In the Supreme Court for the State of Montana

Supreme Court No. DA 24-0705

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

LUCAS CHARLES SALLEE,

Defendant and Appellant.

Appellant's Opening Brief

On Appeal from the Montana Sixth Judicial District,
Park County, Hon. Brenda R. Gilbert, Presiding

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Statement of the Case

Mr. Sallee appeals from his conviction for Vehicular Homicide While Under the Influence. (Appendix A).

Mr. Sallee filed a timely notice of appeal and now requests this Court vacate his conviction and remand his case for a new trial.

Statement of the Issues

The district court erred when it denied Mr. Sallee's motions to dismiss based on the destruction or disposition of the blood and DNA evidence that was critical to his ability to defend himself against the charges.

The district court erred by allowing the State's DNA expert to testify at a pre-recorded deposition. This is especially true given how the deposition was conducted. In total, it violated Mr. Sallee's Confrontation Rights, and the jury's ability to evaluate the credibility of the witness.

Summary of the Arguments

Although an extreme remedy, a motion to dismiss the offense charged was warranted in Mr. Sallee's case. Through a combination of

bureaucratic folly and a delayed charging decision, the State failed to retain and disclose evidence that was critical to Mr. Sallee's case. Further compounding the error was the district court's erroneous interpretation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its companion cases, as applied to the issues raised in Mr. Sallee's motions.

Even if the district court's order allowing the State to present a pre-recorded video deposition of a critical expert witness didn't violate Mr. Sallee's constitutional rights to confrontation, the execution of the deposition did. Mr. Sallee was denied both the right to confront the witness and the jury's full evaluation of the witness's credibility.

Statement of the Facts

October 18, 2020, "was a busy day for crashes." (Trial Tr. 601). Highway 89 between Yellowstone National Park and Livingston was icy, cold, and extremely slick. (Trial Tr. at 246; 772). When law enforcement responded to the accident involving Mr. Sallee and another vehicle, their own vehicles started to slide due to road conditions. (Trial Tr. 122; 772). In Montana terms, the roads were terrible. In technical terms, snow "was accumulating on the roadway kind of in the form of

slush. There was a layer of ice on the roadway as well underneath that layer of slush." (Trial Tr. 487). Law enforcement responded to "other crashes in the area" that day. (Id.)

That day, Mr. Sallee, a professional snowplow driver employed with Yellowstone National Park, finished plowing the Lamar Valley. Driving on bald tires, (Trial Tr. 527), he left work in his pickup and began the trip to Helena to visit his wife. (Trial Tr. 258). Before leaving, he consumed a "few" hard seltzers. (Trial Tr. 761).

As Mr. Sallee was traveling north, Wren Schultz and Della Plaster were traveling south in a minivan. (Trial Tr. 1254-55). According to MHP Trooper Tyler Brant, the accident investigator, Mr. Sallee's vehicle "left his lane and traveled into the other lane and collided with another vehicle traveling in the opposite direction." (Dec. 8, 2022, Evid. Hrg. Tr. at 43-44). Ms. Plaster was killed in the collision that ultimately involved three vehicles. (Trial Tr. 487).

A number of first responders and law enforcement officers encountered Mr. Sallee after the crash. Each had a different impression. Trooper Brant testified about his encounter with Mr. Sallee

through the rolled-down window of Mr. Sallee's vehicle. "I smelled strong, strong odor of a consumed alcoholic beverage coming from the defendant. His eyes were bloodshot." (Trial Tr. 488). Trooper Connor Wagner, on the other hand, did not "smell anything from" Mr. Sallee nor note any smell in his report, although he attributed that to illness. (Trial Tr. 739). Like Trooper Brant, Park County Sheriff's Office Sgt. Stoddard also encountered Mr. Sallee from outside the vehicle. He did not recall smelling alcohol. (Trial Tr. 822; 825). Trooper Justin Knapp, like Trooper Brant, maintained he could smell a strong odor of "a consumed alcoholic beverage" emanating from Mr. Sallee. (Trial Tr. 848).

When MHP officers requested Mr. Sallee be transported to the Livingston Healthcare center "as part of his implied consent blood draw," Sgt. Stoddard transported him. During the trip, Mr. Sallee "kept repeating 'that poor woman.'" (Trial Tr. 825). Despite the repeated utterances, Sgt. Stoddard still could not smell alcohol on Mr. Sallee and did not observe any signs of impairment. (Trial Tr. 825; 837). Sgt. Stoddard did not administer any standard field sobriety testing on Mr.

Sallee. (Trial Tr. 826).

Trooper Knapp did start to perform field sobriety testing of Mr. Sallee in the hospital parking lot, but he was directed to stop at the instruction of Trooper Wagner. (Trial Tr. 606-607). No breath test was conducted either. (Trial Tr. 607). Even Trooper Wagner, who encountered Mr. Sallee in the hospital before and during the blood draw, testified Mr. Sallee was not slurring his words. (Trial Tr. 778). Mr. Sallee agreed to the blood draw. (Trial Tr. 880).

Over two hours after the accident, Diana Raimondo drew Mr. Sallee's blood at the hospital, and two vials containing his blood were sent to the Montana State Crime Lab. (Trial Tr. 880-884; 975). There, the blood sample was tested by Doug Lancon. (Trial Tr. 966). Testing revealed Mr. Sallee's blood ethanol level to be 0.322 grams per 100 milliliters with a margin of error of plus or minus .023. (Trial Tr. 984). The State charged Mr. Sallee on April 26, 2021, over six months after the incident. (Dkt. 2).

Mr. Sallee retained counsel, Jami Rebsom, who represented him through the entirety of the district court proceedings. (Dkt. 6).

