No._____

In the

Supreme Court of the United States

IN RE THE ESTATE OF EDWARD M. BOLAND,
Deceased,

PAUL BOLAND and MARY GETTEL, as heirs of the Estate of Dixie L. Boland,
Petitioners,

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., AND NORTH PARK INVESTMENTS, LLC,
Respondents.

On Petition For A Writ of Certiorari To The United States Supreme Court From an Appeal to the Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioners
PO Box 30457
Billings, MT 59107
(406) 248-7337
towe@tbems.com

QUESTIONS PRESENTED

1) Were Petitioners denied due process of the law when their motion in probate court to turn over assets belonging to their father's estate was denied without a hearing after Petitioners specifically requested a hearing and while discovery was in process (motion to compel outstanding) and when the state supreme court affirmed the district court's denial of a hearing? In other words, is a hearing required when a personal representative or heir seeks turnover of assets to an estate in a probate proceeding and is denial of such a hearing when material facts are at issue a violation of the petitioner's rights under the due process clause of the 14th Amendment of the Constitution of the United States.

2) Does Due Process of Law under the 14th Amendment require some minimal discovery requested in a civil case where material facts are disputed?

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1.

PETITION FOR WRIT OF CERTIORARI

This is a Petition for a Writ of Certiorari from the highest Court of the State of Montana. Petitioners respectfully request this Court to issue a Writ of Certiorari to review the Opinion of the Montana Supreme Court entered on October 3, 2019, and on November 5, 2019.

OPINION BELOW

The Montana Supreme Court, the highest court in Montana, signed its Order on October 1, 2019, and filed it of record on October 3, 2019. Petitioners filed a motion for rehearing which was denied and filed of record on November 5, 2019. Justice Kagan granted an extension until February 13, 2020 to file this Petition. On February 11, 2020, Petitioners were granted 60 days to correct the form of the Petition.

PARTIES

The Petitioners are Paul Boland and Mary Gettel, heirs of the Estate of their mother, Dixie L. Boland, whose estate was entitled to the proceeds of the Estate of their father, Edward M. Boland.

The Respondents are two brothers of the Petitioners, Chris Boland and Barry Boland and the family corporation of their father, Ed Boland Construction, Inc., which included the Respondents but no other siblings as shareholders and North Park Investments, LLC, a limited liability company of Chris Boland and Barry Boland. They are Respondents because they held or controlled the assets that were involved in the Petitioners' motion for an order to turn over assets to the corporation. In compliance with Rule 29(6) to the best of Petitioners' knowledge there is no parent company to either Ed Boland Construction, Inc. or North Park Investments, LLC, nor is either organization publicly listed by a company that owns 10% or more of its stock.

2.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257 to review a case where a right, privilege or immunity is specially set up or claimed under the Constitution of the United States or the actions of state actors acting under color of state law have denied Petitioners property rightfully owed to them.

IDENTIFICATION OF THE PARTIES

Edward M. Boland (hereinafter "Ed") died on December 26, 2014. His wife, Dixie Boland (hereinafter "Dixie"), died on January 4, 2016. Two of their sons, Chris Boland (hereinafter "Chris") and Paul Boland (hereinafter "Paul") were appointed Co-Personal Representatives of Ed's Estate. Chris and Paul did not get along; eventually both sons filed a Motion to Remove the other as Personal Representative.

Paul and his sister, Mary Gettel (hereinafter "Mary") were appointed as Co-Personal Representatives of Dixie's Estate. They worked together well. Chris and another son, Barry Boland (hereinafter "Barry"), challenged the Will of Dixie Boland and that challenge is still pending. Daughter Jacquie Boland (hereinafter "Jacquie") is also an heir but not named as a party in any of these lawsuits.

Ed Boland Construction, Inc. (hereinafter "the Corporation") is Chris and Barry's wholly-owned corporation. North Park Investments, LLC (hereinafter "the LLC") is Chris and Barry's wholly owned LLC.

STATEMENT OF THE CASE

Paul and Mary, as Personal Representatives of the Estate of Dixie Boland, filed a Petition to Recover Assets in the Estate of Ed Boland on November 28, 2017. They named as Respondents, Chris, Barry, the Corporation and the LLC. It claims these Respondents owed money to Ed at the time of his death. Paul as Co-Personal Representative of Ed Boland's Estate filed a separate lawsuit against the same Respondents on December 19, 2017. (Cause No. BDV 17-0795, Cascade County.) This case was consolidated with Mary and Paul's Petition by a *sua sponte* Order of the District Court Judge on February 12, 2018. A motion for partial summary judgment in that case by Paul was filed on April 6, 2018. Nothing further has transpired in that case. The District Court denied Paul and Mary's Petition to Recover Assets on March 13, 2018 without holding a hearing. Discovery was ongoing and discovery issues were outstanding at the time. Paul and Mary then filed a Motion to Set Aside the Court's Order as set forth in Rule 60(b) of the Montana Rules of Civil Procedure on March 30, 2018, claiming a denial of due process of law. Their inheritance interest was a substantial property interest. No action was taken on that and it was deemed denied after 60 days under Rule 60(c)(1) and Rule 59(b) of the Montana Rules of Civil Procedure.

