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STATE OF MONTANA
Case Number: DA 23-0488

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0488

STATE OF MONTANA,
Plaintiff and Appellee,
v.

MICHAEL TODD SMITH,
Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court, Lincoln County, the Honorable Matthew J. Cuffe Presiding.

APPEARANCES:

GREGORY E. PASKELL

Attorney at Law
21500 Cypress Way Ste. C
Lynnwood, Washington, 98036
Cell: 406-250-6917
gpaskell2@gmail.com

ATTORNEY FOR DEFENDANT APPLELLANT

AUSTIN KNUDSEN

Montana Attorney General
TAMMY K. PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201 401
Helena, Mt. 59620-1401

JENNIFER STUTZ
Dpty. Teton County. Atty.
P.O. Box 1259
Choteau, Mt. 59422

ATTYS FOR PLANTIFF AND APPLELLEE

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STATEMENT OF THE CASE

The Appellant was first brought before the district court by information dated and filed April 24th, 2017. The original information *(Dist. Ct. Doc. 3)* charged the Appellant with two counts of Sexual Abuse of Children, a Felony, with each count covering a different time span under a separate subsection of 45-5-625 MCA. One under (1)(d) and the other was under (1)(e). An accompanying Warrant for the Appellant's arrest was issued on the same date. *(Dist. Ct. Doc. 3.5).* The Appellant was arraigned on his charges on July 27th, 2021. *(Dist. Ct. Doc. 20)*

Appellant through his attorney filed a Motion and Brief to Compel Discovery. Said motion sought the turnover of the originally seized computer and hard drive for the purpose of inspection by the defense and also alleged a "Brady" type violation. *(Dist. Ct. Doc. 47)* After briefs were filed by both sides and a hearing was held, the District Court denied Appellant's motion. *((Dist. Ct. Doc. 67)*

Appellant, subsequent to the denial of his motion to compel and order denying same, filed a Motion to Dismiss For Speedy Trial Violation. (*Dist. Ct. Doc. 68)* Again, the issue was fully briefed and the District Court by written order denied the Appellant's Motion to Dismiss. *(Dist. Ct. Doc. 78)*

The State filed Amended Information, *(Dist. Ct. Doc. 84)* the Appellant was charged with a total of five counts of Sexual Abuse of Children a Felony. All five counts were charged under (e) of 45-5-625 (1) MCA.

This matter went to jury trial on the 13th, day of March 2023. The trial lasted 2 days.

At the end of the jury trial a verdict was reached by the impaneled jury of guilty on all counts of the Amended Information. *(Trial Trans. P.398 – 401)*

After the reading of the verdict, the Trial Court proceeded to Poll the jury. The Court polled the first five jurors, who all agreed to the verdict. When the Court polled juror number 6, that the juror indicated that they had reasonable doubt on the evidence. The Court immediately

declared that they did not have a verdict and returned the jury to continue their deliberations. *(Trial Trans. P.403 -404)*

Later that evening, the jury returned with a fully endorsed verdict of guilty on all Counts. *(Trial. Trans. P. 405 – 410)*

The Trial Court held a sentencing on 11th., of July 2023 and sentenced the Appellant to 100 years to the Montana State Prison with 50 years suspended on each count of the Amended Information. Each sentence on every count is to run concurrently to all others. The Court also order various conditions to its sentence. This sentence was reduced to writing and filed with the clerk of the district court on the 20th, day of July 2023. *(Dist. Ct. Doc.109)* It is from this sentence and judgement of the district court that the Appellant appeals.

STATEMENT OF THE FACTS

Sometime during the month of January 2015 Appellant's brother who was on supervision with the Department of Corrections had his residence searched. The brother's residence was shared with the Appellant. During the search, two laptop computers were seized. (PSI. Dist. Ct. Doc. 106 P.3).

A review of the search warrant receipt indicates that more than just the computers were seized. The receipt indicates that a number of items including amounts of illegal drugs, drug paraphernalia an items attributable to a illegal grow operation were seized, also. (*Dist. Ct. Doc. 95, Exhibit 8)* This exhibit was induced at the time of trial over objection. *(Trial Trns P.110 L. 7-10).*

A search warrant was issued to seize all electronic devices on appellant's property and after the computers that were seized they were sent to the federal agency, Homeland Security, for an examination of their contents. Upon examination there was found a large number of suspected child pornographic image files and a number of child pornographic video files. A number of victims were identified as minors through the National Center for Missing and Exploited Children and had been distributed through Peer to Peer sharing to other individuals. *(Dist. Ct Doc. 1).*

The State did not support its allegation that the laptop computers in question were the property of the Appellant until a subsequent review of the laptop computers and supplemental report was issued on April 7th, 2022. (*Dist. Ct. Doc. 47)* The investigators' conclusion of ownership of the

laptop was based upon the finding of personal pictures and documents attributed to the Appellant. (*Dist. Ct. Doc. #47; Trial Trans. P.224 L. 22 -P.225 L.14 and P.227 L.16-21)*

The Appellant's alleged ownership of the laptops was an issue that had to be determined by the jury as it was hotly contested. *(Dist. Ct. Doc. #47; Trial Trns. P. 361-364)*

The seizure of the laptop computers occurred in January of 2015. The information was not filed until April of 2017. During that period of time from January,2015 until April 2017 the Appellant moved from Teton County, Montana to Flathead County, Montana. Subsequently moved to Mexico and resided there until arrested and returned to the United States on June 17,2021. *(Dist. Ct. Doc. 75.)* He subsequently arraigned on July 27th, 2021. *(Dist. Ct. Doc. 20)*

Upon the completion of the offering of evidence and closing statements, the jury entered into deliberations. They reported to the District Court that they had reached a verdict. After the reading of the verdict of guilty on all counts, the Court polled the jury individually. Juror #6, when asked stated: "Reluctantly, Yes." (Trial Trns. P.403 line:21). The Court did not inquire of the present state of the mind of the

juror but stopped any explanation and returned the jury for further deliberations. (*Trial Trns. P. 400-404)* Subsequently the jury returned a second time with a verdict that was also guilty on all counts. The jury was again polled and all of the jurors verified that the verdict returned was their verdict.