Vigorous motions practice ensued. One motion filed was a Motion to Dismiss based on a due process violation because the State had failed to preserve evidence and allow Mr. Sallee the right to obtain exculpatory evidence. (Dkt. 44). It had come to pass that, although two vials of blood were drawn at the hospital and submitted to the Crime Lab, by the time the defense sought independent testing and DNA testing of the blood, the Lab had destroyed all remaining evidence of the blood. (Id. at 3).

Calling the argument "convoluted," the State opposed the motion. (Dkt. 54 at 8). The State also took issue with Ms. Rebsom's recitation of facts that would ostensibly support dismissal. Chief among the factual disputes was the party at fault for the destruction of the remaining blood evidence. The State argued that, pursuant to protocol, "collected samples" "were destroyed after having been stored for one year." (Id. at 9). Therefore, the State asserted it was "disingenuous for Defendant to argue the State failed to preserve evidence." (Id.) "Counsel for Defendant had ample opportunity to request retesting of the specimens prior to the expiration of the one year retention schedule." (Id. at 10).

The State also disputed that the evidence met the legal standard set forth in "*State v. Robertson*, 2019 Mont. 99, § 32." (Id. at 9) (citation errors in original). After block-quoting the paragraph from this Court's decision in *Robertson*, the State summarily asserted: "In this case, the State, via the Montana State Crime Lab, retained the subject biological specimens for over one year, after which the samples were destroyed, pursuant to Crime Lab Protocol. Counsel for Defendant had ample opportunity to request retesting of the specimens prior to the expiration of the one year retention schedule." (Id. at 10). "Further," argued the State while citing its own recitation of facts, "there is no evidence whatsoever that the evidence at issue would be exculpatory. Defendant admitted, during the course of the accident investigation, that he had consumed alcohol, and he knew it was wrong. *See*, recitation of facts set forth in the fact summary. Based on the foregoing[,] Defendant's Motion to Dismiss should be denied." (Id.)

However, the record indicates that Ms. Rebsom did notice both the State and the Court of her intention to test the sample far before the sample was destroyed. At the Jury Trial Verification hearing on

October 4, 2021, Ms. Rebsom indicated she had "filed a request to have the blood tested. The lab that I'm going through needs to directly obtain that from wherever it's being held, and I have not heard back from the State where that location is, if it's with the highway patrol, sheriff, or crime lab." (Oct. 4, 2021 Hrg. at 15). The State, represented by Park County Attorney at that time, ultimately did not dispute Ms. Rebsom's assertion that she had filed the request.

An evidentiary hearing on the Motion to Dismiss was eventually held on December 8, 2022. No witnesses were called for the defense. Regarding the motion to dismiss, the State called Elizabeth Smalley, a toxicologist and "breath/alcohol supervisor" for the Crime Lab. (Dec. 8, 2022, Tr. at 7). Ms. Smalley testified that parties are notified of the Lab's "retention and disposal timelines" at the bottom of each of the reports. (Id. at 10-11; Appendix B). Ms. Smalley testified the disposal clock begins to tick the date the Lab receives the sample. (Id. at 10).

Testimony at the hearing revealed the Lab received the DUI kit on Mr. Sallee on October 22, 2020. (Appendix C at 5). 6 months and 4 days of the disposal deadline had already elapsed by the time the State

charged Mr. Sallee on April 26, 2021. By the time Ms. Rebsom appeared and Mr. Sallee was arraigned, 6 months and 18 days had passed. According to the State, the toxicology report, which also contained the disposal policy, was provided to Ms. Rebsom "in May of 2021). (Dec. 8, 2022, Tr. at 126). The sample was destroyed by the lab on December 7, 2021. (Id. at 13). According to Ms. Smalley's records, Ms. Rebsom did not contact the Lab until June 2022, almost six months after the sample had been destroyed. (Id. at 15).

On cross-examination, Ms. Smalley noted that no one from "Montana Law Enforcement in this case" had contacted the Lab to ask that the blood sample, or any other samples regarding Mr. Sallee be retained. (Id. at 22). Ms. Smalley was also not aware if "Mr. Sallee or anybody on his behalf had reached out to law enforcement or a County Attorney regarding the location of the blood sample before June 2022" stating "that's not something we, as a crime lab, would normally be informed of." (Id. at 23).

On re-direct examination by the State – presented by a deputy attorney general acting as a special deputy county attorney – Ms.

Smalley admitted the Lab does "not have clear direction from the Attorney General's Office on [the Lab's] policies and procedures regarding this information. Previously a Court order was required to get anything more than the report, the chain of custody, and some other basic information. And I believe that the Attorney General's Office is moving towards a different policy on the matter of which I do not have complete clarification at the moment." (Id. at 24-25).

During the evidentiary hearing, Ms. Rebsom stated in "April and June[1], I was reaching out to the County Attorney about, where is the blood, so that I could have my lab - -" (Id. at 122). When pressed by the court, however, she did concede she did not make a specific request for preservation of the evidence. (Id. at 123).

Unsurprisingly, the State faulted Ms. Rebsom for the unfortunate timing surrounding the disposal of the blood evidence. "So, based on the timelines, that gave Defense six months of notice that it would only be retained for a year from that December Date. So, it gave six months of notice that it would be kept for this time." (Id. at 126).

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[1]Presumably April and June 2022.

In response, Ms. Rebsom argued: "I think the important point here is that it has not been the Defendant's burden in this case to preserve the State's evidence. That is on the Government. So to try to shift that burden today, would be complete Constitutional error." (Id. at 135). Not only was Ms. Rebsom contesting the blood-alcohol level but, had the blood been retained, she "wanted a DNA test to confirm this was even Mr. Sallee's blood because the Court did not hear any testimony today about Chain of Custody being preserved on that blood. And, in fact, I don't believe that that is something the State has, but you did not hear evidence of that today." (Id.).

