APPENDICES

GENERAL TABLE OF CONTENTS

§ I: TAB A **APPENDIX A**-- Ninth Circuit Court of Appeals, Cause 22-35774; Order denying Certificate of Appealability, Rule 60.

APPENDIX B-- United States District Court, District of Montana, Cv 21-026-BLG-DLC-TJC, Ellison v Salmonsen, et al.

APPENDIX C-- Montana Supreme Court, 2020 MT 324N; Appeal from Petition for Postconviction Relief.

APPENDIX D-- Montana 13th Judicial District Court, Cause DV-18-1629 Petition for Postconviction Relief.

§II: TAB B **APPENDIX E** -- Ninth Circuit Court of Appeals, Nos:20-35189 & 21-35669 Order denying Certificate of Appealability, Rule 60.

APPENDIX F -- United States District Court, District of Montana, Cv 17-168-BLG-DLC-TJC, Ellison v Fletcher, et al.

APPENDIX G -- Montana Supreme Court, 2020 MT 228N; Appeal from Petition for Postconviction Relief.

APPENDIX H -- Montana 13th Judicial District Court, Cause DV-19-1330 Petition for Postconviction Relief.

TAB C **APPENDIX I** -- Documentation of Retaliation by Respondents; Admissions to Cruel and Unusual Punishment.

TAB D **APPENDIX J** --- 'Outrageous' Gov't. Misconduct and Structural Defects, Perjury and 'Fraud upon the Court', by Federal Jurists covering up the 'Structural Defects' and errors in the Montana State Court System.[See Closing Memorandum]

****

APPENDIX K

APPENDIX L -- N/A

APPENDIX M -- N/A

APPENDIX N -- N/A

APPENDIX O -- N/A

APPENDIX P -- N/A

§ I: The Attack upon the Ellison Residence, by Det. Fritz, as witnessed.
§ II: The Car Fire, in which Ellison was driving the car when it exploded.

NOTE: Each Appendix has it's own detailed Table of Contents, with numbered Exculpatory Exhibits, therein.

FILED

JAN 26 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIONEL SCOTT ELLISON,

Petitioner-Appellant,

v.

JIM SALMONSEN, Warden; STATE OF MONTANA,

Respondents-Appellees.

No. 22-35774

D.C. No. 1:21-cv-00026-DLC
District of Montana,
Billings

ORDER

EXHIBIT
3 A

Before: S.R. THOMAS and McKEOWN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 3, 4, 6) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

To the extent appellant wishes to challenge the conditions of his confinement (Docket Entry No. 8), the denial of appellant's request for a certificate of appealability does not preclude him from pursuing these claims in a properly filed civil action brought pursuant to 42 U.S.C. § 1983.

All remaining motions are denied as moot.

DENIED.

EXHIBIT 4 B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

LIONEL SCOTT ELLISON,

Petitioner,

vs.

JAMES SALMONSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA

Respondents.

CV 21-26-BLG-DLC-TJC

ORDER

This case comes before the Court on Petitioner's motion to proceed in forma pauperis. After reviewing the motion and supporting account statement, I find that Petitioner has sufficiently shown he cannot afford to pay all costs that may be associated with this action. The motion to proceed in forma pauperis will be granted.

As Petitioner was advised in the Notice of Case Opening, habeas petitions must be prescreened. The process takes some time as many petitions are before the Court. When prescreening is completed, an Order and/or Findings and Recommendation will be issued and will prescribe the next step in the litigation.

Based on the foregoing, the Court enters the following:

ORDER

Petitioner's motion to proceed in forma pauperis (Doc. 3) is GRANTED.

The Clerk of Court shall waive payment of the filing fee.

Petitioner must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address." Failure to do so may result in dismissal of this case without notice to him.

DATED this 21st day of May, 2021.

/s/ Timothy J. Cavan
Timothy J. Cavan
United States Magistrate Judge

EXHIBIT 11 B

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

PARK COUNTY CLERK OF DISTRICT COURT

2013 MAY 29 PM 4 55

FILED BY DEPUTY

THE STATE OF MONTANA,

Plaintiff,

v.

LIONEL SCOTT ELLISON,

Defendant.

Cause No. DC 10-114

ORDER OF DISMISSAL

Pursuant to the motion to dismiss filed by the State, this matter charging the Defendant with COUNT I: TAMPERING WITH EVIDENCE, a felony, is dismissed.

DATED this 29th day of May, 2013.

HON. BRENDA GILBERT
District Judge

c: Brett D. Linneweber, Park County Attorney
Liz Honacker, Attorney for Defendant
Dispatch c/c
Dept of Corrections c/c
Park County Sheriff c/c

MG 5-29-13 JL

D. 20

EXHIBIT
12
B

PARK COUNTY CLERK
OF DISTRICT COURT
JUNE LITTLE
2016 JUL 26 PM 3 21
FILED
BY MOLLY BRADBERRY
DEPUTY

State Report
14 pages

HON. BRENDA R. GILBERT
District Judge
Sixth Judicial District
414 East Callender Street
Livingston, Montana 59047
406-222-4130

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

* * * * * * * * * * * * * * *

STATE OF MONTANA,

Plaintiff,

vs.

LIONEL SCOTT ELLISON,

Defendant.

CAUSE NO. DC 10-114

ORDER RELEASING REPORT

PURSUANT to request by the Defendant, dated June 26, 2016, and with no position taken by the State in this matter, with good cause shown, the Court hereby makes the following Order:

1. The Clerk of District Court is directed to mail a copy of the enclosed requested report, dated May 23, 2012, to the Defendant at: Lionel Scott Ellison 3003002, 700 Conley Lake Road, Deer Lodge, MT 59722.

SO ORDERED this 26th day of July, 2016.

Brenda R. Gilbert
BRENDA R. GILBERT, District Court Judge

CC: Park County Attorney
Lionel Scott Ellison – with attachment

mld 7-26-16

mrb

DA 20-0375

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 324N

LIONEL SCOTT ELLISON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 18-1629
Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lionel Scott Ellison, Self-Represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Julie Elaine Mees, Deputy County Attorney, Billings, Montana

Submitted on Briefs: November 12, 2020

Decided: December 29, 2020

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Lionel Scott Ellison appeals the July 9, 2020 order of the Thirteenth Judicial District Court, Yellowstone County, denying his petition for postconviction relief (PCR). We affirm.

¶3 On March 13, 2013, Ellison staged a crime scene in which he attempted to implicate a Yellowstone County Detective. Relative to that incident, Ellison was charged with four counts:

> Count 1: Arson;
> Count 2: Tampering with or Fabricating Physical Evidence;
> Count 3: Tampering with or Fabricating Physical Evidence; and
> Count 4: Impersonating a Public Servant, a felony.

¶4 A jury acquitted Ellison of the arson charge but convicted him of both counts of tampering with or fabricating physical evidence and the count of impersonating a public servant. We reversed the conviction for the second count of tampering with evidence, holding that Ellison's counsel was ineffective by failing to object to the second count under the multiple conviction statute. *State v. Ellison*, 2018 MT 252, ¶ 29, 393 Mont. 90, 428 P.3d 826 (*Ellison I*). We affirmed the convictions on the other two charges and remanded for resentencing. *Ellison I*, ¶ 29.

¶5 On remand, the District Court sentenced Ellison to ten years imprisonment for the tampering conviction and five years for the impersonation conviction. Ellison appealed, raising multiple challenges to both his sentence on remand and to his underlying convictions. *State v. Ellison*, 2019 MT 217N, ¶ 4, 397 Mont. 554, 455 P.3d 447 (*Ellison II*). We rejected Ellison's challenges to his resentencing and affirmed his sentence. *Ellison II*, ¶ 13. With respect to Ellison's collateral attacks on his conviction, we held that they were beyond the scope of his appeal. We noted that Ellison had already initiated a PCR proceeding and that would be the proper venue for pursuing a collateral attack to his underlying convictions. *Ellison II*, ¶ 11. We similarly held that Ellison's allegations of ineffective assistance of counsel (IAC) during the guilt phase of his trial and during his first appeal were beyond the scope of his appeal and that his pending PCR proceeding "may be the appropriate vehicle to raise such claims, subject to properly establishing them in that forum." *Ellison II*, ¶ 12.

¶6 Ellison's PCR petition alleged: (1) insufficiency of the evidence against him at trial; (2) judicial bias of the trial judge against Ellison due to supposed business interactions with Ellison's family; (3) mental impairment at trial impairing Ellison's ability to assist in his own defense; (4) malicious prosecution and prosecutorial misconduct; (5) perjury committed by the State's witnesses; (6) ineffective assistance of trial and appellate counsel; and (7) violation of the prohibition against double jeopardy by charging him with two counts of tampering with or fabricating physical evidence.

¶7 On July 9, 2020, the District Court denied Ellison's petition. In a twenty-six page Order, the District Court detailed and addressed Ellison's allegations and rejected them all.

The District Court concluded that an evidentiary hearing was not required. The District Court held:

> Even within the context of the Petition itself and the voluminous documents that Ellison has filed, he has been self-contradictory and consistently misrepresented the meaning of evidence and cases presented in support of his arguments. The only evidence that Ellison has in support of his claims is the testimony of himself and his parents. The Court finds Ellison's story and that of his parents to be completely without merit, frivolous, and one that Ellison intends to uphold even when the evidence directly contradicts it.

¶8 We review a district court's denial of a PCR petition to determine whether its findings of fact are clearly erroneous and whether its conclusions of law are correct. *Griffin v. State*, 2003 MT 267, ¶ 7, 317 Mont. 457, 77 P.3d 545. We review discretionary rulings in postconviction proceedings, including rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *Sartain v. State*, 2012 MT 164, ¶ 43, 365 Mont. 483, 285 P.3d 407. IAC claims present mixed questions of law and fact which we review de novo. *State v. Henderson*, 2004 MT 173, ¶ 3, 322 Mont. 69, 93 P.3d 1231.

¶9 A petitioner seeking to reverse a district court's denial of a PCR petition bears a heavy burden. *Whitlow v. State*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861. The petitioner has the burden to show, by a preponderance of the evidence, that the facts justify relief. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422. In so doing, the petitioner must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. "Mere conclusory allegations" do not satisfy this procedural requirement. *Ellenberg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315,

87 P.3d 473. If a postconviction petition fails to state a claim for relief, a district court may dismiss the petition as a matter of law. Section 46-21-201(1)(a), MCA.

¶10 Having reviewed the record and the District Court's exhaustive order addressing Ellison's PCR contentions, we find no error in either the District Court's rejection of Ellison's petition, nor in its determination that a hearing was not warranted.[1]

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JIM RICE

[1] Ellison also faults the District Court for failing to address his double jeopardy claim. Ellison alleges that the two charges of evidence tampering violated his right to be free from double jeopardy. Although the District Court did not address that issue, it lacks merit in any event because we vacated the second evidence tampering charge in Ellison's first appeal. *Ellison I*, ¶ 29.

EXHIBIT
3
MT. D.C.+ D

Julie Mees
Deputy Yellowstone County Attorney
P.O. Box 35025
Room 701, Courthouse
Billings, MT 59107-5025
Telephone 406/256-2870
Attorney for Plaintiff

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA Plaintiff, vs. LIONEL SCOTT ELLISON, Defendant.	Cause No. DV 18-1629 Judge Matthew J. Wald **STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF**

Comes now the State of Montana, by and through Deputy County Attorney Julie Mees, and responds to the Petition for Post-Conviction Relief.

INTRODUCTION

On September 23, 2015, the Petitioner was convicted of Count II: Tampering with or Fabricating Physical Evidence (Felony); Count III: Tampering with or Fabricating Physical Evidence (Felony); and Count IV: Impersonation of a Public Servant (Felony). He was acquitted of Count I: Arson (Felony) in DC 14-0614. He was represented by Michael Kakuk. On December 21, 2015, he was sentenced to 10 years to the Montana State Prison each on Counts II and III and to five years to the Montana State Prison on Count IV. The sentences were consecutive to each other, and the Defendant was sentenced as a Persistent Felony Offender (PFO).

The Defendant subsequently appealed the case to the Montana Supreme Court, which reversed the conviction for Count III. In addition to the argument concerning the tampering counts,

the Defendant challenged this Court's ruling on evidence admitted pursuant to Rule 404(b), Mont. R. Evid., and the imposition of the technology user surcharge fee. On October 16, 2018, the Court held that his trial counsel was ineffective for failing to object to his convictions for the tampering counts under Mont. Code Ann. § 46-11-410. The Court held the two tampering counts were part of one transaction, reversed the conviction for Count III, and remanded for resentencing. The case was also remanded to amend the technology surcharge fee. The Court affirmed the District Court on the evidence admitted pursuant to Rule 404(b), Mont. R. Evid.

On October 18, 2018, the Defendant filed a 52-page Petition for Post-Conviction Relief and a 215-page Brief in Support. He also filed two Addenda to the Petition on October 28, 2018, and November 5, 2018. The Addenda seem to repeat information contained in the original Petition and supporting Brief. The Petitioner also filed several other documents with both the underlying criminal cause number and the Petition cause number after he was resentenced.[1]

On December 14, 2018, the Court held a sentencing hearing and resentenced the Defendant to Count II: 10 years to a prison designated by the Department of Corrections and to Count IV: five years to a prison designated by the Department of Corrections. The counts were consecutive to each other, and the Defendant was sentenced as a PFO.

The Petitioner claims:

1. The evidence presented at trial was not sufficient for proof beyond a reasonable doubt;
2. Judge Jones was biased against him due to an alleged past business deal with the Petitioner's father;
3. The Petitioner was "forced into mental impairment" during the trial when detention staff at the Yellowstone County Detention Facility failed to feed him;
4. The State engaged in malicious prosecution and prosecutorial misconduct;
5. Defense counsel was ineffective;
6. Two witnesses committed perjury; and
7. Counts II and III should be dismissed.

[1] The Court ordered the State to respond to the Petition. The State will not respond to the other documents filed by the Petitioner, including the addenda. Mont. Code Ann. § 46-21-105 allows the Petitioner to file one amendment. There is no statutory provision for filing addenda.

The State argues that the first claim should be dismissed because the Petitioner could have raised the issue of sufficiency of the evidence on direct appeal and failed to do so. The Petitioner is now barred from raising this issue through a petition for post-conviction relief. The last claim was decided in the Petitioner's favor on appeal – albeit on different grounds – and cannot be raised in a petition for post-conviction relief. The remaining claims should be dismissed on the merits. The records and affidavit submitted by the State in conjunction with the applicable law demonstrate that the Petitioner's claims are wholly without merit and should be denied without a hearing.

ANALYSIS

I. THE COURT SHOULD DISMISS THE PETITION ON THE MERITS WITHOUT A HEARING.

The Court should deny the Petition without a hearing pursuant to Mont. Code Ann. § 46-21-201(1)(a). A district court may dismiss a petition for post-conviction relief based solely upon the files and records of the case. *Griffin v. State*, 2003 MT 267, ¶ 12, 317 Mont. 457, 77 P.3d 545. A petition for post-conviction relief must show by a preponderance of the evidence that the facts justify the relief. *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588 (citations omitted). "Mere conclusory allegations are insufficient to support the petition." *Id.* Further, a district court is not required to hold a hearing on a petition for post-conviction relief. *Swearingen v. State,* 2001 MT 10, ¶ 7, 304 Mont. 97, 18 P.3d 998. In *State v. Cobell*, 2004 MT 46, ¶ 12, 320 Mont. 122, 86 P.3d 20, the Court stated, "If a district court finds that the allegations in a petition are without merit or would not otherwise entitle a petitioner to relief, a district court may deny an application for postconviction relief without holding an evidentiary hearing." *Cobell*, ¶ 12 (citations omitted; emphasis added).

A district court may deny the petition on the pleadings for failure to state a claim when the petition and supporting memorandum and evidentiary showing fail to present a prima facie post-conviction claim. Mont. Code Ann. § 46-21-201(1)(a); *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422.

Additionally, the Court has held, "unsupported allegations are not sufficient to entitle a postconviction hearing under § 46-21-201, MCA." *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299. The Petitioner has supported his petition with self-serving affidavits from himself and his parents. The affidavits are not a sufficient basis upon which to base a petition for post-conviction relief.

The State will address the substance of each of the Petitioner's remaining complaints in turn. The memorandum, record, and attached exhibit show that the Petition should be denied without a hearing.

II. THE PETITIONER'S CLAIMS ABOUT THE SUFFICIENCY OF THE EVIDENCE SHOULD BE DISMISSED BECAUSE HE COULD HAVE RAISE THE ISSUE ON APPEAL AND FAILED TO DO SO.

Only a person without an adequate remedy of appeal is entitled to relief through a petition for post-conviction relief. Mont. Code Ann. § 46-21-101. All record-based claims must be raised on direct appeal. *See* generally, *State v. Whitlow*, 2001 MT 208, 306 Mont. 339, 33 P.3d 877. Post-conviction claims are reserved for non-record based claims. *State v. White*, 2001 MT 149, 306 Mont. 58, 30 P.3d 340. Mont. Code Ann. § 46-21-105(2) provides in pertinent part, "When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or ***could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter.***" Mont. Code Ann. § 46-21-105(2) (emphasis added).

The Petitioner has already appealed his convictions to the Montana Supreme Court, and that Court has issued an opinion. The Petitioner could have raised the issue of the sufficiency of the evidence of appeal but did not do so. He is now procedurally barred from raising the issue now. The Court should deny the Petitioner's first claim.

III. THE PETITIONER'S CLAIM OF JUDICIAL BIAS FAILS BECAUSE JUDGE JONES HAD NO BUSINESS DEALINGS WITH THE PETITIONER'S FATHER OR THE PETITIONER.

Rule 2.12(A)(1) of the Code of Judicial Conduct provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,

including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party..." The Montana Supreme Court has held, "The well-established common law rule is that recusal is required when a judge has a direct, personal, substantial, or pecuniary interest in a case." (Citations omitted). *Bullman v. State*, 2014 MT 78, ¶ 14, 374 Mont. 323, 321 P.3d 121.

The Petitioner claims he and his father had a business arrangement with Judge Jones regarding the Special K Ranch in Columbus, and the parties had a disagreement over payment. The Petitioner goes so far as to claim that Judge Jones owes money to the Petitioner and his family. The Petitioner includes undated "Affidavits" from his father, Claude Ellison (Affidavits F and G included in Petitioner's Brief).

The State counters that the alleged business dealing is an invention by the Petitioner. Judge Jones expressly denied any dealings with the Petitioner and any connection to the Special K Ranch. Further, the Petitioner and his family have submitted numerous letters and motions with the trial court. In Claude Ellison's earlier letters, he failed to mention any business connection with Judge Jones. Contrary to his latter filings and his claims in the current action, the Petitioner's early filings praised Judge Jones regarding the business arrangement.

In a letter from the Petitioner to Judge Jones dated October 3, 2015, he wrote

I pray you are as honest as you were in the past in the business with Mike Dooley, Special K Ranch and my company in helping our family company get paid during the construction of the resident home. Mike Dooley swore by you that time.

