NO. 20-5010

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

DANNY LEE WARNER JR. - PETITIONER

VS.

STATE OF MONTANA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF MONTANA

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Petitioner filed a timely Motion for new trial after discovering that prosecutors listened to privileged phone calls before and during trial. The trial court summarily denied his Motion based solely upon unsworn assertions in a response brief. Is the purposeful intrusion into the attorney-client privilege per se prejudicial requiring a new trial or is an evidentiary hearing mandated once prima facie evidence is introduced that prosecutors knowingly searched for and seized privileged phone calls?

2. Petitioners identification was unreliable pursuant to Biggers and Perry, however, there is now a plethora of research and empirical data suggesting a change in how reliability of eyewitness identifications are determined; given this are show-up identification procedures per se unnecessarily suggestive, is reliability susceptible to the system and estimator variables many states have adopted, and does the allowance of unreliable identification evidence undercut the fundamental fairness of a trial to a degree that demands dismissal?

3.Where the only evidence used to convict Petitioner was eyewitness identification does the refusal to proffer an eyewitness-specific jury instruction deny the Sixth and Fourteenth Amendment protections, particularly where the standard witness credibility instruction does not fully or fairly charge the jury as to fallibility or the possibility of honest but mistaken identification?

4. Did these questions, along with the denial of compulsory process, plenary power to direct ones own defense, and Equal Protection, refusing to send exhibit to jury or conduct evidentiary hearings, summary denial of Motion to dismiss and Motion for new trial, and accepting unsworn assertions as evidence combine to violate Due Process, requiring remand?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RELATED CASES

State v Warner, No. DC-16-542(B)
Eleventh Judicial District Court of Montana
Judgement entered November 22, 2017

State v Warner, No. DA-18-0046
The Supreme Court of the state of Montana
Judgement entered April 21, 2020

Warner v 11th Judicial District Court, OP-17-0429
The Supreme Court of the state of Montana
Judgement entered August 9, 2017

Warner v 11th Judicial District Court, OP-17-0628
The Supreme Court of the state of Montana
Judgement entered November 7, 2017

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

## OPINIONS BELOW

The opinion of the Supreme Court of the state of Montana appears at APPENDIX A to the petition and is reported at 2020 MT 93N.

## JURISDICTION

The date on which the Supreme Court of the state of Montana decided Petitioners case was April 21, 2020. A copy of that decision appears at APPENDIX A.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the U.S. Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

Amendment VI to the U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense"

Amendment XIV to the U.S. Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws"

18 U.S.C section 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter"

18 U.S.C. section 2515(4):

"No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character"

## STATEMENT OF THE CASE

On November 23, 2016 two men were "almost robbed"[1] in a dark alley[2] and while both had cell phones[3] the suspect did not take, neither Jordan Miller nor Dustin McGibony attempted to take a picture of the person.[4] Rather than call 911[5] they went into the restaurant of Brian Scotti-Belli sometime after the incident and had him call 911. The responding officer, Jason Parce, interviewed all three together, without seperating them[6] and all agreed upon the same description: 6'4" tall, wearing distinctly square reading glasses, a gray light-colored beanie, dark green trench coat, and looking to be in his 40's or 50's with wrinkly skin.[7] Upon his arrest Danny Lee Warner Jr. stood 5'11" tall, was wearing rounded rectangular eyeglasses, a solid black stocking cap, brown suede jacket, and looked to be in his 20's or 30's, with nary a wrinkle on him.[8]

The circumstances of Mr. Warners identification and arrest are so convoluted as to require they be set out seperately.(see

Appendix G) This arrest, however, was the direct result of Parce showing Miller and Scotti-Belli a single photograph of a "suspicious" individual[9], not to identify the robber[10], but to let them know who the police were looking for. Approximately fifteen minutes after being shown the photo, Scotti-Belli (who was not involved in the robbery and could not identify the suspect himself[11]) called 911 to report that the person he had seen in the photo was sitting at the bar of the VFW.[12] After his arrest Mr. Warner was held in the foyer while police went to find Miller[13] who subsequently identified Mr. Warner from the photo he had been shown[14] while he was in handcuffs.

Miller later testified that he was not involved in Mr. Warners arrest[15], nor did he ever identify the person in the photo as the robber according to Parce.[16] Miller would also testify that he did not offer any facial features when describing the suspect because "they didn't ask me about anything like that"[17] and "I think it was more important that I could identify the person so easily when I saw the surveillance" photo[18]. The second victim, McGibony, did not see the photo nor did he identify Mr. Warner until eleven months later for the first time at trial, admitting that he looked Mr. Warner up on the internet and saw pictures of him.[19]

A detective interviewed both victims for the first and only time "several months" after Mr Warners arrest.[20] The descriptions each gave at this time had drastically changed from that given immediately after the incident. Parce would testify that he did not have either victim identify the photo[21], but did show it to other officers as a "potential suspect"[22] despite having no foundation or probable cause to believe the person depicted was connected to the robbery in any way. Parce would first lie in his affidavit[23] then perjure

himself at trial[24] to ensure Mr. Warner was convicted.

Prosecutors suborned perjured evidence from Miller in the form of testimony that Mr. Warner called him from the jail and admitted to the robbery[25], while the Chief of the jail testified that he did not make any such call.[26] Mr. Warners attorney failed to obtain exculpatory alibi evidence[27], so Mr. Warner was forced to pursue only a mistaken identity defense. Similarly, police did not preserve video surveillance from the VFW that would have shown Mr. Warner at the bar when Miller went through looking for the person who had robbed him.[28]

The trial court summarily denied Mr. Warners Motion to Dismiss for, inter alia, Speedy trial, ineffective assistance, and prosecutorial misconduct, without conducting any hearing, nor issuing Findings of fact & Conclusions of law. After a supression hearing for eyewitness identification, having completely misapprehended the facts of the testimony and refusing to take judicial notice of State v Lawson, Young v State, or Commonwealth v Gomes, the trial court issued erroneous Findings of fact & Conclusions of law.(see Appendix D)

During trial the judge repeatedly testified as to what he thought he had heard proffered into evidence.[29] Of particular relevance is the judge saying "I didn't hear light-colored beanie, I heard gray"[30] after Mr. Warner played the audio of the description given to police dispatch.(see Appendix D) Aside from the impropriety of a judge testifying, this comment was both false and emphasized in the jurors minds a significant fact that Mr. Warner was attempting to enter into evidence as part of his mistaken identity defense. The judge would also refuse to send the disc containing this audio to the jury during deliberations stating "well they don't have any way to look at it; they can sit and look at the disk and play frisbee with it, but they

can't listen to it"(see Appendix D) Mr. Warners defense was further hindered when the trial court refused to give his eyewitness-specific jury instruction.(see Appendix E)

After his conviction Mr Warner discovered that prosecutors had intentionally searched through illegally recorded phone calls between himself and his lawyer and investigator (before and during trial), seized and listened to them. Mr. Warner filed a timely Motion for new trial and an addendum to Motion for new trial, however, despite presenting clear and convincing evidence that prosecutors had invaded his attorney-client privilege (obtaining at minimum trial strategy) the trial court denied it without an evidentiary hearing based solely upon the unsworn assertions of the prosecutor in his response.(see Appendix C) The trial court further refused to issue a Subpoena Duces Tecum when Mr. Warner attempted to obtain the records of all calls the prosecutors had downloaded or listened to. Mr Warner presented this denial of compulsory process and other serious and significant issues to the Supreme Court of Montana, however, his appeal was not given meaningful review. As a result Mr. Warner is serving a fifty year sentence, with a thirty-five year parole restriction.