The court denied Mr. Sallee's motion to dismiss on December 20, 2022. (Appendix C). Citing *Robertson* and other cases, the court

> conclud[ed] that the State did not possess the evidence at issue. The blood sample remained in the possession of the Crime Lab. The State did not suppress the evidence as either party had an equal right to request that the Defendant's blood sample be retained beyond the retention policy period of which both parties had notice. Finally, the Defendant did not establish that there is a reasonable probability that the outcome of the proceedings would have been different if the blood sample would have been retained longer by the Crime Lab. The Court concludes the Defendant has failed to establish a violation under *Brady* and *Robinson* as to the Defendant's blood sample.

(Appendix C at 9-10).

On September 11, 2023, defense counsel filed a "Second Motion to Dismiss" alleging "Due Process Violation, Failure to Preserve Evidence as Statutorily Required." (Dkt. 117). Although similar in nature, this Motion relied on *Mont. Code Ann. § 46-21-111.* Defense counsel generally argued *Mont. Code Ann. § 46-21-111* mandates the retention of biological evidence the agency has a reason to believe contains DNA material for three years. Therefore because blood contains DNA evidence, the three-year retention mandate in *Mont. Code Ann. § 46-21-111* trumps the Lab's one-year retention policy.

The Motion also re-raised *Brady* arguments and this Court's decision in *State v. Colvin*, 2016 MT 129, 383 Mont. 474, 372 P.3d 471.

The factual portion of the motion telegraphed why DNA testing on the blood sample attributed to Mr. Sallee may have proven exculpatory.

> On or about October 18, 2020, Wren Robinson and Lucas Sallee's blood was sent to the Montana State Crime Lab for analysis after a vehicle accident, which occurred at approximately 3:19 p.m. on a snowy, icy highway in Park County, Montana. Mr. Sallee's blood was reported drawn at 5:40 p.m. Mr. Robinson's blood was drawn around the same time from the same hospital. A report was generated on December 14, 2020, which stated a result of ethanol in blood

> at a level of .322 + or - .023 for Sallee and no Ethanol detected for Robinson. No person by the name of Robinson was involved in the accident.

(Dkt. 117 at 1).

The State objected arguing, in part, that the motion should be taken as a motion for reconsideration, which is not permitted by state law. (Dkt. 120 at 4). The State also reiterated the district court's prior ruling, including that Mr. Sallee had "failed to establish there is a reasonable probability that the outcome of the proceedings would have been different if the blood sample had been retained." (Id. at 8). Finally, the State argued *Mont. Code Ann. § 46-21-111* was inapplicable because it is codified in the postconviciton chapter of Title 46 and, "even arguendo, statutory violations do not implicate the exclusionary rule." (Id. at 9). As to this latter argument, the State relied on this Court's decision in *State v. Kelm*, 2013 MT 115, 370 Mont. 61, 300 P.3d 687 for the principle that "the exclusionary rule will not apply to violations of statutory requirements unless the violation affects the accused's substantial rights." (Id. at 10) (citing and quoting *Kelm*, ¶ 24).

As with the first, the court denied Mr. Sallee's motion, although

this time without a hearing. (Appendix D). Like the State, the court also deemed this second motion "in effect a Motion to Reconsider." (Id. at 3). The court concluded "it is disingenuous for the Defendant to rely upon the Post-Conviction Relief statutes in this case. §§ 46-21-110 and 111, MCA pertain to Petitions for DNA testing in proceedings for Post-Conviction Relief. But the fact remains that no provision of § 46-21-111, MCA can contravene the Defendant's opportunity, at the pre-trial stage of this case, to request the Lab retain the sample, which the Defendant failed to do." (Id. at 4).

Almost on the eve of trial, Mr. Sallee filed a motion asking the court to vacate the trial and set the matter for a change of plea hearing. (Dkt. 144). Ultimately, the court would reject the plea agreement, Mr. Sallee would withdraw his prior plea, and the matter returned to the trial track. (Dkt. 164).

Before trial, the State also filed a "*Norquay* Motion." (Dkt. 174). The motion sought permission from the court to conduct a deposition of the State's DNA expert, Stephan Antonich, on the grounds that Mr. Antonich's wife was apparently "under doctor's order not to be more

than 15 minutes from the hospital in Missoula because Stephen's wife is pregnant with a high-risk pregnancy." (Id. at 3). Later, in the same paragraph, the State also asserted that "Stephens *and* his wife are under doctor's orders to not travel far from the Missoula area . . . ." (Id.)(emphasis added).

Despite Mr. Sallee's objection, the court granted the order allowing the deposition. (Appendix E). In light of the court's order, Ms. Rebsom moved the court to continue the trial and to allow her to participate in the deposition of Mr. Antonich remotely. The former was denied, but the latter was granted. (Dkt. 181). The deposition was a video deposition taken on August 14, 2024, and is State's Ex. 69 in the district court record. Mr. Antonich is the only individual visible and the video only captures the upper 20 percent of his body, e.g. from about the armpits up to his head.

While Ms. Rebsom identifies herself as a participant in the deposition, Mr. Sallee is not referenced and both this Court and, no doubt the jury, were left to wonder if he was present for this critical stage of his own criminal trial.

