IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP-

STERLING GLENN BROWN,

Petitioner,

v.

MONTANA SEVENTH JUDICIAL DISTRICT COURT, PRAIRIE COUNTY, THE HONORABLE JESSICA T. FEHR, PRESIDING,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL AND REQUEST FOR ORAL ARGUMENT

Original Proceeding Arising from the Montana Seventh Judicial District Court, Prairie County, State of Montana; State of Montana v. Sterling Glenn Brown, Cause No. DC-40-2023-0001, Hon. Jessica T. Fehr

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

EXHIBIT INDEX

Exhibit	Exhibit Description
Ex A	Declaration of James C. Nelson (Jun 19, 2024)
Ex B1	Brown's Motion to Dismiss re: Invasions of Attorney-Client Privilege and Statement of Undisputed Facts, Doc. # 145 (Jul 1, 2024)
Ex B2	State's Response to Defendant's Motion to Dismiss re: Invasions of Attorney-Client Privilege, Doc. # 167 (Aug 5, 2024)
Ex B3	Brown's Reply In Support of Motion to Dismiss re: Invasions of Attorney-Client Privilege, Doc. # 186 (Sep 3, 2024)
Ex B4	Order on Defendant's Motion to Dismiss re: Invasions of Attorney—Client Privilege, Doc. # 389 (Nov 18, 2025)
Ex C	Evidentiary Hearing Exhibit O (call log showing total time listened)
Ex D	Evidentiary Hearing Exhibits C & D (envelope of opened attorney privileged letters to Jasper)
Ex E	Transcript of Evidentiary Hearing (June 16, 17 and August 13, 14, 2025)
Ex F1	State's Motion for Order of Immunity, Doc. # 109 (May 29, 2024)
Ex F2	Brown's Response to State's Motion for Order of Immunity, Doc. # 164 (Aug 5, 2024)
Ex F3	State's Reply In Support of Motion for Order of Immunity, Doc. # 196 (Sep 9, 2024)
Ex G1	Brown's Motion for Additional Discovery, Doc. # 193 (Sep 6, 2024)
Ex G2	State's Response to Motion for Additional Discovery, Doc. # 199 (Sep 20, 2024)
Ex G3	Brown's Reply In Support of Motion for Additional Discovery, Doc. # 204 (Oct 2, 2024)
Ex G4	Order Denying Motion for Additional Discovery, Doc. # 384 (Nov 12, 2025)

Exhibit	Exhibit Description
Ex H	Evidentiary Hearing Exhibit B (DCCF Offender Orientation Handbook)
Ex I	Evidentiary Hearing Exhibit F (Rilley's Incident Report Form)
Ex J	Evidentiary Hearing Exhibit N (Brown's Expert's Documents)
Ex K	Evidentiary Hearing Exhibit S (Full DCI Jail Call Statement from Sheriff Lewis)
Ex L	Evidentiary Hearing Exhibit T (Sherriff Lewis's Attorney call list)
Ex M	Evidentiary Hearing Exhibit NN (Deputy Grey Eagle's interview with DCI Agent Tucker)
Ex N	Evidentiary Hearing Exhibit 16 (DCI Agent Tucker Supp. Report #3)
Ex O	Transcript of Status Hearing (Oct 4, 2024)

ISSUES

Whether the District Court is proceeding under a mistake of law, causing a gross injustice and justifying supervisory control, by:

1. Allowing the State to continue this homicide prosecution despite undisputed evidence that 22 of Petitioner's attorney-client communications (20 calls and 2 letters) were intercepted and reviewed by 13 different State actors—including 2 members of the investigation team itself—when "the only appropriate remedy [for such violation] is the dismissal of the indictment" under *United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978), adopted by this Court in *Baca v. State*, 2008 MT 371, ¶ 35, 346 Mont. 474, 197 P.3d 948; or, alternatively,

2. Declining to issue a more serious remedy for the State's violations or appoint an independent factfinder to review the intercepted attorney-client communications and investigate the breaches of Petitioner's constitutional right to counsel.