Petitioners filed a timely Notice of Appeal with the Montana Supreme Court on June 29, 2018. If Petitioners had not filed at that time, they would have lost their right to appeal the District Court's decision.

The principle reason the District Court did not timely act on the Petition to Reconsider is that Paul raised a question about whether the Judge of the District Court, Judge Pinski, had anything to declare that might be cause for disqualification for cause. Although the language was clearly limited to a simple question without any accusation of bias or prejudice, which Paul understood was authorized by the recent Montana Supreme Court case of *Draggin' Y Cattle Co. v. Addink,* 2016 MT 98, ¶¶ 18, 25-31, 371 P.3d 970, ¶¶ 18, 25-31 (2016), Judge Pinski was offended to be asked and immediately stopped all proceedings and set up a hearing pursuant to §3-1-805, Mont. Code Annot. (M.C.A.) even though no claim or bias or prejudice had been raised under Rule 2.3 of the Montana Code of Judicial Conduct (M.C.Jud.Cond.) and the required affidavit had never been filed.[1]

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[1] Paul and his counsel asked if Judge Pinski had anything to declare referring to Rule 2.2 of M.C.Jud.Cond. which includes more than bias or prejudice as grounds for disqualification. Bias and prejudice is the subject of the next Rule, Rule 2.3. Although the questions followed up with two items, which turned out to be poorly supported, as a possible reference to support the question, Paul's statement carefully avoided any accusation of bias or prejudice. This distinction, however, was apparently too fine a distinction for a Judge who was offended by even being asked. The Supreme Court, in the Decision appealed from in this Petition, also did not distinguish between a question as to whether grounds for disqualification existed (Rule 2.2) and accusation of

The end result was a finding of no bias and a violation by Paul and his counsel of Rule 11, Mont.R.Civ.Proc. and §37-61-421, M.C.A. along with sanctions against both Paul and his counsel amounting to $17,550.55. In addition, Judge Pinski removed Paul as Co-Personal Representative of Ed's Estate. The Decision is replete with suggestions that Paul engaged in too much litigation, apparently referring to this due process matter.

The Court issued its Order regarding sanctions on October 12, 2018, long after June 28, 2018 when the Petitioners appeal was due. Although it is not involved in this Petition for a Writ of Certiorari, the Order on Sanctions was also timely appealed on October 24, 2018. Upon Motion of Respondents, vigorously opposed by Petitioners,[2] the Montana Supreme Court consolidated both appeals on November 20, 2018.

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bias (Rule 2.3). The latter requires an affidavit signed by the parties before a hearing can be held for bias under Rule 2.3, M.C.Jud.Cond. *Guardianship of A.A.M.,* 2016 MT 213, ¶¶ 21-22, 384 P.3d 736, ¶¶ 21-22. Even though no such affidavit was signed, both the district court and the supreme court ignored this law and all proceedings were stopped until after the hearing on bias of the Judge. This matter contains no constitutional or federal issue and is not involved in this Petition.

[2] Petitioners were afraid the issue of sanctions would dominate and override the constitutional issues raised by the first appeal. They were right; the Supreme Court's Decision erroneously stated, "the instant appeal ... is primarily about bias allegations ... ." See the Decision, App.13, ¶17.

Based on the language of Judge Pinski's Sanctions Order, Judge Fehr presiding over the Dixie Boland Estate in a different District Court, removed Paul and Mary both as Personal Representatives as well. As a result, on December 3, 2018, Appellees filed a Notice to the Court and Request to Dismiss or in the Alternate, Stay Proceedings on the grounds that Paul and Mary had been removed as Co-Personal Representatives of Dixie' Estate and no longer had authority to pursue this appeal.

The Supreme Court granted the Motion to Dismiss Without Prejudice on January 2, 2019, and invited Paul and Mary to file a Notice of Appeal individually on the grounds that they had standing to pursue their claims as individual heirs even though they no longer had authority to pursue it as Personal Representatives of the Estate of Dixie. Both Paul and Mary were beneficiaries of Dixie's Estate. App.51. Petitioners followed this suggestion and were substituted as Appellants in their individual capacity on January 2, 2019.

Following briefing the Supreme Court, ruled against Petitioners and affirmed the lower court on October 3, 2019. The Decision, App.1-39, focuses largely on the Sanctions issues and fails to even mention that Petitioners were denied a hearing **while their Motion to Compel Evidence** was pending and undecided in the District Court.