He expressed a similar sentiment in a letter to Judge Jones dated December 22, 2015

Please your Honor understand I did some of the things. You knew me & my dad when we worked for Special K Ranch & you Building those rentals homes and the first Green House. I Thank You for keeping an Eye. Mike Dooley said you were good honest man then. I hope I can see [illegible]

After the Petitioner was convicted, he claims the alleged business deal with Judge Jones abruptly and conveniently became acrimonious. His claims in latter filings mirror the claims here.

At the original sentencing hearing on December 21, 2015, the Petitioner referenced Judge Jones' "honest dealings." He addressed the Court, "You were honest in our dealings with my dad and me when I did that for Mike Dooley and the Special K stuff for the residents' housing on the Special K Ranch. You saw that the guys – that we got paid." Sentencing transcript, 26:21-27:3.

At the resentencing hearing on December 14, 2018, the Petitioner brought up the fictitious business arrangement at the Special K Ranch. He and Judge Jones had the following exchange:

> Petitioner: Your Honor, I built you two homes out there at the Special K Ranch. You were out there. Mike Dooley worked for you, his kids worked for me. You wrote me hundreds of thousands of checks because of those jobs. I never once cheated you ever. I got mad at you guys once, when Mike Dooley had my crew go set up your first greenhouse out there. That really pissed me off. Yeah, I said some things to you and to Mike that I probably shouldn't have, but...
> Judge Jones: It wasn't me, sir. I don't know who you're thinking of, but I don't have any association with the...
> Petitioner: Well, he said you did. And he said you're who made the checks out to me all of the time.
> Judge Jones: No.
> Petitioner: Special K is not next to your house?
> Judge Jones: Well, it is not far away, but I have no relationship with Special K.
> Petitioner: Back then he told me you were the director of it.
> Judge Jones: No, that's never been the case.
> Petitioner: Okay.
>
> Resentencing transcript, 35:15-36:13.

The Petitioner and his father have repeatedly filed documents with the Court making blatantly false and self-serving allegations.[2] The Petitioner's claims about Judge Jones are equally

[2] As one example of many, the Petitioner and his father continue to claim having seen Detective Fritz at their house on the night of the arson, regardless of the facts adduced at trial and the jury's verdict.

false. The Petitioner's own filings contradict each other. His statements at the two sentencing hearings contradict each other. His early filings contradict his latter filings and his father's latest "Affidavits." Judge Jones expressly denied a financial relationship with the Petitioner and with the Special K Ranch. The Petitioner bases his claim of judicial bias entirely on a premise he knows to be false. The Court should deny this claim.

IV. THE PETITIONER WAS NOT "FORCED INTO MENTAL IMPAIRMENT" AT TRIAL.

Like the Petitioner's other claims, his exhibits in support of this claim lack actual support. He includes copies of "kites" he sent to the Yellowstone County Detention Facility staff. However, he again distorts what the messages said. In Exhibit 2, the detention officer responded to his complaint, "Sir, you get fed at regular times through the day." In Exhibit 3, the detention officer indicates the Petitioner's complaints were discussed and a remedy found. Contrary to the Petitioner's statements, the reviewing officer did not admit the detention officers purposely failed to feed the Petitioner. The reviewing officer simply affirmed the "complaint investigator's actions/recommendation." In Exhibit 4, the Petitioner made a complaint about being moved within jail (the copy provided to the State is nearly unreadable), the investigating officer replied to the Petitioner's complaint, "You were moved for your safety. I came back and told you this. I also told you inmate CA and CB had made threats about you. You are not being punished. We are looking out for your safety."

More importantly, the State's attorneys saw the Petitioner throughout the trial, and at no time was he "incoherent." His attorney has sworn that the Petitioner was always coherent and actively participated in the defense. Kakuk brought lunch for the Petitioner during trial. See State's Exhibit 1, Kakuk Affidavit, ¶ 15. The Petitioner's claim is further belied by his own statements on the last day of trial, as described in the section on the claims of ineffective assistance of counsel. After the State rested, Kakuk and the Petitioner met to "finalize [their] defense strategy." Trial transcript, 570:2-5. After their meeting, Kakuk advised the Court and the State that the Petitioner had decided

not to present evidence or witnesses. Trial transcript, 570:19-23. The Petitioner said he wanted to take the stand, but upon advice of counsel, he chose not to testify. Trial transcript, 570:24-571:3. The State asked the Court to clarify that it was the Petitioner's decision not to testify, the Court asked the Petitioner if it was his decision not to testify, and the Petitioner said, "On his [Kakuk's] advice I'm waiving the right to take the stand." Trial transcript, 571:4-15. Kakuk Affidavit, ¶ 15. This conversation shows the Petitioner was not mentally impaired by hunger, hypoglycemia, or anything else. He was actively participating in discussions with his attorney and with the Court.

V. THE PETITIONER'S CLAIM OF MALICIOUS PROSECUTION AND PROSECUTORIAL MISCONDUCT FAILS BECAUSE THERE WAS NO *BRADY* VIOLATION.

To make a *prima facie* claim under *Brady v. Maryland*, 373 U.S. 83 (1963), a petitioner must establish three factors: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *State v. Lionel Ellison*, 2012 MT 50, ¶¶ 15-17, 364 Mont. 276, 272 P.3d 646.

The Petitioner claims the State committed malicious prosecution and prosecutorial misconduct because the State committed various *Brady* violations. Here, as in his previous case, the Petitioner is unable to make a *prima facie* showing.

A. There was no recorded statement of Petitioner or his parents.

The Petitioner claims the State suppressed a taped statement he and his parents made to Billings Police Department Detective Richardson the morning of the arson. On page 31, he faults Kakuk for failing to call his parents in the defense case in chief because their testimony would have been the same as the "audio recording suppressed by the Prosecution."

The Petitioner ignores the fact that neither he nor his parents gave a formal taped statement to Detective Richardson. Detective Richardson and Fire Marshal Schilling met with the Petitioner and his parents at their kitchen table after the fire. Marlene Ellison testified Detective Richardson

was at their kitchen table. Trial transcript 188:15-21. Fire Marshal Schilling testified he and Detective Richardson spoke with the Ellisons at their house. Trial transcript, 268:24-269:4. Detective Richardson met spoke with the Ellisons "at their kitchen table." Trial transcript, 338:13-22. The Ellisons agreed to meet with the detective for a statement after the Petitioner's court hearing, but they never gave statements. Trial transcript, 341:18-24; 366:23-367:9. When they did not contact Detective Richardson, he attempted to contact the person they named as their attorney because Marlene Ellison told him to contact the attorney. Trial transcript, 367:12-17. A formal statement "would have been a recorded statement and we would have went [sic] into more detail than what we discussed at the kitchen table." Trial transcript, 367:20-22. Claude Ellison testified that he did not want to give a recorded statement to Detective Richardson and would have preferred a deposition. Trial transcript, 213:10-214:9.

The Ellisons refused to give a taped statement. Their affidavits do not reference a recorded statement with Detective Richardson. Both Claude and Marlene Ellison testified at trial. Claude Ellison testified that he did not want to give a recorded statement to the "smart aleck" detective, and he would have preferred a deposition. Trial transcript, 212:20-24; 213:20-2:14:9. The Petitioner's trial counsel noted there was no point in calling either parent during the defense case in chief because they had testified during the State's case. Kakuk Affidavit, ¶ 3. Because there was no recorded statement, there could be no suppression of the Ellisons' recorded statement.

B. The Petitioner did not have blood on his hands

Detective Richardson spoke with the Petitioner the morning after the arson and looked at his hands. Detective Richardson noted no injuries to the Petitioner's hands. Trial transcript, 340:9-21. The Petitioner claimed to have punched the door window with his hand but mentioned no injury to his hand to Detective Richardson. Trial transcript, 340:25-341:12. The Petitioner told the responding officer that he used a fire extinguisher to break out the window in the kitchen door. Trial transcript, 150:11-12. Claude testified the Petitioner broke the glass window in the door with a fire

extinguisher and did not know whether the Petitioner cut his hand. Trial transcript, 224:5-6. The Petitioner claims he had a cut on his hand, and his mother took a photo of it. He claims he included a copy of the photo as Exhibit A (Petition, 23:13-15). However, Exhibit A (filed with the Petitioner's Addendum) in an affidavit from the Petitioner's mother.

Trial counsel obtained the cell phone, which had no picture of the Petitioner's hand – bloody or otherwise. Kakuk Affidavit, ¶ 7.

C. There was no blood on the door.

The Petitioner claims that photo 77, which was somehow withheld from him but entered as State's Exhibit 24, shows blood on the door.[3] That is simply false. There was no blood on the door or ropes. Lacey Van Grinsven, a scientist at the Montana State Crime Lab, found no blood on any of the ropes, the lighter, or the knife. Trial transcript, 412:8-20. Further, Claude Ellison testified the Petitioner's hand was "bruised" from trying to break out the window in the kitchen door. Trial transcript, 221:22-222:8. Kakuk Affidavit, ¶ 10. The Petitioner did not have an injury that would have bled on anything.

D. The Petitioner's conspiracy claims have no basis in fact or reality and cannot be morphed into potential impeachment evidence.

The Petitioner and his parents have long maintained that there was a conspiracy against them. Trial transcript, 206:20-207:10. It began with the collapse of their business and was apparently directed by business adversaries. See document entitled "Detailed Factual Events of Corruption in Yellowstone County, Montana," Petitioner's Exhibit 1; Claude Ellison's Affidavit F; trial transcript, 222:9-19. The conspiracy theory has no basis in fact or reality. The Petitioner argues that the evidence of the conspiracy against him could have been used as impeachment evidence.

---

[3] The Petitioner claims he obtained an order from Judge Gilbert in Park County to get "copies of the photos withheld." This is false. There is no order from Judge Gilbert relating to the underlying case. The Petitioner apparently sought an order from Judge Gilbert regarding his brief court-ordered commitment to the Montana State Hospital as part of his Park County case.

The Petitioner has a history of staging crime scenes in which he is the purported victim. The Petitioner's trial attorney filed a motion *in limine* to exclude such evidence. Defendant's Motion in Limine, July 13, 2015. The State responded. State's Response to Defendant's Motion in Limine, July 24, 2015; State's Sur Reply, August 24, 2015. The Court held a hearing on August 10, 2015, in which the State made an offer of proof regarding the Petitioner's staged scenes. The Court denied the Petitioner's motion regarding Detective Fritz and granted the Petitioner's motion "with respect to all other crimes, wrongs, or acts." Order, August 26, 2015.

The Petitioner continues to claim that he was kidnapped, taken to Park County, and raped. He claims that Detective Fritz orchestrated the events with gang members.[4] He made statements to the staff at the State Hospital that were self-serving, and the staff did not review collateral materials. He argues that the State lied to the trial court about the alleged rape.

At the first sentencing hearing, Judge Jones recognized the absurdity of the Petitioner's claims. The judge said, "He's got an obsessive kind of relationship here with a detective that was involved in this case. It has no basis in reason in the Court's view...And all of these allegations that have been made against him have no basis in fact and this sort of thing has to stop." Sentencing transcript, 40:15-41:1.

The Petitioner's conspiracy allegations did not stop. At the re-sentencing hearing in December 2018, he asked the Court to admit photographs and documents relating to the Park County matter. Judge Jones refused to admit those items as the Park County case had "no relevance" to the re-sentencing. Re-sentencing transcript, 30:20-21. The Court again noted that the Petitioner continues to make "unsubstantiated allegations against law enforcement," and such allegations "threaten[] the safe and security of the persons involved and by extension, therefore, the safety and security of the general public." Re-sentencing transcript, 40:13-18.

[4] The State notes that the Petitioner's previous versions of the events did not include Detective Fritz. After the Petitioner was charged with Partner or Family Member Assault and Detective Fritz investigated him for Tampering with Witnesses, the Petitioner's theory pivoted to include the detective as the conspiracy mastermind.

The Petitioner's argument only succeeds if the Court believes in the conspiracy theory and believes that Detective Fritz planned the alleged kidnapping in Park County and arson in Yellowstone County. The Court would also have to believe that the detective orchestrated the 2007 arson and the Petitioner's earlier kidnapping in which he was thrown into the Yellowstone River. Such an argument is farcical. It has no basis in reason or reality.

The Court should deny the Petitioner's claim regarding prosecutorial misconduct and malicious prosecution. There was no suppression of a recorded statement, no suppression of photos of blood, and no suppression of potential impeachment evidence.

VI. THE PETITIONER'S CLAIMS ABOUT KAKUK'S ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE DISMISSED.

The Montana Supreme Court has adopted the two-prong test announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, for reviewing claims of ineffective assistance of counsel. *State v. Savage*, 2011 MT 23, ¶ 22, 359 Mont. 207, 248 P.3d 308. Under that test, a petitioner must "demonstrate both (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *State v. Riggs*, 2011 MT 239, ¶ 8, 362 Mont. 140264 P.3d 693 (citing *Strickland*, 466 U.S. at 687; *Savage*, ¶ 22; *State v. Gunderson*, 2010 MT 166, ¶ 67, 357 Mont. 142, 237 P.3d 74). If the petitioner makes an insufficient showing regarding one prong, the other need not be addressed. *Id.* (citing *Gunderson*, ¶ 68).

> To establish the first prong – whether there was deficient performance – the [petitioner] must show that, considering all the circumstances, counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. In making this determination, we keep in mind that counsel's function is to make the adversarial process work in a particular case. [Courts] must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
>
> *Riggs*, ¶ 9.

Judicial scrutiny of counsel's performance must therefore be "highly deferential" and must "eschew[] the distorting effects of hindsight." *State v. Henderson*, 2004 MT 173, ¶ 5, 322 Mont.

69, 93 P.3d 1231. The court does not second-guess counsel's tactical decisions, as long as those decisions are objectively reasonable. *Hans v. State*, 283 Mont. 379, 942 P.2d 674 (1997).

A claim of ineffective assistance of counsel will not succeed when predicated upon counsel's failure to make motions or objections which, under the circumstances, would have been frivolous, or would have, arguably, lacked procedural or substantive merit, or would likely not have changed the outcome of the proceeding. *Riggs*, ¶ 11 (citation omitted). The Supreme Court has held, "counsel are not expected to make motions that theoretically might help their clients if the motions lack merit." *State v. Frasure*, 2004 MT 305, ¶ 12, 323 Mont. 479, 100 P.3d 1013 (citing *State v. Hildreth*, 267 Mont. 423, 432-33, 884 P.2d 771, 777 (1994)).

The Supreme Court has reiterated that there is a "strong presumption" that counsel's conduct falls within a wide range of reasonableness, and a petitioner bears "a heavy burden" of establishing ineffective assistance of counsel. *Whitlow*, ¶ 21 (citations omitted). Finally, claims of ineffective assistance must be grounded in facts, not merely conclusory allegations. *Wright*, ¶¶ 31-32; *Hagen*, ¶ 19.

Under the second prong of the *Strickland* test, in order to establish a claim that his counsel was ineffective, a petitioner "must show that the deficient performance 'so prejudiced the defendant as to deprive the defendant of a fair trial, a trial whose result is reliable." *Hagen*, ¶ 18 (citing *Strickland*, 466 U.S. at 694). Therefore, a petitioner must also establish prejudice – that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Gunderson*, ¶ 67. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Robinson v. State*, 2010 MT 108, ¶ 12, 356 Mont. 282, 232 P.3d 403.

If the petitioner cannot prove that the result would have been different under the second prong, the Court need not even address the first prong under *Strickland* regarding alleged attorney error. *Cobell*, ¶ 16 (citations omitted).

A. Kakuk did not demand that the two "eye witnesses" falsely state that the perpetrator was not Detective Fritz.

The Petitioner claims his trial counsel demanded that his parents deny seeing Detective Fritz at their house on the morning of the arson. He offers various attachments from his parents to this effect.

The Petitioner's trial counsel never told his parents to deny seeing Detective Fritz. Rather, pursuant to the Motion *in Limine* he filed and the Order partially granting that Motion, Kakuk told Claude and Marlene not to testify about the Petitioner's history, especially with Detective Fritz. Kakuk was rightly concerned that if the parents mentioned anything about the Petitioner's history, the State would argue to the Court that the defense had opened the door, and the Court would allow the State to present evidence regarding the Petitioner's history of staging crime scenes. Kakuk Affidavit, ¶ 5.

Even if Kakuk told the parents to "change their story," it would not constitute ineffective assistance of counsel because they did not change their story. At trial, both parents testified that they saw Detective Fritz at their house the morning of the fire. Trial Transcript, 170:10-17; 203:5-8. This matches the Petitioner's story. The parents maintained their stories before, during, and after the trial. Kakuk's meeting with the parents before trial had no bearing on their testimony at trial.

The Petitioner cannot demonstrate either that Kakuk's performance fell below an objective standard of reasonableness, or that the result of the trial would have been different. Accordingly, he cannot establish ineffective assistance of counsel on this point, and his claim should be dismissed.

B. Kakuk conducted a pretrial investigation.

The Petitioner claims that Kakuk did not investigate the case and accepted the prosecutors' version of the case. He argues that Kakuk should have called the Petitioner's former attorney to testify about a cell phone and that Kakuk failed to hire a serologist to investigate "the blood."

Contrary to the Petitioner's assertions, Kakuk did an appropriate investigation. He talked to both of the Petitioner's former attorneys, Honaker and Arthur. He met with Greg Stovall, a private

investigator. He obtained the cell phone and looked at the pictures on the phone. He also met with the Petitioner and his parents. Kakuk Affidavit, ¶¶ 7-8.

The Petitioner claims the phone contained a photograph of the cut on his hand, and the cut was caused by his breaking the window on the morning of the fire. The Petitioner offers no proof that the photograph exists, or if it exists that it shows what he claims. Kakuk obtained the cell phone, and there was no picture of a bloody cut on the Petitioner's hand. Kakuk Affidavit, ¶ 7. Further, as described above, Detective Richardson testified that he looked at both of the Petitioner's hands on the morning of the fire, and neither hand showed any injury.

Kakuk cannot be faulted for failing to call a witness or present evidence about a nonexistent fact. Kakuk viewed pictures on the phone. There was no photo of what the Petitioner claims.

Likewise, there was no blood on the ropes. Therefore, Kakuk cannot be faulted for failing to hire a serologist to investigate nonexistent blood.

Accordingly, the Petitioner cannot establish ineffective assistance of counsel on this point, and his claim should be dismissed.

C. Kakuk did not refuse to communicate with the Petitioner.

The Petitioner claims Kakuk refused to communicate with him after "the eye witnesses refused to lie" and that Kakuk admitted such at the Finley hearing.

After the omnibus hearing on August 10, 2015, the Court held a Finley hearing on the Petitioner's complaints about Kakuk. The Petitioner claimed Kakuk did not communicate with him. Kakuk explained there were communication problems through the Office of Public Defender, but he never refused to communicate with the Petitioner. Kakuk agreed to make other arrangements so the Petitioner could call Kakuk. Hrg. Trans. 11:18-21; Kakuk Affidavit, ¶ 11. The Court found that there was no lack of communication. Hrg. Transcript 12:10-12. There was a difference in trial strategy, but Kakuk agreed to proceed with the Petitioner's strategy. Hrg. Transcript 12: 10-12; 9:23-27.