Mr. Sallee's trial began on August 26, 2024, and ended with his conviction on August 30, 2024. The transcript reflects the trial was not a model of efficiency. 18 lines into the transcript of the defense's opening statement, the parties were already in chambers discussing evidentiary issues regarding the preservation of the blood and crime lab policy. (Trial Tr. 253). At issue was a prior ruling the court rendered on a motion *in limine* by the state two days before trial began. (Dkt. 206). Among its other rulings, the court precluded Mr. Sallee from cross-examining "the Montana Crime Lab Witnesses with questions regarding the 'intentional destruction of the blood,' 'failure to preserve the blood' or 'failure to follow Montana law regarding preserving the blood.' The Defendant is further precluded from referencing such allegations in voir dire or in argument to the jury." (Id. at 10). As clarified at trial, defense counsel was allowed to argue to the jury and

elicit testimony that the blood was disposed of but not that it was destroyed. (Trial Tr. 256-257).

A short time after the parties reconvened to continue the defense opening they were back in chambers again on the topic of proximate cause and third party guilt. This, too, was an issued decided by the court's order on the State's motion *in limine*. The in-chambers conference was precipitated by defense counsel's argument that a third vehicle in the crash, driven by Mr. Storedall, was also traveling southbound behind Ms. Plaster's vehicle. Ms. Rebsom argued to the jury "[p]olice reports will indicate that Mr. Storedall was driving too fast for conditions - -" before the State objected. (Trial Tr. at 260).

In chambers, Ms. Rebsom argued the State – and by extension the court's order – "completely eliminate[d] any defense Mr. Sallee has." (Id. at 262). After the court reaffirmed its prior ruling, Ms. Rebsom inquired: "So we don't get to mention anything about Mr. Storedall traveling too fast for conditions or too closely, as reported by law enforcement?" (Id. at 264). The State clarified its objection was to the "argument that this is Mr. Storedall, it is - - Mr. Storedall's fault, not

the defendant's, because he was following too closely. That's proximate cause." (Id.) The court agreed "there's no way to exclude those facts from coming in, and so I think Ms. Rebsom is entitled to point out what she believes the facts will show . . .from those witnesses, but [she] can't go the extra step and say whose fault [she] think[s] the accident was." (Id. at 266).

While this is all very well and good, the matter became more complicated when the jury was instructed that "[c]onduct is the cause of a result if without the conduct the result would not have occurred." (Dkt. 223, Instruction 22). Then, in rebuttal closing the State raised an argument regarding Mr. Storedall and that he was not the proximate cause of the accident.

Disregarding the lesser-included-offense of negligent homicide, the jury convicted Mr. Sallee of Vehicular Homicide While Under the Influence. (Dkt. 220; Sent. Tr. 78). He was ultimately sentenced to twenty years to the Montana Department of Corrections for a period of 20 years, with 10 of those years suspended. The court restricted his

eligibility for parole for a period of 5 years.[2] (Appendix A).

Standards of Review

"We review *de novo* a district court's grant or denial of a motion to dismiss in a criminal case. *State v. Willis*, 2008 MT 293, ¶ 11, 345 Mont. 402, 192 P.3d 691; *see also State v. Allen*, 2016 MT 185, ¶ 6, 384 Mont. 257, 376 P.3d 791.

Because the district court's decision in Mr. Sallee's case implicates his fundamental right to face-to-face confrontation of witnesses, the question before the Court is a constitutional one. This Court exercises "plenary review of constitutional questions and reviews a district court's interpretation of the *Sixth Amendment* to the United States Constitution, *U.S. Const. amend. VI*, and *Mont. Const. art. II, § 24*, *de novo*." *State v. Martell*, 2021 MT 318, ¶ 9, 406 Mont. 488, 500 P.3d 1233.

Arguments

I. The District Court Erred By Denying Mr. Sallee's

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[2]Neither the State nor Mr. Sallee objected to this sentence. The state was ordered to prepare the written judgment, which it did. Mr. Sallee does not appeal any aspect of this sentence in the proceeding before this Court. *Mont. Code Ann. § 46-20-701.*

Motions to Dismiss

> *JUSTICE KENNEDY: I think you misspoke when you . . . were asked what is . . . the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a Brady violation. You don't determine your Brady obligation by the test for the Brady violation. You're transposing two very different things.*

Smith v. Cain, SCOTUS No. 10-8145, Oral Argument Tr. at 49[3]

The district court twice denied Mr. Sallee's motions to dismiss. Each time it did so based largely on an argument put forth by the State premised on a misunderstanding of *Brady*. The court adopted the State's reasoning but, like the state attorney at the oral argument in *Smith v. Cain*, 565 U.S. 73 (2012), both the court and the State here transposed two very different things. Also critical to the court's resolution of the motions was its perception that Ms. Rebsom was at fault because the defense had "equal access to the Report and both parties had the right to communicate with the State Crime Lab to request that the Defendant's blood sample be retained beyond the usual

[3]https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf

time frame." (Appendix C at 9; see also: Appendix D at 3). The court concluded the evidence was not in possession of "State," i.e., the prosecution's possession and control. Finally, and relating to Mr. Sallee's second motion to dismiss, the court concluded Mr. Sallee's reliance on *Mont. Code Ann. § 46-21-111* was inapplicable because "no provision of § 46-21-111, MCA can contravene the Defendant's opportunity, at the pre-trial stage of this case to request the Lab retain the sample, which the Defendant failed to do." (Appendix D at 4).

The holding in *Brady* is simple.

> We now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87. "Favorable" is the term used in *Brady*. In fact, the term "exculpatory" appears nowhere in the Majority opinion. Rather, it appears in the concurring opinion of Justice White and, even then, it appears only in a quotation from the lower court's decision. *Brady*, 373 U.S. at 91. "Favorable" is a much broader term than "exculpatory" and, consequently, *Brady* and its progeny mandate the

disclosure of information beyond what is merely deemed "exculpatory." Evidence is favorable if it helps the defendant or hurts the prosecution, including by impeachment of one of its witnesses. *See United States v. Bagley*, 473 U.S. 667, 676 (1985).