As a result, a grave injustice has taken place. Petitioners have been denied an opportunity to present their case at a hearing after adequate discovery. No depositions of anyone have ever been taken. Respondents refused. See letter from Respondent's counsel, App.53; Motion for an Order Compelling Discovery, App. 101-103.

Petitioners filed a Petition for Rehearing, pointing out these failures on October 16, 2019 along with a Petition for a Hearing En Banc because of at least 6 issues of serious changes in Montana law the decision will cause. Both Motions were summarily denied on November 5, 2019. App.40-42.

STATEMENT OF FACTS

1. The People.

Ed Boland had a successful construction company known as Ed Boland Construction, Inc. which has approximately $5 million in revenue every year. He brought his 2 oldest sons, Chris and Barry, into the business, but not Mary, Jacquie and Paul. Chris and Barry now fully own the Corporation. They also fully own a real estate company, namely, North Park Investments, LLC. The other 3 children, Mary, Jacquie, and Paul, were not involved in either the Corporation or the LLC.

Not surprisingly, friction developed between Chris and Barry who owned the business and Mary,

Jacquie and Paul, who did not. Undoubtedly in recognition that some discord may result, Ed changed his Will shortly before he died making Chris and Paul both Co-Personal Representatives for his Estate, thus putting one person from each faction with co-responsibility for the conduct of his Estate.

2. Paul Discovered that Funds were Owed to Ed when He Died.

Immediately after Ed's death further discord developed. Based on information obtained from Ed (before he died), from talking to Ed's close friends, from Ed's accountants, and from some notes left by Ed in his own handwriting (App.54), Paul concluded that Chris and Barry and their entities owed substantial sums of money to Ed at the time of Ed's death. Paul requested information from Chris and Barry. His requests were refused or pushed aside; he received no new information.

Paul and Chris could not even agree on which lawyer to hire to do the probate. Paul thought the Corporate lawyer had a conflict, as indeed he did. Paul was appointed Co-Personal Representative with Chris on July 17, 2015, as provided in Ed's Will but not until after Chris tried to exclude Paul by making a false statement to the Court. (2nd Affidavit of Paul App.55-61.) About a year later Gary Bjelland, original counsel for the Estate, acknowledged he had a conflict of interest and withdrew. The Co-Personal Representatives have not been able to agree on a replacement attorney ever since.

In spite of Paul's many attempts to find out about the monies owed Ed's Estate, Chris ceased all communications with Paul. In response to a subpoena, the Corporation provided tax returns for the Corporation and some Quicken accounting reports. Based on these, it became apparent that there were substantial funds owed to Ed at the time he died, primarily in unpaid dividends but also a number of questions were raised in regards to other loans and debts owed to the deceased by his two sons and their entities.

3. Petition Filed in the Estate plus a Separate Complaint in the District Court.

On November 28, 2017, Mary and Paul, representing their mother's Estate, filed a Petition in Ed's Estate for Recovery of Assets requesting an Order of the Court requiring the Respondents to turn over assets belonging to the Estate. (App.62-65.) As the residual beneficiary in Ed's Will, Dixie (and her Estate upon her death) was entitled to any monies owed to Ed at the time of Ed's death.

Discovery was commenced but soon became bogged down because of the failure of the Respondents to cooperate. The informal answers to informal requests for clarification were totally unsatisfactory and ended with a statement that, "No further responses or clarification will be provided... ." (App.53.) Paul and Mary's Second Discovery Requests

were answered with the same words in response to every single request—effectively a blanket refusal to answer. Requests for depositions were denied. At no time have any depositions been taken in this case. Paul and Mary then filed a **Motion for an Order Compelling Discovery** along with a Brief in support on January 18, 2018. (App. 101-103.) Chris filed a Motion for a Protective Order.

On December 27, 2017, Paul as Co-Personal Representatives of the Estate of Edward M. Boland, filed an independent civil suit against the Corporation, the LLC, Chris, and Barry for these same debt items. Chris, the other Co-Personal Representative, was given an opportunity to join in the lawsuit and refused. Paul then proceeded on his own on the theory that Chris had an irreconcilable conflict because Chris could not be both Plaintiff and Defendant in the same lawsuit and, therefore, Chris's consent should not be required. Paul believed it was necessary to file this independent law suit at this time because issues dealing with the statute of limitations needed to be avoided.

This new case was filed in the same District Court and was assigned to Judge Elizabeth Best (Cause No. BDV 17-0795). However, Judge Pinski, acted *sua sponte* without notice and without a hearing, and issued an Order joining this case with the Petition for Recovery of Assets in the instant case. (App. 68.) Judge Pinski cited Local Rule 13 which only deals with family law matters, juvenile, and criminal matters and therefore, has no application to the present probate

matter. No explanation was set forth by the Court. (*Id.*) A Motion to Set Aside the Consolidation of the Cases is currently pending.