Accordingly, the Petitioner cannot establish ineffective assistance of counsel on this point, and his claim should be dismissed.

C. The Petitioner was present for the second omnibus hearing, and no rules of trial were changed.

The Petitioner alleges that there was a second omnibus hearing held without his knowledge, and the "rules at [t]rial changed." He offers no information regarding what rules were "changed."

The Petitioner was present for the second omnibus hearing (as he was present for the first with previous trial counsel). There was no change in the "rules of trial." Kakuk Affidavit, ¶ 12.

Accordingly, the Petitioner cannot establish ineffective assistance of counsel on this point, and his claim should be dismissed.

E. Kakuk did not abandon the defense strategy at trial.

Kakuk and the Petitioner agreed that the most effective trial strategy was to "poke holes" in the State's case so the jury would find reasonable doubt. The Petitioner agreed with the strategy. The Petitioner also agreed that he could not testify. Kakuk Affidavit, ¶ 13.

After the State rested, Kakuk and the Petitioner met to "finalize [their] defense strategy." Trial transcript, 570:2-5. After their meeting, Kakuk advised the Court and the State that the Petitioner had decided not to present evidence or witnesses. Trial transcript, 570:19-23. The Petitioner said he wanted to take the stand, but upon advice of counsel, he chose not to testify. Trial transcript, 570:24-571:3. The State asked the Court to clarify that it was the Petitioner's decision not to testify, the Court asked the Petitioner if it was his decision not to testify, and the Petitioner said, "On his [Kakuk's] advice I'm waiving the right to take the stand." Trial transcript, 571:4-15.

Kakuk was correct in advising the Petitioner not to take the stand. The Petitioner cannot control himself in court. See in general Resentencing transcript. He likely would have opened the door to his history of staging crime scenes. The jury would have heard his claims of being kidnapped and thrown into rivers in at least two counties. Ultimately, it is the Petitioner's decision whether he should testify. He listened to sound legal advice and chose not to testify.

F. Kakuk did not cross-examine Detective Fritz because it would have reinforced the State's theory of the case.

The Petitioner finds fault with Kakuk for failing to cross-examine Detective Fritz because his parents had already testified that Detective Fritz was the "true perpetrator." The Petitioner accuses the detective of perjury because his testimony conflicted with the parents' testimony. This argument is without rational basis in law or fact.

At trial, the State offered evidence that Detective Fritz was across the county with all of the other detectives from the Yellowstone County Sheriff's Office. Detective Bancroft testified the address of the homicide investigation was 15-20 minutes away from the Sheriff's Office and even farther from the Ellisons' home. Trial Transcript 540:21-541:11.

The State also offered evidence that Claude and Marlene Ellison had animosity towards the detective. They filed a lawsuit against Yellowstone County and Detective Fritz, among other defendants. See Trial Exhibit 52. The.lawsuit concerned the alleged intimidation and intentional infliction of emotional distress against the Ellisons. At the time of the arson, the Ellisons - the parents and Petitioner - did not know that their attorney had dismissed the lawsuit, and the Ellisons believed the lawsuit was still active[5]. The Ellisons did not know the lawsuit had been dismissed until after the Petitioner had been arrested. Trial transcript, 178:25-179:21; 211:1-7; 194: 8-14. Their belief in the pendency of the lawsuit gave them motive to testify falsely about seeing the detective at their house. Both parents expressed dislike for Detective Fritz. Marlene Ellison summed up the Ellisons' animosity towards him: "Every time I see him I get angry." Transcript 193:15.

Kakuk decided not to cross-examine Detective Fritz because it would have reinforced elements of the State's theory, and he had no ground upon which to question him without emphasizing the Ellisons' version of events. Kakuk Affidavit, ¶ 14.

Detective Fritz was the last witness to testify at the trial. Kakuk made an objectively reasonable decision not to cross-examine him and reinforce the State's theory that the Ellisons had a

grudge against him. That grudge led to their false testimony and false identification. This Court should defer to Kakuk's reasoned decision and dismiss any claim of ineffective assistance of counsel based on this allegation.

G. The Petitioner's miscellaneous complaints have no merit.

The Petitioner references other instances in which he disagrees with Kakuk's trial performance. See Petition, p. 31. Petitioner's points 1 and 2 are addressed in other sections of his Petition and consequently in the State's response. The State will briefly address the Petitioner's remaining points.

3. The photographs of the knife and its location were admitted as Exhibits 6, 9, 10, and 11. The knife itself was admitted as Exhibit 51. Further, outside the presence of the jury, the Court amended through interlineation the Amended Information to conform with the Amended Affidavit regarding the location of the knife "in the approximate area of his parents' yard." Trial transcript 604:17-605:5. Based upon that change, Jury Instruction 27 was amended. Trial transcript 605:6-23.

4. The Petitioner claims Kakuk did not argue that no witness identified his voice on the phone calls. However, in his closing argument, Kakuk stated, "There's not even evidence from the two people that testified that said they had talk to [the Petitioner] on the phone, there's no evidence that says and, 'That voice sounded like [the Petitioner's].' It's not there. There is no evidence. There's your beyond a reasonable doubt." Trial transcript, 617:22-618:1.

5. Appellate counsel raised this argument in the Petitioner's Appeal, and the Montana Supreme Court reversed, sending the case back for resentencing.

IX. THE WITNESSES DID NOT COMMIT PERJURY.

The Petitioner claims Detective Richardson, Detective Fritz, and Detective Bancroft committed perjury at trial. He argues that the Montana State Hospital report supports his theory and should have been admitted at trial to show "collusion between" Detective Fritz and the Petitioner's

[5] The attorney filed a motion to dismiss the lawsuit on September 30, 2011. The complaint had not been served.

ex-wife. The State counters that none of the witnesses committed perjury. The Montana State Hospital report was inadmissible hearsay and does not support the Petitioner's conspiracy theory.

Pursuant to Mont. Code Ann. § 45-7-201(1), "A person commits the offense of perjury if in any official proceeding the person knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when the statement is material." Pursuant to Mont. Code Ann. § 45-7-201(4), "Whether a falsification is material in a given factual situation is a question of law."

The Petitioner claims Detective Richardson "deliberately and knowingly lied" about the ropes tied on the doors. He argues that the ropes were tied tightly, and the doors could not be easily opened. He also claims that photos of the ropes and the doors were withheld from the jury.

The Petitioner is challenging the jury's perception of the evidence because it is in direct opposition to his claims. Detective Richardson testified that the doors that were tied were easily opened. The photos of the ropes and the doors were admitted as Exhibits 12, 13, and 24-27. The photos showed the manner in which the ropes were tied. The ropes were admitted as Exhibits 42-46. The jury could test the weight of two of the items the doors were tied to: the planter was admitted as Exhibit 41, and the wagon wheel was admitted as Exhibit 47. The jury was free to give the proper weight to Detective Richardson's testimony and the physical evidence admitted at trial. The Petitioner's differing interpretation of the evidence is not grounds to accuse Detective Richardson of committing perjury.

The Petitioner also claims Detective Fritz committed perjury when he testified he had only seen the petitioner twice as the detective allegedly had more contact with him.

The State counters that the number of times Detective Fritz had contact with the Petitioner is immaterial to the case. The detective was asked about "face-to-face interactions" with the Petitioner. The detective testified he believed he had two "face-to-face interactions" with the Petitioner. Trial transcript, 557:5-9. The Petitioner offers only a self-serving statement to challenge the number of

"face-to-face interactions" he had with Detective Fritz. The detective's testimony against the Petitioner in a previous court hearing is not a "face-to-face interaction." Further, there is no evidence that the number of "face-to-face interactions" was material to the case, nor that the detective knowingly made a false statement.

CONCLUSION

Based on the foregoing, the State requests that the Court dismiss the Petition without a hearing. The Petitioner could have raised the issue of sufficiency of the evidence on appeal but did not do so. He is now barred from attempting to litigate this issue. There is no evidence of any bias by the former presiding judge, and to suggest that Judge Jones was biased against the Petitioner after an alleged sour business deal is offensive. The Petitioner was not forced into mental impairment. Instead, the evidence shows that he actively participated in all aspects of his defense. There was no malicious prosecution, nor was there ineffective assistance of counsel. No witness committed perjury. The Petitioner was previously granted the relief he seeks regarding Counts II and III. The Petition for post-conviction relief should be denied without a hearing.

DATED: March 17, 2020

/s/ Julie Mees
Deputy County Attorney

cc: Lionel Ellison, Montana State Prison

EXHIBIT
4
MT. D.C.A. D

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

LIONEL SCOTT ELLISON, Petitioner, vs. STATE OF MONTANA, Respondent.	Cause No. DV 18-1629 Judge Matthew J. Wald **ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

Before the Court is a *Petition for Post-Conviction Relief* filed by Petitioner Lionel Scott Ellison ("Ellison"). Ellison is not represented by an attorney. Ellison's *Petition* challenges his September 23, 2015 conviction for Tampering with or Fabricating Physical Evidence, a felony, and Impersonation of a Public Servant, a felony, under cause number DC 14-0614. Having reviewed Ellison's *Petition* as well as the attached exhibits, the State's *Response*, as well as the applicable law, the Court finds that the *Petition* must be denied.

STANDARD OF REVIEW

Petitions for postconviction relief are prescribed by statute and are civil in nature. *Coleman v. State*, 194 Mont. 428, 433, 633 P.2d 624, 627 (1981). Section 46-21-201(1)(a), MCA provides that "[u]nless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be sent to the county attorney in the county in which the conviction took place and to the attorney general and order that a responsive pleading be filed." In a petition for postconviction relief, "[g]rounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided." Section 46-21-105(2), MCA. "Grounds for relief" includes "all legal and factual issues that were or could have been raised in support of the petitioner's claim for relief." Section 46-21-105(3), MCA.

A petitioner for postconviction relief has the burden of proving by a preponderance of the evidence that he or she is entitled to relief. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422. In so doing, the petitioner must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. Mere conclusory allegations do not satisfy this procedural requirement. *Ellenberg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 573. The Court may dismiss the petition as a matter of law for failure to state a claim for relief. Section 46-21-201(1)(a), MCA.

An evidentiary hearing on a petition for post-conviction relief is not required, as "[a] district court is permitted to dismiss a petition for post-conviction relief based solely upon the files and records of the case." *Griffin v. State*, 2003 MT 267, ¶ 12 (citing § 46-21-201(1)(a), MCA (1999), and *Swearingen v. State*, 2001 MT 10, ¶ 7). "It is not error to deny an application for post-conviction relief without an evidentiary hearing if the allegations are without merit or would otherwise not entitle the petitioner to relief." *Coleman v. State*, 194 Mont. 428, 433, 633 P.2d 624, 627 (1981).

PROCEDURAL HISTORY

The factual background surrounding the criminal conviction underlying the instant *Petition* has been described in depth by the Montana Supreme Court and the Court will not repeat it in full here. See *State v. Ellison*, 2018 MT 252, ¶¶ 2-7. However, the procedural history of this case is extensive, and summarized as follows:

On September 23, 2015, after a jury trial, Ellison was acquitted of Count I: Arson and convicted on the following counts:

- Count II: Tampering with or Fabricating Physical Evidence, a felony;
- Count III: Tampering with or Fabricating Physical Evidence; a felony; and
- Count IV: Impersonation of a Public Servant, a felony.

The Montana Supreme Court reversed his conviction on Count II, affirmed his convictions on the other two charges and remanded the case for resentencing. *State v. Ellison*, 2018 MT 252, ¶ 29.

On October 25, 2018, Ellison filed the instant *Petition for Post-Conviction Relief*, accompanied by a *Motion to Disqualify Judge Jones for Cause*. At the same time as his Petition, Ellison filed other documents titled (1) *In the "Interest of Justice" Addendum to Petition for Post-Conviction Relief Based on Actual Innocence* (Claim #1); (2) *Motion for Evidentiary Hearing of Probable Cause*; and (3) *Addendum to Petition for Post-Conviction Relief #2*. While these documents are not clearly permitted under the post-conviction relief statutes, the Court has been purposefully lenient with Ellison as he is *pro se*, and reviewed these documents for what relevance they may to his *Petition*. The Court did not address Ellison's *Motion to Disqualify Judge Jones* for cause prior to his resentencing hearing as it was not accompanied by the necessary affidavit of good faith from his attorney of record, which it clarified in its later *Order Re: Petition for Post-Conviction Relief*.

In December 2018, the Court re-sentenced Ellison to ten years imprisonment for the tampering conviction and five years imprisonment for the impersonation conviction, with no time suspended. He appealed, and the Montana Supreme Court affirmed. *State v. Ellison*, 2019 MT 217N, ¶ 14. In doing so, the Supreme Court observed that "Ellison's bias claims are based on conjecture, and he has not provided evidence substantiating bias on the part of the District Court" and thus found that it "cannot conclude Ellison has carried his burden of demonstrating 'actual evidence of bias, prejudice, or unethical conduct' on the part of Judge Jones." *State v. Ellison*, 2019 MT 217N, ¶ 8.

After his resentencing, Ellison continued to file a range of documents with the Court, the majority of which lack justification under the post-conviction relief statutory scheme. Ellison filed or attempted to file, *inter alia*:

- *Motion for Judgment Per M.R.Civ.P. Rules [Rules 11(b-c); Rule 12; Rule 42; Rule 54 and Rule 60]* on February 5, 2019;
- *Judicial Notice to the Court of Law and Fact* on February 13, 2019;
- *Motion to Arrest Judgment Based Upon MCA: § 46-13-101(3) Trial Judge's Lack of Jurisdiction* on February 13, 2019;

- *Motion to Dismiss the Underlying Charges Based Upon State/Federal Law & Statute* on February 21, 2019;
- *Demand for (Summary Judgment) and Immediate Release from Illegal Incarceration Based on State Law and Rules* on March 25, 2019;
- *Submission of Additional New Evidence w/ Supporting Memorandum of Law* on April 8, 2019.

These documents generally repeat the arguments raised in his *Petition* or make demands for relief based on statutes that are not procedurally relevant to a post-conviction relief proceeding.

On April 9, 2019, the Court issued its *Order Re: Petition for Post-Conviction Relief* wherein it (1) ordered that the State file a responsive pleading to the *Petition* and (2) formally denied Ellison's *Motion to Disqualify Judge Jones for Cause*. On May 13, 2019 the State filed a *Motion for Extension of Time* to respond to the Petition, as well as a *Motion for Order Preserving Previous Defense Counsel from Disciplinary or Malpractice Claims*. Both motions were granted despite Ellison's objections.

On May 28, 2019, Ellison filed yet another document, this time titled *Motion for Sanctions to be Justly Imposed and Enforced Upon the Yellowstone County's Office and Their Representatives for "Fraud Upon the Court" and Malicious Misconduct by Prosecutors Mees and Linneweber*. This document repeated many of the same claims as in the original *Petition*.

On June 7, 2019, the State filed a *Motion to Stay Proceedings*, requesting that proceedings on the *Petition* be stayed as Ellison had appealed his resentencing. The Court granted this *Motion* on June 14, 2019. The Supreme Court issued its decision, referenced above, on September 10, 2019, affirming the Court in full. See *State v. Ellison*, 2019 MT 217N.

On October 17, 2019, the Court issued its *Order Setting Deadline for Amendment*, allowing Ellison one opportunity to amend his *Petition* per the post conviction relief procedure. Section 46-25-105(1)(a), MCA. On November 4, 2019, the Court issued its *Order Correcting Previous Order Setting Deadline for Amendment*. Ellison was given until November 15, 2019 to file an amendment to his *Petition*.

Ellison continued to file or attempt to file more documents. These included:

- *Notice to the Court of Judicial Malfeasance* on November 4, 2019;
- *Motion for Joint Evidentiary Hearing Based on the Legal and Timely Filing of Both Petitions for Post-Conviction Relief*, on November 4, 2019;
- *Absolute Proof the State Prejudiced the Jury in DC 2014-0614 Trial with Opinions and that State Testimony Links DC 2014-0614 to DC 2007-0907*, on November 4, 2019;
- *Plea and Motion for the Court to Amend or Strike the Court's Previous Order Based on the Common Law of MT*, on November 4, 2019;
- *Plaintiff's Addendum to both Petitions Containing "New Evidence" Documentation from the US District Court Ruling that further Substantiates and Proves the Plaintiff's Claims for Post-Conviction Relief*, on November 18, 2019.

These documents repeat the arguments raised in his *Petition*, while attempting to link the instant *Petition* to another petition for post-conviction relief that he had filed regarding a different criminal conviction. *See* DV 19-1330. The Court ultimately denied the DV-19-1330 petition and again only considered these documents insofar as they were relevant to the instant *Petition*. (See *Order Denying Petition for Post-Conviction Relief*, DV 19-1330, issued December 31, 2019).

On December 20, 2019, the State filed another *Motion for Extension of Time* to respond. The Court, recognizing the volume of documents filed by Ellison that the State would have to review and respond to, and otherwise finding good cause, granted this *Motion*.

On February 20, 2020, Ellison filed yet another document with the Court, an *Application for Default Judgment Based Upon the Rules of the State of Montana*. On February 26, 2020, the Court denied Ellison's *Application*. In that *Order*, the Court reminded Ellison that "he must abide by the Court's orders including by not attempting to file anything further without first getting leave of Court to do so." (See *Order Denying Application for Default*, p. 2). On March 10, 2020 Ellison filed a *Motion for Leave to Present Montana Law [...] in Support of a Default Judgment* which the Court immediately denied.

On March 18, 2020 the State filed its *Response to Petition for Post-Conviction Relief*. On March 24, 2020 Ellison filed his *Petitioner's Response to Respondent's Answer*. Ellison has requested an evidentiary hearing on his *Petition*, but the Court finds that one is not justified, as explained below. The *Petition* is now ripe for decision.

DISCUSSION

I. Summary of claims raised in Ellison's *Petition*

Ellison has filed a voluminous number of documents with and in addition to his *Petition*, making many claims of error therein. In general, these documents simply repeat the claims raised in his *Petition*. While the Court will not address each of Ellison's filings individually, it has reviewed them and finds that they allege the following grounds for relief:

- Insufficiency of the evidence against him at trial;
- Alleged bias of the trial judge against Ellison due to supposed business interactions with Ellison's family,
- Ellison's alleged mental impairment at trial impairing his ability to assist in his own defense;
- The State's alleged malicious prosecution of Ellison and alleged prosecutorial misconduct,
- Alleged perjury committed by witnesses against Ellison at trial; and
- A claim of ineffective assistance of counsel by Ellison's trial attorney.

Ellison argues that because of these issues he was denied a fair trial and thus that his conviction should be overturned.