## REASONS FOR GRANTING WRIT

Across the nation the recording of privileged phone calls and their use by prosecutors is a hot button issue.[31] In one district alone it was determined that between 2010-2017 1,429 attorney-client calls were obtained by Federal prosecutors[32] and could result in hundreds of overturned convictions.[33] Purposeful intrusion is a question that meets all of this Courts criteria for certiorari: as an issue of national importance it has nonetheless resulted in disagreement between state courts of last resort[34] as well as a significant split among the circuits.[35] Mr. Warners case is such that this Court

should grant certiorari to resolve the questions of per se prejudice and mandatory evidentiary hearings whether that analysis favors him or not.

Conversely, eyewitness identification is the most important issue in criminal jurisprudence today. With the disproportionate percentage of wrongful convictions being based upon eyewitness misidentification[36] a statistic in conflict with Mr. Blackstones argument that reducing false positives is more important than reducing false negatives[37], this issue is ripe for review. While many state courts of last resort are recognizing the necessity of revising outdated methods of determining the reliability of eyewitness identifications and mandating instructions that address their fallibility[38], others, such as Montana, remain stuck in the past and require clarification from this Court regarding unnecessary suggestiveness, reliability, and eyewitness-specific jury instructions.

Cumulative error remains amorphous and ill-defined to the point of ineffectiveness where in many states, such as Montana[39], it is underutilized and requires guidance from this Court as to whether each error must rise to a Constitutionally offensive level on its own or does more than one error of any type require reversal.

I. Purposeful intrusion into attorney-client privilege

The Sixth Amendment right to counsel has long been established as fundamental to fairness in the adversarial process.[40] While this Court has likewise recognized the necessity for preserving societys interest in the administration of justice, "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[41] The issue of purposeful intrusion is such that it requires this Courts immediate attention, particularly where,

as here, both the trial court and court of last resort disregard the issue altogether without so much as a shred of evidence from the State or an evidentiary hearing to determine prejudice. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands"[42]

The Ninth circuit has held that the mere communication of defense strategies to the prosecution is sufficient to constitute a violation of the Sixth Amendment[43], while this Court in Morrison left open the question of whether intentional and unjustified intrusion upon the attorney-client relationship may violate the Sixth Amendment.[44]

The amorphous nature of strategy is such that the question of prejudice is too subtle for the defendant to answer and there is an imbalance where only the prosecution can know what it did and why. In their controlling case the D.C circuit noted "It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of [their] decisions" [45], and this is particulary true in the instant case.

Conversely, a violation occurs under the Sixth Amendment where, as here, "[t]here are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"[46] The prosecutor knowingly downloaded three privileged calls between Mr. Warner and his investigator days before a status hearing in which they discussed discovery violations and potential prosecutorial misconduct.[47] It is beyond dispute that the intrusion was intentional as he purposely bypassed the conspicuous X mark in the private column of the phone number for Mr. Warners investigator.[48] In another intrusion prosecutors, on the third day of trial, listened to a call between Mr. Warner and his investigator (who sat at his

table during trial as part of the defense team) that was made after the first day of trial[49], presumably to prepare for their closing. Mr. Warner asserts that this purposeful intrusion is per se prejudicial; in part because of the nature of the calls, the timing, and the presumption of innocence he was to be afforded as a pretrial detainee. No person out on bail would be subject to such intrusion and the very act of recording privileged phone calls violates the Federal Wiretap Act[50] as well as the Sixth Amendment, signalling the presumption of prejudice.

In an opinion authored by Justice O'Connor, the First circuit stated that the institutional recording of inmates and their attornies conversations itself "presents a significant Sixth Amendment issue" and that she did "not express approval of the practice of monitoring calls between attorneys and clients in prisons and jails"[51] a practice that Ken Daley, then spokesman for the New Orleans District Attorneys Office, summed up as "any call that is on that monitoring and recording system is basically fair game."[52] The affirmative actions of Travis Ahner constitute illegal search and seizure in violation of Mr. Warners right to protection "against government intrusion that upsets an...'actual (subjective) expectation of privacy' that is objectively... 'reasonable'."[53] This Court has never directly answered the question of whether the Fourth Amendment protects attorney-client conversations in a jail setting, however, has ruled that warrantless searches and seizures are per se violations of the Fourth[54], and that "[i]t may be assumed that even in jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection."[55] Under Fourth Amendment protection the result of an illegal search and seizure would be the exclusion of evidence obtained, however, as the trial strategy of Mr. Warner cannot be excluded after the fact, the only remedy remaining

is to vacate his conviction.

The unsworn assertions in the prosecutors reply brief are unavailing and lack any evidentiary value considering "statements in briefs are not evidence"[56], but, more importantly perhaps, the evidence Mr. Warner presented directly contradicts the conclusory statement of Ahner, creating a genuine issue of material fact necessitating, at a minimum, a hearing. Nor do such denials obviate the trial courts obligation as an impartial arbiter to present at least the appearance of fairness or justice given that "hunting for...privileged communication with his attornies [is] outrageous conduct that shocks the conscience"[57] By suggesting that a trial judge can make a sound determination to such crucial questions concerning the fundamental fairness of a trial without the benefit of an adversarial test, the Montana Supreme Court ignores the procedural nature of the Constitutional error whose existence it purports to assume. Higher courts only defer to lower ones findings and conclusions because of the expectations regarding the procedures used in the proceedings and in the absence of such an instrument for judicial judgement both fail in their gateway determinations and the entirety of the proceedings must be brought into question.

The fundamental requirement of Due Process is the opportunity to be heard "at a meaningful time and in a meaningful manner"[58] and this Court has held that where a petitioner did not receive a full and fair evidentairy hearing in a State court, one is mandated in Federal court [59], so it stands to reason that where no hearing is conducted at all it violates Constitutional protections. The Fourteenth Amendment allows this Court to mandate a Kastigar hearing[60] in such situations and should do so here. Whether this Court finds that purposeful intrusion is per se prejudicial or that a defendant bears the burden of proving

prejudice, an evidentiary hearing must, of necessity, be conducted to determine either a properly tailored remedy to any taint or address the evidence of prejudice, particularly where a party has alleged facts that, if proved, would admit of relief.

II. Eyewitness misidentification

The Innocence Project has established the fact that eyewitness error is responsible for over 70% of wrongful convictions overturned through DNA evidence[61] and given such a high percentage it must be wondered how many people in this country, who cannot be exonerated by DNA, have been the victims of mistaken identity. One estimate claims that "more than 4,250 Americans per year are wrongfully convicted due to sincere, yet woefully inaccurate eyewitness identifications".[62] Currently there is no meaningful Due Process protection against honest but mistaken identification. Many courts place the onus on defendants to prove that an eyewitness identification is unnecessarily suggestive, while others put the burden on prosecutors to show their identification is reliable, though neither approach takes into consideration genuine mistake on the part of the witness, what this Court calls fallibility.

Allowing mistaken identification evidence, regardless of reason or reliability determinations, "is so extremely unfair that its admission violates fundamental conceptions of justice".[63] The very nature of the process due a person presumed innocent of a crime is such that a series of actions or operations must take place prior to a conviction. A missing step or misstep in that process precludes the presumption of fundamental fairness, vitiating the end result. Due Process demands that inadmissible evidence be barred and a likelihood of misidentification makes such testimony inadmissible because a prosecutor must prove each element, including the identity of a perpetrator, beyond any reasonable doubt.