At this point, it was obvious that Chris was never going to cooperate with Paul. Consequently, many issues that needed attention to protect the assets of the Estate went unattended. (App.59-61,¶¶9-14.) Paul did what he could to take care of the physical properties and paid, from his own money, some of the expenses that had to be paid to preserve the assets. Paul then filed a Motion to remove Chris as a Co-Personal Representative because of the lack of cooperation and the conflict of interest. (Petition to Remove Chris Boland as Co-Personal Representative, Court Docket #41.)

When Chris learned of the Petition, he filed his own Motion to Remove Paul. (Motion to Remove Paul Boland as Co-Personal Representative, Court Docket #35.)

4. One Debt Item, $277,617.13 in Dividends Owed, was Practically a Slam Dunk; It is Strong Enough for the Immediate Entry of Summary Judgment in Paul's Favor.

Paul filed a Motion for Partial Summary Judgment in the separate lawsuit (Cause No. BDV17-0795). By adding up Ed's 26.4% share of the Ordinary Business Income shown on the Corporation's K-1 forms of its income tax returns (App. 85-92; these numbers are summarized in App.69-78) and comparing the

results with the Quicken reports of dividends received by Ed from 2007 to 2014 (App.80-84), from the documents received in his subpoena to the Corporation, there is a shortfall as follows:

Ed's Share of the Income	$846,438.00
Dividends received by Ed	568,820.67
Shortfall-monies owe to the Estate	$277,617.13

No response has been filed, nor has any action been taken on this Motion for Partial Summary Judgment. Since Ed was required to report $846,438 on his individual income tax returns for 2007 through 2014,[3] it is hard to argue with these numbers or that the money is not due. They come from the tax returns of the Corporation **furnished by Respondents**.

Chris and Barry insist that they paid Ed $230,000 on June 6, 2014 and that was supposed to cover all dividends prior to 2014. First, that payment is $47,617.13 short of the amount owed. ($277,617.13 - $230,000 = $47,617.13.) Second, that payment was

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[3] The annual income on the $846,438 list corresponds exactly with Ed's K-1 Forms prepared by the Corporation each year. The information on this form told Ed how much to include in his personal 1040 tax return each year. The K-1's from 2007 to 2013 were furnished with the Tax Returns of the Corporation produced in response to the Subpoena. (App.85-91.) The K-1 for 2014 is shown in App.92. A more complete discussion of this issue is contained in Petitioners' Brief in Support of Partial Summary Judgment. (App.69-79.)

made by the LLC, **not the Corporation**. See the Quicken Computer printout showing all the payments made to Ed Boland **by North Park Investments, LLC**, which shows the $230,000 payment by the LLC. (App.93.) And there is nothing in the record to show why the LLC would be paying the dividends owed by the Corporation. This payment was made by the LLC at a time when the LLC owed Ed $90,000 that was undisputed and $560,000 more that is disputed ($680,000 less payments of $30,000 & $90,000). (App.54.) Third, the **dividends for 2014** are not included in that payment. The Corporation ceased paying dividends to Ed in 2014 after Ed became sick and concerned about his health. Only $14,000 was paid during calendar year 2014. See 8 checks on the Quicken Computer Printout of the monies paid Ed Boland in 2014 from Ed Boland Construction, Inc. (App.80.) When Paul asked questions about why the dividends stopped in May of 2014, Chris and Barry refused to answer. (App.66-67.)

Answers of Respondents to this issue are wholly inadequate. There is absolutely nothing in the record that constitutes a believable response to this dividend claim.[4] To close this case without letting Petitioners

[4] When it became clear during mediation that Respondents could not answer some of these questions, Respondents agreed to allow the mediator to contact the Corporation's accountant by phone. The accountant was asked about a letter he wrote to Barry (which was produced–App.94-95) referencing a mystery agreement between Chris, Barry and Ed. Respondents were unable or refused to produce this agreement and refused to let Petitioners depose the accountant. (App.53.) Respondents claimed it was an

present the evidence of this claim is outrageous. It is a monumental miscarriage of justice.

5. The District Court then Dismissed Paul and Mary's Claims while the Parties were Waiting for a Scheduling Conference and Hearing, and without a Decision on Their Motion to Compel Discovery.

Chris denied each claim in his Response in Opposition to the Petition to Recover Assets on December 22, 2017. In addition, he claimed the claims were time-barred. In his Reply Brief, Paul addressed the legal issues and then stated the remaining issues are factual which "**cannot be decided without setting a time for a hearing.**"[5] (Court Docket 57 at 4.)(Emphasis supplied.) The Petitioners outlined the

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agreement already produced but the letter itself says it was in addition to that agreement. Requiring an attorney to try a case based on evidence that will only be produced in mediation and thereby confidential, constitutes a corruption of the legal system.