II. Sufficiency of the Evidence

First, Ellison claims that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he was guilty of the crimes alleged. Ellison argues that the state "lacked any reasonable evidence to charge" him because of the possibility "secondary DNA transfer" of his DNA from the doorknobs of his home to the rope allegedly used to tie him and his parents in their home. Ellison claims that the possibility of "secondary transfer" renders any DNA evidence worthless. The State disagrees, arguing that Ellison is procedurally barred from raising this issue because he could have raised it on direct appeal. The Court agrees with the State. Ellison is procedurally barred from raising these issues and, even if he was not, his arguments lack merit.

"A person adjudged guilty of an offense in a court of record *who has no adequate remedy of appeal* [...] may petition the court that imposed the sentence to vacate, set aside, or correct the

sentence or revocation order." Section 46-21-101(1), MCA (emphasis added). "When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided" via a petition for post-conviction relief. Section 46-21-105(2), MCA; see also *State v. Whitlow*, 2001 MT 208, ¶ 16. All claims that are based on the record must be raised via a direct appeal. *Id.*; see also *Smith v. State*, 2000 MT 327, ¶ 18 (finding that § 46-21-105(2) procedurally barred the defendant from raising the issue of the constitutionality of Montana's statutory scheme for selecting substitute judges); *State v. Woods*, 2005 MT 186, ¶ 32 ("[a] claim that the District Court erred during trial may not be raised in a postconviction proceeding.").

Ellison's arguments about the sufficiency of the evidence against him could "reasonably have been raised on direct appeal" and thus are procedurally barred. See, e.g. *State v. Cherry*, 2020 MT 25 (reviewing on direct appeal a trial court's denial of a motion to dismiss based on insufficiency of evidence); *State v. Bauer*, 2002 MT 7. His claim about the reliability of DNA evidence, i.e. the possibility of "secondary DNA transfer", is something that he could have raised at trial by cross-examination of the State's witnesses or calling his own expert witness. See, e.g. *United States v. Brooks*, 678 Fed. Appx. 755 (10th Cir.)(raising issue of "secondary transfer" by cross-examination); *United States v. Bicket*, 497 Fed. Appx. 679 (using expert witness). While Ellison may argue ineffective assistance of counsel related to these issues via post-conviction relief, directly attacking the sufficiency of the evidence is procedurally barred.

Even if Ellison's arguments about the sufficiency of the evidence were not procedurally barred, they lack merit. Ellison argues that the DNA evidence found on the ropes tied to the doors of his home did not provide probable cause for his arrest because of the possibility of the DNA arising from "secondary DNA transfer" from the doorknob, which he admittedly touched frequently. The Court finds that this is insufficient to justify the relief Ellison seeks.

The Montana Supreme Court summarized the significance of the DNA evidence during Ellison's direct appeal. Ellison was accused of "stag[ing] a crime scene in which he attempted to implicate Yellowstone County Detective Frank Fritz [...] by tying the doors shut to the trailer

home he shared with his parents, starting a small fire outside, and placing a knife on the ground outside the home with 'Fritz' scribbled on it." *State v. Ellison*, 2018 MT 252, ¶ 2. During the investigation of the fire, "Ellison reported he saw flames from his bedroom window but was unable to escape the house because the doors had been tied shut from the outside." *Id.* The Montana State Crime Lab determined that the DNA found on the ropes tied to the doors of Ellison's home matched Ellison's DNA and he was arrested on July 31, 2014. *Id.*, ¶ 3.

Ellison argues that without this DNA evidence the State would have lacked probable cause to charge him and that a reasonable jury would not have convicted him. He claims that the possibility of "secondary DNA transfer" makes this DNA evidence worthless towards proving his guilt for the charged offenses, and the fact that the Court and jury presumably relied on the DNA evidence makes his conviction infirm.

The cases that Ellison cite do not support his position. In *DA's Office v. Osborne*, the United States Supreme Court held that a defendant "has no constitutional right to obtain postconviction access to the State's evidence for DNA testing." 557 U.S. 52, 52, 129 S. Ct. 2308, 2310, 174 L. Ed. 2d 38, 42 (2009). Ellison relies on dicta from *Osborne* wherein the Court noted that:

> [...] modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder). [...] Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence.

Id., 557 U.S. at 82 (internal citations omitted). *Osborne* referenced these shortfalls of DNA evidence simply to note that "[i]t gives short shrift to such risks to suggest that anyone [...] should be given a never-before-recognized constitutional right to rummage through the State's genetic-evidence locker." *Id.* at 82-83. *Osborn* did not hold that these shortfalls bring DNA evidence outside the realm of reliable scientific evidence or that it cannot be used as probable cause for an arrest warrant or as evidence at trial.

State v. Pope, 2003 MT 330, is similarly unhelpful to Ellison. In *Pope*, the defendant was convicted of sexual intercourse without consent and kidnaping. 2003 MT 330, ¶ 1. At trial, a forensic serologist, testified regarding the physical evidence that was collected in the victim's "rape kit." *Id.*, ¶ 14. The serologist testified that type A blood was present in semen samples taken from the victim's clothing, indicating that the defendant was the source. *Id.* The serologist acknowledged that DNA tests were incomplete at the time of trial and that "[t]he report submitted at trial did not indicate the presence of [the defendant's] DNA." *Id.*, ¶ 16. "The report indicated that when the testing was completed another report would be issued that may provide additional information with regard to the DNA". *Id.*

The defendant filed a *pro se* petition for postconviction relief, alleging that "the State presented inaccurate and confusing DNA evidence which was calculated to produce a wrongful conviction." *Id.*, ¶ 24. The District Court denied the petition, but on appeal the Montana Supreme Court appointed counsel to represent the defendant. *Id.*, ¶¶ 26-27. The defendant's counsel obtained the completed results from all DNA tests, which indicated that none of the DNA present on the victim's underwear matched the defendant. *Id.*, ¶ 28. The Supreme Court noted that "[o]ther than the blood type evidence that is contradicted by the new DNA evidence, there was little evidence presented at trial from which a reasonable juror could find that [the defendant] had intercourse with [the victim], consensual or non-consensual" and that "[t]here was no other physical evidence." *Id.*, ¶ 61. Thus "it is probable no reasonable juror would have found beyond a reasonable doubt that [the defendant] was guilty of having non-consensual sexual intercourse with [the victim]." *Id.*, ¶ 63. Accordingly, the *Pope* Court reversed the District Court's order dismissing the post-conviction relief petition and remanded for a new trial on the charge of sexual intercourse without consent. *Id.*, ¶ 70.

Pope is distinguishable from Ellison's case. First, *Pope* dealt with the complete absence of DNA evidence implicating the defendant, not the presence of DNA that could have resulted from possible "secondary transfer". Further, *Pope* involved a complete lack of other supporting evidence. That is not the case here. There was evidence aside from the DNA that suggests that

Ellison touched the rope. "During cross-examination, Claude testified that he was sure that Ellison touched the rope that tied the kitchen door shut. (Kakuk Affidavit, ¶ 3). Even Ellison's trial attorney admits that it was undisputed that Ellison touched the ropes and thus "[t]here was no point in challenging the DNA analysis". (Kakuk Affidavit, ¶ 8).

Ellison's DNA argument asks the Court to hold that DNA evidence has no probative value if there is the mere possibility that the DNA came from "secondary transfer". Ellison has provided no caselaw or other authority that supports such a decision. The few courts that have addressed secondary transfer issues have refused to take such a broad view. See, e.g., *United States v. Brooks*, 678 Fed. Appx. 755, 758 (10th Cir. 2017); *United States v. Wade*, 2011 U.S. Dist. LEXIS 96052, *9 (W.D.N.Y.); *Seitzinger v. Nooth*, 2016 U.S. Dist. LEXIS 182967 (D. Oreg). None of Ellison's cited cases provide such a broad holding, and this Court will not be the first.

The Court does not believe that the existence of Ellison's DNA on the rope had such an impact on the jury's verdict that a new trial is warranted. In fact, as the issue of Ellison touching the rope was not even disputed, the presence of his DNA has little relevance whatsoever. Thus, Ellison's argument about "secondary transfer" does not justify granting him post-conviction relief, even if the argument was procedurally proper. Other claims about the sufficiency of the evidence could be inferred from Ellison's Petition, such as, for example, the existence of "eyewitness testimony" disputing the State's allegations (referring to statements made by Ellison's parents). As discussed above, these claims could have been raised on direct appeal and thus are procedurally improper. Further, the Court does not believe that these arguments are sufficient to cast doubt on the verdict reached in this case.

III. Trial Judge's Alleged Bias

Second, Ellison claims that Judge Jones, the judge that presided over his trial and sentencing, was biased against him. Ellison claims that Judge Jones was involved in a dispute with Ellison's father, Claude Ellison ("Claude") over construction work that Claude's company was doing at the "Special K" ranch. Ellison claims that this dispute led to Judge Jones being

biased against Ellison in the criminal case underlying his *Petition*. The State argues that the alleged business dealing is an "invention" that Ellison is using to claim judicial bias where none exists. The Court agrees with the State.

Rule 2.12(A)(1) of the Code of Judicial Conduct requires that a judge "disqualify himself [...] in any proceeding in which the judge's impartiality might reasonably be questioned, including [if] [t]he judge has a personal bias or prejudice concerning a party". "The well-established common law rule is that recusal is required when a judge has a direct, personal, substantial, or pecuniary interest in a case." *Bullman v. State*, 2014 MT 78, ¶ 14. Merely having previous interactions with a party is not sufficient evidence of bias or prejudice. For example, "a judge's previous adverse rulings against a party do not constitute sufficient evidence to demonstrate a judge's personal bias or prejudice against that party." *State v. Strang*, 2017 MT 217, ¶ 25.

Ellison has claimed the existence of a business dealing between his family and Judge Jones for quite some time but has been inconsistent in his description of that interaction. In a letter to Judge Jones on October 3, 2015, he stated that he "pray[s] that [Judge Jones] [is] as honest as [he was] in the past in the business with [...] Special K Ranch and [Ellison's] company in helping [Ellison's] family company get paid." (State's *Response to Petition for Post-Conviction Relief*, p. 5). In another letter to Judge Jones on December 22, 2015, he again expressed gratitude for Judge Jones alleged help in this supposed business interaction. (State's *Response to Petition for Post-Conviction Relief*, p. 5). At Ellison's sentencing hearing, Ellison again told Judge Jones that "[y]ou were honest in our dealings with my dad and me when I did [...] the Special K stuff...". (Sentencing transcript, 26:21-27:3). Finally, at his resentencing hearing, Ellison again brought up this alleged business transaction, which Judge Jones denied any knowledge of whatsoever. Judge Jones said, *inter alia*, that "I don't know who you're thinking of, but I don't have any association with" the Special K Ranch. (Resentencing transcript, 35:15-36:13). Judge Jones stated that he has "no relationship with Special K". (*Id.*).

The only support that Ellison has for his claims of Judge Jones' alleged bias is Ellison's own statements and an affidavit from his father Claude. The Court doubts Ellison's credibility on

this issue specifically, as his story has shifted according to what benefits him at the time. Before his conviction, when he was presumably attempting to get in Judge Jones' good graces, Ellison was complimentary about his involvement in this alleged business interaction. However, once Ellison was convicted and sentenced, the alleged interaction suddenly became acrimonious. These stories can only be reconciled by concluding that Ellison is structuring this story in accordance with his goal – avoiding liability for the criminal offenses for which he was convicted.

Ellison first raised this issue in a *Motion to Disqualify Judge Jones for Cause* filed prior to his December 14, 2018 resentencing hearing. The Court denied the *Motion* because it did not satisfy the requirements of § 3-1-805, MCA. (See *Order Re: Petition for Postconviction Relief*). If the business interaction that Ellison describes occurred as he now alleges, Ellison would not have waited until after he was convicted and facing resentencing to raise it. Further, the Montana Supreme Court has already addressed Ellison's claims of bias, noting that:

> Ellison's bias claims are based on conjecture, and he has not provided evidence substantiating bias on the part of the District Court. We cannot conclude Ellison has carried his burden of demonstrating "actual evidence of bias, prejudice, or unethical conduct" on the part of Judge Jones. [...] Although Ellison also complains the District Court erred by not allowing him to submit documents and exhibits demonstrating Judge Jones' bias, the asserted evidence was based on Ellison's postconviction relief (PCR) petition and accompanying exhibits, which are not within the scope of his current appeal.

State v. Ellison, 2019 MT 217N, ¶ 8. Nothing has changed since the Supreme Court made these observations. Ellison has not provided any "documents and exhibits demonstrating Judge Jones' bias". Ellison's claims and an affidavit from his father Claude are simply not enough to overcome the "presumption of honesty and integrity in those serving as adjudicators." *Id.*, ¶ 7. Ellison appears to believe that if he continues to make the same baseless claims it will eventually work. On the contrary, "[v]ague rehashings of issues previously adjudicated by a court of competent jurisdiction will not make unworthy claims magically meritorious." *Coleman v. State*, 194 Mont. 428, 439, 633 P.2d 624, 631 (1981). Finally, Judge Jones is on the record trying to correct Ellison's claims that he (Judge Jones) had any dealings with Special K Ranch and/or Ellison's father.

The Court also has serious reservations about the credibility of Ellison's father, Claude due to the conflicting nature of information stemming from him in this proceeding. As the State notes, Ellison and his family have submitted numerous letters and other documents to the Court during the pendency of these proceedings. Claude Ellison's earlier letters failed to mention any business connection with Judge Jones. At trial, both of Ellison's parents admitted to having animosity towards the detective allegedly at the center of a conspiracy against Ellison. Claude's affidavits filed with the instant *Petition* conflict with his testimony at trial on multiple occasions. The Court needs more than such unsubstantiated and self-serving allegations to overcome the presumption that Judge Jones is a fair and unbiased adjudicator.

Combining the issues of credibility with Ellison, his father, the changing nature of the story regarding the Special K Ranch, and Judge Jones' emphatic denials, the Court finds that Ellison has not met his burden to show Judge Jones was unfairly biased against him.

IV. Ellison's Alleged Mental Impairment During the Trial

Ellison claims that he suffered from mental impairment during the trial that harmed his ability to participate in his defense. Ellison asserts that he was denied food during the last two days of trial and that, due to his severe hypoglycemia, this made him incoherent. He claims that this violated his Eighth Amendment right to be free from cruel and unusual punishment as well as his rights to a fair trial under the Fifth and Fourteenth Amendments to the U.S. Constitution. These claims lack merit.

Ellison attaches multiple exhibits to his *Petition* that purportedly support his claims regarding being denied food during his trial. These exhibits are unconvincing. They primarily consist of notes and complaints to jail staff about what he was being fed and how often. This is, at best, evidence that he made certain claims and does not meet the attachments requirement of § 46-21-104(1)(c), MCA. See *Herman v. State*, 2006 MT 7, ¶ 28 (defendant's letter to sister and unsworn online ACLU complaint form "establish[ed], at most, that he told others about counsel's alleged advice" but did not establish that his trial counsel actually made a certain statement and

thus did not meet the 'attachments' requirement of § 46-21-104(1)(c), MCA, with respect to the alleged statement and the defendant's related ineffective assistance of counsel claim).

The record and other evidence in front of the Court do not support Ellison's claim. Ellison's trial attorney, Michael Kakuk, directly denies that Ellison was denied food during his trial. Kakuk wrote that "Ellison was always coherent and actively involved in the defense of his case. He was never not fed. I bought him lunch during the trial." (Kaluk Affidavit, ¶ 15). After the close of the State's case, Kakuk and Ellison met to finalize their defense strategy, after which Kakuk informed the Court that Ellison had decided not to present evidence or witnesses. (Trial transcript, 570:19-23). Ellison himself said that he wanted to take the stand but chose not to on the advice of counsel, explicitly stating that he was "waiving the right to take the stand." (Trial transcript, 571:4-15). This shows that Ellison was not mentally impaired, actively participated in discussions with his attorney and the Court, was aware of his right to testify, and knowingly waived that right because of his attorney's advice. This is in stark contrast to Ellison's claim that he was "sit[ting] like a zombie through the last two days of trial". (*Petitioner's Response to Respondent's Answer*, p. 6).

Ellison falsely claims that the U.S. District Court of Montana held that "it is undisputed fact that [Ellison] was forced into a mental state of incoherence during the second and third day of the three-day trial." (*Petitioner's Response to Respondent's Answer*, p. 4). Thus, Ellison claims, this issue "has [already] been decided in a superior court, whose decision must be abided by and conceded by law under the rules of 'Res Judicata'". Aside from being incorrect about it being a "superior court", Ellison either does not understand the U.S. District Court's order or is attempting to mislead this Court about what it says. The U.S. District Court was considering summary judgment motions in Ellison's civil case against staff at the Yellowstone County Detention Facility for, *inter alia*, allegedly denying him food during the trial. The U.S. District Court stated that:

> *Taking the facts in the light most favorable to Mr. Ellison*, Officer Washington was on duty in the Classification unit on September 22, 2015 and was told that Mr. Ellison needed

> food. Officer Washington was aware that Mr. Ellison was hypoglycemic because he had previously provided extra meals to Mr. Ellison and when Mr. Ellison asked verbally and in writing for food, Officer Washington denied his requests.

Ellison v. Washington, 2019 U.S. Dist. LEXIS 224348, ** 21-22 (D. Mont. 2019)(emphasis added). The Court clearly said that "*[g]iven the facts alleged by Mr. Ellison and taken as true for purposes of these motions*, Officer Washington intentionally refused to give Mr. Ellison food after being advised that Mr. Ellison had not eaten and knowing that he was hypoglycemic." *Id.*, *22 (emphasis added). Officer Washington "d[id] not recall Mr. Ellison's complaint and his standard procedure would have been to get him a sack meal, but he d[id] not recall his specific actions on that evening." *Id.*. Thus, the U.S. District Court found that "there is a *genuine issue of material fact* regarding whether Officer Washington made an intentional decision to deny Mr. Ellison food knowing that the denial of such food would place Mr. Ellison at a substantial risk of suffering serious harm". *Id.* (emphasis added). In no way is this a finding that Ellison's allegation is an "undisputed fact. Further, the U.S. District Court was operating under a wholly different standard in assessing Ellison's claims than is this Court. The U.S. District Court was deciding whether to grant summary judgment, which can only be granted "when the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed.R.Civ.P. 56(a)). This Court, however, is evaluating Ellison's allegations in the context of post-conviction relief, where he has the burden to show by a preponderance of the evidence that he is entitled to the relief sought. It is entirely reasonable for the U.S. District Court to issue such an order and this Court still find that Ellison's claims lack merit. The U.S. District Court's decision in no way binds this Court to find in Ellison's favor.

Finally, Ellison does not clearly explain what impact his being "more coherent" would have had on the trial. Presumably, he is arguing he would have chosen to testify and would have presented the same story that he is currently presenting in the instant *Petition* – i.e. a story about a wide-ranging conspiracy whose target is Lionel Ellison. The Court finds it difficult to comprehend how that could have helped him. It is even possible that calling him to testify would have made things worse, leading to a conviction for arson instead of the acquittal that resulted. In

the Court's view, Ellison followed the advice of a competent attorney and knowingly waived his right to testify, a sound decision he made unhampered by mental impairment.

