

FILED

07/01/2025

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 25-0459

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.

ANTHONY LEE WEGNER,

Petitioner,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY, THE HONORABLE ASHLEY HARADA,

Respondent.

**PETITION FOR WRIT OF SUPERVISORY CONTROL AND REQUEST
FOR IMMEDIATE STAY**

APPEARANCES:

JOSEPH GORMAN

Gallinger & Stockdale Law Firm
1004 Division St.

Billings, MT 59101

HONORABLE ASHLEY HARADA

District Court Judge

P.O. Box 35029

Billings, MT 59101

ATTORNEY FOR PETITIONER

RESPONDENT

I. INTRODUCTION

This petition for supervisory control arises from a matter currently pending in District Court of the Thirteenth Judicial District County: *State v. Wegner*, DC-2021-1232. Anthony Wegner petitions the Court to issue a writ of supervisory control directing the Honorable Ashley Harada to reverse the denial of his post-trial Motion to Dismiss.

Additionally, Anthony Wegner requests an immediate stay of the lower court orders and proceedings. *See* Mont. R. App. P. 14(7)(c) (authorizing this Court to grant such a stay).

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 24, 2021, a Motion for Leave to File Information with Supporting Affidavit as well as an Information were filed against Anthony Wegner alleging Count I: Failure to Stop or Remain at Accident Scene Involving Death or Serious Bodily Injury and Count II: Tampering With or Fabricating Physical Evidence related to an accident on January 1, 2021.

An Amended Information was filed and accepted by the court on September 26th, 2023, adding a new Count III: Negligent Homicide. A second Amended Information was filed and accepted by the court on July 22, 2024, which modified the factual wording of Count III: Negligent Homicide.

Prior to trial the prosecution endorsed Dr. Walter Kemp, State Medical Examiner, as an expert to testify to the injuries sustained by the victim as well as the cause of death. As part of this disclosure the prosecution provided a written postmortem examination report prepared by Dr. Walter Kemp. (**Exhibit A**) Dr. Kemp's report never mentioned the speed of any vehicles related to injuries he observed, no mention of Dr. Kemp having training or education to provide opinions about speed relating to specific injuries or any opinion about the circumstances which caused injuries he observed.

The case proceeded to trial on July 29th, 2024.

The State called crash investigator Officer Gabrielle Denio to testify about the steps that were taken during the investigation. Officer Denio testified that she drove the crash scene to approximate Mr. Wegner's speed at the time of the accident. She concluded he was traveling approximately 50 MPH. (**Exhibit B, p. 81, ll. 8-13**) Detective Sergeant Tony Jensen was also called as witness by the State. His testimony was related to information he obtained from the crash data recorder in Mr. Wegner's vehicle. He testified that Mr. Wegner was traveling at 77 miles per hour at the time of the accident. He also testified that he could not state when, where, or what occurred that caused the crash data recorder to record this speed. (**Exhibit B, p. 137, ll. 20-24**)

On the third day of trial the prosecution disclosed new information and a new opinion of their expert, Dr. Walter Kemp. Dr. Kemp was now going to testify regarding a specific speed and range of speeds that caused a specific injury to the victim. This was new information and a new opinion the prosecution had not disclosed to the defense until the third day of trial.

This information and opinion were shared with the prosecution by an email from Dr. Kemp on the Friday before the trial began on Monday.

This email contained a partial quote from one textbook titled *In Forensic Medicine of the Lower Extremity* (Rich, Dean, Power, eds., Humana Press 2005).
(Exhibit C)

After the trial defense counsel obtained a copy of *In Forensic Medicine of the Lower Extremity* (Rich, Dean, Power, eds., Humana Press 2005) referred to by Dr. Kemp to form his opinion.

Discovering the full sentence Dr. Kemp relied on stated “At speeds higher than 90-100 km/h(60 mph) inguinal skin ruptures (Fig.32) usually are present (they never occur below 50 km/h = 30 mph) **and the limbs often get amputated (Fig. 33) as the limb is pulled under the front bumper of the car and disrupted due to the pulling by the upper body part thrown over the car-front (the disrupted distal limb may still be held by the skin or clothes and be completely severed during the “somersault” over the car – sometimes the limb is found very far from the**

hit site.)" *In Forensic Medicine of the Lower Extremity* (Rich, Dean, Power, eds., Humana Press 2005) at p. 338 (emphasis added).

There was no amputation of any limbs of the victim in this case.

At no time was any portion of this statement or information provided to Mr. Wegner's defense team prior to the start of trial.

The court allowed Defense Counsel to conduct a brief *voir dire* of Dr. Kemp prior to his testimony regarding his new undisclosed opinion. During this *voir dire* Dr. Kemp disclosed he had no experience in accident reconstruction, the source of his new knowledge was a book he couldn't provide the title of, he only read it based on a specific question the prosecution asked him in trial prep. He had no specialized experience, training or knowledge to qualify him as an expert to testify regarding speed relating to specific injuries.