STANDARDS OF REVIEW

As to ISSUE 1, this Court reviews a trial court's order denying motions to compel discovery for abuse of discretion. *City of Bozeman v. McCarthy, 2019 MT 209, Henricksen v. State 2004 MT 20, Lynes v. Helm 2007 MT 226*

As to ISSUE 2, this Court in it opinion in *State V. Ariegwe, 2007 MT 204* stated that the issue of speedy trial is a question of constitutional law and that the Court will review said conclusions of law de novo to determine whether the trial court's interpretation and application of law is correct. *Ariegwe supra at P119.* The *Ariegwe* court stated that the factual circumstances would be evaluated pursuant to the outlined four factor balancing test to determine if they amounted to a speedy trial violation. All factual findings underlying this analysis are reviewed for clear error. A finding is clearly erroneous if it is not supported by

substantial credible evidence, if the district misapprehended the effect of the evidence or if after a review of the record, this Court is convinced that the lower court made a mistake. *(State v. Chambers, 2020 MT 271).*

As to ISSUE 3, this Court reviews a district court's ruling on the admissibility of evidence under Rule 404(b) of the Montana Rules of Evidence de novo for abuse of discretion on the part of the trial court. *State v. Dewitz 2009 MT 202*, *State v. Link 1999 MT 4*

As to ISSUE 4, this Court will review issues of admissibility of evidence under Rules 403 the same as under Rule 404(b) of the Montana Rules of Evidence as a question of abuse of discretion on the part of the trial court. *State v. Colburn, 2018 MT 141*

As to ISSUE 5, Should this Court apply the "Cumulative Error Doctrine" which mandates reversal of a conviction when numerous errors regardless of whether they are harmful or harmless when taken together prejudiced the Appellant's right to a fair trial. *State v. Cunningham2016 MT 56, citing Kills On Top v. State 279 Mont. 384 P. 392*

SUMMARY OF ARGUMENT

The trial court's denial of the Appellant's motion to compel discovery in light of the testimony of the State's witness at the motion

hearing that setout a protocol that would allow for the safe access of the computer hardware by Appellant or his designee expert, coupled with defense counsel willingness to abide by whatever safety protocols put in place by the State effectively prevented access for investigative purposes the "crime scene" source of the information that made up the majority of the State's case. It prohibited the Appellant form being able to effectively build a and defend against the allegations of the State. The findings of the district court in its order are insufficiently supported with the facts alleged by the State and the order is erroneous on its face.

The district court inappropriately weighed the Ariegwe factors for determining a speedy trial violation in favor of the State. The State failed to make a factual showing in support of its duty to attempt to locate the Appellant during the first 1514 days of the delay to trial. It failed to establish that the Appellant willfully hid himself to avoid prosecution on the charges brought in this action.

Further, the remaining 529 days except for 98 days are attributable to the State as either institutional or State sponsored delay. The Appellant vigorously sought to go to trial and the only motion to continue seeking an extension which resulted in the 98 days the court attributed

to him was for reasons out of his direct control, as his counsel was unavailable.

The Appellant suffered extension prejudice as a result of the prolong incarceration which was clearly testified to and was unchallenged by the State. The Appellant had extensive medical and mental health issues that resulted in hospitalizations on a number of occasions. He was heavily medicated to insure his stability during the period. H suffered excessively high levels of anxiety over the marriage and financial issues created by the unresolved charges.

All of the Ariegwe factors should be found in the Appellant's favor and this matter dismissed due to the Appellant's speedy trial rights having been violated.

The trial court's erroneously failed to prevent the State from introducing a "Exhibit 8" Search Warrant Inventory which contained by characterization and content statements concerning items found in the house of the Appellant that were of a drug nature and not relevant to the charges in the case on trial. The court also admitted a screenshot "Exhibit 11" which contained a irrelevant and profane statement as to the Appellant. The Court on both occasions did so in a of violation of Rule 403

and 404 of the Montana Rules of Evidence. This evidence was gratuitous, created hostility against the Appellant, confused the issues and mislead the jury.

When taken all together the errors of the trial court whether harmless or reversible created such prejudice that it deprived the Appellant of a fair trial in violation of his rights.

ARGUMENT

ISSUE 1: The Appellant' trial counsel filed a motion to Compel Discovery, *Dist. Ct. Doc. #47* The State filed a response *Dist. Ct. Doc.#58* to said motion and a hearing was held on November 1, 2022. Hrng*Trns. Mtn Hearing November 1, 2022* The court denied the motion. *Dist. Ct. Doc. # 62.*

The statute governing this type of special discovery motion is 46-15-322(5) MCA. It reads in part: Upon motion showing that the Defendant has substantial need in the preparation of the case for additional material, ...that the defendant is unable without undue hardship …by other means….The court may in its discretion order … it made available …*46-15-322(5) MCA.*

Subsection 1 and 2 of the same statute permits, if not requires, the turnover by the State to the defendant all materiel or information that tends to mitigate or negate the defendant's guilt as to the charge. *46-15-322(1)(2) MCA.*

Two United States supreme court cases make it an "affirmative duty to disclose all information and materials known to the prosecutor that are favorable to the accused and constitutionally materiel to the determination of his or her guilt or punishment. *Brady v. United States, 373 U.S. at 87-88 and Giglio v. United States, 405 U.S. 150 at 153-55*

Subsection 3 of 46-16-322 allows for the placement of reasonable conditions for any release of information.