V. The State's Alleged Malicious Prosecution and Prosecutorial Misconduct

Ellison claims that the State engaged in malicious prosecution against him and prosecutorial misconduct that impaired his ability to get a fair trial. The State argues that Ellison's arguments have no basis in fact and did not impact the result of the trial. Ellison's claims of malicious prosecution and prosecutorial misconduct lack an evidentiary basis and have little to no relevance to the conviction underlying his *Petition*. While Ellison adamantly asserts the existence of a wide-ranging conspiracy by prosecutors and law-enforcement against him, the Court is not convinced that this conspiracy exists nor that it had an impact on his conviction. It certainly does not warrant post-conviction relief.

Ellison's claims about prosecutorial misconduct, at least those that with even minimal relevance to the underlying conviction, are that (1) the State hid material from him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and (2) prosecutors and law enforcement involved in this case are part of a wide-ranging conspiracy with Ellison as its target. Neither claim has merit.

1. Alleged Brady violations

"Under *Brady*, the State must disclose any evidence that is material to a defendant's guilt or punishment." *State v. Ellison*, 2012 MT 50, ¶ 15. "The prosecutor also has a continuing duty to promptly disclose any additional, discoverable evidence pursuant to § 46-15-327, MCA." *Id.* "The State's failure to properly release exculpatory, material evidence to a defendant is a violation of the defendant's Fourteenth Amendment guarantee of due process, regardless of the prosecutor's good faith." *Id.* "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.*

"[T]here is no Brady violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production." *Id.*, ¶ 19.

Further, "evidence is only material within the meaning of *Brady* 'when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* (quoting *Smith v. Cain*, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012)).

Ellison claims that the State hid the following evidence from him:

- A taped statement that he and his parents made to Billings Police Department Detective Richardson the morning of the fire;
- A picture of a cut on his hand;
- A photo allegedly showing blood on the door that was tied shut.

The State, however, says that this evidence does not even exist and argues that Ellison has suffered no prejudice even if it did. The Court agrees with the State.

Ellison claims that there was a taped statement of his parents talking with Detective Richardson the morning of the fire. Ellison claims that this tape would have supported his parents' testimony at trial about Detective Fritz being present at the scene of the fire. The State, however, asserts that neither he nor his parents gave a formal taped statement to Detective Richardson. The State claims that Detective Richardson and Fire Marshal Schilling met with Ellison and his parents at their kitchen table after the fire. This claim is supported by trial testimony from Marlene Ellison and Fire Marshall Schilling. Trial testimony also supports the State's claim that the Ellisons never provided formal statements. Claude Ellison even testified that he did not want to give a recorded statement to Detective Richardson and would have preferred a deposition. The only evidence that Ellison has that this recorded statement even exists are his own conclusory, self-serving allegations. This is insufficient. Further, the Court does not find this evidence "material;" Ellison's parents had already testified during the State's case-in-chief and repeated the same story that Ellison claims was on this alleged tape. Even if the tape did exist, of which the evidence suggests otherwise, the Court does not believe that "had [it] been disclosed, the result of the proceeding would have been different." *Ellison*, 2012 MT 50, ¶ 19. Thus, it does not meet the standard for a *Brady* violation.

///

Ellison also claims that there was a picture of a cut on his hand that shows he cut his hand as he was reaching out of a broken window to cut the ropes tied on the doors to his home. As explained in this Order regarding Ellison's ineffective assistance of counsel claims, his trial attorney strongly disagrees that this photo even exists. See Section IV, *infra*. Ellison claims that a photo allegedly showing blood on the door was suppressed, and that this is relevant for the same reasons as the alleged photo showing his cut hand. Ellison's trial counsel disagrees with Ellison's account, stating that "[a]ll of the items as evidence during the State's case in chief were provided in discovery [...] includ[ing] 'Photo 77' which was admitted as State's Exhibit 24." (Kakuk *Affidavit*, ¶ 10). As Kakuk says, "[t]hat photo does not show blood on the door." (*Id.*). The Court concludes that neither the photo of the cut hand nor the photo showing blood on the door would have had any impact on the result of the case in any event. The Court is also not convinced by a preponderance that either of these items exist. Regardless, such claims are not actionable *Brady* violations.

2. Wide-ranging conspiracy that Ellison alleges exists against him

Ellison also claims, as he has for some time, that there is a wide-ranging conspiracy against him involving prosecutors, police and other government officials, including those involved in the case underlying his *Petition*. Ellison claims that, years before the incident relevant to the criminal conviction he challenges here, he was kidnapped, taken to Park County, and raped by gang members at the direction of Detective Fritz. As the U.S. District Court summarized:

> Mr. Ellison alleges that Yellowstone County Detective Frank Fritz had an affair with Mr. Ellison's ex-wife and together they stole most of Mr. Ellison's property totaling over $200,000.00. He claims they then hired two Nortanio gang member to abduct, torture, and rape Mr. Ellison and dump him over a 155-foot cliff.

Washington, 2019 U.S. Dist. LEXIS 224348, *27, 2019 WL 7838331.

At Ellison's resentencing hearing, Ellison attempted to enter into evidence photographs and documents relating to the Park County incident. The Court refused to admit those items as they were not relevant to the resentencing. "Ellison sought to introduce a 2009 report from a Park County criminal proceeding that allegedly stated Ellison had not committed sexual intercourse

without consent, for the asserted purpose of demonstrating Ellison was 'framed' in that matter, which Ellison wanted to use to support his innocence in this proceeding." On appeal the Supreme Court found that this Court "clearly did not abuse its discretion in the proceeding by excluding this evidence as irrelevant." *State v. Ellison*, 2019 MT 217N, ¶ 9.

Ellison alleges that the prosecutors and law enforcement involved in this case are part of the conspiracy, and that these charges were merely a continuation of this plot. Ellison has not provided any evidence of the existence of this conspiracy beyond the self-serving statements of himself and his parents. He misconstrues the exhibits that he attaches as "evidence", and the story of the conspiracy and who is involved appears to shift over time. The Court finds that these are no more than conclusory statements that are not supported by evidence and thus do not justify post-conviction relief.

VI. Alleged Perjury by Witnesses at Ellison's Trial

Ellison claims that two witnesses that testified against him at trial engaged in perjury and that this impaired his ability to get a fair trial. The Court finds this claim without merit. The statements that Ellison claims are "perjury" are matters of opinion, not material, or statements that are in the province of the jury to assess and thus insufficient to warrant post-conviction relief.

"A person commits the offense of perjury if in any official proceeding the person knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when the statement is material." Section 45-7-201(1), MCA. The materiality of a statement is a question of law. Section 45-7-201(4).

Ellison's claim that Detective Richardson lied about the ropes tied on the door is a matter of opinion that the jury was capable of assessing. Detective Richardson testified that the doors were tied in such a way that they were easily opened, while Ellison claims they were tied tightly and could not be easily opened. The jury had access to the ropes and the items that the doors were tied to and could give the proper weight to both Detective Richardson's testimony and the physical evidence. The jury, as the fact finder, also has the role of judging Detective Richardson's

credibility. Finally, what is considered "tight" and "easily opened" is such an amorphous issue that it hardly rises to the level of perjury. It does not justify overturning Ellison's convictions.

Ellison's claim about Detective Fritz committing perjury when he testified that he had only seen Ellison once is similarly unconvincing. First, the question asked about "face-to-face interactions", which is distinct from simply seeing Ellison. Second, Detective Fritz testified that he "believed" he had two "face-to-face interactions" with Ellison, and it is not perjury if he was merely mistaken. Finally, the amount of interactions that they had is not material to the case.

Overall, Ellison's perjury claims are merely disagreements that Ellison has with their interpretation of the evidence. They are not supported by anything except conclusory statements by Ellison himself, and thus do not justify granting the relief requested.

VII. Ineffective Assistance of Counsel

Ellison claims that his trial counsel, Michael Kakuk ("Kakuk"), was ineffective. Ellison claims that Kakuk was ineffective for a myriad of reasons, including that"

- Kakuk instructed Ellison's parents to not testify that they saw Detective Fritz at their house the morning of the fire;
- Kakuk did not conduct an adequate pre-trial investigation;
- Kakuk did not adequately communicate with Ellison;
- Kakuk was in possession of a phone that allegedly show contained a picture of Ellison's bloody hand and that Kakuk did not present that evidence to the jury;
- Kakuk conducted a second omnibus hearing without Ellison's knowledge where the "rules at trial changed";
- Kakuk abandoned the defense strategy at trial, including by refusing to allow Ellison to take the stand;
- Kakuk did not cross-examine Detective Fritz;
- Kakuk did not ensure that Ellison was adequately fed, allowing Ellison to be mentally impaired during the trial and unable to assist in his defense; and
- Kakuk did not argue that no witness identified Ellison on the phone call related to Ellison's conviction for Impersonation of a Public Servant.

Ellison also claims that his appellate attorney was ineffective because he refused to present the claims in Ellison's *Petition* during his appeal. The State argues that Ellison's allegations have no basis in fact and that his attorneys' actions meet the objective standard of reasonableness. The Court agrees with the State.

Montana has adopted the two-prong test for ineffective assistance of counsel claims as outlined by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 89 L.Ed.2d 674 (1984). See *State v. Savage*, 2011 MT 23, ¶ 22. "In order for a criminal defendant to prevail on an ineffective assistance of counsel claim, he or she must demonstrate both (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Riggs v. State*, 2011 MT 239, ¶ 9 (internal citations omitted). "If the defendant makes an insufficient showing regarding one prong, the other need not be addressed." *Id.*.

"A defendant must also establish prejudice — that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different." *Id.*, ¶ 12. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." *Id.* "The prejudice inquiry focuses on whether counsel's deficient performance renders the trial result unreliable or the proceedings fundamentally unfair." *Id.* "A claim of ineffective assistance of counsel will not succeed when predicated upon counsel's failure to make motions or objections which, under the circumstances, would have been frivolous, or would have, arguably, lacked procedural or substantive merit, or would likely not have changed the outcome of the proceeding." *Id.*, ¶ 11.

Ellison fails to show that his trial counsel was ineffective. First, Ellison cannot show that Kakuk's performance fell below an objective standard of reasonableness. In making this assessment, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "must make every effort to eliminate the distorting effects of hindsight." *Id.*, ¶ 10 (internal citations omitted). Further, nothing that Ellison complains about in his *Petition* would have changed the outcome of the proceeding, and much of

what Ellison says he wanted would have been frivolous and lacked procedural and substantive merit.

Ellison claims that Kakuk told Ellison's parents to change their story about seeing Detective Fritz the morning of the fire. Kakuk strongly denies this. Kakuk admits that he told them not to testify about Ellison's history, including that with Detective Fritz, because he was concerned that if Ellison's parents mentioned anything about Ellison's history it would allow the State to present evidence regarding Ellison's history of staging crime scenes. (See Kakuk *Affidavit*, ¶ 5). Kakuk previously filed a motion *in limine* to avoid this information being presented to the jury. Kakuk's decisions regarding Ellison's parents' testimony were strategically sound and do not fall below the objective standard of reasonableness. Further, as Ellison's parents testified that they saw Detective Fritz at their house the morning of the fire, they clearly did not listen to Kakuk's alleged instructions, and thus it did not affect the outcome of the proceedings.

Ellison's claims about Kakuk not doing an appropriate investigation similarly lack merit. Kakuk provides convincing reasoning for his actions and decisions. Kakuk spoke with Ellison's former attorney, David Arthur. (Kakuk *Affidavit*, ¶ 8). Kakuk "did not hire a serologist because the serologist at the Crime Lab determined that there was no blood on the ropes." (*Id.*). Detective Richardson had taken photos of the ropes and there was no blood on the ropes in the photos. Thus, there was no point in hiring a serologist. (*Id.*). There was no point in challenging the DNA analysis because "it was undisputed that Ellison touched the ropes and it would have been counter-productive and highlighted the problematic theories of Claude and Marlene." (*Id.*).

The alleged photograph on the phone is also an area of dispute. Ellison claims that a phone that Kakuk obtained from Ellison's former attorney contained pictures of Ellison's bloody hand, which Ellison says shows he cut his hand on the broken glass as he reached through the window to cut the ropes tying the door shut. Kakuk says that he spoke with the investigator, Greg Stovall and Ellison's former attorney, Elizabeth Honaker, and that he attained the phone that Ellison describes. (Kakuk *Affidavit*, ¶ 7). Kakuk says that he viewed the photos on the phone and that "[t]here was no photo of Ellison's hand - bloody or otherwise - on the phone." (*Id.*). Thus,

there was "no reason to call a witness to testify about an injury for which there was no evidence and that was not relevant to the case." (*Id.*).

Regarding Kakuk's alleged refusal to communicate with Ellison, the Court previously addressed this issue at a hearing on August 10, 2015. Further, Kakuk's affidavits staunchly reject Ellison's claims. Kakuk says that he "never refused to communicate with Ellison" and that although "[t]here was some problem with [Ellison] calling [Kakuk] from the jail", they "sorted that out at [the] hearing." (Kakuk *Affidavit* ¶ 11). Kakuk notes that "Judge Jones found there was no lack of communication and that that he "continued to meet with Ellison and his parents." (*Id.*). Ellison has not alleged what specific impact this alleged "refusal to communicate" had on his trial.

Ellison's claim about the rules "changing" at the second omnibus hearing without his knowledge is also without merit. Kakuk states that "Ellison was present for the second omnibus hearing, and there was no change in the 'rules of trial.'" (Kakuk *Affidavit* ¶ 12). Further, Ellison does not make it clear what rules were allegedly changed or how this impacted his trial.

Ellison's claim about Kakuk allegedly abandoning the defense strategy at trial is also without merit. Kakuk says that he "met with Ellison and discussed the best trial strategy" which they decided was to "poke holes in the State's case so the jury would find reasonable doubt as to the charges." (Kakuk *Affidavit* ¶ 13). Kakuk says that Ellison "agreed with the strategy" and also agreed that he should not testify. (*Id.*). Kakuk presents compelling logic for why he suggested that Ellison not testify, noting that Ellison "does not present well, and [...] has little control over himself" and that Kakuk had "great concern that the jury would not believe [Ellison]". (*Id.*). Further Kakuk "had a very serious concern that [Ellison] would also open the door to his charged and uncharged criminal history", which "would have been disastrous." (*Id.*). Although Ellison now denies this and says that he preferred a more active defense strategy that included him testifying, Kakuk's reasoning is convincing. Further, Ellison made no complaints about the strategy at the time of trial. Kakuk's performance exceeds the objective standard of reasonableness and Ellison has not shown that he was prejudiced. At best, Ellison alleges a *post*

hoc dissatisfaction with trial strategy that does not amount to ineffective assistance of counsel. See *Sartain v. State*, 2012 MT 164, ¶ 19 (where attorney stated by affidavit that his trial strategy was based on cross-examination of the State's witnesses and that he "chose not to give an opening statement because he did not want to 'tip off' the State about his defense strategy or give the State any assistance in preparing witnesses for his cross-examination"; the defendant "ha[d] not demonstrated that [counsel's] strategy was unreasonable under the circumstances). Further, Ellison's claim that he was not permitted to testify lacks credibility because he did not object when Kakuk rested the defense's case without Ellison testifying, and affirmatively stated on the record that he understood his right to testify but was waiving it. See *Sartain*, ¶ 24.

Kakuk's decision not to cross-examine Detective Fritz was also not ineffective assistance of counsel. Kakuk has presented strong strategic reasoning for this decision, most importantly his explanation that he "did not cross-examine Detective Fritz because it would have reinforced elements of the State's theory." (Kakuk *Affidavit* ¶ 14). This is sufficient to show that Kakuk's performance met the objective standard of reasonableness.

Ellison's other complaints about Kakuk's performance are also without merit. Contrary to Ellison's claims, Kakuk did argue that no witness identified his voice on the phone calls, arguing that this provided reasonable doubt. (Trial transcript, 617:22-618:1). His arguments about the location of a knife is irrelevant, as photographs of the location of the knife and the knife itself were admitted as evidence, and the Information was amended to conform with the Amended Affidavit concerning the location of the knife. These issues had no impact on the outcome of the case.

The Court finds Ellison's claims about his appellate counsel similarly unconvincing. As all of Ellison's claims in his *Petition* lack merit, his appellate attorney's refusal to present them during Ellison's appeal does not fall below the objective standard of reasonableness, and Ellison was not prejudiced by this decision.

Ellison has failed to show that Kakuk's or his appellate counsel's performances in any way "fell below an objective standard of reasonableness". *Riggs*, 2011 MT 239, ¶ 9. Further, he has

failed to establish any prejudice, i.e. "that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different." *Id.*, ¶ 12. Thus, Ellison's claims for ineffective assistance of counsel must fail.

VIII. A hearing on Ellison's Petition is unnecessary

Ellison has requested an evidentiary hearing on his *Petition*. In assessing a petition for post-conviction relief, the Court "may receive proof of affidavits, depositions, oral testimony, or other evidence" and "*[i]n its discretion,* the court may order the petitioner brought before the court for the hearing." Section 46-21-201(5), MCA (emphasis added). The Court does not find such a hearing necessary nor would it be helpful in determining the issues that Ellison raises. See *State v. Peck*, 263 Mont. 1, 4, 865 P.2d 304, 306 (1993)(district court properly denied appointment of counsel for a hearing on the petition for post-conviction relief where "after review of the petition, the briefs, and the record, it determined that a hearing was not required."). First, most of Ellison's claims depend on the Court believing Ellison's version of the events in question, including the existence of a wide-ranging conspiracy against him. Even within the context of the *Petition* itself and the voluminous documents that Ellison has filed, he has been self-contradictory and consistently misrepresented the meaning of evidence and cases presented in support of his arguments. The only evidence that Ellison has in support of his claims is the testimony of himself and his parents. The Court finds Ellison's story and that of his parents to be completely without merit, frivolous, and one that Ellison intends to uphold even when the evidence directly contradicts it. A hearing would be a waste of time and judicial resources and would have no impact on the outcome of Ellison's *Petition*. Thus, his request for a hearing must be denied.

For the sake of this order being complete, the Court acknowledges that in late June 2020 Ellison attempted to file additional documents in support of his *Petition*. See, e.g. *Petitioner's Submission of Judicial Notice of Law and Fact Per the Montana Rules of Evidence Rule's* [sic] *201 and 202*, dated June 15, 2020. Although Ellison did not obtain leave to file these documents, as the Court has required by previous order, the Court reviewed them in order to ensure that his

Petition was fully and fairly evaluated. However, nothing contained in these documents changes the analysis provided above nor do they cast any doubt on the propriety or fairness of the trial process underlying the convictions in this case.

For these reasons,

IT IS ORDERED that Ellison's *Petition for Post-Conviction Relief* is hereby **DENIED.**

IT IS FURTHER ORDERED that any of Ellison's filings under this cause number that are not explicitly addressed herein are hereby **DENIED.**

DATED this 9th day of July, 2020.