INTRODUCTION

"From my review of the evidence, it appears undisputed that attorney-client communications (both calls and letters) between Sterling Brown and his counsel were intercepted by the State on multiple occasions. This is particularly concerning because, in my experience, government officials involved in Montana's criminal justice system are well aware of the longstanding prohibition against reviewing these communications. Based on my experience as a prosecutor and judge, the kind of monitoring of privileged communications shown by the record in this case is unprecedented in Montana. As far back as I can recall, I have never seen it before and never even heard of it happening in our great state."

~ Declaration of James C. Nelson, ¶ 21.[1]

[1] Attached as **Exhibit A**. Similarly, Petitioner made an offer of proof for retired Montana Chief Public Defender, Randi Hood, whose testimony would echo Justice Nelson's from the perspective of a long-time criminal defense attorney and public defender, and thus illustrate the chilling effect of the State's conduct on indigent defendants and public defenders in Montana.

This case is indeed unprecedented. After charging Petitioner Sterling Brown with deliberate homicide and arson, it is undisputed (and the District Court found) that the State of Montana recorded 68 of Brown's attorney-client calls and listened to 20 of them. Brown's attorney-client calls were listened to on multiple occasions, in multiple places, by multiple different people, at multiple State agencies, including the jail warden, the local sheriff, and a DCI narcotics agent. Most disturbingly, two members of the Prairie County Sheriff's Office—officers who have been directly involved in the investigation and prosecution of Brown from the start—listened to portions of recorded phone calls between Brown and his counsel. Additionally, two of Brown's handwritten attorney-client letters were opened and reviewed or "scanned" by a State actor who worked at the jail. This is all undisputed.

When these unprecedented attorney-client violations came to light, the State failed to have an independent agency investigate. Instead, the State's investigation of the attorney-client violations was spearheaded by the lead DCI agent and principal trial witness responsible for the underlying homicide investigation.

Brown moved to dismiss the charges against him, arguing in accordance with *Levy* and *Baca* that the State's violations of his constitutional right to counsel required dismissal. At minimum, Brown requested a third-party factfinder be appointed to review the attorney-client communications and investigate the

admitted violations. Following an evidentiary hearing, the District Court denied Brown's motion. It declined to dismiss the charges (which violates *Levy*). It suppressed the attorney-client materials (which makes sense) but also prohibited all who listened to a call or scanned legal mail, including the Sheriff and former Deputy Sheriff, from testifying at trial (which does not make sense because it prevents Brown from exposing the bias and credibility problems of the State's investigation against him).

At its core, the District Court attempted to assess the extent of prejudice to Brown, which constitutes a mistake of law. It was the same mistake made by the district court in the seminal case addressing attorney-client privilege violations, *Levy*, which this Court adopted and applied in *Baca*. Under *Levy*, if the state intercepts attorney-client privileged communications, "the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case." *Levy*, 577 F.2d at 209 (emphasis added). Here, the District Court attempted to assess the extent of prejudice and determined the harm was outweighed by other factors. This was a legal error. The inquiry into prejudice should have stopped once it was established that individuals responsible for investigating and prosecuting Brown's case had accessed his attorney-client

privileged communications, at which point "the only appropriate remedy is the dismissal of the indictment." *Id.* at 210.

Due to the District Court's mistake of law, Brown is now facing trial when, under *Levy* and *Baca*, the charges against him should be dismissed outright. This causes a gross injustice for which an appeal after trial is not an adequate remedy, and thus presents the unique, urgent, and emergency circumstances that justify supervisory control.

LEGAL STANDARD

This Court "has general supervisory control over all other courts." Mont. Const. Art. VII, § 2(2). It may exercise supervisory control when: (1) urgency or emergency factors exist making the normal appeals process inadequate; (2) the case involves purely legal questions; and (3) the other court is proceeding under a mistake of law and is causing a gross injustice. Mont. R. App. P. 14(3).

Supervisory control is appropriate where, as here, an error is such that if finally corrected on appeal, this Court could find that the defendant was entitled to avoid prosecution altogether. *See Tipton v. Mont. Thirteenth Jud. Dist. Ct.*, 2018 MT 164, ¶ 10, 392 Mont. 59, 421 P.3d 780; *Miller v. Mont. Eighteenth Jud. Dist. Ct.*, 2007 MT 149, ¶ 20, 337 Mont. 488, 162 P.3d 121; *Booth v. Mont. Twenty-First Jud. Dist. Ct.*, 1998 MT 344, ¶ 6, 292 Mont. 371, 972 P.2d 325.