Defense counsel at the motion hearing describes what his intention is and what he is looking for. He states: "I have talked to my client that I want to look for on those machines and determine whether they're there or not….that impact his defense on whether he was the one that was actually downloading the child pornography or not." *Hrng Trns, 11-1-2022, P.23 l. 18-25 and P.24 l. 1-2.* The defense counsel obviously has information from his client that may not or was not discovered by the forensic investigation. These markers that the defendant disclosed may

be outside the range of that investigation and only known to the defendant. Under the intent of this statute the Appellant is entitled to put together his defense without hinderance from the State. The State does not have to facilitate the investigation except that it must bring forward the information it has as requested, particularly if it is of a exculpatory nature. *Brady and Giglio Supra.*

He has absolutely no place else to acquire the information as the computers, hard drive and reports in the sole control of the Teton Sherriff's Office. *Hrng. Trns., 11-1-2022 P. 17 l.21-25 P. 18 l. 1-4* The statutory showing of undue hardship is met as the only place to get the information was the office of the Teton Sherriff's Office.

There is a method available to all to protect the hard drive which is really in question. It was described by Homeland Security Agent Johnsrud on cross examination at the hearing. He describes that method as one that includes the removal of the hard drive and using forensic hardware that is a write blocking and imaging too. He does state that it would allow for the powering up of the hard drive in a read only format and the data would not be changed on the drive. He goes on to say that

they could go on to see the contents of the drive without making changes. *Mtn. Hrng. Trans 11-1-2022 P. 21 l. 1-22*

Defense counsel, later in the hearing, argues to the court that he is more than willing to follow whatever conditions or protocols the State wishes to put on the viewing of the computers that it wanted. *Mtn. Hrng. Trns. P. 23 l. 4-15*

All the conditions of the statute governing this matter are met. Defense is seeking exculpatory information that is not available to him at any cost or hardship. There is a method that could be used to meet its request, as outlined by the agent from Homeland Security. The defense counsel is also willing to accept any conditions or protocols.

The district court denied the motion for lack of showing a "substantial need" and what "undue hardship" the parameters caused. *Dist. Ct. Doc. #62 P.* 3 The defense counsel sought access to all of the hardware and not just the hard drive mirror copy. During direct examination, Agent Johnsrud described the normal protocol for review of only the mirror copy and why the hardware is protected. *Mtn. Hrng. Trns. P. 12 l.1 24-25 P.13 l. 1-13* On cross examination as described above in

changed his testimony by describing a method available to actually turn on the hard drive and review its contents. *Mtn. Hrng. Trns. P.21 l. 1-22.*

The undue hardship was the result of not being offered the second method to review the actual hard drive as only the mirror image copy was offered. *Mtn. Hrng. Trns. P. 12 l.24-25 P. 13 l. 1-13*

The finding of the court is just not supported by the record of the testimony of the State's own witness. It is an abuse of discretion as granted to the court by statute. The order should be reversed.

ISSUE 2:

The law is well established, as to the criteria for evaluating an order of the District Court in denying the Appellant's motion to dismiss for violation of his speedy trial rights. The right to a speedy trial is guaranteed under the Sixth and Fourteenth Amendment to the United Sates Constitution and under *Article II, Section 24 of the Montana Constitution*. (*State v. Ariegwe, 2007 MT 204 P. 20*) This Court in the case of *(State v. Eystad, 20177 MT 29 P. 13)* stated that any evaluation depends upon the conduct of both the State and the Defendant, *(citing, Barker v. Wingo, 407 U.S. 514, 530*). The *Eystad*, Court *supra* went on to state that the evaluation of a speedy trial claim is necessarily relative

and depends upon the circumstance of each case. *(Citing State v. Hodge, 2014 MT 308 P. 15.*,)

This Court in Ariegwe, *Supra*, established a trigger date or number of days before this claim can be considered by a court at 200 days between the original charges and the trial date or appropriate motion to raise this issue, which is easily met in this case. (*2093 days, Dist. Ct. Doc.75*)

This Court in Ariegwe, *supra*, established four factors to be considered by this Court or any court in its analysis of a motion to dismiss for violation of one's right to a speedy trial. Those factors have been outlined in several cases such as *State v. Morrisey, 2009 MT 201; Elystad, supra; State v. Reynolds, 2017 MT 25, P16 and onward.*

Those factors are as outlined in *Reynolds* (*P18-30, supra):* 1. The length of the delay; 2. The reason for the delay; 3. The accused response to the delay; 4. Prejudice to the accused. As the *Reynolds'* Court went on to say (*supra P31-33*) stated as to "Factor 4", the court should weigh the facts to 1: Preventing oppressive pre-trial incarceration; 2. Minimizing anxiety and concern of the accused; 3. Limiting the possibility that the defense will be impaired.

In reviewing and evaluating the first Ariegwe *supra* factor 1. Length of Delay, as applied to this case. The conclusion of the District Court is a total delay of 2,093 days from the filing of the Information and until the 4th, scheduled trial date. The Court adopted in its order denying the Appellant's Motion to Dismiss, the grid set forth by the State in its discussion of the delay factor and whether the threshold of 200 days has been met. *(Dist. Ct. Doc. 75 P.7 and Dist. Ct. Doc. 78 P.4).* For purposes of reference, this brief will refer to that portion of the order as it reflects a consistent view of the dates involved in this brief and the Court filings.

It is obvious from the trial courts calculations, that the first factor to be considered the "length of the delay" has been established in this case, as this Court in *Ariegwe P. 42-43*, states that the period starts from either the arrest, indictment, information or complaint and runs to the date of trial. (This court in later cases has extended that to the date of sentencing.) The total time of the delay is 2093 days. The Appellant's motion was timely and appropriate, when filed.