The current reliability test has become devoid of definitive significance. Some courts treat the Biggers factors as a checklist and simply go through the motions of ticking each one off to give the appearance of justice, while others have determined these factors to be based on assumptions flatly contradicted by well-respected and unchallenged empirical studies.[64] Compounding the confusion is that three of the five Biggers factors depend upon self-reporting, which is "notoriously unreliable".[65] One court cited self-reporting as a primary reason for concluding that the Biggers/Brathwaite factors were no longer valid.[66]

In one opinion after another this Court has attempted to address eyewitness identification[67], trying to balance Due Process with societal considerations, however, have failed in fulfilling its three stated goals altogether: that the jury not hear eyewitness testimony unless that evidence is reliable, deterrence, and the effect on the administration of justice.[68] It is time for a complete overhaul of the existing reliability test, an upgrade to more comprehensive protections that take into account the empirical data collected by researchers into the psychology of eyewitness identification. The instant case is the first to come before this Court since States began adopting system and estimator variables to determine reliability and Mr. Warner urges the Court to do the same.[69] In doing so it is necessary to take the additional step of declaring show-up procedures per se unnecessarily suggestive and mandate eyewitness-specific jury instructions.

a. System and estimator variables

"It is the likelihood of misidentification which violates a defendants right to due process."[70] "The factors to be considered in evaluating the likelihood of misidentification include..."[71]

While he asserts that his due process rights were violated under Biggers, Mr. Warner maintains that the reliability of eyewitness identification stands on its own without the need for any prior showing of suggestiveness, due to the widespread recognition of eyewitness fallibility.[72] This Court held that "the trial judge must screen the evidence for reliability pretrial"[73], then that an inquiry was only necessary "under unnecessarily suggestive circumstances arranged by law enforcement".[74] These two things conflict.

This Court has been content to allow the admission of evidence in state trials to be governed by state law, applying due process only on a limited basis, however, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[75], yet Montanas' laws do just that. Allowing unreliable identification evidence, regardless of suggestiveness, undercuts the fundamental fairness of a trial; state laws that are vague or do not put in place procedures to prevent this are unconstitutional. In the instant case Mr. Warner had the absolute right to a presumption of innocence that could only be overcome by proof beyond a reasonable doubt that HE is the person who committed the crime. The prosecutor was able to present inadmissible evidence in the form of honest but mistaken identification testimony because there is no law in place to screen this out, The Supreme Court of Montana subsequently held that absent suggestiveness no further analysis was necessary to ascertain the "likelihood of irreparable misidentification".[76] Likelihood is probability, however, a preponderance of the evidence determination that does not rely on suggestiveness, but stands alone in establishing reliability.

While there are misidentifications caused by suggestive police procedures, the vast majority are attributable to the unreliable nature of perception and memory[77], thus the likelihood of misidentification

requires a pretrial procedure that adequately ascertains reliability on its own merits. As the Court noted "[i]dentification evidence is so convincing to the jury that sweeping exclusionary rules are required"[78], and where state law does not do so, it is incumbent upon this Court to provide citizens of the United States protections and privileges denied by the state. As such, the Court should adopt the system and estimator variables, collectively and seperately, to determine when police procedures are unnecessarily suggestive and to ascertain reliability respectively, allowing for any identification to be challenged pretrial.

The system and estimator variables are derived from an abundance of scientific studies, though the courts of last resort that have adopted them agree on the following[79]:

> System variables are state-controlled factors within the sole purview of prosecutors and police and include blind administration of identification procedures, pre-identification instructions, line-up construction, feedback avoidance, multiple viewings, and show-ups. These variables can determine unnecessary suggestiveness and the burden must be upon prosecutors to demonstrate that there is not a likelihood of misidentification. Estimator variables are witness-specific factors that include stress, weapon focus/attention, environmental conditions, initial description, witness characteristics, perpetrator traits, cowitness/outside influence, and memory decay. Because reliability is case-specific and the facts are often within state control, trial courts must hold evidentiary hearings to determine admissibility of identification evidence whenever doubt is raised as to the likelihood of misidentification.

These variables are beyond the scope of this petition to fully or exhaustively examine and explain individually, however, Mr. Warner trusts that this Court will take judicial notice of those courts that have not only explored the empirical data, but explained why Biggers does not go far enough in protecting against misidentification.[80] Instead, Mr. Warner will apply these variables arguendo to his case. "High levels of stress or fear can have a negative effect on a witness' ability to make accurate identifications".[81] Miller stated he "was in shock"[82], while McGibony testified he had "a little bit of PTSD".[83]

"When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit".[84] When describing the robber to 911 it was relayed that Miller could not remember because he was focused on the gun[85] and McGibony admitted that his mind was freshest the night of the crime "except I just had a gun in my face".[86] This Court has long recognized the importance of "the accuracy of the witness' prior description of the criminal"[87] in determining the reliability of a later identification. In the instant case both victims agreed on a description of the perpetrator, none of which fit Mr Warner at all.[88]

"The conditions under which an eyewitness observes an event can significantly affect the eyewitness' ability to perceive and remember facts regarding that event".[89] The owner of the bar where the robbery occurred testified that the back alley is "very dark" at night.[90]

"The witness' own personal characteristics affect the accuracy of an identification".[91] Miller testified that he wears "pretty strong" contacts and had been drinking prior to identifying Mr. Warner in handcuffs[92], while there was no confrontation with McGibony.

"Masks, sunglasses, hats, hoods, and other things that hide the hair and hairline affect a witness' ability to accurately identify a perpetrator".[93] Both victims stated that the robber wore glasses and a beanie, but neither described any facial feature.[94] Miller could not identify the glasses Mr. Warner was wearing when he was arrested as those of the robber, while McGibony was certain the person had blue eyes and a goatee and Mr. Warner has brown eyes and was clean shaven.[95]

"The actions of third parties, like those of law enforcement, can affect the reliability of eyewitness identifications".[96] Both victims testified that they were interviewed together immediately after the crime, rather than being seperated, and while they agreed on the initial

description, there are indications that an uninvolved third party influenced their own recollection of the crime at that interview.[97] "Memory decay is irreversible; memories never improve".[98] "...studies have shown that showups occurring only two hours after the encounter frequently led to misidentifications...and this is especially so where the time period is interupted with an unnecessarily suggestive presentation of a photograph of the defendant; in my view this eradicates any reliability otherwise stemming from a short temporal break".[99] Miller identified Mr. Warner approximately two and a half hours after the crime and was shown a photograph of him in between by an officer who testified that Miller did not identify the photo, but only looked at it. [100] McGibony identified Mr. Warner in court eleven months after the robbery.[101]

The estimator variables all demonstrate the unreliability of Mr. Warners identification as the perpetrator, and even absent any element of suggestiveness (which was present as well) the trial court should have suppressed the identification evidence as inadmissible.

b. Show-up identifications

This Court has held that "even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render his testimony inadmissible" [102] and without overturning Brathwaite, emphasized that "where the indicators of [a witness'] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed".[103] The inferrence is that an unnecessarily suggestive procedure can, by itself, outweigh the reliability factors. This would seem to imply that it is suggestiveness rather than reliability that is the linchpin in determining the admissibility of identification testimony based upon pretrial confrontation.