BACKGROUND

As set forth in the Statement of Facts attached (**Ex. B1**), Brown was charged with deliberate homicide and arson following the death of Isaac Carrier. **Ex. B4** at 1. He was held at Dawson County Correctional Facility (DCCF) for nine months where dozens of his privileged attorney-client communications were intercepted by the State. *Id.* at 1–5. While the State blames Brown and his counsel for not following DCCF's alleged protocols, it also acknowledges that Brown's "calls to his attorney should not have been recorded or listened to by anyone," and the facts supporting the State's position are hotly contested whereas the undisputed evidence proves the State could have prevented the invasions but failed to. *See generally* **Ex. B1–B3**.

Initially, DCI Agent Bradley Tucker (lead investigator in Brown's prosecution) directed Prairie County Sheriff Keifer Lewis (member of the investigative team who testified at Brown's co-defendant's trial along with Agent Tucker) to monitor Brown's jail calls using a recorded call system. **Ex. B4** at 5. In doing so, Sheriff Lewis listened to 79% of a six-minute and thirty-six second call from Brown to his attorney the day after Brown arrived at DCCF. *Id.* at 4–9. Although Sheriff Lewis testified he stopped listening once realizing it was an attorney-client call, he listened for over five minutes. *Id.* He then called DCCF and advised them to block Brown's counsel's telephone number immediately. *Id.*

DCCF continued, however, to record Brown's attorney-client calls for another 9 months, and at least 12 different people[2] listened to 20 recorded calls. **Ex. C**. Prairie County Sheriff's Deputy Jason Grey Eagle admitted to listening to a portion of a recorded call. **Ex. B4** at 10. Like Sheriff Lewis, he was part of the investigative team responsible for Brown's prosecution and was expected to testify at Brown's trial. *Id.*

Finally, two envelopes containing Brown's legal mail were opened by DCCF staff. *Id.* at 12–15. Each letter was in a law firm envelope, had been inspected for contraband by DCCF staff, sealed by Brown with DCCF staff approval, and initialed by DCCF staff as evidence that the letters had been examined and approved for mailing. *Id.* at 12. A photograph of one of the opened envelopes illustrates this:

[Image on next page.]

[2] Each listener is identified by username in **Exhibit C**, except Sheriff Lewis and Deputy Grey Eagle that are identified as "PCSO."

Ex. D. Despite this, two of Brown's letters to his attorney were opened and scanned by a DCCF staff member—which involved, at minimum, "reading some of the words." **Ex. B4** at 12–15; **Ex. E** at 175.

In total, at least 68 of Brown's attorney-client calls were recorded by the State, 20 of which were listened to by 12 individuals, including 2 members of the investigative team responsible for Brown's prosecution. **Ex. B4** at 21. Additionally, two envelopes containing Brown's legal mail were opened and

accessed by DCCF. *Id.* at 12–15. Despite the breadth and unprecedented nature of these violations, not a single person admitted to having any substantive recollection of the communications they accessed. **Ex. E**. A remarkable case of mass amnesia seems to have taken hold.

Brown moved to dismiss all charges against him, with prejudice. **Ex. B1**. The District Court denied Brown's motion following an evidentiary hearing. It suppressed all recorded attorney-client calls and prohibited individuals who accessed Brown's attorney-client communications from testifying at his trial, which is set for May 26, 2026. **Ex. B4** at 26.

If this Petition and request for oral argument cannot be resolved before May 2026, Brown respectfully requests the underlying proceeding be stayed pending the disposition of the Petition. Mont. R. App. P. 14(7)(c).

ARGUMENT

I. THE PROSECUTION OF BROWN IS A MISTAKE OF LAW, CAUSING A GROSS INJUSTICE.

The right to assistance of counsel is guaranteed by the U.S. and Montana Constitutions, and it includes the right to confer privately with counsel. *Baca*, ¶¶ 35–36. The District Court's ruling was a mistake of law under *Levy* and *Baca*. Supervisory control is warranted because Brown is being forced to trial when the charges against him should be dismissed as a matter of law. Additionally, the District Court's remedy is inadequate, causing a gross injustice to Brown.