The Second factor is to consider is the "Reasons for the Delay". It is important to first establish who under the law has the burden to justify the delay and that burden falls upon the State. *Ariegwe P. 40 &41.* It is

important to note that the outline offered by this Court in *Ariegwe* specifically states that "2. The State's burden under factor Two to justify the delay likewise increases with the length of the delay thus the further the delay stretches beyond the 200-day trigger date, the more compelling the State's justification under factor 2 must be." *Ariegwe P40*.

Other than self-serving conclusions in its response to the Appellant's Motion to Dismiss, the State at the motion hearing did not meet that burden of justifying the delay with facts, support by affidavit, testimony or offer evidence at the motion hearing dated January 3, 2023. In fact the State did not even cross examine the Appellant as to his testimony. Mtn. Hrng. *Trns. 1-3-23*

The first and largest portion of time that is attributed to the delay, the period from the date of the Information until arrest, a period per the Court's findings is 1,514 days. The trial court attributed this period to the Appellant and notated that it was deliberate. *Dist. Ct. Doc. 78*. The reason set forth by the State is that the Appellant absconded to avoid prosecution. The implication being that the Appellant left to avoid prosecution on the charges from which he appeals. This is not supported by the evidence and the record.

Attached to the State's Response to Appellant's Motion to Dismiss for Lack of a Speedy *Trial Dist. Ct. Doc. 75* there is a series of exhibits which include among other items, the Sentence and Judgement in Teton County case DC-15-003 Exhibit C part of *Dist. Ct. Doc. 75.* This was a complete case that the Appellant was serving his sentence on when the charges in the present case were filed. Included with that judgment and part of the filed *District Court Document #75* was a Petition to Revoke in case number DC-15-003, Affidavit in Support of Petition and most interesting a copy of the Probation and Parole officers "Report of Violation".

The date of the report is May 12, 2017. This report indicates under "Alleged Violations/Supporting Evidence" 1.)a) "…on 4-26-2017 a home check was attempted; the residence could not be located."

On paragraph 2.)a) the report states "On 04.26/2017, the Defendant was contacted via phone to show his supervising officer the listed residence. He did not make himself available to the supervising officer. As requested, "

On paragraph3.) a) the report states "On 04/25/2017. the Defendant was given a urinalysis, the results were positive for THC. He admitted to ingesting Marinol capsules which he was not proscribed."

Under the paragraph entitled "INTERMDEDIATE SANCTIONS UTILIZED AND CONSIDERED" the report states "On 04/24/2017, the Defendant was verbally reprimanded regarding his THC use…. he was called several times and given the chance to provide updated information but failed to do so." It is obvious that the probation officer was aware of the warrant on the 17th., of May as he refers to it. *Exhibit to Dist. Ct. Doc. 75 Montana Department of Corrections Adult probation and Parole, REPORT OF VIOLATION*

From the above documents filed by the State that the Appellant, who was on probation for other crimes, was but all but told that he was going to be revoked on his present child endangerment sentence and even though there was multiple contacts between probation and the Appellant he was never informed about the pending charges in this case, as any indication is missing from the narrative in the report.

The conclusion that the Appellant abscond by the State's own exhibits indicates it was not for the charges before this Court but for the

earlier sentence. It is impossible to determine what the probation officer knew or did not know about the new charges from the record, but it is obvious that the Appellant had other reasons to leave and had no knowledge or at least nothing was offered by the State as proof that the absconding was the result of these pending charges.

This lack of credible evidence is problematic for the State. The United States Sixth Circuit Court of Appeals was confronted with a set of fact similar to the ones facing this, Court. The Appellate Court in *United States v. Brown*, stated "However we believe that the government has failed to prove that Brown was actually culpable in causing the delay in this case. The government **did not present credible evidence** *emphasis provided* that Brown was aware of the issuance of the indictment and intentionally **hid** himself from law enforcement agents." *United States v. Brown***,** *169 F.3d 344 P. 348.*

The *Brown* case involved over 4 years of time and the allegation that the Defendant had used aliases to hide from law enforcement. The ruling in *Brown* applies directly to this case at bar. The State has presented no evidence that he knew of new charges and hid from prosecution. From the State's own exhibits, it had multiple chances to

advise the Appellant of the pending charges against him but failed either by ignorance or design to provide that information to the Appellant.

This Court reviewed a case in that knowledge of the charges and purposely ignoring them by the Appellant had played a significant role in assigning delay to the Appellant, which was *State v. Eystad*. This was an appeal from a justice court action to the district court and finally to this Court. This Court was clear that if the Appellanat purposely keeps himself ignorant of pending charges or has knowledge of the proceedings and is voluntarily absent from them, should expect the delay to be charged against him. *State v. Eystad, 2017 MT 28.* There is no proof in this case that the Appellant acted with any information or intent to delay this case. The burden is on the State to come forth with the explanation for the delay. *Ariegwe supra.*

This analysis changes the scales as to the relative relationship to the delay assignment between the State and the Appellant. This is not the only analysis that shifts the delay to the State as the State has the burden to bring the Appellant to trial.

This Court in *State v. Synder, 2018 MT 258 P. 18 citing State v. Zimmerman, 2014 MT 173* simply stated that the Appellant has no

obligation is timely prosecuted the case. Further, the Defendant has no duty to bring himself to trial. *Ariegwe citing cases.*

In the case of *State v. Lacey, 2010 MT 6, P17* this Court stated that the negligence of the State or their lack of diligence in bringing the Appellant to trial is an unacceptable reason for delay. This Court went on to say that accordingly, if the Appellant is outside the jurisdiction of Montana the State must act diligently and in good faith to acquire jurisdiction. *Citing cases*. After a review of the record, it is impossible to tell what the State did to bring the Appellant to trial as there is no record of any kind in this case as to what steps they took to procure the Appellant. The only indications that are part of the record are the unsupported statements by the State in its brief, that the Appellant was for some reason deported from Mexico and arrested in Texas. *Dist. Ct. Doc. #75* This statement does not fulfill the State's burden, as to locating the Appellant.