"A showup identification is inherently suggestive".[104] "Showup identifications are generally considered impermissibly suggestive".[105] "A single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion".[106] "Nothing, that is, except the inherently suggestive environs of the courtroom".[107] The use of single photographs, identifying suspects already in handcuffs, and in court only identifications are always unnecessarily suggestive and can be nothing else given the advancements in technology and training. These procedures do not take into account this Courts admonishments nor the system variables. Trial courts do not adequately analyze suggestiveness and the weight given it is negligible considering nearly every court that has found an identification impermissibly suggestive still allowed the identification testimony, at times on the basis of a single Biggers factor.[108] This is in conflict with the Courts holding that "it is necessary to scrutinize any pretrial confrontation".[109]

Rather than having the intended deterrent effect, some courts have praised the show-up identification as a convenient and efficient method of resolving an investigation.[110] This Courts previous attempts at deterrence have failed and will continue to do so until it adopts a per se rule that holds police and prosecutors accountable for procedures they employ in obtaining identification evidence, one that incorporates the system variables and is on par with fingerprint and DNA evidence.

In the instant case no lineup was ever conducted, no blind administration or pre-identification instructions given; instead the identification of Mr. Warner was the product of show-ups, widely regarded as "less reliable than properly administered lineup identifications".[111] Where, as here, the police and prosecutor had ample opportunity to secure a more reliable identification, utilizing the system variables, but elected to rely on show-up identification

instead, it must be deemed per se unnecessarily suggestive, and this Court should adopt a rule that all procedures using single photographs, identifying suspects already in handcuffs, and in court only identification are always impermissibly suggestive.

Every aspect of Millers identification of Mr. Warner was questionable: A)his initial description did not match Mr. Warner in any way[112], B)he was shown a single photo of Mr. Warner, not to identify him, but simply shown a "suspicious" person[113], C)he identified Mr. Warner in handcuffs after having been drinking and seen the photo[114], and D)he lied under oath at trial.[115] It is significant that officer Parce did not have Miller identify the photo, but only talked to Scotti-Belli, the uninvolved third party:

> Q: Now, you previously testified under oath that you remembered showing Scotti-Belli and could not recall showing that to Miller is that right?
> A: Yeah, I remember conversing with Scotti-Belli, I know the other individual was there right next to him.
> Q: So you don't recall Miller identifying that photo?
> A: I didn't correspond with him, he saw the photo.[116]

Parce showed the photo to other officers as "a potential suspect" with no probable cause or foundation[117], even testifying that it was not necessary to have a victim identify the person in the photo first:

> Q: And why wouldn't you show it to the victim and the witness before you show it to your fellow officers, to confirm it?
> A: Because the officers are the ones that are out mobile looking for the individual, and so I wanted to make sure that we all had similar information.
> Q: So that implies you were pretty convinced already that that was the person?
> A: No sir.
> Q: You didn't feel it necessary - you didn't think it would have been necessary to confirm it with the victim first, then show officers?
> A: No, not necessarily.
> Q: Wouldn't that have given you a more reliable foundation for the photograph?
> A: Not necessarily.
> Q: Confirming it with the victim wouldn't have given you a more reliable foundation for that photograph?
> A: Not necessarily.[118]

Parce admitted that showing a single photo was not proper procedure [119], then testified that, in his opinion, single-photo identifications should not be avoided in most situations.[120] This photograph was first used to release an individual who had been detained at gunpoint in the exact direction the victim had said he'd seen the robber walking, again without confirming it with that same victim, who was a mere two blocks away, or have Miller identify the man who "couldn't have fit the description better".[121] Because officers were locked in on the person in the photo, they did not even ask the man they had detained at gunpoint his name, nor file any report of the stop, but simply let him go.[122] Officer Parce did not take notes of the scene, nothing about the weather or how dark it was outside[123] and did not keep the notes he did take.[124] After a long line of questioning regarding police procedure for eyewitness identifications, including writing seperate reports, blind administration, and the importance of non-suggestive methods, Parce admitted that he disregarded all of it. [125] The trial court erroneously held this procedure to not be suggestive.[126]

McGibonys identification was shown to be unreliable at trial, though should never have been allowed. The State did not produce McGibony at the suppression hearing and the judge was so oblivious to what was going on in his courtroom he did not even know Mr. Warner had moved to have McGibonys identification testimony suppressed.[127] Without requiring any evidence the judge summarily denied Mr. Warners motion to suppress McGibonys in court only identification, despite his prima facie showing that it was based on factors other than his own recollection of the crime.[128]

The Montana Supreme Court acknowledges that McGibonys identification of Mr. Warner was a show-up[129], then misstates the facts by stating "McGibony replied he had the keys but his vehicle was not in the lot"

[130], when in fact McGibony testified "I told him it was in the parking lot".[131] This is only one example of how the trial court and court of last resort misapprehended the facts and that Mr. Warner received neither a fair trial nor a meaningful review. The "positive identification" that was the result of "McGibonys recollection of the crime"[132] likewise is misstated, as it should include McGibony admittedly looking at pictures of Mr. Warner online before trial, giving a completely inaccurate initial description, and his certainty that the robber had blue eyes and a goatee, while Mr. Warner has brown eyes and was clean shaven.[133]

McGibony identified Mr. Warner for the first and only time in court eleven months after the robbery, having never picked him out of a line-up, but admittedly seeing photographs of Mr. Warner. This is the very unnecessarily suggestive identification procedure this Court has condemned and it could have been prevented by police or prosecutors conducting a proper line-up at any point before trial. Under Biggers McGibonys in court only identification should have been suppressed, however, Mr. Warner maintains that should this Court adopt a per se rule declaring show-up identification procedures unnecessarily suggestive, reversal of his conviction would be required.

Using sleight of hand to introduce inadmissible identification evidence, the State improperly presented Scotti-Bellis testimony as a de facto third identification to intentionally mislead the jury into believing their identification of Mr. Warner as the robber was stronger than it actually was. Despite the prosecutor assuring the trial court that Scotti-Belli was "not being offered to identify the person who robbed Mr. Miller and Mr. McGibony"[134] he did just that:

> Q: Okay. For the record do you see that individual in court today?
> A: I do, yes.
> Q: Could you point him out please?

A: He's right there (indicating)
Q: What color is his shirt?
A: Blue
Mr. Ahner: Your Honor, if the record could reflect the witness has identified the defendant?
The Court: So reflects.[135]

The prosecutor then improperly emphasized this in his closing argument asserting "we have multiple identifications of Mr. Warner in this case. You heard with regards to Brian Scotti-Belli I saw you"[136], though, again, Scotti-Belli testified he could not have identified the suspect because "I wasn't robbed" and did not see the robbery.[137] Mr. Warner had attempted to prevent this very thing by moving the trial court to suppress Scotti-Bellis identification testimony, however, the judge erroneously allowed it.

c. Eyewitness-specific jury instructions

The Court has held that the Sixth Amendment gaurantees "the right of the accused to require the prosecutions case to survive the crucible of meaningful adversarial testing...[b]ut if the process loses its character as a confrontation between adversaries, the constitutional gaurantee is violated".[138] The Fourteenth Amendment gaurantees fundamental fairness, which "[w]e have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense".[139] If either adversarial testing or a complete defense are to be meaningful this Court must mandate an eyewitness-specific jury instruction.