MATTHEW J. WALD, District Judge

cc: Julie Mees
Lionel Ellison
Michael Kakuk

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail, fax, or email upon the parties or their attorneys of record at their last known addresses.
Dated this 9th day of July, 2020
By: Kathryn B. Stahley
COURT ADMINISTRATOR/ALEX HON. MATTHEW J. WALD

EXHIBIT
MT 3
13th J.D.C. H

COPY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

LIONEL SCOTT ELLISON, Petitioner, vs. STATE OF MONTANA, Respondent.	Cause No. DV 19-1330 Judge Matthew J. Wald **ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

Before the Court is a *Petition for Post-Conviction Relief* filed by Petitioner Lionel Scott Ellison ("Ellison"). Ellison is not represented by an attorney. Ellison's *Petition* challenges his conviction for arson under cause number DV 07-907. Having reviewed Ellison's *Petition* as well as the attached exhibits, as well as the applicable law, the Court finds that the *Petition* must be denied.

STANDARD OF REVIEW

Petitions for postconviction relief are prescribed by statute and are civil in nature. *Coleman v. State*, 194 Mont. 428, 433, 633 P.2d 624, 627 (1981). Section 46-21-201(1)(a), MCA provides that "[u]nless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be sent to the county attorney in the county in which the conviction took place and to the attorney general and order that a responsive pleading be filed." In a petition for postconviction relief, "[g]rounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided." § 46-21-105(2), MCA. "Grounds for relief" includes "all legal and factual issues that were or could have been raised in support of the petitioner's claim for relief." § 46-21-105(3), MCA.

A petitioner for postconviction relief has the burden of proving by a preponderance of the evidence that he or she is entitled to relief. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422. In so doing, the petitioner must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. Mere conclusory allegations do not satisfy this procedural requirement. *Ellenberg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 573. The Court may dismiss the petition as a matter of law for failure to state a claim for relief. Section 46-21-201(1)(a), MCA.

A petition for post-conviction relief must be filed within 1 year of the conviction becoming final. Section 46-21-102, MCA. A conviction becomes final for the purpose of post-conviction relief when "(a) the time for appeal to the Montana supreme court expires; (b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires; or (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case." Section 46-21-102(1)(a)-(c), MCA. The only exception to the one-year time limit is when the post-conviction relief petition "alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." Section 46-21-102(2), MCA. In such cases, the petition must be "filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later." *Id.*

PROCEDURAL HISTORY

The procedural history of this case has been discussed in depth by the Montana Supreme Court on at least two occasions. See *State v. Ellison*, 2009 MT 408N, ¶ 5; and *Ellison v. State*, 2013 MT 376, ¶¶ 1-7, 373 Mont. 159, 315 P.3d 950. The Court will not repeat that discussion here except as necessary in determining the merits of the *Petition*. Ellison filed the instant *Petition for Post-Conviction Relief* on September 5, 2019.

DISCUSSION

I. Ellison's *Petition* is time-barred

Ellison entered an Alford plea to the charge underlying the instant *Petition* on April 1, 2008. Ellison filed a motion to withdraw his plea which was denied by the district court on May 5, 2009. On May 26, 2009, the District Court sentenced Ellison to five years, all suspended, in the Montana State Prison for this charge. Ellison appealed the District Court's denial of his motion to withdraw his plea to the Montana Supreme Court, which affirmed the District Court's decision on November 25, 2009. See *State v. Ellison*, 2009 MT 408N, ¶ 14. Having been nearly ten years since the Montana Supreme Court issued its decision denying Ellison's appeal, it has clearly been more than a year since Ellison's conviction has become final, and thus the time limit for filing a petition for post-conviction relief has passed. Section 46-21-102, MCA. The only way that Ellison can overcome this time limit is if by alleging "the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." § 46-21-102(2), MCA. Ellison attempts to make such an allegation, which is discussed in Part II, infra.

As the time limit for filing a petition for post-conviction relief regarding anything other than the existence of newly discovered evidence establishing Ellison's actual innocence has passed, any other claim raised in Ellison's *Petition* is time-barred. Thus, the Court will only address Ellison's claims that fall into this narrow category and all other arguments raised in his *Petition* must be denied.

II. Ellison cannot show that he is in possession of newly discovered evidence that would allow him to overcome the time limit found in § 46-21-102, MCA

Ellison claims that he is in possession of newly discovered evidence that would establish that he did not engage in the criminal conduct for which he was convicted. Ellison claims that his conviction under Section 45-6-103, MCA was because the car he was driving "accidentally caught fire in the trunk area due to a known mechanical failure while [Ellison] was driving the car" to have it repaired. Ellison claims that the State "procured this wrongful conviction [by]

misrepresent[ing] material evidence to the court." He claims that then Deputy County Attorney Scott Twito ("Twito") "knowingly and purposefully filed an [a]ffidavit [...] claiming a video from a nearby [...] security camera had captured the alleged [a]rson." Ellison claims that this video was "deemed as meaningless by the State's formost [sic] [v]ideo [e]xpert." Ellison also claims that Twito "filed the above [a]ffidavit with the knowledge that the filing was illegal at that time due to a substantial [g]ap in the [c]hain of [c]ustody of the car" between when it caught fire and when "the County investigators viewed and photographed the car," which Ellison states is three months. Ellison calls this a "fraud upon the Court." Essentially, he argues that the State presented "false information" to the Court and that this "tainted" the proceedings against him. In order for Ellison's claim to have any merit, he must do more than merely allege that the State "fabricated the condition of the car in question as being in the same condition as it was when the trunk caught fire", he must provide evidence that is newly discovered and, furthermore, that shows that he did not commit the crime for which he was convicted. He fails to meet this standard.

Notably, Ellison has previously filed a petition for post-conviction relief regarding the conviction underlying this petition. See *Ellison v. State*, 2013 MT 376, ¶ 24, 373 Mont. 159, 160, 315 P.3d 950 (Montana Supreme Court decision affirming the District Court's denial of Ellison's petition for postconviction relief). In that previous petition, Ellison "alleg[ed] ineffective assistance of counsel, and that the District Court misinterpreted the arson statute." *Ellison v. State*, 2013 MT 376, ¶ 1. While the issue of the District Court's interpretation of the arson statute is not relevant to Ellison's arguments in the instant *Petition*, the ineffective assistance of counsel is revealing in at least two ways: first, it shows that some aspects of the issue that Ellison raises in the instant *Petition*, the surveillance video and the condition of the car, has already been adjudicated, and second, it shows that he was in possession of some of the evidence raised herein at least nearly six years ago and thus it is not "newly discovered" such that he can escape the time bar of § 46-21-102, MCA.

In his previous petition, Ellison alleged that one of his attorneys, Jeffrey Michael ("Michael"), "provided ineffective assistance of counsel by allowing Ellison to enter a plea for a

charge that had an insufficient factual basis" and that his subsequent attorney, Herbert Watson ("Watson"), "provided ineffective assistance of counsel for failing to raise the issue of the sufficiency of the factual basis of the arson charge on direct appeal." *Ellison v. State*, 2013 MT 376, ¶ 6. Ellison's claim about Michael shows that he was in possession of the surveillance video and related reports years ago. *Ellison v. State*, 2013 MT 376, ¶ 20 (referring to the video and a related expert analysis that Ellison has attached to the instant *Petition* as Exhibit 1).

In meeting his burden of proving by a preponderance of the evidence that he or she is entitled to relief, *Herman*, supra, at ¶ 44, Ellison must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. With this in mind, the Court will examine all the exhibits that Ellison has attached to his *Petition*. None of them are sufficient to prove, nor do they even suggest, that Ellison is entitled to the relief requested.

First is Ellison's "Affidavit of Petition", wherein he makes a myriad of "Facts and Claims". He makes many factual allegations but lacks descriptions of evidence of these accusations that is newly discovered. The evidence he does refer to in this affidavit is included in a list of exhibits that he attached to his *Petition* and are described below.

Exhibit 1 is an expert analysis by State Video Expert Douglas McShane concerning the surveillance video that Ellison claims shows there was not "probable cause" to charge him with arson. The Montana Supreme Court's decision on Ellison's previous petition for post-conviction relief shows that he has been in possession of this evidence for years:

> Ellison relies on a report by an expert in surveillance systems, obtained in support of his petition for postconviction relief, which states that the surveillance video showed fire and smoke coming from an unidentified vehicle, followed by the appearance of "one and two or even three barely visible" unidentifiable individuals in the vicinity of the fire. The report notes, "it is truly impossible to determine anything even remotely associated with actions taken or intent." Even though the report clearly states that the surveillance video is unreliable due to its quality, Ellison nonetheless relies on the video to corroborate Ellison's version of events.

Ellison v. State, 2013 MT 376, ¶ 20.

Exhibit 2 is a psychiatric evaluation of Ellison from the Montana State Hospital. While Ellison claims that it supports Ellison's claim that "a detective and his ex-wife had been involved in multiple attempts at harming/killing" Ellison, the Court finds nothing in the report that supports this assertion. Further, the report is dated May 23, 2012, and the *Order Releasing Report* explicitly providing Ellison access to it was issued on July 26, 2016. Using either date as the day that this "evidence" was "discovered", it has been far more than the one-year limit of § 46-21-102, MCA.

Exhibit 3 is a note supposedly recovered from a "Nortanio [sic]" gang member who Ellison alleges was paid $50,000 to abduct, torture and rape Ellison. The Court has reviewed this note and finds it wholly irrelevant to the issues raised in Ellison's *Petition*. Further, even if the Court assumes it means what Ellison's claims, it is not evidence of actual innocence. Exhibit 4 is an affidavit from Deborah Harris that Ellison alleges supports his version of events. The affidavit is dated June 16, 2008. Thus, this is not "newly discovered evidence". Exhibit 5 concerns the value of the vehicle involved in the arson charge. Ellison's arguments about the value of the vehicle has already been rejected by the Montana Supreme Court. *Ellison v. State*, 2013 MT 376, ¶ 13. Exhibit 6 is Ellison's affidavit about the events surrounding the arson for which he was convicted. Ellison's own claims and alleged memories are by no means "newly discovered evidence", especially considering that the affidavit itself is dated June 10, 2013. Exhibit 7 is a pair of articles written by a Billings reporter. These articles were published in January 2012. Again, not "newly discovered evidence". Exhibit 8 is a state statute for Arson and Negligent Arson, which is again not "newly discovered evidence." In sum, none of the exhibits that Ellison has attached to his *Petition* are "newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." Section 46-21-102(2), MCA.

For these reasons,

IT IS HEREBY ORDERED that Ellison's *Petition for Post-Conviction Relief* is hereby **DENIED**.

IT IS FURTHER ORDERED that any of Ellison's filings under this cause number that are not explicitly addressed herein are hereby **DENIED**. This includes, but is not limited to, Ellison's motion pursuant to Rule 60, M. R. Civ. P, which he refers to multiple times within his *Petition.*

IT IS FURTHER ORDERED that if Ellison wishes to file anything else with the Court under this cause number, he must first seek leave of Court before doing so. The Clerk is instructed to **reject any attempted filings by Ellison if he has not first been granted leave of court**. The Court will not examine, decide or address any documents filed by Ellison that are not preceded by an order granting him leave to file.

DATED this 31 day of December, 2019.

MATTHEW J. WALD, District Judge

cc: Julie Mees
Lionel Ellison
Michael Kakuk

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail, fax, or email upon the parties or their attorneys of record at their last known address/email.
Done this 31 ***day of*** December, ***20*** 19
By: Kathryn B. Stanley
COURT ADMINISTRATOR/LAW CLERK TO HON. MATTHEW J. WALD

EXHIBIT
8
MT 13th J.D.C. H

#14696

CLERK OF T
DISTRICT COU
MONTANA

2009 MAY 26 PM 4 16

FILED

BY _____ DEPUTY (64)

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA Plaintiff, vs. LIONEL SCOTT ELLISON, Defendant.	CAUSE NO. DC 07-0907 Judge Susan P. Watters **JUDGMENT AND ORDER SUSPENDING SENTENCE**

The County Attorney, with the above-named defendant and his counsel, Herman Watson, came into Court on the 21st day of May 2009. The defendant was duly informed by the Court of the nature of the Information filed against him for the crime of ARSON (FELONY) committed on or about the the 19th day of May 2007, at his arraignment and entered a plea of nolo contendere to the crime of ARSON (FELONY) on the 1st day of April 2008.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment: That whereas the said LIONEL SCOTT ELLISON has been duly convicted in this Court of the crime of ARSON (FELONY);

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said LIONEL SCOTT ELLISON be punished by imprisonment in the Montana State Prison at Deer Lodge, Montana, for the term of FIVE (5) YEARS.

IT IS FURTHER ORDERED that the execution of said prison sentence this day imposed on said defendant, as hereinabove set forth, be, and the same hereby is SUSPENDED, and said defendant is hereby placed on probation for said period of FIVE (5) YEARS, and the Court retains jurisdiction of said defendant in the above-entitled cause during the entire term of said imprisonment above-mentioned, and the following conditions are to be performed and kept by said defendant during this term of probation as follows, to wit:

1. The Defendant is to be placed under the supervision of the Department of Corrections, subject to all rules and regulations of the Adult Probation & Parole Bureau.

2. The Defendant will not change his place of residence without first obtaining permission from his Probation/Parole Officer. The residence must be approved by his Probation & Parole Officer. The Defendant will make the home open and available for the Probation

& Parole Officer to visit as required per policy. The Defendant will not own dangerous/vicious animals such as guard dogs, use perimeter security doors, or refuse to open the door of the residence when requested.

3. The Defendant shall not leave his assigned district without first obtaining written permission from his Probation & Parole Officer.

4. The Defendant shall seek and maintain employment or a program approved by the BOPP or his Probation & Parole Officer. The Defendant must obtain permission from his Probation & Parole Officer prior to any change of employment. The Defendant will inform his employer of his status on probation or parole.

5. The Defendant will personally report to his Probation/Parole Officer as directed. He will submit written monthly reports on forms provided. He will make himself available to his Probation & Parole Officer as requested.

6. The Defendant will not own, possess, or be in control of any firearms or deadly weapons, including black powder, as defined by state or federal law. The Defendant will not possess chemical agents such as O.C. spray.

7. The Defendant will obtain permission from his Probation & Parole Officer before financing or purchasing a vehicle, property, or engaging in business. The Defendant will not go into debt without his Probation & Parole Officer's permission. Restitution, child support, fines, and fees will be the Defendant's priority financial obligations.

8. Upon reasonable suspicion, as ascertained by the Probation & Parole Officer, the Defendant's person, vehicle, and/or residence may be searched at any time, day or night, without a warrant by a Probation & Parole Officer, ISP Officer or a Law Enforcement Officer (at the direction of the Probation & Parole/ISP Officer). The Defendant may also be searched at his place of employment. Any illegal property or contraband will be seized and may be destroyed.

9. The Defendant shall comply with all city, county, state, federal laws, ordinances, and conduct himself as a good citizen. The Defendant shall report any arrests or contacts with law enforcement to his Probation & Parole Officer within 72 hours. The Defendant will at all times be cooperative and truthful in all his communications and dealings with his Probation & Parole Officer.

10. The Defendant will not possess or use illegal drugs or any drugs unless prescribed by a licensed physician. The Defendant will not be in control of or under the influence of illegal drugs, nor will he have in his possession any drug paraphernalia.

11. The Defendant shall pay supervision fees pursuant to Section 46-23-1031, M.C.A. If convicted of a drug offense and placed on Intensive Supervision, then he may be ordered to pay $50 per month as per 45-9-202 (2) (d) (ii). All supervision fee payments will be made by money order or cashiers check and sent to the Department of Corrections, Collection Unit, P.O. Box 201350, Helena, MT 59620.

12. The Defendant will pay court ordered victim restitution in the amount of EIGHT HUNDRED DOLLARS ($800.00) in a timely fashion. The P&P officer will determine the amount of payments if the offender is on supervision; otherwise, the DOC will take a portion of the offender's inmate account if the offender is incarcerated. All restitution payments will be made by money order or cashiers check and sent to the Department of Corrections, Collection Unit, P.O. Box 201350, Helena, MT 59620. The Defendant will

be assessed a 10% administration fee on all restitution ordered. All of the methods for collection of restitution provided under Sections 46-18-241 through 46-18-249 shall apply, including garnishment of wages and interception of tax refunds. Pursuant to Section 46-18-244(6)(b), MCA the Defendant shall sign a statement allowing any employer to garnish up to 25% of his wages. The Defendant will continue to make monthly restitution payments until he has paid full restitution, even after incarceration or supervision has ended. Restitution shall be disbursed to:

Deane Ames
510 Killarney St
Billings, MT 59102

13. The Defendant shall pay to the Department of Corrections a $50 fee at the time that the PSI report is completed unless the court determines that the Defendant is not able to pay the fee within a reasonable time as per 46-18-111, M.C.A. The Defendant is to submit the payment to the Department of Corrections, Collection Unit, P.O. Box 201350, Helena, MT 59620.

14. The Defendant will pay all fines and fees as ordered and directed by the Court.

15. The Defendant shall pay the greater of $20 or 10% of the fine levied for each felony charge and $15 for each misdemeanor charge to the Clerk of Court as provided for in Section 46-18-236, M.C.A.

16. The Defendant shall pay an additional $50 for each misdemeanor and felony charge under Title 45, 61-8-401, M.C.A.

17. The Defendant shall pay a surcharge to the County Clerk of Court in the amount of $10.00, pursuant to Section 3-1-317, M.C.A.

18. The Defendant shall successfully complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program and follow all treatment recommendations.

19. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.

20. The Defendant will not associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from his Probation & Parole Officer. The Defendant will not associate with persons as ordered by the Court or BOPP.

21. The Defendant will submit to DNA testing as required by Title 44, Chapter 6, Part 1, M.C.A.

22. The Defendant will enter and complete an Anger Management class to assist his in dealing with his violent criminal behaviors.

23. The Defendant will register as a Violent Offender in compliance with Title 46, Chapter 23, Part 5 M.C.A. and give appropriate notice of any address change.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the defendant fails to comply with any of the above-conditions, a bench warrant of arrest will be issued, the

defendant apprehended, and the said defendant will be required to appear before this Court for further proceedings.

Sentence was imposed for the following reasons:

1. The Court considered the contents of the pre-sentence report, the corrections/modifications at the sentencing hearing made thereto and the author's recommendations contained therein.

2. The Court considered the statutory criteria for sentencing; the age of defendant; employed; notes this is a violent offense as defined by statute; plead guilty as charged thereby accepting responsibility; the circumstances/facts of the offense; defendant's criminal history/record recognizing this offense was committed subsequent to the deferred imposition of sentences; and the recommendations/arguments of counsel.

3. Given the above-stated reasons, the Court shall afford defendant the opportunity of a suspended sentence, however, the Court hopes defendant understands and recognizes that it is solely his responsibility to take advantage of the programs this type of sentence/commitment offers to assist in rehabilitation and change his attitude towards criminal behavior/activity. Defendant is receiving a tremendous, one last chance/break and is expected to have no further involvement with the criminal justice system and become a law-abiding citizen/productive member of society.

The Bond, if any, is hereby exonerated.

If the written judgment differs from the sentence the Judge pronounced orally, the State or the offender has only One Hundred Twenty (120) Days to contest the written judgment. After One Hundred Twenty (120) Days, the written judgment is presumed correct.