Alternatively, the District Court's refusal to appoint a third-party factfinder to review the attorney-client communications in camera and investigate the State's violations is another mistake of law causing a gross injustice. Accordingly, this Court should exercise supervisory control.

A. The District Court should have presumed prejudice and dismissed Brown's charges.

The seminal case on attorney-client violations, *Levy*, is squarely on point. There, a government informant accessed attorney-client communications and shared them with the investigative team. The district court conducted an evidentiary hearing to better understand the types of attorney-client information obtained by the government and the resulting prejudice to the defendant. After considering the evidence, the district court found that individuals involved in the investigation and prosecution learned part of the defense's strategy, but the court weighed the prejudice to the defendant and declined to dismiss the case, resulting in a conviction. *Levy*, 577 F.2d at 203–05.

The Third Circuit reversed on appeal. It emphasized not only that prejudice must be presumed if attorney-client privileged information is provided to the government, but, critically, the trial judge erred by trying "to weigh the prejudice to [the defendant] even though there was both an admitted invasion of the attorney-client privilege and a transmittal of confidential information to the government." *Id.* at 208. "Inevitably that standard put the district court, and

indeed would put future courts, in the position of speculating as to the prejudice to the defense of the disclosure in question." *Id.* This task of attempting to weigh the prejudice is "virtually impossible." Why? Because "it is highly unlikely that a court can . . . arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government." *Id.*

The *Levy* Court considered adopting a more lenient rule, similar to Fourth Amendment case law, but rejected this approach because of the importance of the attorney-client privilege. "Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful." *Id.* at 209. The court therefore announced a simple and practical rule in cases such as this:

> **[T]he inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case**. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

Id. (emphasis added).

This Court adopted this test in *Baca,* ¶ 35. Indeed, *Baca* quoted the bolded language above.

The inability to assess prejudice—as a practical reality—is equally true in Montana. Justice Nelson explained that "when attorney-client privileged communications are intercepted, it would be extremely difficult, if not

impossible, to fully appreciate or measure the extent of prejudice to the defendant" and "[p]rejudice is inevitable." **Ex. A** at ¶ 16. Because of the complexity, length, and fluidity of a criminal investigation, "[a]n intrusion into the attorney-client privilege may result in privileged information or strategy indirectly finding its way into the investigation, with or without the knowledge of the lead agent or prosecution team, even if they are acting in the utmost of good faith." *Id.* And once the privilege is breached, "the ability to verify that the investigation is untainted would be difficult, if not impossible." *Id.*

While the District Court declined to consider the testimony of either Justice Nelson or Randi Hood, **Ex. E** at 490, the facts stated in Justice Nelson's Declaration are difficult to dispute. It is impossible to assess prejudice where attorney-client communications were listened to by members of the investigation team. Prejudice must be presumed, and dismissal is the only appropriate remedy.

Here, the District Court's ruling to the contrary is a mistake of law. Instead of presuming prejudice, the District Court weighed the harm against what it deemed as "mitigating factors." **Ex. B4** at 23. It did so despite acknowledging that Sheriff Lewis's and Deputy Grey Eagle's accessing privileged communications "may impact their ongoing involvement in the case, and potentially their testimony at trial." *Id.* at 25. Under *Levy* and *Baca*, "the inquiry into prejudice must stop at

the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case." *Baca*, ¶ 35. Thus, the analysis should have stopped once established that members of the investigation team listened to Brown's attorney-client calls—a fact that was undisputed.

Like the trial judge in *Levy*, the District Court here committed a legal error by weighing the prejudice to Brown, which necessarily required "speculating." *Levy*, 577 F.2d at 208. Although 20 different attorney-client calls were listened to by 12 different State actors, conveniently not a single one of them remembered what they heard and yet, at the same time, all were certain that no privileged information was shared. *See* **Ex. E**. While Brown respectfully submits that this strains credulity, the District Court nonetheless found "no disclosure of any of the information heard in the calls or scanned in the letter beyond those that listened and viewed," but, at the same time, it could not "ignore that the offending individuals may have a perspective or information, even unknowingly, that could put the Defendant at a disadvantage." **Ex. B4** at 26.