The Montana Supreme Court is in conflict with many other courts of last resort in this regard. "There is no requirement that a jury be instructed specifically on eyewitness identifications in Montana".[140] However, the Utah Supreme Court has long since held:

> "We therefore today abandon our discretionary approach to cautionary jury instructions and direct that in cases tried from this date forward, trial courts shall give such an instruction whenever eyewitness identification

is a central issue in a case and such an instruction is requested by the defense".[141]

Montanas reliance on the general witness credibility instruction to "fully and fairly" instruct a jury is misplaced. This Court has long recognized the fallibility of eyewitness identification evidence and the necessity of warning jurors against the potential for mistake. Rather than credibility then it is fallibility that trial courts must caution the jury about, and a general credibility instruction falls far short of any constitutional protection in this regard. "Eyewitness-specific jury instructions...warn the jury to take care in appraising identification evidence".[142]

As the Honorable Mark W. Bennett has noted "[t]he standards for determining witness credibility have persisted as if frozen in time, based on myth, and completely unconnected with current knowledge of cognitive psychology".[143] A standard credibility instruction is always going to favor the prosecution in criminal cases where conviction depends upon eyewitness identification, as it simultaneously acts as a mandatory presumption in the absence of any cautionary charge about eyewitness fallibility and serves to shift the burden of proof from prosecutors to accused to prove mistaken identity. Only instructing jurors to consider the appearance of the witness on the stand, their manner of testifying, apparent candor, fairness, or intelligence, and believability is insufficient, focused as it is upon whether the witness "willfully testified falsely".[144] Even with the somewhat cautionary "You are not bound to decide any fact based upon...testimony [that] does not convince you"[145], the general credibility instruction is woefully inadequate given that "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says 'That's the one!'".[146]

Courts, legal scholars, and a plethora of empirical data have

recognized the necessity of eyewitness-specific jury instructions, demonstrating that, inter alia, jurors do not understand how memory works[147], often believe it to be much more reliable than it actually is[148], less susceptible to outside influences[149], and tend to depend too much on certainty[150], all of which contribute to the conviction of innocent suspects at a "rate somewhere north of 40% in actual cases".[151] Many mistaken eyewitnesses, by the time they testify at trial, exude complete confidence in their identifications in large part because they think they are telling the truth, even when their testimony is inaccurate. The only way to protect against this is eyewitness-specific jury instructions, for while judges presume jurors are able to detect liars from truth tellers, credibility is at best an inferior indicator of reliability in eyewitness identification and lacks all relevance to an honest, but mistaken identification. "Because the eyewitness is testifying honestly (i.e. sincerely), he or she will not display the demeanor of the dishonest or biased witness".[152] While eyewitness-specific instructions may not, in se, prevent honest but mistaken identifications, they will ameliorate the effect such evidence has on the jury. "It is difficult to un-ring the bell that an unreliable eyewitness identification tolls...[h]owever, robust jury instructions can minimize the dangers associated with inaccurate eyewitness identifications".[153]

Conversely, the refusal of an eyewitness-specific jury instruction offends the fundamental framework of criminal jurisprudence: the presumption of innocence, the right to confrontation, and a fair trial before an impartial jury. The trier of fact cannot possibly assess the evidence properly without being fully and fairly instructed on the way in which they are to determine those facts. Both the Sixth and Fourteenth Amendments gaurantee that a jury be impartially instructed

on the elements of the offense and the theory of the defense, this latter being a part of a complete defense, and "includes, of course, as its most important element, the right to have a jury, rather than the judge, reach the requisite finding".[154] Even then, however, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judges last word is apt to be the decisive word".[155] To highlight just how important the judges last word can be, consider the case of Ann Duny. The highly esteemed Sir Matthew Hale held a trial against Duny in 1664, wherein she was accused of witchcraft. At trial evidence was given by Anne Durent that her son William and daughter Elizabeth had been bewitched by Duny, suffering from strange and sad fits. Dr. Brown expressed his expert opinion that the children had been bewitched, testifying that in Denmark there had been a discovery of witches who used the very same methods of afflicting people. Sir Matthew Hale instructed the jury that they were to inquire first whether the several acts of witchcraft mentioned in the indictment had been committed and secondly, if they had, it was for them to say whether the accused was the guilty person. The jurors, he said, could not doubt that there were such creatures as witches, for history affirmed it. The jury brought in a verdict of guilty, the judge passed a sentence of death, and Ann Duny was then executed.[156] Had the Honorable Judge Hale not instructed the jury that they could not doubt the existence of witches it is unlikely that Ann Duny would have been convicted or executed. Thus is the reason jury instructions are so significant and there can be no single element more important in a criminal trial than proving that it is the defendant who actually committed the crime. Absent this proof every other element must, of necessity, fail.

Some courts consider cross-examination sufficient to satisfy Due Process, however, this Court held in one of its earliest opinions on the subject that cross-examination "cannot be viewed as an absolute assurance of accuracy and reliability...where so many variables and pitfalls exist".[157]

In the instant case the States sole evidence was eyewitness identification, while Mr. Warners only defense was mistaken identity. Mr. Warner maintains that, as a matter of right, he was entitled to an eyewitness-specific jury instruction as an element of his complete defense, one that presented the jury with his theory of the case. The refusal to proffer such an instruction undermined Mr. Warners entire defense by not fully or fairly cautioning jurors against the fallibility of eyewitness identification in general or the risks of an honest but mistaken identification specifically, depriving Mr. Warner of all meaningful adversarial testing in the process. While he was able to present evidence of his innocence, even putting forth the person who likely committed the crime[158], the State did not prove beyond a reasonable doubt the identity of Mr. Warner as the individual responsible for the robbery, thus denying him his Sixth and Fourteenth Amendment protections.

Mr Warner contends that, properly instructed on the fallibility of eyewitness identifications, "no rational trier of fact could have agreed with the jury".[159] There is no reason to believe that the jurors who convicted Mr. Warner were any more enlightened about memory formation or recall than those who participated in the plethora of studies cited, yet they were instructed to depend only upon credibility. A reasonable juror could easily interpret the standard credibility instruction as conclusive and irrebuttable, that the eyewitness who testifies to having seen the crime is to be believed over any other

witness, including an expert simply offering opinion. At the very least, there is a substantial likelihood that the jury interpreted the trial courts instructions to prevent consideration of an honest but mistaken identification. Nothing in the overall charge cautioned jurors on the fallibility of eyewitness identification, but simply reinforced common misconceptions about certainty and memory, even directing their attention to the archaic notion of "apparent intelligence".[160]

During the settlement of instructions the trial court simply said "theres no requirement that a jury be instructed specifically on eyewitness identification in Montana"[161], instead of considering Mr. Warners instruction according to the facts of the case. The Montana Supreme Court cited the trial court verbatim, only adding that "[h]ere, the jury instructions properly instructed the jury on witness credibility" [162], a fact that Mr. Warner does not dispute. What is at dispute is the complete lack of any warning against the fallibility of eyewitness identifications in the jury instructions. A witness' candor is utterly irrelevant to an honest but mistaken identification and this Court has held that protections against this last include "eyewitness-specific instructions warning juries to take care in appraising identification evidence".[163] This is sufficient reason alone for this Court to mandate eyewitness-specific jury instructions. "[T]he arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force".[164]

III. Cumulative error

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal".[165] While this Court has had occasion to examine the cumulative effect in the Brady context[166] it has never addressed the issue of cumulative error,

the doctrine "that the aggregate of non-reversible errors (i.e. plain errors failing to necessitate reversal and harmless errors) can yield a denial of constitutional rights to a fair trial, which calls for reversal".[167] Put another way "[t]he reliability of a state criminal trial can be substantially undermined by a series of events, none of which individually amounts to a constitutional violation", though together erode the fundamental fairness of that trial.[168]