DONE In Open Court: the 21st day of May 2009.

SIGNED this 26th day of May 2009.

Susan P. Watters
DISTRICT COURT JUDGE

CC: YCAO – Scott Twito-slm
YCSO (07-30334)
PROBATION & PAROLE
DEFENSE COUNSEL- Herman Watson

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served upon the parties or their counsel of record at their last-known address this 26th day of May 2009.
By: Kristy T. Schneider
Judicial Asst to the Honorable Susan P. Watters

THIRTEENTH JUDICIAL DISTRICT COURT · YELLOWSTONE COUNTY · SEAL · MONTANA

State of Montana
County of Yellowstone } ss CERTIFICATE

I hereby certify that this sheet and all attached sheets identified by impression of my Official Seal are each and all true and correct copies of originals filed in my Office in Case No DC-07-907

WITNESS my hand and Official Seal this 30 day of March 20 22

Terry Halpin
Clerk of the District Court

By Heather B
Deputy

EXHIBIT 4 Relat. I

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

LIONEL SCOTT ELLISON, Plaintiff, vs. OFFICER WASHINGTON, OFFICER GROSLOCK, OFFICER JOHNSON, and SGT. PETERS, Defendants.	CV 18-00056-BLG-BMM-JTJ ORDER AND FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

The following motions are pending before the Court: (1) Plaintiff Lionel Ellison's Motion for Summary Judgment (Doc. 41); (2) Defendant Grosulak's Motion for Summary Judgment (Doc. 47); (3) Mr. Ellison's Motion for Sanctions (Doc. 57); (4) Defendant Washington's Motion for Summary Judgment (Doc. 60); (5) Defendant Johnson's Motion for Summary Judgment (Doc. 64); (6) Defendant Peters's Motion for Summary Judgment (Doc. 68); (7) Mr. Ellison's "Demand for Disqualification of Defendants Counsel and Second Request for Sanctions against Counsel, Mark A. English for his Continued Suppression of Requested Evidentiary Documentation that is Exculpatory to Plaintiff" (Doc. 80); (8) Mr. Ellison's "Motion to Dismiss Defendants' Motions for Summary Judgment" (Doc. 87); and (9) Mr. Ellison's Motion for Default Judgment (Doc. 89).

The Court first notes that the parties failed to comply with several of the

Court's Local Rules regarding these motions. For example, Defendants' Statements of Undisputed Facts (Docs. 49, 62, 66, 70), do not comply with Local Rule 56.1 in that the facts are not set forth in serial form. Yet, Defendants argued in their reply briefs that Mr. Ellison's failure to file a Statement of Disputed Facts in response to Defendants' motions for summary judgment should be construed as an admission that there are no disputed facts. The Court will not do so because Defendants presented their Statements of Undisputed Facts in narrative form as opposed to serial form. In fact, the Court has been unable to rely on Defendants' Statements of Undisputed Facts in the analysis of the above motions. Mr. Ellison also violated Local Rule 56.1 in that he failed to file a Statement of Undisputed Facts with his Motion for Summary Judgment. There is no excuse for these violations of the Local Rules as there is a form which demonstrates the correct format for statements of disputed facts. Local Rules, Appendix C, Form A.

The parties are also in violation of Local Rule 7.2(b) which provides that "only exhibits that are directly germane to the matter under consideration by the court may be filed." Perhaps most egregious is Defendant Grosulak's filing of Mr. Ellison's entire criminal case file from state court (825 pages). The Court fails to see how anything within that record is relevant to his claims herein and none of the Defendants explained the relevance of these documents. Despite the irrelevance of Mr. Ellison's criminal charges, convictions and sentences, Defendants copied and

pasted the same two to three pages regarding the nature and history of Mr. Ellison's criminal charges nine times in their filings. (Docs. 28, 48, 49, 61, 62, 65, 66, 69, 70.) They spent the majority of each of the four Statements of Undisputed Facts discussing Mr. Ellison's criminal charges. An extensive history of Mr. Ellison's criminal charges is not at all relevant to whether or not he was provided food or assaulted at the Yellowstone County Detention Center (YCDF) and that is the bulk of factual information provided to the Court by Defendants.

Similarly, Mr. Ellison has repeatedly filed the same documents and photographs regarding the 2010 incident when he was allegedly assaulted. He has attempted to make these documents relevant to the case at bar, but it is completely unnecessary to file numerous copies of these documents in the record.

Due to the parties' violations of Local rule 7.2(b) the following documents will be stricken, they will not be considered for any purpose and will be sealed: Documents 54-1: state court criminal case file; Documents 79-1 at 2-21, 23-61: additional copies of Mr. Ellison's documents regarding the 2010 incident when he was allegedly assaulted. Any party who files any additional irrelevant, redundant exhibits in violation of Local Rule 7.2(b) will be subject to sanctions.

Finally, both parties have also violated Rule 5.2 by filing numerous documents that contain Mr. Ellison's date of birth.

Despite these violations, the Court recommends that Mr. Ellison's motion

for summary judgment (Doc. 41) be denied; Officer Grosulak's motion for summary judgment (Doc. 47) be granted on all claims except Mr. Ellison's failure to protect regarding the December 10, 2015 alleged assault; Officer Washington's motion for summary judgment be granted on all claims except Mr. Ellison's September 22, 2015 food claim and his failure to protect claim regarding the December 10, 2015 alleged assault; Officer Johnson's motion for summary judgment be denied with regard to Mr. Ellison's failure to protect claim regarding the December 10, 2015 alleged assault; and Sgt. Peters' motion for summary judgment be granted.

Should these recommendations be adopted, this matter will be scheduled for trial on Mr. Ellison's claim that Defendant Washington denied him necessary food on September 22, 2015 and Mr. Ellison's failure to protect claim against Officers Grosulak, Washington and Johnson regarding the December 10, 2015 incident.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving

party may accomplish this by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by showing that such materials "do not establish the absence or presence of a genuine dispute, or that the adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1)(A), (B).

"Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *Oracle Corp.*, 627 F.3d at 387 (*citing Celotex*, 477 U.S. at 325); *see also* Fed.R.Civ.P. 56(c)(1)(B). Summary judgment should be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *See Celotex*, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11. "A plaintiff's verified complaint may be considered as an affidavit in opposition to summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence." *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc). The opposing party must demonstrate that the fact in contention is material, i.e., a fact "that might affect the outcome of the suit under the governing law," and that the dispute is genuine, i.e., "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all inferences supported by the evidence in favor of the non-moving party." *Walls v. Cent. Costa Cnty. Transit Auth.*, 653 F.3d 963, 966

(9th Cir. 2011). It is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586 (citations omitted).

By notices provided on May 8, 2019 and June 25, 2019 (Docs. 50, 63, 67, 71), Mr. Ellison was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998)(en banc); *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

II. UNDISPUTED FACTS

A. September 22-23, 2015

Mr. Ellison was incarcerated at YCDF from February 26, 2015 until December 22, 2015. (Bodine Affidavit, Doc. 51 at 2.) A jury trial regarding criminal charges against Mr. Ellison was held from September 21, 2015 through September 23, 2015. During that criminal trial, Mr. Ellison was housed in Classification, a unit within the YCDF. (Bodine Affidavit, Doc. 51 at 2.)

Mr. Ellison alleges Defendants Washington and Grosulak refused to feed him during the last two days of his criminal trial on September 22 and 23, 2015. (Ellison MSJ, Doc. 41 at 5.) Mr. Ellison contends, and Defendants do not dispute

that he is hypoglycemic. Mr. Ellison claims that due to his condition he needs food on a regular schedule of five small meals in a 24-hour cycle and YCDF had supplied him with extra "no processed meat" sack meals from the first week of his detention. (Ellison's MSJ, Doc. 41 at 5.) Mr. Ellison alleges Officer Washington was aware of this condition as he had previously supplied him with these extra sack meals. He alleges the only days he was not provided this sack meal was the final two days of his criminal trial. (Ellison's MSJ Response, Doc. 79 at 2.)

On a September 20, 2015, Mr. Ellison submitted an inmate special request form, stating, "I have court early tomorrow. Tomorrow morning may I shower & shave early (Breakfast) so I can be ready for court." The response stated, "Denied—time outs are on a schedule." (Doc. 41-1 at 14.)

On September 22, 2015, Mr. Ellison contends he collapsed after court. The transport officer took Mr. Ellison back to YCDF and told Officer Anderson to make sure that the 'B' unit officers were told to feed Mr. Ellison. Mr. Ellison contends he heard Officer Anderson tell Officers Washington and Grosulak that the transport guards ordered that Mr. Ellison be fed immediately. Mr. Ellison alleges (and Defendants do not appear to dispute) that he was not given any food the evening of September 22, 2015. Mr. Ellison presented an undated inmate special request form stating, "I hardly got lunch & no dinner yet its after 8. Please feed me soon lightheaded & hypoglycemic is not good." The response was, "Sir,

you get food at regular times through the day." (Doc. 41-1 at 13.) Mr. Ellison contends it was Officer Washington who wrote this response and Defendants did not dispute that allegation.

Officer Washington admits he was working in Classification on September 22, 2015 but he does not remember any problem with the meal service. He testified that he did not recall a complaint from Mr. Ellison about not receiving a meal and if Mr. Ellison had not been present for meal service, he would have followed standard procedure to obtain a sack meal from the kitchen for him. (Washington Aff., Doc. 75 at 1-2.) Officer Grosulak worked at YCDF on September 22, 2015 but did not work in Classification. (Grosulak Time Sheet, Doc. 53-1 at 1.)

On September 23, 2015, Mr. Ellison submitted an "Official Complaint" stating, "Yesterday on the 22nd I received regular lunch late at court . . . Officer Shirley took me home from Court . . . I could hardly stand and almost fell from hypoglycemia. CO told B I needed food soon. . . They moved me back to B and C. Officer Anderson said he could get food. It was almost 6:15 p.m. I asked C.O. Washington about 7:00 for food—he refused both verbally and by kite." The response on September 29, 2015, stated, "It was discussed and this information was placed on briefing. This complaint was addressed and a remedy was found." (Doc. 41-1 at 15.)

Mr. Ellison submits that the last day of trial (September 23, 2015), a guard brought him breakfast but only allowed him a couple bites of oatmeal and then took the food away and made Mr. Ellison go to the shower. Mr. Ellison alleges he then waited two hours to be transported to court and by that time he was getting sick because the oatmeal had worn off. The rest of the day at trial he was lightheaded and incoherent due to lack of food because his defense counsel refused to supply him food as he told the transport officers.

Mr. Ellison admits he was given sandwich the night of September 23, 2015 but contends that by 9:00 p.m. he was ill again from lack of food. He has not however, provided any allegation that any named Defendant was responsible for denying him food on September 23, 2015. Neither Officer Washington nor Officer Grosulak worked at YCDF on September 23, 2015. (Washington Time Sheet, Doc. 76-1; Grosulak Time Sheet, Doc. 53-1 at 1.)

B. December 10, 2015

From November 29, 2015 to December 11, 2015, Mr. Ellison was housed in Classification B with Steven Aalgaard as his cellmate. (Bodine Aff., Doc. 78 at 2.) Mr. Ellison alleges that around the first of December 2015 (presumably November 29, 2015), Officers Johnson, Washington, and Grosulak placed Mr. Aalgaard in Mr. Ellison's cell. Mr. Ellison told the guards that this was not allowed. Mr. Aalgaard allegedly confirmed there was "bad history" between Mr. Aalgaard and

Mr. Ellison because Mr. Aalgaard had been Mr. Ellison's former employee and had been fired for theft and refusing a drug test. (Ellison MSJ, Doc. 41 at 6-7.)

In their disclosure statement, Defendants admitted that Mr. Ellison complained to the Facility that Mr. Aalgaard posed a threat to him but the Facility did not believe that Mr. Aalgaard posed a threat to Mr. Ellison. Defendants contended that Mr. Ellison had a history of false allegations against other inmates. (Defendants' Disclosure, Doc. 38 at 3.)

Mr. Ellison contends that on the evening of the assault (the night of December 10-December 11), Officer Grosulak called Mr. Aalgaard out of the cell for about an hour. Later that night, Mr. Aalgaard allegedly stabbed Mr. Ellison three times and cut Mr. Ellison two other times. Mr. Ellison contends he kicked the knife under the door of the cell and punched Mr. Aalgaard to keep him away. Mr. Ellison alleges that Officer Grosulak came and took the knife and ignored Mr. Ellison. (Ellison Disclosure, Doc. 39 at 5.)

Mr. Ellison submitted a medical request form stating, "My cellmate freaked out last night in the dark, he stabbed me in the top of the head, my left ear, and left forearm. Could you please look at these cuts. Thank you." The response indicated that Mr. Ellison was seen by the provider on December 11, 2015. (Doc. 41-1 at 16.)

The December 11, 2015 medical record indicates that Mr. Ellison reported

an altercation with his cellmate last night. He reported he was attacked with a pen and hit in the head and jaw. He reported a minor headache but denied loss of consciousness and confusion. The PA noted that Mr. Ellison had a 1 cm contusion in the mid left/superior parietal region (back of the head), a minor abrasion on his forehead but no battle signs. He noted a minor abrasion on Mr. Ellison's left ear and a 20m superficial scratch of his left forearm. But the PA specifically noted no signs of a stab wound on Mr. Ellison's arms, head, anterior or posterior trunk or abdomen. The Clinical note was that Mr. Ellison had a few minor abrasions but no sign of any stab wounds. (RiverStone Health report of PA Chris Caruso, PA-C, Doc. 74-1.)

Mr. Ellison contends he later saw Mr. Aalgaard carrying a large amount of property in a sack that he did not have before. Mr. Ellison wrote a grievance which was answered by Sgt. Peters who confirmed that there had been many threats against Mr. Ellison. (Ellison's MSJ, Doc. 41 at 6-7.)

Officer Grosulak was not on duty at the YCDF on December 9, 10 or 11, 2015. (Grosulak timesheets, Doc. 53-1 at 2.) Officer Johnson does not make cell assignments for inmates. He admits that Mr. Ellison complained that his cellmate posed a threat to him, but he did not believe him because he contends Mr. Ellison had previously made false allegations against other inmates, including cellmates, to manipulate his unit and cell assignments. (Johnson Aff., Doc. 72 at 1-2.)

Officer Washington made cell assignments in his unit with a priority towards the safety of the facility. Any problems that arose were addressed, documented, and when necessary, he would confer with the sergeant on duty and/or classification. Officer Washington testified that inmates would sometime try to manipulate their cell assignment by falsifying health conditions or saying they would fight their cellmate. Officer Washington represents that a change would be made if the inmate's claims were confirmed with medical or documentation of a keep separate or when given the alternative they accepted this. Officer Washington contends Mr. Ellison had made previous false allegations against other inmates, including cellmates, to manipulate his unit and cell assignments. (Washington Aff., Doc. 75 at 2.)

Sgt. Peters investigated the alleged assault but could not substantiate the assault. For example, Mr. Ellison alleged Mr. Aalgaard stabbed him, but Mr. Ellison did not have stab wounds and Mr. Aalgaard did not have a knife. Mr. Ellison also alleged that Mr. Aalgaard punched him, but Mr. Ellison did not have bruises from being punched and Mr. Aalgaard did not have any injuries to his knuckles. Mr. Ellison also gave different descriptions of the assault. In one version, he claimed Mr. Aalgaard stabbed him but in another version, he claimed Mr. Aalgaard punched him. Mr. Aalgaard denied that he assaulted Mr. Ellison. In addition, the guard on duty during the night did not notice any disturbance in Mr.

Ellison' s cell. It is Sgt. Peters' belief that Mr. Ellison made a false allegation that the assault occurred in an attempt to have Mr. Aalgaard moved to another cell or unit. (Peters' Aff., Doc. 77.)

C. December 15, 2015

Mr. Ellison later complained to Sgt. Peters about the constant threats by jail staff and that other guards had allowed Mr. Ellison to be "piss bombed." (Complaint, Doc. 2 at 15-16.) Mr. Ellison alleges Sgt. Peters failed to protect him from other inmates who placed urine and feces in his cell when he placed him in Classification C with the knowledge that some inmates in the unit posed a threat to him. (Amended Complaint, Doc. 15 at 3, ¶ 9.)

Sgt. Peters testified that Mr. Ellison had a reputation of making false allegations against inmates that caused conflict between him and inmates. On December 11, 2015, Sgt. Peters transferred Mr. Ellison from Classification B to Classification C after the alleged assault. Sgt. Peters testified that he transferred Mr. Ellison to Classification C for his safety because it was one of the few units that did not have any inmates who had prior conflicts with Mr. Ellison. Sgt. Peters did not believe that any of the inmates in Classification C posed a threat to Mr. Ellison. (Peters' Aff., Doc. 77.)

On December 16, 2015, Mr. Ellison submitted a special request form to Sgt. Peters stating, "Sgt. – This morning I am in receipt of your statement on grievance

do nothing – Last night I was piss bombed again by gay with AIDS!! 3rd time same man . . . I wrote 3 kites last night, showed Toland and Willette . . . They laughed did nothing as before!!" (Doc. 41-1 at 18.)

Brent Toland, a guard in the Facility, checked Mr. Ellison's cell. He saw a small amount of water on the floor of the cell but no urine or feces. Officer Toland asked Mr. Ellison to identify the inmate or inmates who allegedly placed the urine and feces in his cell, but Mr. Ellison refused to identify an inmate. Officer Toland believed Mr. Ellison made a false allegation that an inmate placed urine and feces in his cell because Mr. Ellison had a reputation of false allegations against other inmates to manipulate his unit and cell placement. (Toland Aff., Doc. 73 at 2.)

III. DISCUSSION OF SUMMARY JUDGMENT MOTIONS

The only remaining claims in this action are Mr. Ellison's conditions of confinement claims (failure to protect and failure to provide adequate food) and retaliation claims against Defendants Washington, Grosulak, Johnson, and Peters.

For purposes of these Findings, the Court assumes Mr. Ellison was a pretrial detainee while he was incarcerated at the YCDF and will analyze his conditions of confinement claims under the Fourteenth Amendment. Such claims have the following elements:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
> (2) Those conditions put the plaintiff at substantial risk of suffering

> serious harm;
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
> (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc). With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily turn on the facts and circumstances of each particular case. *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015) (citation and internal quotation marks omitted); *Castro*, 833 F.3d at 1071. (citations, internal brackets and internal quotation marks omitted). A plaintiff must prove more than negligence but less than subjective intent—something akin to reckless disregard. *Castro*, 833 F.3d at 1071. The mere lack of due care is insufficient. *Castro*, 833 F.3d at 1071 (citation and internal quotation marks omitted).

A. Denial of Meals

Although Mr. Ellison alleges he was denied meals on both September 22 and 23, 2015, he presented no evidence that any Defendant was responsible for the alleged denial of meals on September 23, 2015. In fact, the undisputed evidence is that Officers Grosulak and Washington did not work at YCDF on September 23, 2015. (Time sheets, Doc. 53-1, 76-1.) Mr. Ellison's claims regarding September

23, 2015 will be recommended for dismissal and the Court will limit its discussion to the events of September 22, 2015.