[5] The exact language used by Counsel in this Brief is as follows: "All of the remaining issues raised by Chris deal with whether or not there is a factual basis for the request set forth in the Petition. The Response in Opposition to the Petition filed by Chris can only be considered an answer to the claims made in the Petition. This only indicates that factual issues do exist which must be resolved by the Court. Those factual issues cannot be decided without setting a time for a hearing in which both sides can submit their evidence and the court can then decide on the facts." Court Docket 57 at 4.)

nature of the evidence in their initial page brief in support of the Petition, including 16 exhibits. (Court Docket 27). Both the Inventory Petitioners submitted 10 days before the Court's Decision (Court Docket 86) and the 36 page "Combined Brief" on several related issues Petitioners submitted 7 days before the Decision along with 4 affidavits and 25 exhibits (Court Docket 87), had extensive documentation of the facts supporting Petitioner's position. But the evidence had not even been fully gathered and no depositions had been taken.

Chris filed a note of issue on this Petition (App.96-97) dated January 29, 2018 specifically stating that Paul's petition "is fully briefed and ready for **hearing**." (Emphasis supplied.) This is incorrect; it was ready for the **scheduling** of a hearing including deadlines for discovery, expert witness disclosure, etc. There were discovery issues still outstanding. Nevertheless, Respondents do seem to acknowledge that a hearing was required.

Without granting a hearing or even holding a scheduling conference and without asking for further factual support or dealing with Paul's motion to compel discovery on this issue, the Court on March 13, 2018, issued its Order Denying Paul's Petition to Recover Assets. (App.43-48.) In its Order the court discusses the facts for each issue and states, in each claim that the evidence was insufficient to support Paul's petition. The exact wording of the Court is: "Paul has not provided any evidence ... ." (App.47.) Obviously, the

Court had not read Paul's Combined Brief (*Id.* Court Docket 87.)

This Decision was a total surprise. It caught counsel off guard because the normal procedure when a factual question is raised in a turnover order in probate is to have a scheduling conference, set deadlines for discovery, and schedule a trial date. That is why counsel felt it unnecessary to argue the facts at his reply brief. These particular facts had been set forth in detail in his initial brief of 9 pages plus 12 Exhibits and two other briefs on related issues of a total of 44 pages with 4 affidavits and 53 exhibits. Twenty-four days later and shortly after Petitioner's Motion to Set Aside the Order was filed, a Motion for Partial Summary Judgment was filed on the separate case which was 10 pages of brief with 64 pages of exhibits attached. It is unlikely the Judge read any of these briefs when he stated Paul had not provided any evidence.

The court began its written Order by stating that Paul had violated the Court's Order to present an inventory (App.43), even though Paul had, indeed, timely presented just such an inventory.[6] It was far

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[6] Chris raised the question of whether Paul's filing was timely and the Supreme Court seemed to accept it without comment. The Court's Order requesting an Inventory to be filed within 30 days was filed on February 5, 2018. Thirty days from the date of filing would make it due on March 7, 2018. Paul's Inventory and Appraisement was dated and mailed on March 5, 2018. The usual overnight delivery by the Postal Service between Billings and Great Falls can no longer be counted on and it was not received

more detailed and comprehensive that the inventory provided by Chris.[7] Further, the District Court states, with regard to the dividends, that Ed received a $230,000 "from **the corporation**." (App.46.) (Emphasis supplied.) The evidence cited by both Petitioners and Respondents, namely, Exhibit O, clearly shows the $230,000 payment was made not by the corporation but by **North Park Investments, LLC**. (App.93.) There is no explanation in the record of why the LLC would pay a dividend owed by the Corporation. The Court's error, therefore, was critical.

In Petitioners' initial Petition to the District Court, they listed 5 items of debt owed to their father. Obviously with almost no cooperation from the Respondents in responding to discovery, Petitioners have little evidence to support their other claims. Petitioners were not allowed to take any depositions. Whenever the questions got too close to something Chris and Barry didn't want to reveal to their little brother's attorney, they simply gave a stonewall denial or refusal. That is the reason it was necessary to file a motion to compel discovery which was still pending

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and stamped in as filed until March 8, 2018. (Court Docket 86.) Nevertheless, it was well within the 3 day allowance for any pleading submitted by mail in Rule 6(d) of the Mont. R. Civ. P. The Supreme Court said it was untimely without discussing why this explanation was not accepted. App.16, ¶24.

[7] Judge Pinski has never acknowledged that he was in error in chastising Paul (and Paul's counsel) for not complying with his Order to file an Inventory. Nor has he raised any questions on the manner it was filed or its content. It is apparent not only that he had not read the briefs but also he was not familiar with the Court filings in this case.

when the District Court Judge issued his ruling precluding any further discovery on those other debt items. Nevertheless, the dividend claim is so strong that failure to grant a hearing on the facts when substantial material facts were clearly at issue denied Petitioners' due process of law. Petitioners raised the due process issue immediately when they filed their Brief in Support of Motion [to Set Aside Order Denying Petition to Recover Assets] on March 30, 2018, 17 days later. App.99-100 (excerpt).