Mr. Wegner objected to Dr. Kemp being allowed to testify regarding opinions that had not been previously disclosed to the defense. In addition, Defense Counsel argued that Dr. Kemp, as a medical examiner, was not qualified to offer opinions regarding the speed required to cause specific injuries.

Over the defense's objection, the court allowed Dr. Kemp to testify about his unqualified, new opinion that speeds in excess of 70 miles per hour caused the victims injuries, a fact never previously disclosed to defense counsel.

At the close of the prosecution's case, 3 witnesses had testified regarding Mr. Wegner's speed at the time of the accident. The crash scene investigator, Officer Denio, testified it was about 50 miles per hour, Sgt. Jensen testified the crash data recorder had recorded a speed of 77 miles per hour at some point and the new testimony of Dr. Kemp that it was more than 70 miles per hour.

Based on the new opinion from Dr. Kemp bolstering Sgt. Jensen's testimony regarding a speed of 77 miles per hour, Mr. Wegner felt he had to give up his 5th Amendment right not to testify in order to provide evidence regarding his speed being closer to 50 miles per hour.

In the prosecution's closing statement, they referred to Dr. Kemp's new opinion multiple times throughout their initial closing and their rebuttal closing.
(Exhibit D, p. 4 ll. 11-12, p. 13-14 ll. 20-02, p. 17 ll. 6-14)

After approximately 7 hours of deliberation the jury reached a verdict on August 1st, 2024, finding Mr. Wegner; Not Guilty on Count I: Failure to Stop or Remain at Accident Scene Involving Death or Serious Bodily Injury and Count II: Tampering With or Fabricating Physical Evidence. They returned a verdict of Guilty on Count III: Negligent Homicide.

After the verdict was returned, defense counsel filed a motion for a new trial based on the previously undisclosed opinions of Dr. Kemp. **(Exhibit E)** The

prosecution in their response to Mr. Wegner's motion for a new trial included an email they received from Dr. Kemp the Friday before trial was to begin. (**Exhibit F**)

Included in the email from Dr. Kemp was the partial quote he found in a book, plus the title of the book and authors. Once defense counsel became aware of the title of the book they ordered a copy of the book. While reading the book defense counsel noted multiple statements that were exculpatory or impeachment of the testimony of Dr. Kemp. This information was not available at the time of Dr. Kemp's testimony due to the prosecution failing to disclose it as required by Mont. Code Ann. § 46-15-327.

The court conducted a hearing on defense counsel's Motion for a New Trial on October 7th, 2024. At this hearing, defense counsel requested leave from the court to file a motion for discovery violations under *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S. Ct. 1194. The court granted the defense's request granting leave to file a motion for *Brady* violations.

Defense's *Brady* motion was fully briefed on December 13th, 2024. (**Exhibit G**) The court issued their ruling on defense counsel's motion for new trial and *Brady* violations on April 10, 2025. (**Exhibit H**)

In the court's order, Mr. Wegner's request for a new trial was granted, but the court denied Mr. Wegner's request to dismiss for *Brady* violations.

However, the Court failed to apply the correct legal standard under Montana law when denying defense counsel's *Brady* motion.

This petition follows.

III. SUMMARY OF THE ARGUMENT

The district court applied an incorrect legal standard when it denied Mr. Wegner's Motion to Dismiss for *Brady* violations. The law provides for a *Brady* violation to occur three elements must be met: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different.

The district court's order for denying Mr. Wegner's Motion to Dismiss for *Brady* violations states the court was "not entirely certain" it would have resulted in a different outcome. The court fails to reach any conclusion about the reasonable probability of a different outcome, stating "The Court is not in a position to speculate on that issue."

This Court should issue a writ of supervisory control and order the lower court to dismiss this case in accordance with Montana law.

IV. ARGUMENT

A. Supervisory control is necessary.

This Court supervises Montana's other courts. Mont. Const. Art. VII, § 2(2). This Court may issue a writ of supervisory control "when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions," and when the case either involves "[c]onstitutional issues of state-wide importance" or the lower court is proceeding under a mistake of law and is causing a gross injustice." Mont. R. App. P. 14(3)(a)-(b). Judicial economy and inevitable procedural entanglements are appropriate reasons to exercise supervisory control where a mistake of law will affect virtually all aspects of the case..." *Redding v. Mont. First Judicial Dist. Court*, 2012 MT 144A, ¶18, 365 Mont. 316, 281 P.3d 189. In *Covington v. Mont. Eighth Jud. Dist. Ct.*, OP 23-0460, 2023 WL 6141567, at *3 the Court exercised supervisory control stating "...rather than furthering the cause of justice, the denial of the motion to dismiss has delayed it."

Supervisory control is appropriate in this case for several reasons. First, the lower court's ruling denying the motion to dismiss is a mistake of law and causing gross injustice. Second, the lower court's ruling involves a defendant's constitutional right to have all evidence disclosed prior to proceeding to trial. Third, the case presents an issue of statewide importance because the same judge presides over other criminal cases where similar issues have and will continue to arise. Fourth, the

granting of a new trial and not a dismissal is not judicial economy and will cause further procedural entanglements.