The scope of a prosecutor's disclosure obligation – versus the analysis on whether that obligation has been violated – extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf . . ." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Courts have declined to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team which includes both investigative and prosecutorial personnel. *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). "A contrary holding would enable the prosecutor to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Martinez v. Wainwright*, 621

F.2d 184, 188 (5th Cir. 1980) (citing *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977)).

The analysis of a *Brady* violation is distinct. If, after a trial concludes, an allegation of a *Brady* disclosure violation arises, the focus turns toward materiality. Withheld evidence is material if its admission *at trial* would have created a reasonable probability of a different outcome, which is demonstrated when the suppression undermines confidence in the trial's outcome. *Kyles*, 514 U.S. at 433-434. "Materiality" and whether there is a "reasonable probability of a different outcome" are backward-looking factors. Neither have any place in a pre-trial dispute surrounding whether the information should be disclosed in advance of trial.

Notwithstanding this clear distinction, both the state and the district court in Mr. Sallee's case adopted the *Brady* violation standard when evaluating the pre-trial motions. For example, the court began its analysis of *Brady* with a conclusion of law that a *Brady* due process violation occurs when the defendant establishes, among other things, "that the suppression prejudiced the defense." (Appendix C at 8).

Prejudice is a component of the materiality analysis and part and parcel of the analysis for a *Brady* violation. "The terms 'material' and "prejudicial' are used interchangeably in *Brady* cases. Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.' Thus, for *Brady* purposes, the two terms have come to have the same meaning." *Benn v. Lambert*, 283 F.3d 1040, 1053, n.9 (9th Cir. 2002).

The court also concluded as a matter of law that "[a]s a general rule, the State's obligation to disclose information under *Brady* does not impose a duty on the prosecutor or investigators to learn of information possessed by other jurisdictions or agencies that have no involvement in the investigation or prosecution at issue." (Appendix C at 8) (citing *McGarvey v. State*, 2014 MT 189, ¶ 16; *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996)). This is certainly accurate in the abstract, but the holdings are inapplicable in a situation where the Montana Crime Lab is in the jurisdiction where Mr. Sallee's case was prosecuted and did participate in the investigation and prosecution.

Employees of the Lab testified about their investigations and conclusion at both the evidentiary hearings and the trial itself.

The blood at issue was taken from the hospital by Trooper Knapp and sent directly to the Montana Crime Lab. Montana law mandates cooperation of state agencies. *Mont. Code Ann. § 44-2-116* ("All state departments and agencies shall cooperate with such agents and assisting personnel in providing transportation and educational and laboratory facilities for their use when so requested."); *A.R.M. 23.2.204* ("Local, state, and federal law enforcement agencies will make every good faith effort to notify the appropriate law enforcement agencies concerning active investigations.")

Montana law defines "agent" as "a person appointed by the attorney general to conduct a criminal investigation and perform related duties within the department of justice." *Mont. Code Ann. § 44-2-111.* The Attorney General is "authorized to employ personnel necessary to perform function authorized under" the Montana Forensic Science System Act. *Mont. Code Ann. § 44-3-106.* The Forensic Science Division is a division of the Montana Department of Justice. *Mont.*

Code Ann. § 44-3-104; A.R.M. 23.1.101(1)(c)(iii). Therefore, while the court's conclusion in Mr. Sallee's case may not be an incorrect conclusion of law, it did make an incorrect finding of fact: The Montana State Crime Lab was most certainly involved in the prosecution of Mr. Sallee.

This erroneous factual conclusion leads to an equally erroneous factual and legal conclusion made by the Court: "This Court concludes that the blood sample was never in the State's possession and control." (Appendix C at 9). In fact, testimony from the evidentiary hearing highlighted just how intertwined the Office of the Attorney General and the Montana Crime Lab are. Ms. Smalley, testifying regarding the Lab's policies and whether a court order is required before the Lab can release information said:

> At this moment, we do not have clear direction from the Attorney General's Office on our policies and procedures regarding this information. Previously a Court order was required to get anything more than the report, the chain of custody, and some other basic information. And I believe that the Attorney General's Office is moving towards a different policy on the matter of which I do not have complete clarification on at the moment.

(Dec. 8, 2022, Hrg. at 25-26). While not referring to all policies of the Lab, Ms. Sweeney's testimony can be reasonably read to infer that the Attorney General's Office sets all policies for the Crime Lab, including the policy that requires disposal and destruction of samples, including ones reasonably suspected to contain DNA, after one-year from receipt by the Lab.

The court made a final error relating to its *Brady* analysis. "The Park County Attorney's Office has no supervisory control over the State Crime Lab." (Appendix C at 9). This factor is utterly irrelevant to the prosecution's *Brady* disclosure obligations. One of Ms. Rebsom's first acts as Mr. Sallee's counsel was to file a Motion for Discovery. (Dkt. 7). This motion, filed before the blood evidence was disposed of by the Lab, sought an order from the Court "directing the State of Montana to provide all relevant material in this cause to the defendant." (Id.) The relevant material included "all material exculpatory or inculpatory to the defendant." (Id. at 1).

On May 10, 2021, also before the disposal of the blood evidence, the court entered its own "Discovery Order and Order Setting Omnibus

Hearing." (Dkt. 10). The order directed the State to comply with discovery disclosure provisions of *Mont. Code Ann. § 46-15-322* before June 10, 2021, i.e., before the blood was destroyed by the Lab. The order informed the parties that "[n]o written motion for disclosure was required except as otherwise set forth in the Order. One exception was for "additional discovery not covered under this Order." The blood evidence, however, was covered by the order. Pursuant to *Mont. Code Ann. § 46-15-322(10)(e)*, the State – here represented by the Park County Attorney – is obligated to disclose "all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence." It cannot be disputed the blood evidence qualifies as "material."