The Supreme Court in its initial decision filed on October 3, 2019, did not address the principle issues raised. As feared, because of the consolidation of the 2 appeals the Court was more interested in defending the honor of a district judge than it was at looking at the Constitutional rights that that Judge had denied. The 31-page decision devotes only 3½ pages to the principal issue of the case, namely, the denial of Petitioners constitutional rights in denying a hearing as requested and expected.

The Supreme Court did not read the briefs carefully or consider the facts and arguments presented by Paul. Notwithstanding the sizeable briefs and numerous affidavits Paul presented and notwithstanding that Paul was denied effective discovery, the Supreme Court stated, "Paul had ample opportunity to provide documentation, affidavits, or other evidence establishing the existence of a debt, but failed to do so." Decision, App.17, ¶27. They go on to state that "Paul failed to adequately prepare and

timely file an inventory, ..." This is manifestly untrue. A very detailed inventory was timely filed. See footnote 6 *supra*. Worse, the Court failed to even acknowledge that discovery was just begun and that significant discovery motions were pending at the time of the District Court's decision. This was not even mentioned by the Supreme Court. (See Paul's Brief in Support of Motion to Compel, Court Docket 58.)

Although the Supreme Court specifically admits that the parties disagree on the facts, including the existence of a debt owed to the Estate in the form of unpaid dividends, the Court contends Petitioners failed to produce evidence that contradicts Chris's evidence. They obviously did not read the briefs or look at App.93 which directly contradicts Chris and Judge Pinski's contention that $230,000 was paid to the decedent **by the Corporation**. It was paid **by North Park Investments, LLC**, as the document clearly shows. All of this and much more was outlined in the Facts section of the Opening Brief.

Based on the erroneous conclusion that Paul and Mary produced no contrary evidence, the Court stated the decision of Judge Pinski was "straightforward." App.17, ¶28. Contrary to this conclusion, Paul offered 3 briefs (53 pages combined) supported by 4 affidavits, and 65 exhibits on this very point before the District Judge made the Decision. (See Brief in Support of Petition, Paul's Reply Brief, and Brief in Support of Motion to Compel and their attachments at Court Docket 27, 57, and 60 respectively. See also Brief in Support of Motion to Set

Aside his Order and Brief in Support of Partial Summary Judgment filed, at approximately the same time at Court Docket 96 and 102.[8]) When it is all combined, the District Court was presented with 18 pages of affidavits and 94 pages of documents. Any conclusion that Paul did not present any documentation, exhibits or other evidence is pure nonsense. The Judge simply did not read the briefs and was not familiar with the filings in his Court. Due Process has been denied.

The Corporation income taxes (App.85-91 plus App.92) and the Computer Printout of Dividends paid by the Corporation (App.80-84) and the document that shows the $230,000 payment came from the LLC (App.93) were repeated in virtually every one of these briefs. It is all that is needed to conclusively prove the amount of dividends owed. See, e.g., App. 69-79.

On this point, the Montana Supreme Court concludes,

> Accordingly, after reviewing the evidence in this matter, the factual circumstances of the dispute, the nature of the interest at stake, and the risk of

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[8] This is the Brief in support of Motion for Partial Summary Judgment in the separate lawsuit was consolidated *sua sponte* with the Estate file a month before the Court's decision on the Order. The Brief was filed with Judge Pinski on April 6, 2018, along with all the attached exhibits, after the Judge Pinski entered his Order Denying the Petition but 7 days after Paul's Motion to Set Aside the Order Denying Paul's Petition.

> making an erroneous decision, this Court concludes Paul was afforded adequate due process in the District Court's resolution of his Petition and the Court did not err in ruling on Paul's Petition without a hearing.

App.18, ¶29. In view of the Affidavits, Briefs, and Exhibits Judge Pinski and the Supreme Court had before them, this statement simply does not comport with reality. There was not only a risk of making an erroneous decision, they did make an erroneous decision.

Petitioners filed a Petition for Re-hearing and Reconsideration suggesting the Decision overlooked facts material to the Decision including that discovery was ongoing at the time of the Decision, that documents produced by Respondents show the decedent was owed $277,617.13 at the time of his death and other grounds. At the same time Petitioners filed a Petition for *En Banc* Hearing pointing out 6 major changes in Montana law as a result of this Decision including the right of a judge in a probate case to decide disputed facts without a hearing.

REASONS FOR GRANTING THE PETITION:

I.

The Court Should Intervene to Avoid a Huge Injustice to the Petitioners. The Facts Supporting their Bona Fide

Claim for Inheritance from their Parents are Overwhelming and yet their Claim was Denied by the State Court's Refusal to grant them a Hearing on their Claim.