Finally, this is a matter of urgency as Mr. Wegner will be unfairly prejudiced by having to undergo a new trial. Mr. Wegner's waiver of his 5th Amendment rights and testifying in his first trial was directly related to the State's violation of their duties under Mont. Code Ann. 46-15-322. If Mr. Wegner is forced to undergo a second trial, the State will be rewarded for their failure to comply with their obligation to disclose evidence to a defendant because Mr. Wegner felt compelled to forsake his 5th Amendment rights.

In addition, Mr. Wegner was found not guilty by a jury of Count I: Failure to Stop or Remain at Accident Scene Involving Death or Serious Bodily Injury and Count II: Tampering With or Fabricating Physical Evidence. Now Mr. Wegner is forced to face a retrial for Count III: Negligent Homicide. Which will cause a new jury to hear that Mr. Wegner left the scene of an accident resulting in death. Resulting in only 2 possible outcomes at the new trial – no explanation provided to the jury for why Mr. Wegner left the scene or the jury being told that Mr. Wegner was tried on those matters and found not guilty, which is unfairly prejudicial towards him and the judicial system.

For these reasons, it is appropriate for a Writ of Supervisory Control be issued by this Court.

B. The district court proceeded under a mistake of law causing gross injustice by denying the defense's motion for dismissal.

This Court has held that in order to establish a violation under *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 a defendant must establish: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *State v. Severson*, 2024 MT 76, ¶ 16.

The district court held that the State possessed evidence favorable to the defense and that the State suppressed the favorable evidence by not disclosing it to the defense. (**Exhibit H @ 10**)

Thus, the only part in dispute is the third element whether the evidence had a “reasonable probability” the outcome of the proceedings would have been different.

The district court’s ruling states “At this stage, the Court is *not entirely certain* that disclosure of the book would have resulted in a different outcome. The Court is not in a position to speculate on that issue. The situation does not undermine confidence in the verdict so as to require dismissal of the case.” (**Exhibit H, emphasis added.**)

While the legal standard of “reasonable probability” is a subjective standard, this Court has further defined it to mean, “could reasonably be taken to put the whole

case in such a different light as to undermine confidence in the verdict.” *State v. Weisbarth*, 2016 MT 214 ¶ 26 (quoting *Kyles v. Whitley*, 514 U.S. 419 (1995)).

The district court applied a higher legal standard of “entirely certain” instead of the correct standard of “reasonable probability” which is a mistake of law.

The district court stating it is not “entirely certain” implies they have a level of certainty that there would have been a different outcome. Any level of certainty rises to the lower standard of a “reasonable probability” that the outcome would have been different.

Additionally, the district court after stating they were not able to speculate on the issue of reasonable probability, then proceeds to speculate that “the situation does not undermine confidence in the verdict so as to require dismissal of the case.” If the district court is not able to speculate on the element of reasonable probability, how is the district court able to make a legal conclusion that “[T]he situation” does not undermine the confidence in the verdict.

V. CONCLUSION

It is necessary and appropriate for this Court to exercise supervisory control. The trial court applied an incorrect legal standard to their analysis of the issues. In addition, the trial court, by their own admission, was unable to speculate on the issue of a different outcome. For these reasons, Mr. Wegner petitions this court to issue a

writ of supervisory control directing the Honorable Ashley Harada to grant his motion to set aside the verdict and dismiss with prejudice.

RESPECTFULLY SUBMITTED this 1st day of July 2025.

Gallinger & Stockdale Law Firm
1004 Division St.
Billings, MT 59101

By: /s/ Joseph M. Gorman

Joseph M. Gorman
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b) of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is not more than 4,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance. The word count is 2,540.

/s/ Joseph M. Gorman
Joseph M. Gorman

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing was served by the Montana Courts e-filing system on the 1st day of July 2025, upon the following interested parties:

Honorable Ashley Harada
District Court Judge

Jesse Erickson
Yellowstone County Attorney's Office

/s/ Joseph M. Gorman
Joseph M. Gorman

TABLE OF CONTENTS OF EXHIBITS

	<u>Page</u>
Exhibit A – Postmortem Examination Report	3
Exhibit B – Transcript of Testimony of Ofc. DeNio and Sgt. Jensen.....	3
Exhibit C – Email from Dr. Walter Kemp to Prosecution.....	4
Exhibit D – Transcript of Proceedings Closing Argument – State of MT	6
Exhibit E – Defendant’s Motion for a New Trial	6
Exhibit F – State’s Response to Defendant’s Motion for a New Trial.....	7
Exhibit G – Defendant’s Motion to Set Aside Verdict and Dismiss with Prejudice.....	7
Exhibit H – Order Granting Motion for New Trial and Order Denying Motion to Dismiss	7, 11