While it may be true the Park County Attorney's Office has no supervisory control over the State Crime Lab, it had statutory and constitutional obligations to disclose the material from the Crime Lab or, at minimum, ensure the material preserved. According to

arguments Ms. Rebsom was making at the October 4, 2021[4], Jury Trial Verification hearing, she had "filed a request to have the blood tested. The lab that I'm going through needs to directly obtain that from wherever it's being held, and I have not heard back from the State where that location is, if it's with the highway patrol, sheriff, or crime lab." (Oct. 4, 2021 Hrg. at 15). The State, represented by Park County Attorney, did not dispute Ms. Rebsom's assertion that she had filed the request.

For decades, courts across the county have recognized the *Brady* duty of disclosure "includes a duty to use earnest efforts to preserve evidence for possible use by the defendant. . . ." *State v. Ward*, 98 Idaho 571, 573, 569 P.2d 916 (ID 1977) (citing *People Norwood*, 37 Colo. App. 157, 547 P.2d 273 (CO 1976)); *see also California v. Trombetta*, 467 U.S. 479, 489 (1984) ("Whatever duty the Constitution imposed on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense[5]."); *United*

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[4]Two months *before* the blood samples were destroyed according to the Lab's policy.

[5]Including impeachment evidence.

State v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971) ("[W]e hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later"; *Deberry v. State*, 457 A.2d 744, 751 (Del. 1983) ("[T]he State's duty to disclose evidence includes a duty to preserve it as well"); *State v. Hahn*, 132 Wis. 2d 351, 358, 392 N.W.2d 464, 467 (Wis. App. 1986); *Nichols v. Wiersma*, 108 F.4th 545, 553 (7th Cir. 2024) (recognizing well-established prosecution duty to preserve potentially exculpatory evidence on behalf of defendants, including impeachment evidence); *State v. Clements*, 52 Ore. App. 309, 313 (OR App. 1981) ("The duty to disclose also operates as a duty to preserve exculpatory evidence); *State v. Moses*, 390 S.C. 502, 518, 702 S.E.2d 395 (S.C. 2010) ("State has the additional duty, albeit not an absolute duty, to preserve evidence that is favorable to the defendant"); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) (recognizing duty to preserve evidence subject to discovery and inspection); *People v. Wallace*, 102 Mich. App. 386, 392, 301 N.W.2d 540, 542 (Mich. 1980).

This Court has been more reluctant to extend a duty to preserve to the State's *Brady* obligations. In *State v. Villanueva*, 2021 MT 277, 406 Mont. 149, 497 P.3d 586, this Court seems to have implicitly recognized a duty to preserve when it analyzed Villanueva's claims using *Trombetta* and *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Villanueva*, ¶¶ 26-28. However, this Court immediately transitioned to evaluating the facts of Villanueva's specific claims under the *Trombetta* and *Youngblood* analyses.

> The *Trombetta* Court articulated a two-prong test for when the State's failure to preserve evidence meets the level of 'constitutional materiality' necessary to constitute a *Brady* due process violation: (1) the evidence at issue must 'possess an exculpatory value that was apparent before the evidence' was permanently lost or destroyed, and (2) the evidence must 'be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'

Villaneuva, ¶ 27 (*citing and quoting Trombetta*, 467 U.S. at 489.) In *Youngblood*, the United States Supreme Court extended *Trombetta* to provide that if the exculpatory value of the evidence is indeterminate, a defendant must show that the government acted in bad faith to establish a due process violation. *Youngblood*, 448 U.S. at 58.

Application of *Trobetta* and *Youngblood* was appropriate in Villaneuva's case and would have been potentially appropriate in Mr. Sallee's case. Unfortunately, neither of the court's rulings (Appendices C and D) reference either *Trombetta* or *Youngblood*. Rather, the issues were resolved in an incorrect application of the *Brady* "materiality" standard. In some jurisdictions, appellate courts have concluded that – in the face of an absence of inquiry by the lower court or use of an incorrect analysis – remanding the case for additional fact-finding is appropriate. *See e.g., Deberry*, 457 A.2d at 753. Such a remedy in this instance would be likely meaningless given the nature of the evidence that was destroyed.

The court relied on *State v. Robertson*, 2019 MT 99, 395, 440 P.3d 17. (Appendix C at 9). In *Robertson*, this Court addressed the question: Whether the district court erred when it denied Robertson's motion to dismiss the DUI charge due to State's failure to preserve video evidence. *Id.*, ¶ 31. The evidence sought by Robertson was a detention center video of his arrest. *Id.,* ¶ 9. At a hearing on the motion, a supervisor of the detention center testified that although he "was given

a specific request to preserve the video," he was "out of the office when the request was made and the video was overwritten before he could download it." *Id.*, ¶ 10. While the notion that a defendant's due process rights depend on the availability or unavailability of a single government official should be concerning, the district court denied the motion to dismiss and Robertson appealed.

This Court began the *de novo* review by articulating the *Brady* violation test.

> To prove the State violated his due process rights under *Brady*, a defendant must establish that: (1) the State possessed 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 proceeding would have been different.

Robertson, ¶ 32. It also noted "[t]he defendant bears the burden of proving all three prongs to demonstrate a *Brady* violation occurred." *Id.* (emphasis added).