Petitioners have a solid claim for assets that must be included in their parents' estates of which they will benefit along with their siblings. The facts supporting their claim are not only material but overwhelming. Petitioners consider one part of the claim a slam dunk on the facts; they've even filed a motion for partial summary judgment as it relates to that part. Yet, the claim has been effectively denied because of the state's refusal to grant a hearing on their claim. That is wrong. That is unfair. And that is contrary to due process of law guaranteed by the due process clause of the 14th Amendment.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 US 385, 394 (1914). This Court has put high priority on the due process of law clause in the 14th Amendment. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 314 (1950), this Court was faced with how to deal with the beneficiaries of a common trust fund established under New York law some of whom were known and some of whom were not. The only notice given to both was the publication in a local newspaper in strict compliance with the minimum requirements of New York law. This Court, citing *Grannis v. Ordean*, repeated that, "The fundamental requisite of due process of law is the opportunity to be

heard." *Mullane* at 314. This Court concluded that the statutory notice by a newspaper publication was sufficient for those who were unknown but not for those whose places of residence were known. *Id.*

This Court, in a number of cases, expressed the importance of making sure a person is notified before any of his property can be taken from him. See *Robinson v. Hanrahan*, 409 US 38, 40 (1972)(if the State knows a person is in jail, notice sent to his home is insufficient); *Jones v. Flowers*, 547 US 220, 238-39 (2006)(a tax sale notice returned unclaimed is insufficient notice); *Nelson v. Adams USA, Inc.*, 529 US 460, 470-71 (2000)(the corporate veil cannot be pierced at the end of a trial because there was no notice or opportunity to be heard).

This Court has recognized that if the due process clause is violated this Court has jurisdiction even in probate matters. See *Hannah O'Callaghan v. O'Brien*, 199 US 89, 118-19 (1905). In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 US 78, 484, 491 (1988) a case involving a creditor's claim in probate by a hospital for payment of the decedent's last illness cannot rely on a statutory publication of notice to creditors "if appellant's identity as a creditor was known or 'reasonably ascertainable.'"

The second part of the due process requirement is a hearing. *Mullane,* 339 U.S. 314. This Court has often spoken of the importance of a hearing. Thus, in *Goldberg v. Kelly*, 397 US 254, 269 (1970) this Court

held that public assistance cannot be terminated without an evidentiary hearing.

> [W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Id. at 269. In *Sniadach v. Family Finance Corp. of Bay View*, 395 US 337, 342 (1969) garnishing an employee's wages without a hearing violates due process.

This Court has often held that the right to a hearing must include, "an opportunity which must be granted at a meaningful time in a meaningful manner." *Armstrong v. Manzo*, 380 US 545, 552 (1965). *Boddie v. Connecticut*, 401 US 371, 379 (1971). In *Boddie*, this Court stated:

> The State's obligations under the 14th Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Id. at 380. In *Cleveland Board of Education v. Loudermill*, 470 US 532, 542-43 this Court held that the guarantee of a hearing must be "appropriate to the nature of the case" and must include an opportunity to "respond" and "present reasons" before a person can be deprived of any significant property interest. *Id.* at 542, 546.

As applied to the instant case it is clear that when substantial property is claimed by inheritance and denied Petitioners, Petitioners are denied due process of law if they are denied a hearing and an opportunity to be heard on their claim. This is particularly true where the facts are at issue, something the Montana Supreme Court has admitted, and the facts at issue are material. Chris's denial that the Corporation owes $277,617.13 in dividends based on corporate records as reported on the K-1 forms of the IRS establishes a material factual dispute. Chris has not denied or challenged these facts or documents except by a statement that the Corporation paid $230,000 when the documents show that money was paid by the LLC (App.93). See a full explanation of Petitioners' position at App.69-79. The materiality of these disputed facts cannot be denied.

Even if somehow Respondents had real evidence to support their dispute, it is certainly a material dispute that needs resolution after Petitioners have been given an opportunity to be heard and present their evidence. Denying such an opportunity is simply unfair, particularly when discovery had barely commenced, discovery issues had not yet been resolved, and the opposing parties who owed the debt had not even been deposed. It is an overwhelming denial of justice. Petitioner's due process guarantees have not been complied with.

And to rub salt into the wound, the Montana Supreme Court held that Petitioner's position was frivolous, so much so that Petitioners were required to

pay Respondent's costs and attorney's fees in sanctions for bringing a frivolous appeal. Decision, App.35-37, ¶¶ 59-62. This will cost Petitioner's $25,000. This is wrong.

II.

This Court Has Not Addressed the Exact Issue of Whether an Heir Entitled to an Inheritance Under the Probate Laws of the State Can be Denied Due Process of Law When the Heir is Denied their Entitlement by the Decisions of a State Court. Montana now Has Said a Hearing is not Required When Material Facts are at Issue. Nebraska, Florida, and Illinois and other States Clearly Rule to the Contrary.