Courts of last resort, as well as circuits, seem to be split as to what constitutes cumulative error and how to apply it on review.[169] Mr. Warner maintains that his Sixth and Fourteenth Amendment rights were violated from an aggregate of erroneous court rulings and prosecutorial misconduct. The question is not if these errors and misconduct, analyzed alone, rise to the level of constitutionally offensive, but whether together they "put the whole case in such a different light as to undermine confidence in the verdict".[170]

Mr. Warners "defense was far less persuasive than it might have been had he been given an opportunity to" maintain plenary power over it.[171] Mr. Warners claims, like those of Chambers, "rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense".[172] His was an identity trial and allowing inadmissible identification evidence, coupled with the denial of an eyewitness-specific jury instruction and the refusal to send properly admitted audio exhibit to jury denied Mr. Warner due process. The judge testified several times at trial (falsely in places), adding to the cumulative effect of his refusal to conduct evidentiary hearings, the summary denial of Motions to dismiss and for new trial, accepting unsworn assertions from the state as evidence, and allowing perjured testimony, this last an alleged admission that, like the coerced confession, "vitiates the judgement because it violates the due process clause of the Fourteenth Amendment".[173]

The trial court frustrated Mr. Warners Faretta rights by denying his autonomy over his defense in not allowing him to withdraw a motion to preserve his speedy trial right[174], refusing to enforce subpoenas or even issue them[175], allowing discovery violations, while forcing Mr. Warner to have standby counsel initial all documents before he could file them[176], which created procedural delay that prejudiced his case, and denying Mr. Warner a limited waiver of attorney-client privilege[177], all of which had a one-sided impact upon Mr. Warners defense that denied him "a trial in accord with traditional and fundamental standards of due process".[178]

The trial court made multiple erroneous rulings and this Court has held that "the cumulative effect of such erroneous rulings require reversal of the conviction".[179] The most damaging ruling was the summary denial of Mr. Warners Motion to dismiss for, inter alia, speedy trial without conducting any analysis nor issuing Findings of fact and Conclusions of law as required. The Montana Supreme Court conceded that the district court erred in its speedy trial analysis[180], then, once more, misstates the facts of the case to justify the error. "The record clearly demonstrates Warner, while representing himself, twice moved for a psychiatric examination".[181] What the record actually reflects is that Mr. Warner did not begin representing himself until March 22, 2017[182] and that the trial court refused to even acknowledge any of his motions or letters before that date[183], nor instruct the State to respond to them, thus the two motions mentioned (February 1, 2017 and March 2, 2017) were never properly before the court or subject to its ruling. Furthermore, even if they were, Mr. Warner clearly informed the court that he wanted to withdraw these motions to preserve his speedy trial right, but was denied the autonomy of directing his own defense. The Montana Supreme Court cannot have it both ways: either Mr.

Warner was representing himself, in which case he had the plenary power to withdraw the motions as a strategic decision, or the time attributed to him in the speedy trial analysis should have been properly assigned to the court for forcing him to go to the state hospital against his strenuous objections.[184] Both of these cannot be concurrently true, for as this Court has held, "if the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made".[185]

Having already invaded Mr. Warners attorney-client privilege and learned of his trial strategy, the State was able to supplement the contested identifications with inflammatory and inaccurate remarks during closing argument, to mislead the jury into believing Mr. Warner was guilty. Aside from the impropriety of sandbagging Mr. Warner by having co-counsel give only ten minutes and reserving the remaining fifty for himself, the lead prosecutor manipulated and misstated the evidence, implicated Mr. Warners right to remain silent, and raised an entirely novel notion of the arrangement of the money during his closing remarks, knowing that Mr. Warner could no longer respond. The State was also allowed to manufacture identification evidence through the testimony of an individual who was not present for the robbery despite Mr. Warners attempt to suppress this very inadmissible evidence pretrial. Where, as here, the States case was weak to begin with, the cumulative effect of the prosecutorial misconduct substantially affected the jury's verdict.

There are several improper remarks during closing argument and the prosecutors misconduct was not "slight or confined to a single instance, but...was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential".[186]

"And so one of the things that we have is this surveillance photo...that shows this hat, and in that light I submit to you that hat does look gray...theres been no dispute that this is Mr. Warners and yet this is the hat that was found on him."[187]

"...when Mr. Warner was brought in and when Mr. Warner was seen kicking chairs, kicking doors, yelling, telling officers 'you think your safe here? You're not.' Now, why would Mr. Warner say that?"[188]

"So his statements such as 'you think you're safe here, you're not'...[189]

"...there was no coat and there was no shoes. Ladies and gentlemen, shoes make a difference with regard to height."[190]

"If Danny Warner is innocently at the counter of the VFW drinking a beer and two officers come lock him up and send him out the door, he doesn't say a word? Not one word? What's going on? You got me, that's what's going on in Mr. Warners mind."[191]

"What we have, ladies and gentlemen, we have multiple identifications of Mr. Warner in this case. You heard with regards to Brian Scotti-Belli I saw you..."[192]

"Ladies and gentlemen, you might be interested to look at the cash and how it's piled together... [i]f the person took approximately $120 worth of cash in roughly those denominations and stacked them in it might add up just like that, right?"[193]

Far from being ambiguous remarks that may or may not affect the jury these were "focused, unambiguous, and strong".[194] It would be impossible to read the prosecutors closing argument without seeing it as a calculated and sustained attempt to mislead and inflame the jury. The remark about police not being safe "here" was completely irrelevant to the case and only intended to be inflammatory considering Mr. Warner is not from Montana, while the jury was from the area where the police are a large part of the community. Mr. Warner had objected to the introduction of this testimony when it was first raised[195], however, was overruled by the judge; Mr. Warner saw no point in objecting again during closing as it would have only irritated the jury and emphasized the very evidence that he did not want introduced in the first place.

The remark about the gray hat is relevant considering the judge did

not allow the properly admitted audio exhibit that would have clarified the color of the beanie to go to the jury. Additionally, Ahner lied blantantly as the gray hat was not found on him; he was arrested wearing a black stocking cap, a highly disputed fact throughout the entire trial.

The remark about the money is particularly troubling as it was not only raised for the first time in closing once Mr. Warner had no opportunity to respond, but Mr. Warner had also filed a Motion in limine "to suppress all evidence related to money purportedly taken from Jordan Miller and exclude any testimony regarding money stolen or recovered pursuant to Rule 403 M.R.E."[196] that was summarily denied with the rationale that, despite the State not having the actual money in evidence, "photographs and testimony concerning the cash are relevant, admissible..."[197] The arrangement of the money in the photograph was completely staged by police, rather than being how it was actually found on Mr. Warner and he had nearly seven times the amount allegedly stolen.

Finally, the State used Mr. Warners initial silence as evidence of guilt, which this Court has clearly held unconstitutional.[198]

## CONCLUSION

For all the reasons cited herein Mr. Warner respectfully prays this Court grant his petition for a writ of certiorari.

Dated this 1st day of July, 2020.

Respectfully submitted,

DANNY LEE WARNER JR.