The key portion of this Court's holding on the issue was:

> the record here fails to establish a prima facie Brady violation. Robertson offers nothing to indicate that the Detention Center video constituted favorable evidence. Robertson's contention that the erased video would have

> demonstrated his sobriety is "mere speculation" unsupported by the record. Although Detention Center Supervisor Shawver confirmed that the Detention Center video was mistakenly overwritten, Robertson fails to demonstrate that it was material, vital to his defense, or exculpatory. Finally, Robertson fails to establish that there would be a reasonable probability that the outcome of his DUI charge would be different given the existence of the Detention Center video. The record contained substantial evidence indicating Robertson's impairment while driving, including: [the arresting officer's] observation of Robertson's erratic driving at night shortly after leaving a local bar; Robertson's admission to the [arresting officer] that he consumed alcohol prior to driving; Robertson's field sobriety tests indicated impairment; and Robertson's blood test sample revealed a BAC of 0.112.

Robertson, ¶ 35 (internal citations omitted."

From the standpoint of protecting a defendant's due process rights and ensuring state officials do not skirt their *Brady* obligations, the Court's holding in *Robertson* – and its adoption in Mr. Sallee's case – is problematic for the very reason articulated by Justice Kennedy during the oral arguments in *Smith v. Cain*: The test for a *Brady* violation is very different than the test for a *Brady* disclosure obligation.

The error in conflating the two tests is highlighted at the third stage of the *Brady* violation analysis: "had the evidence been disclosed, a reasonable probability exists that the outcome of the proceeding

would have been different." *Robertson*, ¶ 32. In both *Robertson* and Mr. Sallee's case, the *Brady* claim was raised in a pretrial setting. Therefore, if application of the *Brady* violation test is appropriate, the "proceeding" analysis should be limited to the pretrial proceeding, not to the trial itself. Further, placing the burden on a defendant in a pretrial setting to establish "prejudice" or "materiality" resulting from a *Brady* violation is anathema to the very guarantees *Brady* is designed to ensure: due process and the right to a fair trial. *Bagley*, 473 U.S. at 678.

This contention is supported by well-established case law from the federal courts of appeals. For example, in *Osborne v. Dist. Atty's Office for Third Jud. Dist.*, 521 F.3d 1118, 1132 (9th Cir. 2008), the Ninth Circuit concluded that in a *Brady* context, the right to due process is "not conditioned on his ability to demonstrate that he would or even probably would prevail if the evidence were disclosed." "This is because under *Brady* and its progeny, it is the suppression of material evidence – and not the plaintiff's ultimate conviction – that deprives the plaintiff of their liberty interest in a fair trial." *Richards v. County of San*

Bernardino, 39 F.4th 562, 572-573 (9th Cir. 2022) (citing *Poventud v. City of N.Y.*, 750 F.3d 121, 133 (2d Cir. 2014 (*en banc*) ("proof of the constitutional violation need not be at odds with [the plaintiff's] guilt.")

In *Robertson*, and contrary to the precedent explaining the federal constitutional rights at issue, this Court held at the last *Brady* violation step that "Robertson fails to establish that there would have been a reasonable probability that the outcome of his DUI charge would have been different given the existence of the Detention Center video. The record[6] contained substantial evidence indicating Robertson's impairment while driving, including. . . ." *Robertson*, ¶ 35.

Even accepting the video evidence in *Robertson* did not amount to a *Brady* disclosure violation, e.g., witnesses could have testified about Robertson's behavior at the detention center at the pretrial hearing, video evidence is a far cry from blood sample evidence. Blood sample evidence requires scientific analysis and comprises a critical element of

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[6]The Court does not explain whether "the record" is the record from the hearing or the entire trial record. However, the State's briefing in *Robertson* suggests the only record of the district court's hearing was a "detailed minute entry." *State's Resp. Br.,* DA 17-0717 at 3 & n.1. Robertson was convicted after a jury trial and a transcript of that was available and cited in the State's briefing. *Id.* at 6.

the offense charged, and a jury instruction charging "an alcohol concentration of .08 or more at the time of the alleged offense," allowed the jury to infer Mr. Sallee was under the influence of alcohol. (Dkt. 223, instructions 20 & 32). The evidence of the blood samples was "favorable," to Mr. Sallee and should have been preserved by the State and disclosed. Whether it was "material" or not cannot be known because the State failed in its duty to preserve in the first place.

Faulting Mr. Sallee for failing to prove materiality under the *Brady* violation test for a *Brady disclosure* violation that occurred pre-trial violates his due process rights and his right to a fair trial. It was also a legal error by the district court in applying the incorrect analysis. At minimum, this Court should vacate Mr. Sallee's convictions and remand the case to the district court with instructions to evaluate Mr. Sallee's two motions under the correct analysis and without placing the burden on Mr. Sallee to establish "materiality" when instead "favorability" is the correct standard.

II. By allowing video deposition of the State's DNA witness, the court violated Mr. Sallee's confrontation rights.

The court violated Mr. Sallee's right to confront the State's DNA expert, Stephen Antonich, when the court permitted the State to conduct a trial deposition based on Mr. Antonich's seeming unavailability. (Appendix E). Even if the video deposition did not *per se* violate Mr. Sallee's confrontation rights, the nature of the deposition did by limiting the jury's view of Mr. Antonich and its ability to evaluate his demeanor.

As with all criminal trials in Montana, the jurors were instructed they were "the sole judges of credibility, that is the believability of all the witnesses testifying in the case." (Dkt. 223, Inst. 11). The Pattern Jury Instructions and the court in Mr. Sallee's case provide the jurors with guidance on evaluating witness credibility including "[t]he appearance of the witness on the stand, their manner of testifying, their apparent candor, their apparent fairness, their apparent intelligence, their knowledge and means of knowledge on the subject upon which they have testified." (Id.) "[T]he primary object of the Confrontation Clause" is to afford the accused "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling

him to stand face to face with the jury in order that he may look at them, judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber v. Page*, 390 U.S. 719, 721 (1968) (citing *Mattox v. United States,* 156 U.S. 237, 242-243 (1895)). Montana's Confrontation Clause, found at *Article II, § 24*, "may provide greater protection than the *Sixth Amendment* to the United States Constitution in certain circumstances." *State v. Clark*, 1998 MT 221, ¶¶ 20-25, 290 Mont. 479, 964 P.2d 766.