The decision of the Montana Supreme Court is a bad decision. Not only does it deny Petitioners due process of law in taking away their claim for a share of their inheritance from their father, but the decision is contrary to case law in Montana. Whether or not the Montana Supreme Court made an incorrect decision on the law, however, this Decision has set the law for the State of Montana. A district court in Montana now has the discretion not to hold a hearing even though the material facts regarding the Petitioners' inheritance claim are disputed. This is wrong.

Furthermore, it is contrary to decisions in most other states. See *Estate of Chaney v. Koenig*, 232 Neb. 121, 136, 439 NW 2d 764, 774 (Nebraska 1989) and lower court decisions in Florida and Illinois, cited hereinafter.

Although the Uniform Probate Code was silent on whether or not a hearing is required to meet the requirements of due process when a dispute arises over the possession and right to the property, it does clearly give the personal representative authority to seek such property. Uniform Probate Code Section 3-709. Several states have made the requirement of an "**evidentiary hearing**" mandatory. See *Swartz v. Russell*, 481 So. 2d 64, 66 (D.C. App. Fla., 3rd Dis.1985)(probate court erred in ruling on the right to possession without an evidentiary hearing); *Delbrouck v. Eberling*, 177 So. 3d 66, 70 (D.C. App. Fla., 4th Dis., 2015) (the question of who should temporarily possess property is a factual question that should be resolved by a prompt preliminary evidentiary hearing); *Harmon v. Ladar Corp.*, 200 Ill. App. 3d 79, 83, 557 N.E. 2d 1297, 1300 (App. CT. Ill. 2d. 1990) (it was error for the trial court to summarily deny the motion for turnover order). See also *In re Wheeler Technology, Inc.*, 139 B.R. 235, 239 (Bkrty. App. Pan. 9th Cir. 1992) (basic motions of due process require that parties in a turnover order in bankruptcy be apprised of an action against them and that they be allowed a reasonable opportunity to respond.)

This Court should provide guidance for Courts throughout the country dealing with this serious

problem. Factual issues regarding whose property belongs to the decedent in probate require evidentiary hearings in the event there is a material dispute as to the facts. Without it, due process of law guaranteed by the 14th Amendment will not be universally complied with.

III.

This Court should Acknowledge that Some Minimal Discovery is Required in any Civil Case in which Material Facts are in Dispute to Satisfy Constitutional Due Process.

While this Court has released no cases holding that denial of discovery in a civil case constitutes a violation of due process (see *United States v. Augenblick*, 393 U.S. 348, 356 (1968)), some rights must be implied in the "right to be heard." It is not a stretch to suggest all parties to a civil dispute have the right to be treated fairly and some discovery, such as the right to depose the opposing party, could be an integral part of the right to be heard.

In *Mullane*, 339 U.S. at 314, this Court stated that the right to be heard has "little reality or worth" unless one is informed of the nature of the proceedings. In *Wardius v. Oregon,* 412 U.S. 470, 474 (1973) this Court struck down an Oregon statute that required a criminal defendant to give prior notice of an alibi witness but did not allow any discovery of government's evidence. The Court stated that the

"forces" of a trial must be balanced. *Id.* See also, this Court's reference to the fact that a well-disciplined trial is not like a poker game where each side is entitled to hold their cards secretly. *Williams v. Florida,* 399 U.S. 78, 81 (1970). Some degree of fairness and a look at the facts is required for a fair contest. See generally, *Williams v. Florida,* 261 U.S. 86, 92 (1923)(where the barriers and safeguards are too relaxed and the facts are not examined, it becomes a constitutionally unfair trial).

In the modern world of litigation, discovery is critical to a fair trial. Here we had practically none. Questions in interrogatories went largely unanswered (App. 66-67 - every single response to 25 Requests was identical, effectively refusing to answer) and no depositions of the adverse parties were allowed (App. 53). In fact, no one was deposed, not even the accountant who mentioned a secret agreement which he declined to follow. (App. 94-95, a letter written by the accountant 2 ½ years after Ed died.) Petitioner's right to be heard has been effectively denied.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

In the event the Court does not accept this case for a full review, it should at least remand the case to the Montana Supreme Court with instructions to make a full determination of Petitioners rights under the due

process clause of the 14 Amendment. Petitioners are entitled to more than the superficial review they received by the Montana Supreme Court in its Decision of October 3, 2019.

DATED this 20 day of March, 2020.

By Thomas E. Towe

Thomas E. Towe
Towe, Ball, Mackey,
Sommerfeld & Turner, PLLP
2525 Sixth Avenue North
P.O. Box 30457
Billings, MT 59107-0457
406-248-7337
towe@tbems.com
Counsel of Record for Petitioners