In the *Lacey supra*, there was some effort made by law enforcement to contact the last known state of residency of the defendant, the state of Nevada and the state of Arizona where he was arrested. There was evidence that Lacey's name was placed in the NCIC database and that

was the basis for his arrest. We have no evidence of any effort, including the above-described minimal steps, on the part of Teton County to search and find the Appellant for the purpose of prosecution.

This Court in *State v. Longhorn, 2002 MT 135* (a case reversed on other grounds), a case very similar to the one at bar found that the level of effort put forward by the State to locate the defendant was sufficient. This Court found, that putting the Defendant's name into the National Criminal Information Center system, contacting a Oklahoma sheriff's office seeking assistance to arrest, publishing a request for information of the defendant's whereabouts in a local newspaper, running a criminal history check a year later to locate the defendant and then seeking help again in arresting the defendant was enough. None of the efforts described in that case that the State undertook to locate the defendant are present on the record of this case. Again, there is no evidence of any kind of effort put forward by the State in this case to support the conclusion that the State is not negligent in obtaining jurisdiction over the Appellant. In fact, one can conclude that its silence lends more to a conclusion of negligence on the part of the State. *Longhorn supra*, cites and quotes extensively the United States Supreme Court case of *Doggett*

v. United States, (1992) 505 U.S. 647. The United States Supreme Court simply stated in *Doggett supra*, that when the Government's negligence thus causes delay six time as long as that is sufficient to trigger judicial review and when the presumption of prejudice even though unspecified and is not extend by the Defendant's acquiescence or persuasively rebutted, then the Defendant is entitled to relief. Based simply on the position taken by the U.S. Supreme Court and when applied to the facts of this case, the Appellant is entitled to have this matter dismissed.

Based upon the previous opinions of the Court as indicated above. The 1514 days of the delay that the district court attributed to the Appellant should have been and must be attributed to the State based upon their obligation to bring the Appellant to trial and their negligence in fulling their duty. As stated in *State v. Houghton,2010 Mt145 P23* … "the State must act diligently and in good faith to acquire jurisdiction." of the accused. The record is devoid of any evidence that that obligation was fulfilled by the State in this matter and a fair conclusion can be drawn that little to nothing was done by the State. Once the appropriate allocation of days is made to the State, the overwhelming number of days

of 1514 supports the position that the State directly or indirectly denied the Appellant his right to a speedy trial.

Alternatively, this Court in *Lacey supra* has also determined that under certain fact situations, this Court can clearly find and determined that under the second factor, both the defendant and the State can be attributed with and share the responsibility for the delay. *Lacey P.18...* The Court in its opinion cites *State v. Morrisey, 2009 Mt 201 P.66* for its support. The Court could apply the same logic here. The Court in *Morrisey supra* found that 42% of the delay, 490 days was the joint responsibility of the State and the Appellanat equally.

Once a determination is made as to the appropriate allocation of the first 1514 days is made, the remaining 529 days and their impact on the Appellant's right to a speedy trial becomes clearer.

Of the 529 days only 98 days are assessed to the Appellant by the trial court, with the remaining 481 to the State. *Dist. Ct. Doc. 78.* It is clear that the even though some of those days are assessed to the State under the umbrella of "Institutional Delay" that they should be given a weight that is heavier than that "less heavily" weight attributed to institutional delay. *Ariegwe supra* The Appellant's trial counsel was

adamant about going to trial on the 17th of January, the 4th scheduled trial date and not wanting to put off the date for what turned out to be a period of over 3 months (98 days,). Trial counsel states in open court at the evidentiary hearing on his motion to dismiss for speedy trial violations: "I am anticipating going to trial on the 17th., Judge." *Trns. Mtn. Hrg. Jan 3,2023. P.26 L. 7-8.* He was ready for trial and did not want to put it off. The motion filed was not done for delay purposes but to protect the rights of the Appellant. It was filed on the 14th., of December 2022 and trial was scheduled for the 17th., of January 2023. The evidentiary hearing was held on the 3rd., of January 2023. Both the fling of the motion and the hearing occurred within almost 30 days of trial and well outside the 10 day mandatory assessment described in *Ariegwe supra.* It is only because of the Court's need to review the briefs and rule not because of anything that the Appellant did or offered that caused this delay. This Court should place the heavier weight on this delay at the expense of the State. Within the 529 day remaining time period these acts and rulings must place more weight on attributing the delay to the State than simply brushing off the State's delay as light weight institutional delay.

The above argument also plays directly into Factor 3: "The Accused response to the Delay:" *Ariegwe supra*. This Court has stated in *Reynolds supra*, that if the court attributes the delay to the defendant the court must still engage in a difficult and sensitive balancing process and this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution. *Lacey supra citing Ariegwe quoting Barker,407 U.S. @533.*

As stated above, the record is complete with statements by the Appellant through counsel that he wanted to go to trial. For example, the transcript of the status hearing held on July 8, 2022. Counsel for the Appellant stated that he wanted to proceed to trial on this date, referring to the trial date on the 8th, of August 2002. *Hrng. Trans. 7-8-22, Page 3, L. 2-3.* This position is again repeated at the hearing on January 3, 2023, where defense counsel states, "I am anticipating to go to trial on the 17th., (January 2023). *Hrng. Trns. 1-3-2023, P. 26 L. 7-8.*

Even the Motion to continue that is filed by his defense counsel is not based upon anything that the Appellant is directly responsible for. His counsel was unavailable due to prior commitments. Dist. *Ct. Doc. 34.*

It is obvious from the above examples that the Appellant wanted and intended to get to a resolution of the charges. He made no effort to delay or inhibit the court process in order to delay this matter.