NOTES:
[1] App. F, Tr. pg. 284@6
[2] App. F, Tr. pg. 327@19-20
[3] App. F, Tr. pg. 217@9-11; pg. 297@10-12
[4] App. F, Tr. pg. 217@21-25; pg. 297@13-15
[5] App. F, tr. pg. 217@12-25
[6] App. F, Tr. pg. 293@5-11
[7] App. F, Tr. pg. 248@9-10; pg. 296-297; pg. 429-430
[8] App. F, Tr. pg. 364@14-17; pg. 430@5; pg. 664@13; pg. 667@11-13
[9] App. F, Tr. pg. 243@10-12
[10] App. F, Tr. pg. 465@7-10
[11] App. D, Tr. Suppression hearing, pg. 36@8-10
[12] App. F, Tr. pg. 343@20
[13] App. F, Tr. pg. 256@7-11; pg. 256-257
[14] App. F, Tr. pg. 259@16-18
[15] App. F, Tr. pg. 250@11-16
[16] App. F, Tr. pg. 465@7-10
[17] App. F, Tr. pg. 219@15-16
[18] App. F, Tr. pg. 220@16-18
[19] App. F, Tr. pg. 294@21-23
[20] App. F, Tr. pg. 200@13-15
[21] App. F, Tr. pg. 465@7-10; pg. 468@18-21
[22] App. F, Tr. pg. 466@9-11
[23] App. F, Tr. pg. 420-444
[24] App. F, Tr. pg. 428@2-11 and 436@14-20
[25] App. F, Tr. pg. 191-192
[26] App. F, Tr. pg. 668-672
[27] Arraignment
[28] App. F, Tr. pg. 234@3-5
[29] App. F, Tr. pg. 432@17-19; pg 435@13-14; pg. 481@12; pg. 573@4-6
[30] App. F, Tr. pg. 435@13-14
[31] U.S v Carter, 2019 U.S. Dist. LEXIS 137728 (KS); Austin Lawyers Guild v Securus Techs, Inc., 2015 U.S. Dist. LEXIS 178047 (W.D. TX); Romero v Securus Techs, Inc., 2018 U.S. Dist. LEXIS 198922 (S.D. Cal); Johnson v CoreCivic, 2018 U.S. Dist LEXIS 226333; see also Jordan Smith & Micah Lee, "Not so Securus", INTERCEPT (theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients)
[32] U.S. v Carter, 2019 U.S. Dist. LEXIS 137728 *146 (KS)
[33] id. *250 and *251
[34] Compare State v Warner, 2020 MT 93N with State v Robins, 164 Idaho 425 (2018)
[35] The Tenth circuit holds that purposeful intrusion is per se prejudicial and violates the Sixth Amendment with no showing by defendant (see Shillinger v Haworth, 70 F.3d 1132 (10th cir. 1995); accord U.S. v Levy, 577 F.2d 200(3rd cir. 1978) and Briggs v Goodwin, 698 F.2d 486(D.C. cir. 1983)) Conversely, the Sixth circuit has held that the defendant must prove both intentional intrusion and prejudice. (see Chittick v Lafler, 514 Fed. Appx. 614(6th cir. 2013); accord U.S. v Kriens, 270 F.3d 597(8th cir. 2001) and U.S. v Massino, 311 F.Supp. 2d 309(2nd cir. 2004)) The First and Ninth circuits take a middle ground, holding that once a defendant demonstrates prima facie evidence of purposeful intrusion the burden shifts to prosecutors to prove there was no prejudice under any standard, though under all of these approaches a hearing would be required to determine purposeful intrusion and/or prejudice.

[36] InnocenceProject.org/understand/Eyewitness-Misidentification.php
[37] see Athan P. Papailliou, "The great engine that couldn't:science, mistaken identity, and the limits of cross-examination", 36 Stetson L. Rev. 727, 772 (2007)
[38] State v Henderson, 208 N.J. 208(N.J. 2011); State v Lawson, 352 Ore. 724 (OR 2012); Young v State, 374 P.3d 395 (Alas. 2016)
[39] State v Cunningham, 2018 MT 56, ¶33
[40] see U.S v Cronic, 466 U.S. 648 (1984)
[41] Bursey v Weathorford, 528 F.2d 483, 486 (4th cir. 1975)
[42] Morissey v Brewer, 408 U.S. 471, 481 (1972)
[43] U.S. v Danielson, 325 F.3d 1054, 1070-71 (9th cir. 2003)
[44] U.S. v Morrison, 449 U.S. 361 (1981)
[45] Briggs v Goodwin, 698 F.2d 486, 494 (D.C. cir. 1983)
[46] U.S. v Cronic, 466 U.S. 648, 658 (1984)
[47] see App. C, Addendum to Motion for new trial
[48] id. @ Tools>Reports>Call Detail>Search>Download, where prosecutor elected to ignore the privacy filter and chose instead the most intrusive option of downloading it to his computer to keep.
[49] see App. C, Motion for new trial, Recording access log pg. 16
[50] 18 U.S.C. §2510, et. seq.
[51] U.S. v Novak, 531 F.3d 99, 102-104 (1st cir. 2008)
[52] "Attorney-client privilege under attack in jails across the nation", Prison Legal News (May, 2019)
[53] Bond v U.S., 529 U.S. 334, 340 (2000)(citations omitted)
[54] see Minnesota v Dickerson, 508 U.S. 366, 373 (1993)
[55] Lanza v New York, 370 U.S. 139, 143-144 (1962)
[56] Florida v Georgia, 138 S.Ct. 2502, 2546 (2018)
[57] U.S. v Adams, 2018 U.S Dist. LEXIS 208752 *62
[58] Armstrong v Manzo, 380 U.S. 545, 552 (1965)
[59] Townsend v Sand, 372 U.S. 293, 312 (1963)
[60] "Kastigar hearing= a hearing at which the prosecution must establish by a preponderance of the evidence that the governments evidence derives from proper nonimmunized sources" (Blackstone's)
[61] InnocenceProject.org/Understand/Eyewitness-Misidentification.php
[62] Matthew J. Reedy, "Witnessing the witness", 86 Notre Dame L. Rev. 905, 906-07 (2011)
[63] Dowling v U.S., 493 U.S. 342, 352 (1990)(internal quotation marks omitted)
[64] see State v Long, 721 P.2d 483, 491 (Utah 1986)
[65] Timothy P. O'Toole & Giovanna Shay, "Manson v Brathwaite revisited: towards a new rule of decision for Due Process challenges to eyewitness identification procedures", 41 Val. U.L.Rev. 109,121(2006)
[66] State v Henderson, 208 N.J. 208, 286 (N.J. 2011)
[67] Stovall v Denno, 388 U.S. 293 (1967); U.S. v Wade, 388 U.S. 218 (1967); Simmons v U.S., 390 U.S. 377 (1968); Foster v California, 394 U.S. 440 (1969); Coleman v Alabama, 399 U.S. 1 (1970); Neil v Biggers, 409 U.S. 188 (1972); Kirby v Illinois, 406 U.S. 682 (1972); Manson v Brathwaite, 432 U.S. 98 (1977); Perry v New Hampshire, 565 U.S. 228 (2012)
[68] Brathwaite @ 111-113
[69] Biggers @ 198; see note [38]
[70] Biggers @ 198
[71] Biggers @ 199-200 (emphasis added)
[72] see U.S. v Wade, 388 U.S. 218, 228 (1967)
[73] Perry @ 232
[74] Perry @ 248
[75] Fourteenth Amendment to the U.S. Constitution
[76] State v Warner, 2020 MT 93N, ¶19