This catch-22 is precisely what the rule in *Levy* and *Baca* was intended to avoid. The District Court's weighing and balancing of prejudice was legal error—that analytical step should not have been taken because it necessarily involves speculation.

The District Court then fashioned an unrequested remedy of prohibiting certain individuals from testifying at trial. *Id.* To start, this remedy misses the point. Suppressing attorney-client communications between Brown and his counsel does nothing to account for the impact such violations may have had on the investigation and prosecution itself. For example, Sheriff Lewis listened to 79% of an attorney-client call during the infancy of this case, and then, for the next 33 months, remained part of the investigative and prosecution team. Additionally, prohibiting Sheriff Lewis's and Deputy Grey Eagle's testimony at trial harms Brown because he intended to call them at trial. Thus, the District Court's remedy violates *Levy* and caused further prejudice to Brown.

What is the correct remedy? Given the undisputed fact that attorney-client communications were accessed by individuals responsible for the investigation and prosecution of Brown, "the only appropriate remedy is the dismissal of the indictment." *Levy*, 577 F.2d at 210.

This is key. It illustrates the legal error made by the District Court in fashioning a different remedy and highlights why supervisory control is appropriate—because Brown is being forced to proceed to trial when, under controlling law, the only appropriate remedy is dismissal and thus he is entitled to avoid the prosecution altogether. As this Court detailed in *Booth,* ¶ 6, when it exercised supervisory control, "[i]f the District Court's conclusion that the

prosecution is not barred proved—on appeal—to be incorrect, [the defendant] would have been subjected to prosecution notwithstanding his entitlement to avoid the prosecution altogether." Similarly, this Court exercised supervisory control in *Tipton,* ¶ 10, because "[a]ppeal would not be an adequate remedy because, if [defendant] is correct, he is not subject to prosecution." *See also Miller*, ¶ 20. Accordingly, the Court should exercise supervisory control.

B. Alternatively, if Brown's charges are not dismissed, a more serious remedy is required.

While Brown firmly believes the only justifiable remedy for the State's undisputed violations of his most fundamental right as a criminal defendant is dismissal, if this Court disagrees, the District Court's remedy is insufficient. The only possible way to minimize prejudice, if Brown's prosecution continues, is by having a completely clean slate.

Instead of suppressing all attorney-client materials and prohibiting individuals who accessed attorney-client material from testifying at trial, the District Court should have, at minimum, removed from the investigative and prosecutorial teams anyone who violated Brown's rights or had contact with the violators. This includes, but is not limited to, Agent Tucker—the lead investigator in Brown's case, the expected chief witness at Brown's trial, and most importantly, the individual who investigated the State's violation of Brown's attorney-client

privilege (over Brown's objection) and interviewed every person who accessed Brown's privileged communications.

Further, a more serious remedy is required here when considering the potential ramifications. As the Supreme Court of Washington aptly recognized:

> [I]f the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

Washington v. Cory, 382 P.2d 1019, 1023 (Wash. 1963); *see also Washington v. Myers*, 530 P.3d 257, 270 (Wash. 2023). The same reasoning applies here. If state actors know the most severe consequence for the violation of a criminal defendant's fundamental right is that the accessed material is suppressed and only some individuals who accessed it are prohibited from testifying, it is difficult to imagine that they will be seriously deterred from accessing privileged material.

As such, dismissal is the only way to adequately protect Brown given the undisputed State interceptions of his attorney-client communications. But if dismissal is not entered by this Court, the removal of all individuals who violated Brown's rights or were in contact with those individuals is warranted. An alternative or additional remedy would be the exclusion of Brown's co-defendant as a trial witness. The State requested immunity for him, but courts have discretion to grant (or decline) such a request, which was briefed in the District Court.

Exhibit F1–F3.[3] Denying immunity and excluding the co-defendant's testimony would proportionately, equitably, and meaningfully redress the State's violations.