This Court in *Meeks supra* stated that the defendant did not waiver his right to speedy trial, had on one continuance due to a matter outside of his control, and continued to assert his right to a speedy trial throughout the case. The Court found that this factor three weighed in Meeks's favor. All of the outlined facts are the same in this case before the bar and thus this factor should to be weighted in favor of the Appellant.

The final Factor 4 focuses on the "Prejudice to the Accused. The presumption of prejudice and the burden of proof attached to it is described in *State v. Meeks 2020 MT 67N*. Even though it is a non-citable case for law, it doses provide sources that show the shift in burden of proof as the length of time grows longer between "accused" and trial. Also, *Meeks* shows how this Court has analysis similar fact situations.

The presumption of prejudice intensifies as the State's burden to justify the delay increases as the delay goes beyond the *Ariegwe supra* initial 200-day threshold. *State v. Kurtz, 2019 MT 217.* The *Meeks supra*

concerned itself with 547 days as the delay. This case at bar concerns itself with a total delay of 2093 days. After eliminating the 1514-day period, there remains a period of delay of 529 days. This amount of delay substantially increases the State's burden to provide "particularly compelling justification" for the delay under Fact Two and under Factor Four. The State must make a "highly persuasive" showing that the Appellant was not prejudiced by the delay. The quantum of proof that may be expected of the Appellant under Factor Four is substantially deceased. *Ariegwe supra-P.123; State V. Rose 2008 Mt 4 P.46.*

The level of proof to show lack prejudice as offered by the State in this matter at the trial court level is almost nonexistent. Other than a few conclusionary and self-serving statements made in its response/brief *Dist. Ct. Doc. 75* in response to the Appellant's motion to dismiss *Dist. Ct. Doc. 68* The State offers no evidence either by exhibit, affidavit in support, or testimony at the evidentiary hearing that was held January 3rd., 2023 *Trns. Mtn. Hrg. 1-3-2023* in support of its obligation required by *Areigwe supra* and *Ross supra.*

Relying on the statement that the Appellant was incarcerated on some other charge during the period in question does not mitigate the

State's obligation to bring the Appellant to trial in an expeditious manner. Nor does the fact that the delay may have been unavoidable due to institutional reasons avoid the States obligation to limit prejudice and bring the Appellant to trial in a timely manner, also. *State v. Wombolt (1988) 231 Mont. 400 and State v. Barker (1993) 261 Mont. 379 P.384*

The Appellant at the evidentiary hearing does not rely on the above stated reasons, as the State did, but offers testimony and explanation of the extent of the prejudice that he suffered during the delay.

The entire evidentiary hearing was the Appellant explaining in detail the extent of the prejudice that he suffered

A summary of that testimony, with references to the appropriate page number and line number, includes the following, as stated below. (All references are to the January 3, 2023, Motion Hearing transcript that is part of the appeal record.)

The Appellant had served 2 years, 9 or 10 months on an existing 4-year criminal endangerment sentence. This amount of time made him eligible for parole by operation of statute. The prosecution of the present charges inhibited, if not prohibited him from being paroled. *P. 7 l. 8 – P. 8 l. 16*

The Appellant suffers from severe health issues including GI bleeding in the small intestine and has been pursuing a solution for over two years. P. 9 l.12-20.

The Appellant was hospitalized on two occasions over the previous two years one in Salt Lake and once in Great Falls. P. 10 l. 13-17

The Appellant has had difficulty getting a resolution to his medical problems because of the difficulties in getting Department of Corrections approval for treatment, working with inadequately trained jail medical staff and failures by jail doctors to fulfill the requirements of the specialists. P.10 l. 20-25 -11 P. 11 l. 1-25. P. 13 l. 11-25 P. 14 l. 1-8. P.15 l. 1-5

The treatment of the Appellant's medical problem was also stymied because of jail administration refusal to make necessary appointments. P. 14 l. 5

The Appellant suffered elevated levels of stress due to his medical and physical condition. P.16 l. 1-7.

The Appellant had to seek care from a psychiatrist to get 8 different medications due his mental health issues and anxiety. P16 l. 8-24

The Appellant suffered from not only anxiety but server depression requiring medication. P. 17 l. 2-25

The Appellant suffered mental health breakdowns and had to be hospitalized twice to recover. P18 l. 1-3

The mental health distress and issues endured during incarceration were substantially more server that the loss of his father at Appellant's young age.P19 l. 1-18.

There has severe marital stress as the Appellant's wife resides in another country and the protocol to bring her to the United States is long and strenuous. The ongoing criminal matter affected the decision to even come and place both parties in a difficult position. P 19 l. 24-25 P. 20 l. 1-12.

There is the financial stress of spending 4 to 5 hundred dollars a month to talk to each other in order to have some kind of contact. P.20 l. 10-18.

The Appellant's bleeding problem has been enhanced by the anxiety and stress, the inability to get answers because DOC has not approved the necessary treatments and the jail medical staff cooperating with the various doctor's orders. P21. L.23-25 P. 22 l. 1-5.

The initial housing of the Appellant in a general population situation exposed the Appellant to threats of violence from other inmates based upon the alleged child sex-based charges. P 22. L. 25 P. 23 l.1-8.

The Appellant does not deny that a certain level of medical care was provided but argues that the incomplete nature, refusal to provide the level of care necessary to determine the cause and provide a working medical solution to resolve the problem minimized it. Factor four's goals are to prevent oppressive pretrial incarceration and minimize anxiety and concern by the presence of unresolved criminal charges and limit the possibility that the accused ability to present an effective defense will be impaired. *Ariegwe supra.* This Court in *State v. Reynolds 2017 MT 25, P. 30* citing *Ariegwe supra* stated that a reviewing court may find prejudice to the accused under any one or all of these factors.

Three are few more oppressive situations than regularly bleeding out your rectum and not receiving anything close to competent, realistic medical care. This is also true when your mental state is affected by your medical conditions, incarceration, loss or close family contact forces one into taking 8 different medications for anxiety and depression and which leads to 2 hospitalizations for you to reclaim your sanity.