[77] see Frederic D. Woocher, "Did your eyes deceive you?", 29 Stàn. L.Rev. 969, 970 (1977)
[78] Brathwaite @ 111
[79] see note [38]
[80] id.
[81] Lawson @ 744
[82] App. F, Tr. pg. 189@22
[83] App. F, Tr. pg. 287@5-6
[84] Henderson @ 262
[85] App. D, Tr. of Supp. Hearing pg. 39-42
[86] App. F, Tr. pg. 295@13
[87] Biggers @ 199
[88] see note [7]
[89] Lawson @ 744
[90] App. F, Tr. pg. 327@19-20
[91] Young @ 423
[92] App. F, Tr. pg. 216@18-23; pg. 233
[93] Young @ 424
[94] App. F, Tr. pg. 430@1-2
[95] App. F, Tr. pg. 292@15
[96] Young @ 425
[97] App. F, Tr. pg. 293@5-11
[98] Henderson @ 267 (internal citations omitted)
[99] U.S. v Lewis, 719 Fed. Appx. 210, 229 (4th cir. 2018)
[100] App. F, Tr. pg. 465@7-10
[101] App. F, Tr. pg. 294@17-18
[102] Brathwaite @ 129
[103] Perry @ 239
[104] U.S. v Scott, 420 F.Supp. 3d 295, 318 (3rd cir. 2019)
[105] U.S. v Shaw, 894 F.2d 689, 692 (5th cir. 1990)
[106] Hudson v Blackburn, 601 F.2d 785, 788 (5th cir. 1979)
[107] McFowler v Jaimet, 349 F.3d 436, 453-454 (7th cir. 2003)
[108] see e.g. Carson v Artus, 2020 U.S. Dist. LEXIS 13204
[109] Kirby v Illinois, 406 U.S. 682, 690 (1972)(emphasis added)
[110] see Michael D. Cicchini & Joseph G. Easton, "Reforming the law on show-up identifications", 100 J Crim. L. & Criminology 381, 388-89 (2010)
[111] Lawson @ 743
[112] compare notes [7] and [8]
[113] App. F, Tr. pg. 243@10-12
[114] App. F, Tr. pg. 259@16-18
[115] App. F, Tr. pg. 191-192
[116] App. F, Tr. pg. 464@25-465@1-10
[117] App. F, Tr. pg. 466@9-22
[118] App. F, Tr. pg. 467@6-25
[119] App. F, Tr. pg. 457@2-5
[120] App. F, Tr. pg. 464@5-7
[121] App. F, Tr. pg. 488@6
[122] App. F, Tr. pg. 489@24
[123] App. F, Tr. pg. 454@10-17
[124] App. F, Tr. pg. 450@5-10
[125] App. F, Tr. pg. 457-463
[126] App. D, Findings of fact & Conclusions of law
[127] App. D, Tr. of Supp. Hearing, pg. 176@19-23
[128] App. D, Motion to suppress
[129] State v Warner, 2020 MT 93N, ¶19
[130] id.
[131] App. F, Tr. pg. 297@25

[132] State v Warner, 2020 MT 93N, ¶19
[133] App. F, Tr. pg. 292@15; pg. 296@19-24
[134] App. D, Tr. of Supp. Hearing, pg. 175
[135] App. F, Tr. pg. 321@7-17
[136] App. F, Tr. pg. 774@8-11
[137] App. D, Tr. of Supp. Hearing pg. 36@2
[138] U.S. v Cronic, 466 U.S. 648, 656-657 (1984)
[139] California v Trombetta, 467 U.S. 479, 485 (1984)
[140] State v Warner, 2020 MT 93N, ¶20
[141] State v Long, 721 P.2d 483, 492 (Utah 1986)
[142] Perry @ 246
[143] Mark W Bennett, "Unspringing the witness memory and demeanor trap", 64 Am. U. L. Rev. 1331 (July 2015)
[144] App. E, Credibility instruction
[145] id.
[146] Watkins v Sowders, 449 U.S. 341, 352 (1981)(Justice Brennan, dissenting)
[147] see Hal Arkowitz & Scott O. Lillenfeld, "Why science tells us not to rely on eyewitness accounts", Sci.Am. (Jan. 8, 2009)
[148] see Elizabeth Loftus, "How reliable is your memory?", TED TALK (June 2013)
[149] see Daniel L. Schacter, "The seven sins of memory: How the mind forgets and remembers" 9 (2001)
[150] see Michael R Leippe, et. al., "Cueing confidence in eyewitness Identifications", 33 Law & Hum. Behav. 194 (2009)
[151] Jennifer E. Dysert, "A primer on the psychology of eyewitness memory", 64 Loy. L. Rev. 663, 664 (Fall 2018)
[152] Jules Epstein, "The great engine that couldn't: science, mistaken identity, and the limits of cross-examination", 36 Stetson L. Rev. 727, 772 (2007)
[153] Dennis v Sec'y PA Dept. of Corr., 834 F.3d 263, 344 (3rd cir. 2016)
[154] Sullivan v Louisianna, 508 U.S. 275, 277 (1993)
[155] Bollenbach v U.S., 326 U.S. 607, 612 (1894)
[156] James Grant, "The mysteries of all nations", chapter LVI
[157] U.S. v Wade, 388 U.S. 218, 235 (1967)
[158] App. F, Tr. pg. 488@1
[159] Cavasor v Smith, 565 U.S. 1, 2 (2011)
[160] App. E, Credibility instruction
[161] App. E, Discussion on jury instruction
[162] State v Warner, 2020 MT 93N, ¶20
[163] Perry @ 230
[164] Brathwaite @ 117 (Justice Stevens concurring)
[165] Parle v Runnels, 505 F.3d 922, 927 (9th cir. 2007)(citations omitted)
[166] Kyles v Whitley, 514 U.S. 419 (1995)
[167] U.S v Baker, 432 F.2d 1189, 1223 (11th cir 2005)
[168] Purcell v Horn, 187 F.Supp. 2d 260, 274 (W.D PA 2002)
[169] see e.g. note [165]; Livingston v Johnson, 107 F.3d 297 (5th cir. 1997); Young v Sirmons, 551 F.3d 942 (10th cir. 2008); Fahy v Horn, 516 F.3d 169 (3rd cir. 2008)
[170] Kyles v Whitley, 514 U.S. 419, 421 (1995)
[171] Chambers v Mississippi, 410 U.S. 284, 294 (1973)
[172] id. @ 290 n.3
[173] Payne v Arkansas, 356 U.S. 560, 568 (1958)
[174] see App. F, Pretrial hearing of April 19, 2017
[175] App. C, Subpoena Duces Tecum; Motion for issuance of Subpoena Duces Tecum (Expedited); Objection to courts abuse of discretion

[176] App. F, April 25 & September 17, 2017 letters from clerk of court
[177] App. F, Discussion on limited waiver of attorney-client privilege
[178] Chambers @ 302
[179] Chambers @ 294
[180] State v Warner, 2020 MT 93N, ¶17
[181] id.
[182] App. F, March 22, 2017 Hearing summary
[183] App. F, January 30 & February 6, 2017 letters and rejected motions
[184] App. F, April 19, 2017 Pretrial hearing
[185] Indiana v Edwards, 554 U.S. 164, 187 (2008)
[186] Berger v U.S.,295 U.S. 78, 89 (1935)
[187] App. F, Tr. pg. 764@13-20
[188] App. F, Tr. pg. 766@5-11
[189] App. F, Tr. pg. 775@18-19
[190] App. F, Tr. pg. 770@13-15
[191] App. F, Tr. pg. 774@2-7
[192] App. F, Tr. pg. 774@8-10
[193] App. F, Tr. pg. 777@16-25
[194] Caldwell v Mississippi, 472 U.S. 320,340 (1985)
[195] App. F, Tr. pg. 419@9
[196] App. F, Motion in Limine RE: Money
[197] App. F, Order & Rationale on pending motions, pg. 4
[198] see Griffin v California, 380 U.S. 609, 615 (1965)