Accordingly, failing to adequately craft a proportionate remedy to the State's violations is a mistake of law causing gross injustice to Brown by forcing him to proceed to trial under the circumstances.

C. Alternatively, a third-party factfinder should be appointed to investigate the State's violations of Brown's attorney-client privileged communications.

The District Court alternatively made a mistake of law by declining to appoint a third-party factfinder to investigate the State's violations. Irreversible, structural error applies in situations of "constitutional dimensions" that precede trial and undermine the fairness of the entire trial proceeding. *State v. Stronmen*, 2024 MT 87, ¶ 29, 416 Mont. 275, 547 P.3d 1227. This is such a situation. Brown's most privileged communications were invaded by the State, and then the lead investigator responsible for trying to convict Brown of deliberate homicide investigated the State's violations at the lead prosecutor for the State's instruction. **Ex. E** at 736 ("I was contacted by Mr. Guzynski to look into the issue."). This was improper and undermines the fairness of the entire proceeding.

Consider, for example, *United States v. Pederson* where the court found it was inappropriate for a member of the team investigating the State's violation of

[3] The District Court's Order on the briefing is sealed and not attached to this Petition.

the defendants' rights to confer with their attorneys in confidence to also work with the prosecution team. No. 3:12-cr-00431-HA, 2014 U.S. Dist. LEXIS 106227, at *88, (D. Or. Aug. 4, 2014). A serious problem with the investigative team protocol was that it allowed a member of the prosecutorial team to participate. *Id.*

Here, the investigation into the State's violations of Brown's attorney-client privilege was inappropriately done, justifying a finding of irreversible, structural error. Despite Brown being limited in conducting discovery regarding the investigation, it is clear that Agent Tucker was directed by the State to investigate the attorney-client calls and letters that were accessed by the State. *See* **Ex. G1–G4**; *see also* **Ex. E** at 196. Thus, Agent Tucker impermissibly worked for the prosecution team *and* the attorney-client investigative team. *See Pederson* at *88. Dismissal would have been an appropriate remedy as a result; at minimum, a third-party factfinder should have been appointed. Refusing to dismiss or appoint a third-party factfinder is a mistake of law.

As Justice Nelson explained, the investigation was flawed from the start because the State "did not enlist an independent party to investigate." **Ex. A** at ¶ 22. Having the lead investigator and chief witness in Brown's case conduct the investigation was a fundamental conflict of interest. *Id.* "The prevailing norms, standards, customs, and practices require an investigation of such a serious and unprecedented issue by a truly independent party without any involvement in the

underlying investigation and prosecution of Sterling Brown." *Id.* In fact, both parties agreed that if the Court declined to dismiss all charges against Brown, the appointment of an independent third-party to investigate the admitted attorney-client privileged communications was warranted. *See* **Ex. B1**–**B3**.

In its Order, the District Court did not directly address the conflict of interest issue but ruled that "[n]o additional third party investigation would move the conversation forward or offer any additional information instructive to the specific questions before the Court." **Ex. B4** at 26. This was a mistake causing gross injustice to Brown by forcing him to proceed to a trial where the main witness for the State (Agent Tucker) is the same individual who investigated the State's numerous invasions of Brown's attorney-client privileged communications. If this case is not dismissed, at minimum, a third-party investigator is needed because of the inherent problems with the State's investigation.

It is a mistake of law to accept the State's investigation into its own violations of Brown's attorney-client privilege. This causes Brown a gross injustice by forcing him to proceed to trial under the circumstances.

CONCLUSION

For the reasons stated above, this Court should exercise its supervisory control and remedy the District Court's prejudicial mistakes of law. Oral argument should also be ordered.

DATED: January 19, 2026

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/s/*Lance P. Jasper*

&

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/s/*Matthew B. Hayhurst*
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CERTIFICATE OF COMPLIANCE

In accordance with Montana Rule of Appellate Procedure 11(4)(e), I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,000 words (exact count of 3,962 words), excluding table of contents, certificate of service and certificate of compliance.

DATED: January 19, 2026

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/s/*Lance P. Jasper*

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CERTIFICATE OF SERVICE

I, Matthew B. Hayhurst, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 01-19-2026:

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