The Federal Appeals Court in *Brown supra* quoting *Doggett 505 U.S. 647 P. 655* ("finding that the impairment of one defense is the most difficult form of speedy trial prejudice to be shown") because time's erosion of exculpatory evidence and testimony can rarely be shown. *Aroegwe P61 supra* quoting *U.S. v. Rucker, 464 F.2d 823, 825 (D.C. Cir. 1972)* clearly states: "When the delay approaches a year and a half as in this case the Government must provide a justification which convincingly outweighs the prejudice which can normally be assumed to have been caused the Defendant". At the trial level the State made no attempt to provide evidence of any kind to meet this burden of proof. 529 days us more than a year and a half and that does not count the first period of over 15 hundred days. The burden is surely on the State and has not been met by them.

As to the four Ariegwe factors:

Factor 1: Length of time is over 200 days in Appellant's favor.

Factor 2: Cause of the delay in Appellant's favor due to the State's negligence in attempt to locate the Appellant and his ignorance of any new charges.

Factor 3: Appellant continually pressed his desire for a speedy trial while the prosecution continued the trial for its own purposes places this factor in in favor of the Appellant.

Factor 4: Prejudice in found in Appellant's favor due to the ongoing medical issues that were poorly treated, the resulting mental health issues of depression and anxiety. The damage to his family and his finances.

The failure of the State to provide any facts in support of its position clearly makes the findings of the trial court erroneous because they are not supported by substantial credible evidence. *Ariegwe supra* When completing the balancing of factors as required, the balance tips in favor of the Appellant. This analysis leads to only one conclusion and that the verdict must be revered and this case dismissed for the violation of the Appellant's constitutional right to a speedy trial.

ISSUE 3 & 4: These issues focus on the same law and application of that law, Rule 403 and 404 of the Montana Rules of Evidence.

Issue 3 is factually centered on the introduction of a Search Warrant Evidence Inventory created by the Teton County Sheriff's Office. Even though not directly filed with the Clerk of Court's office in

this case, it appears as *Exhibit # 8 on Record of Exhibits for March 13 and 14, 2023 Jury Trial. Dist. Ct. Doc." 95*

Like issue 3, Issue 4 is centered on a screenshot of the alleged Appellant's computer and is referred to as "Exhibit 11" and is listed on *Dist. Ct. Doc. #75* but is not included in the attached exhibits to that document. It is described in detail on Page 211, 218 and 219 on the trial transcript, as a picture of the alleged desktop of the Appellant's computer. This exhibit was being offered to exemplify the testimony of the Homeland Security agent that was testifying.

Along with some shortcuts to apps or files as they commonly appear on the homepage/desktop, it contained an image of an individual pointing to the user, stating: "you know, you're a sick, twisted f**k. (*asterisk added*) I like that about that you." *Trial Trns. Page 219 L. 7-14*

Appellant's trial counsel objected to both exhibits "8" and "11" on the bases that they both violate Rule 403 and 404 of the Montana Rules of Evidence.

As to Exhibit "8", The "Search Warrant Evidence Inventory" the court at *Page 90 L. 24 – Page 91 L. 4*, the Court had just prior to testimony about the exhibit sustained an objection to any testimony as to any illegal

drugs found on the premises. At *page 99* the State begins to ask questions about a search of the Appellant's residence and more particularly his bedroom. Defense's objection to testimony about illegal narcotics and it is sustained. During the following questioning of the witness, the State refers to "Exhibit 8" only to show the seizure of the computers in question. *Trial Trns. P. 99 L. 20-25.*

A review of "Exhibit 8" clearly shows that the information contained on it is divided into 2 categories. One, the top category is designated "House" which show a seizure of 2 computers and the second is designated "Grow" which is a list of illegal narcotics, marijuana and the equipment to grow it.

The case before the trial court and this Court is not a drug case. It is a child pornography case. The objection of the defense counsel should have been sustained and the exhibit prevented from being introduced.

At the request of the defense counsel, the trial court granted a continuing objection to any questions or evidence offered on illegal drugs or narcotics in the residence. *Trial Trns. P91 l. 14-16.* Also, defense counsel specifically objected to "Exhibit 8" under rule 403 and 404 of the Montana Rules of Evidence. *Trial Trns. P.110 l.8*

There was ample discussion and testimony of what was gathered from the residence. *Deputy Mark Grove Tril Trns. Page 90 -110.* The underscoring of the "grow" items and the marijuana that was taken in custody was irrelevant as to the charges being tried. The exhibit could have been redacted for the purposes for which it was offered. There is no probative value of this portion of the exhibit, and it is only highly prejudicial as it lays the ground work for the concept of illegal activity on the part of the Appellant.

This Court in *State v. Strizich* specifically, after quoting cases, commented that probative evidence is always prejudicial to some degree. It rises to be unfairly prejudicial only if it arouses the jury's hostility or sympathy for one side or the other without regard to its probative value. The court went on to say that if it confuses or misleads the trier of fact or if it unduly distracts from the main issues, it is unfairly prejudicial. *State v. Strizich 2021 MT P34, citing State v. Madplume 2017 MT 40*

The *Strizich supra* court goes on to summarize the law by stating: " Relevant evidence 'maybe excluded if it probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury… citing Rule 403 M.R. Evid.' *Strizich P34 Supra.*

Exhibit "8" with its characterization of evidence collected as "grow" meets all of criteria set out in Rule *403 M. R. Evid.* and the *Strizich supra* case for reasons to be excluded: it has no probative value as to the issues before the court, creates hostility, confuses the jury and misleads them as to the issues before them.

Moving on to Issue 4, which focuses on the Screenshot of the desktop/home screen, which is State's "Exhibit 11". *Dist. Ct. Doc. 75* This exhibit and its contents fall in the same category of non-probative, prejudicial evidence that the Rules of Evidence are designed to allow to be excluded.