The Legislature has seen fit to allow depositions in criminal cases providing certain prerequisites are met. *Mont. Code Ann. § 46-15-201* through *§ 204*. Chief among them is the requirement the court conclude the prospective witness "is likely to be either unable to attend or otherwise prevented from attending a trial or hearing." *Mont. Code Ann. § 46-15-201(1)(a)*. In Mr. Sallee's case, the court deemed Mr. Antonich's circumstances satisfied this requirement because his wife was "currently undergoing a high-risk pregnancy," which posed a "significant health risk" to the wife. Mr. Antonich "and his wife [were]

under doctor's orders to remain near the Missoula area." (Appendix E at 2).

Recently, in *State v. Strommen*, 2024 MT 87, 416 Mont. 275, 547 P.3d 1227, this Court addressed the propriety of live two-way video testimony of an expert witness for the prosecution. While distinct from video deposition testimony, it is arguable the confrontation clause right is protected more with live two-way video than by a static video deposition that was taken prior to the introduction of other evidence at trial.

Relying on *Maryland v. Craig*, 497 U.S. 836 (1990), this Court concluded "the trial testimony of a prosecution witness is admissible via two-way video conference . . . upon an affirmative case-specific prosecutorial showing, and corresponding trial court findings, that (1) the witnesses is 'unavailable' for personal face-to-face cross-examination in the courtroom, and (2) denial of such personal face-to-face cross-examination is 'necessary to further an important public policy' with 'the reliability of the testimony . . . otherwise assured.'" *Strommen*, ¶ 19. As to the first factor–unavailability–the courts afford only narrow

leeway and require a "case-specific prosecution showing . . . that the personal presence of the witness is impossible or impracticable to secure due to extraordinary distance, expense, or health considerations." *Id.* Nothing about the possible considerations reflect they apply to anyone other than the witness. In fact, in *Strommen*, the district court had invoked health considerations pertaining to the COVID pandemic to allow the two-way video testimony of a prosecution expert witnesses. For this Court, that argument did not justify violating Strommen's confrontation rights.

Therefore, while Mr. Antonich's wife's circumstances were no doubt serious to her and personally distressing to Mr. Antonich, they were not his "health considerations" such that it made his appearance impossible or impracticable to secure. In fact, rather than a deposition, the court could have come closer to satisfying Mr. Sallee's confrontation rights by requiring live two-way video. This option certainly would have come closer to balancing Mr. Sallee's confrontation rights with any possible "health considerations" for Mr. Antonich than what ultimately occurred. Thus, the court erred in concluding Mr. Antonich was

"unavailable" for the purposes of circumventing Mr. Sallee's confrontation right.

Even if a video deposition was constitutionally permissible under the circumstances, both the State and the court were required to devise a method of testimony other than live in-court testimony" that would otherwise satisfy Mr. Sallee's confrontation rights. As the Court can see from the screen shot, *supra*, and from the deposition itself (Ex. 69), the video deprived both Mr. Sallee and the jury of the ability to view approximately 80% of Mr. Antonich's body. Thus, the ultimate product served as an as applied violation of Mr. Sallee's right to confront Mr. Antonich and to have the jury evaluate his demeanor.

In *Craig*, the United States Supreme Court recognized that certain requirements must exist even for two-way-video testimony. "The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witnesses as he or she testifies." *Craig*, 497 U.S. at 851. The Confrontation Clause's

guarantee to have the defendant and the jurors evaluate the witness's credibility of that ability is thwarted by the method and environment in which the deposition is taken.

Take the deposition in this case, for example. Very little of Mr. Antonich is visible. Neither the jury nor Mr. Sallee could see if Mr. Antonich was exhibiting signs of stress or stereotypical signs of dishonesty (fidgeting, nervous-leg bouncing, sweaty palms, etc.,), whether he had crossed his fingers upon taking the oath, or even whether he was wearing pants. While these latter two examples may seem absurd, both are certainly factors that – had they occurred in a courtroom and witnessed by a jury – would give all who witnessed it cause to question the veracity of the witness's testimony.

Mr. Antonich's testimony was critical to the State and devastating to Mr. Sallee's case. He performed the DNA analysis of swabs taken from a vodka bottle found at the scene. (Aug. 13, 2024, Hrg. at 69). He also conducted the "mathematical comparison" on the DNA results. (Trial. Tr. 705). Using this evidence, the State suggested that Mr. Sallee was "drinking straight from the bottle" earlier in the day or while

driving, which explained the high blood alcohol results and undercut Mr. Sallee's own admissions of the limited nature of his alcohol consumption. (Trial Tr. at 1245 - 1246; 1292 - 1293).

As it did in *Strommen*, this Court should hold "that, under the particular circumstances here, the denial of [Mr. Sallee's] right to personal in-court face-to-face confrontation of [Mr. Antonich] was reversible error in violation of the *Sixth Amendment* Confrontation Clause and similar protection guaranteed by *Mont. Const. art. II, § 24*." *Strommen*, ¶ 31.

Conclusion

Given the circumstances of the case and the legal bases for the court's rulings, Mr. Sallee respectfully requests this Court vacate his convictions and set this matter for a new trial as well as pretrial hearings at which the district court can both evaluate *Brady* claims with the correct legal analysis and allow Sallee's right to face-to-face confrontation of the State's witnesses against him.

Respectfully submitted this 10th day of March, 2026.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 8,518.

Dated this 10th day of March 2026.

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