 2, 2021, page 4, line 5).

In Tucker, the Supreme Court reversed the lower court's sentence because its sentencing was partly based upon two previous convictions which were later, subsequent to the defendant's sentencing, held to be unconstitutional. "for we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." Tucker, 404 U.S. at 447, 92 S. Ct. at 591-92, 30 L. Ed. 2d at 596.

THE COURT: ---"It is noted in that presentencing investigation that Mr. Kirn is already a registered violent offender. This is his 10th felony." (Sentencing, June 2, 2021, page 9, line 21-23).

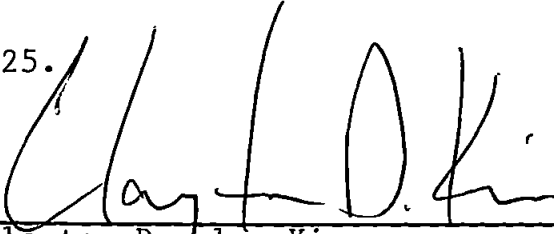
¶58 While the District Court's written judgment provided that Kirn had only nine felonies, the court, as part of the reasons for imposition of sentence, provided that Kirn had ten felonies. This was based on incorrect information. The District Court also relied on incorrect information when it classified Kirn as a registered violent offender. Ten years after a violent offender must register, the offender's violent offender status automatically expires without a petition process if the offender has not committed any subsequent felonies. State v. Sedler, 2020 MT 248, ¶ 19, 401 Mont. 437, 473 P.3d 406. DA 21-0381, filed 05/30/2023, Page 24, lines 8-14.

#### CONCLUSION

Appellate Counsel, and trial Counsel have behaved ineffectively, and placed the Appellant's constitutional right to a fair sentence in great jeopardy.

Thus, the Appellant asks this Court to assign the Appellant new counsel, and allow this matter to be brought back before this Court.

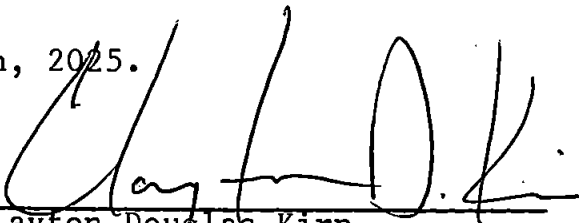
DATED this 24th day of March, 2025.

  
\_\_\_\_\_  
Clayton Douglas Kirn,  
Defendant and Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Response To Anders Brief was typed with the provided materials at Crossroads Correction Center; is double spaced except for footnotes, quoted, and indented material; and as an inmate I am not afforded the benefits of Microsoft Word Professional Edition or any other modern version(s) of word processing software common to people living in the 21st century.

DATED this 24th day of March, 2025.

  
Clayton Douglas Kirn,  
Defendant and Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Appellant's Response To Anders Brief to be mailed and/or hand delivered to:

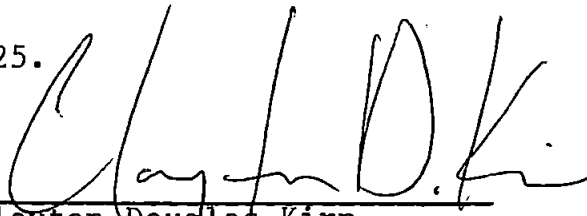
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DATED this 24th day of March, 2025.

  
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Defendant and Appellant.