Defense counsel argued his objection to the admission of State's "Exhibit 11" on page 219 of the trial transcript at line 5 – 25 and line 1 – 3 on page 220.*Trial Trns. P.219 l. 5-25 -P. 220 l. 1-3.*

Agent Johnsrud testified extensively to what was depicted on the exhibit and what he found on the desktop/home screen of the Appellant's alleged computer and as to his report on it. The need to introduce this exhibit with the statement on it has little probative value, if any. At BEST it only supports what the agent found but lacks any additional probative value. The statement on its face on the other hand has no

probative value as to the case and only incites prejudice and confuses the jury. *Strizich supra.*

Rule 404(b) of the Montana Rules of Evidence specifically prohibits the admission of prior crimes, wrongs or acts "to prove the character of a person in order to show action in conformity therewith. *State v. Colburn, 2018 MT 141 P12.* While the rule allows the same evidence to admitted for reasons other than propensity, none of those exceptions for admission under Rule 404(b) of the Montana Rules of Evidence was offered by the State at the time the evidence was offered and now are not applicable here. The State should not be allowed to later argue for a use of the evidence. One can seemingly argue that the State offered the exhibit to support the testimony of its witness to the extent of what he found that was relevant on the desktop/screenshot, but the State had to know that it created evidence that the jury could understand as pointing to the propensity of the Appellant to commit the crime alleged. This exhibit is nothing but inflammatory or unfairly prejudicial, as protected against in Rule 403 of the Montana Rules of Evidence. This evidence carries no additional proof or probative value that has not been established by the

evidence found in the testimony of the State's witness in direct examination.

By allowing this evidence in, the State gets a gold mine of inadmissible propensity evidence at the price of a innocuous reference to some previously testified to file fold shortcuts. After a balancing test under 403 and 404 of the Montana Rules this Court must find the denial of the objection of defense counsel is erroneous.

ISSUE 5; This Court in the case of *State v. Cunningham 2018 MT 56* recognized and applied to that case the "Cumulative error doctrine" The Cunningham Court at P.33 of its opinion stated that the doctrine mandates reversal of a conviction where numerous errors when taken together have prejudiced the defendant's right to a fair trial. *State v. Hardman, 2012 MT 70 P. 35 Kills On Top v. State, 279 Mont. 384, 392.* The *Cunningham* Court also expressed the concept, that two or more harmless errors can prejudice the Defendant as any reversible error. *Cunningham Supra P. 32 Kills On Top v. State, 279 Mont. 384, 392.*

The *Cunningham* Court recognizes the effect of multiple errors on a fair trial but only after a showing of prejudice. In this case prejudice is first found in the denial of the order to compel the State to provide access

to the hardware of the computer, even though the Defendant had agreed to be controlled and had established a substantial need. He could only build his defense, if certain markers or indicators were on the computer and access to the hardware was necessary to determine that. The State had full control over the information that it planned on convicting the Appellant along with and the source of that information, the hardware. Liken to a crime scene, the hardware contained all the hard evidence but with the denial of access the defense could not examine it for the purposes of building a defense. This placed the defense on an uneven playing field forcing it to develop its defense with one hand tied behind its back.

This is similar as to the facts in *Cunningham Supra*, where without the blocked statements, this Court found that Cunningham could not completely establish his defense *Cunningham P.33.* Here the Appellant could not independently establish facts that would support his denial of guilt. The sources of all of the alleged facts were in State control.

As to the admission of the Search Warrant Evidence Inventory, the Court allowed direct evidence that met the very purpose of Rule 403 and 404 and this is avoid confusion, hostility and the jury being misled. The evidence inventory was all the above. The inclusion of the "grow" category

placed emphasis on the implied drug activity that could have been happening in the house.

When one includes the Screen shot of the desktop, with its irrelevant statement on its face, to the wrongfully admitted evidence inventory, the Appellant' right to the presumption of innocence is destroyed, or at least severely damages. All of this wrongfully admitted evidence does not go to proof of the charges at trial but evidence that goes to his character, when he has not placed his character at issue. A fair inference can be drawn that this evidence painted the Appellant to the jury as a drug using "twisted f**k!, and thus a person capable of abusing children.

The Doctrine of Cumulative Error must be applied here and it calls for the setting aside of the verdict and at least a call for a new trial.

CONCLUSION

Based upon the arguments above the Appellant is entitled to a have this matter dismissed solely on the violation by the State of Appellant's right to a "speedy trial". To allow the State to do nothing for a period of over 1500 days, and then come to the trial court and repeat is performance and do nothing again in support of its position, even though

required by law and then follow up with another period of inactivity, until at its convenience a trial is held, all while the Appellant suffers in jail awaiting a verdict calls for the dismissal of this case. The erroneous actions of the trial court, when taken together, should require at a minimum a new trial.

Respectfully submitted this 9th., day of May, 2025.

/s/ Gregory E. Paskell
Gregory E. Paskell
Attorney at Law
For the Appellant
21500 Cypress Way Ste. C
Lynnwood, Washington, 98036

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed in proportionately spaced Century Schoolbook text typeface of 14 points, is double-spaced except for footnotes and for quoted indented materials; and the word count calculated by Microsoft Word for Windows is 9226 words, , excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures and any appendices.

/s/ Gregory Paskell
Gregory E. Paskell

CERTIFICATE OF SERVICE

APPENDIX

Judgement and sentence of the Court dated July 11, 2023 and filed July 20, 2023.

CERTIFICATE OF SERVICE

I, Gregory E. Paskell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-09-2025:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Jody (Joe) W. Coble (Attorney)
PO Box 899
Choteau MT 59422
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Michael Todd Smith
Service Method: eService

Electronically Signed By: Gregory E. Paskell
Dated: 05-09-2025