1. Officer Grosulak

Defendant Grosulak testified that he did not work in the Classification unit on September 22, 2015. (Grosulak Aff., Doc. 52 at 2.) In addition, according to Commander Roger Bodine's affidavit, the officer activity log indicates Officer Grosulak was not working in Classification on September 22, 2015. (Doc. 51 at 2.) Even if Officer Grosulak was in the Classification unit on September 22, 2015 as alleged by Mr. Ellison, if he was not working that unit, he was not responsible for getting Mr. Ellison food. Further, Mr. Ellison did not mention Officer Grosulak in his "official complaint" regarding this issue. (Doc. 41-1 at 15.) Officer Grosulak's motion for summary judgment on Mr. Ellison's claims regarding denial of meals should be granted.

2. Officer Washington

Officer Washington contends he is entitled to qualified immunity. Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The protection of qualified immunity applies regardless of whether the government official makes an error that is "a mistake of law, a mistake

of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation and citation omitted). The doctrine of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law. . . ." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The qualified immunity inquiry has two prongs: (1) "whether the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) (*quoting Pearson*, 555 U.S. at 232). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This inquiry is wholly objective and is undertaken considering the specific factual circumstances of the case. *Saucier*, 533 U.S. at 201. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson*, 555 U.S. at 245. Where there is a dispute in the underlying evidence, qualified immunity cannot be granted. *Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003) ("Where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate.")

a. Constitutional Violation

Taking the facts in the light most favorable to Mr. Ellison, Officer Washington was on duty in the Classification unit on September 22, 2015 and was told that Mr. Ellison needed food. Officer Washington was aware that Mr. Ellison was hypoglycemic because he had previously provided extra meals to Mr. Ellison and when Mr. Ellison asked verbally and in writing for food, Officer Washington denied his requests.

Officer Washington does not recall Mr. Ellison's complaint and his standard procedure would have been to get him a sack meal, but he does not recall his specific actions on that evening. Therefore, there is a genuine issue of material fact regarding whether Officer Washington made an intentional decision to deny Mr. Ellison food knowing that the denial of such food would place Mr. Ellison at a substantial risk of suffering serious harm, that he did not take reasonable available measures to abate that risk, even though a reasonable officer in his position would have appreciated the risk, and by not giving Mr. Ellison food it caused injury.

b. Clearly Established

Officer Washington argues that he is entitled to qualified immunity because it is not clearly established that a guard's failure to provide an inmate with one meal violates the inmate's constitutional rights. Given the facts alleged by Mr. Ellison and taken as true for purposes of these motions, Officer Washington

intentionally refused to give Mr. Ellison food after being advised that Mr. Ellison had not eaten and knowing that he was hypoglycemic.

Before the 2015 incident, it was clearly established that officers could not intentionally deny or delay access to medical care. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Specifically, in *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), evidence existed that the defendant officers were aware of the plaintiff inmate's extreme behavior, his obviously sickly appearance, and his explicit statements that he needed food because he was a diabetic and found defendants were not entitled to qualified immunity because their conduct ran afoul of the clearly established authority that an officer could not deny or delay access to medical care. *Lolli*, 351 F.3d at 421-422.

Similarly, a reasonable officer in Officer Washington's situation would have known that denying a hypoglycemic inmate medical treatment in the form of food is a constitutional violation. Summary judgment on qualified immunity grounds should be denied as to Mr. Ellison's denial of a meal claim against Officer Washington regarding the September 22, 2015 incident.

B. Failure to Protect

1. Placement in Cell with Inmate Aalgaard

Mr. Ellison alleges Defendants Washington, Grosulak, and Johnson placed a combative inmate into his segregated cell, against jail policy. Mr. Ellison claims

he was segregated due to gang threats of violence and death made against him. He alleges that despite these threats, Defendants placed Mr. Aalgaard into his cell and Mr. Aalgaard produced a knife and stabbed Mr. Ellison three times. (Ellison's MSJ, Doc. 41 at 3.) Mr. Ellison contends Mr. Aalgaard was Mr. Ellison's former employee who had been fired due to drug use and theft. Mr. Ellison alleges the officers ignored his complaints regarding his concern for his safety while housed with Mr. Aalgaard.

Defendant Grosulak defends against Mr. Ellison's claims on the grounds that he did not work on December 10, 2015 but the issue is whether Defendants made an intentional decision to place Mr. Ellison at a substantial risk of suffering serious harm by placing him in the cell with Mr. Aalgaard. Defendants admit that they made an intentional decision with respect to placing Mr. Aalgaard into Mr. Ellison's cell. They admit that Mr. Ellison raised concerns for his safety. Mr. Ellison contends that Mr. Aalgaard also agreed that it was a bad idea to house him in the same cell with Mr. Ellison. Defendants do not dispute this representation.

Defendants took no available measures to abate any risk which Mr. Ellison may have been under. They simply defend on the basis that they did not believe Mr. Ellison. They presented no evidence to substantiate this belief or any evidence to demonstrate it was a reasonable belief. In Defendants' Disclosure Statement they represent that Sgt. Peters and Officer Robinson conducted investigations

regarding this incident and wrote reports on those investigations, but those documents are not included in the record. (Defendants' Disclosure, Doc. 38.) Defendants' conclusory statements that Mr. Ellison had a reputation for making false allegations are insufficient without evidentiary support. The Court agrees that Mr. Ellison's claims of being stabbed are unsubstantiated, but the medical records indicate that he did suffer minor contusions. Defendants are asking this Court to do what it appears they did – simply disbelieve Mr. Ellison. The Court must take the facts in the light most favorable to Mr. Ellison. As such, there is a genuine issue of fact regarding whether Mr. Ellison was placed at a substantial risk of suffering serious harm when he was placed in the cell with Mr. Aalgaard and whether that placement actually caused him injury. Defendants Grosulak, Washington, and Johnson's motions for summary judgment on Mr. Ellison's failure to protect claims regarding the December 10, 2015 alleged assault should be denied.

2. Placement in Classification C

In his Amended Complaint, Mr. Ellison alleges Sgt. Peters placed Mr. Ellison in Classification C where he was assaulted by other inmates who urinated in a sack containing feces and squirted it under Mr. Ellison's door. (Amended Complaint, Doc. 15 at 3.) Mr. Ellison submitted a grievance on December 11, 2015 complaining that Sgt. Peters had moved Mr. Ellison to population B after the

Aalgaard incident. Sgt. Peters responded that Mr. Ellison was moved for his safety and because inmates CA and CB had made threats about him. (Doc. 41-1 at 19.) Sgt. Peters filed an affidavit stating that Mr. Ellison complained that inmates placed urine and feces in his cell, but staff investigated the allegation and did not substantiate the allegation. (Peters Aff., Doc. 46.) Officer Brett Toland investigated the incident by checking Mr. Ellison's cell and did find not urine or feces. Mr. Ellison refused to identify the inmate or inmates who allegedly placed the urine and feces in his cell. Officer Toland concluded that this was a false allegation. (Toland Aff., Doc. 73.)

Aside from his allegation against Sgt. Peters in the Amended Complaint, Mr. Ellison has provided no additional argument or evidence regarding Sgt. Peters' actions in this regard. There is no evidence that Sgt. Peters made an intentional decision to place Mr. Ellison at a substantial risk of suffering serious harm. Sgt. Peters' motion for summary judgment should be granted.

C. Retaliation

Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal."

Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (*citing Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000)). It is the plaintiff's burden to prove each of these elements. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995).

Mr. Ellison alleges that Yellowstone County Detective Frank Fritz had an affair with Mr. Ellison's ex-wife and together they stole most of Mr. Ellison's property totaling over $200,000.00. He claims they then hired two Nortanio gang member to abduct, torture, and rape Mr. Ellison and dump him over a 155-foot cliff. In his Amended Complaint, Mr. Ellison alleged that Defendants submitted him to extreme bodily harm in retaliation for his statements that Detective Fritz committed crimes. (Amended Complaint, Doc. 15 at 4.)

To survive summary judgment on a retaliation claim, a plaintiff must put forth evidence of retaliatory motive. *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). Thus, here, Mr. Ellison must show that Defendants' actions alleged herein that his statements made against Detective Fritz were "the 'substantial' or 'motivating' factor" behind Defendants' conduct. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). To show the presence of a retaliatory motive on a motion for summary judgment, Mr. Ellison needed to "'put forth evidence of retaliatory motive that, taken in the light most favorable to him, presents a genuine issue of material fact as to'" Defendants' intent in denying him meals and allowing him to be assaulted. *Brodheim v. Cry*, 584 F.3d 1262, 1271

(9th Cir. 2009) (*quoting Bruce*, 351 F.3d at 1289). Evidence of retaliatory motive may include the timing of the adverse action. *Bruce*, 351 F.3d at 1288.

Mr. Ellison has not established how the denial of a meal on September 22, 2015 and the alleged assault on December 10, 2015 were in any way related to any of the actions which may have been taken against him four years earlier. Mr. Ellison's retaliation claims should be dismissed.

IV. MOTIONS FOR SANCTIONS AND DEFAULT

Mr. Ellison has filed three motions for sanctions based upon Defendants' counsel's alleged failure to produce documents in discovery. (Docs. 57, 80, and 89.) In his first motion, he asks the Court to strike Defendant Grosulak's Motion for Summary and order default judgment against Defendants for a continued course of illegal and unconstitutional acts to protect a member of the Yellowstone County Law Enforcement Community. (Doc. 57.) In his second motion, he sees to disqualify Defendants' counsel "due to his continued 'bad faith' acts concerning his continued suppression of requested records and information pertaining to the employment records of his clients, the Defendants." (Doc. 80.) In his third motion, he seeks default judgment based upon the "'bad faith' acts and omissions by defendants and their counsel of records; in violation of the Federal Rules of Civil Procedure, Rule 37(b)(2)(A)(vi)." (Doc. 89.)

These motions are construed as motions for sanctions based upon alleged

discovery violations, but there are two problems with the motions. First, according to Defendants' responses, Mr. Ellison did not submit discovery requests pursuant to the Federal Rules of Civil Procedure. *See e.g.* Fed.R.Civ.P. 33 (interrogatories); 34 (requests for production of documents); 36 (requests for admissions). (Defendants' Response, Doc. 59, at 2.) Even if he had, Mr. Ellison did not attach those discovery requests to his various motions as required by Local Rule 26.3(c)(2)(C). His informal correspondence to counsel is insufficient to obtain discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure which provides:

> (B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
>
> (i) a deponent fails to answer a question asked under Rule 30 or 31;
>
> (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
>
> (iii) a party fails to answer an interrogatory submitted under Rule 33; or
>
> (iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

Fed.R.Civ.P. 37(a)(3)(B). As Mr. Ellison did not request discovery pursuant to Rules 30, 31, 33, 34 of the Federal Rules of Civil Procedure, he is not entitled to a Court order compelling that discovery or sanctioning counsel for failing to comply. Mr. Ellison's informal letter and/or his motions for

sanctions are insufficient under Rule 37.

Mr. Ellison's Motion for Sanctions (Doc. 57), Motion to Disqualify Counsel (Doc. 80), and Motion for Default (Doc. 89) will be denied.

Based upon the foregoing, the Court issues the following:

ORDER

1. Mr. Ellison's Motion for Sanctions (Doc. 57) is DENIED.

2. Mr. Ellison's Demand for Disqualification of Defendants Counsel and Second Request for Sanctions against Counsel, Mark A. English for his Continued Suppression of Requested Evidentiary Documentation that is Exculpatory to Plaintiff (Doc. 80) is DENIED.

3. Mr. Ellison's Motion for Default (Doc. 89) is DENIED.

4. The Clerk of Court shall STRIKE and SEAL Document 54-1 and Document 79-1 at 2-21, 23-61. These documents will not be considered for any purpose.

Further, the Court issues the following:

FINDINGS AND RECOMMENDATIONS

1. Mr. Ellison's Motion for Summary Judgment (Doc. 41) should be DENIED.

2. Defendant Grosulak's Motion for Summary Judgment (Doc. 47) should be GRANTED on all claims except Mr. Ellison's failure to protect regarding the

December 10, 2015 alleged assault.

3. Officer Washington's Motion for Summary Judgment (Doc. 60) should be GRANTED on all claims except Mr. Ellison's September 22, 2015 food claim and his failure to protect claim regarding the December 10, 2015 alleged assault.

4. Officer Johnson's Motion for Summary Judgment (Doc. 64) should be DENIED.

5. Defendant Peters's Motion for Summary Judgment (Doc. 68) should be GRANTED.

6. Mr. Ellison's Motion to Dismiss Defendants' Motions for Summary Judgment (Doc. 87) should be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

The parties may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof.[1] 28 U.S.C. § 636. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed

[1]Mr. Ellison is entitled to an additional three days after the fourteen-day period would otherwise expire to file his objections.

until entry of the District Court's final judgment.

DATED this 4th day of November, 2019.

/s/ John Johnston
John Johnston
United States Magistrate Judge

EXHIBIT 1 J.Mrs J

DA 19-0028

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 217N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LIONEL SCOTT ELLISON,

Defendant and Appellant.

FILED

SEP 10 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 14-0614
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lionel Scott Ellison, Self-represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Julie Elaine Mees, Deputy County Attorney, Billings, Montana

Submitted on Briefs: July 24, 2019

Decided: September 10, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant Lionel Scott Ellison (Ellison) appeals the judgment entered by the Thirteenth Judicial District Court, Yellowstone County, following this Court's remand for resentencing.

¶3 In September 2015, Ellison was found guilty by a jury of two felony counts of tampering with or fabricating physical evidence and one felony count of impersonating a public servant. Ellison appealed, and this Court vacated Ellison's conviction of one count of tampering with or fabricating physical evidence, while affirming Ellison's convictions of the other counts, and remanded the case to the Thirteenth Judicial District Court, Yellowstone County, for re-sentencing. *State v. Ellison*, 2018 MT 252, ¶ 29, 393 Mont. 90, 428 P.3d 826.

¶4 In December 2018, upon remand, the District Court sentenced Ellison to ten years imprisonment for the tampering conviction and five years imprisonment for the impersonation conviction, with no time suspended. Judgment was entered on

December 14, 2018. Ellison timely appealed and raises multiple issues in challenge to his new sentence, but also to his underlying convictions, which we address in turn.[1]

¶5 This Court reviews criminal sentences that include at least one year of incarceration for legality only, meaning "we will not review a sentence for mere inequity or disparity." *State v. Webb*, 2005 MT 5, ¶ 8, 325 Mont. 317, 106 P.3d 521. Rather, we determine if the sentence is authorized by statute. *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815. A district court's application of the sentencing statutes is a question of law that we review de novo. *Ariegwe*, ¶ 175. We may review a criminal sentence that is alleged to be facially illegal or in excess of statutory mandates even if those issues were not preserved for appeal. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979); *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 334, 151 P.3d 892.

Judicial bias

¶6 Ellison challenges his sentence by arguing that "Judge Blair Jones was bias[ed] and prejudice[d]" against him, asserting that he and Judge Jones "had a previous bad business relationship" involving two houses that Ellison and his father constructed, which he claims were financed, at least in part, by Judge Jones. In open court, Judge Jones denied having a prior business relationship with Ellison.

[1] Ellison was represented by counsel in his trial and first appeal, and by new public counsel for his re-sentencing hearing on remand. However, he has represented himself on appeal herein. We previously entered an order in this matter approving Ellison's waiver of his right to counsel and addressing his right to represent himself on appeal.

¶7 Due process "requires recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Reichert v. State*, 2012 MT 111, ¶ 28, 365 Mont. 92, 278 P.3d 455 (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872, 129 S. Ct. 2252, 2257 (2009)). When faced with a claim of judicial bias, our inquiry is an objective one—that is, we must determine "not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or [whether] there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 869, 129 S. Ct. at 2255. "There is 'a presumption of honesty and integrity in those serving as adjudicators.'" *Reichert*, ¶ 39 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975)). As such, "'charges of disqualification should not be made lightly.'" *Reichert*, ¶ 39 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826-27, 106 S. Ct. 1580, 1588 (1986)). "Absent evidence to the contrary, the 'presumption of honesty and integrity in those serving as adjudicators' stands." *Reichert*, ¶ 50 (quoting *Withrow*, 421 U.S. at 47, 95 S. Ct. at 1464) (holding that no judicial bias existed where the appellant failed to provide "actual evidence of bias, prejudice, or unethical conduct" on the part of the accused adjudicators); *see also Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) ("[W]e abide by the general presumption that judges are unbiased and honest."); *cf. In re George Tr.*, 253 Mont. 341, 346, 834 P.2d 1378, 1382 (1992) ("any relief provided by the court must be based on evidence presented before the court.").

¶8 Ellison's bias claims are based on conjecture, and he has not provided evidence substantiating bias on the part of the District Court. We cannot conclude Ellison has carried

his burden of demonstrating "actual evidence of bias, prejudice, or unethical conduct" on the part of Judge Jones. *Reichert*, ¶ 50. Although Ellison also complains the District Court erred by not allowing him to submit documents and exhibits demonstrating Judge Jones' bias, the asserted evidence was based on Ellison's postconviction relief (PCR) petition and accompanying exhibits, which are not within the scope of his current appeal. Ellison initiated a PCR proceeding in Yellowstone County on October 25, 2018, *Ellison v. State*, Yellowstone County Dist. Ct. No. DV-56-2018-0001629-PR, which is currently pending. That matter is a separate proceeding, and is not before us in this appeal.

Evidentiary claims

¶9 Ellison argues the District Court abused its discretion by preventing him from presenting evidence related to his character, history, and mental health at his resentencing hearing. The Rules of Evidence do not apply at a sentencing hearing. Mont. R. Evid. 101(c)(3). Ellison sought to introduce a 2009 report from a Park County criminal proceeding that allegedly stated Ellison had not committed sexual intercourse without consent, for the asserted purpose of demonstrating Ellison was "framed" in that matter, which Ellison wanted to use to support his innocence in this proceeding. However, the District Court clearly did not abuse its discretion in the proceeding by excluding this evidence as irrelevant.

¶10 During the hearing, Ellison referenced mental health evidence, but did not request introduction of such evidence. Accordingly, Ellison cannot demonstrate the District Court erred in its evidentiary rulings.

Prosecutorial misconduct

¶11 Ellison offers several arguments alleging wide-scale misconduct by the State during the guilt phase of his trial. However, these issues constitute a collateral attack on his convictions and are beyond the scope of this proceeding. In *Ellison*, ¶¶ 26, 29, we stated, "[W]e reverse Ellison's conviction for the second count of tampering. The sentence imposed by the District Court is vacated and the court is ordered to resentence the Defendant after notice and hearing . . . Ellison's conviction for the second count of tampering with or fabricating evidence is reversed. His convictions on all other charges are affirmed. We remand for further proceedings consistent with this Opinion." Thus, the remand was limited in scope to Ellison's re-sentencing. Ellison's convictions were affirmed and were not part of the remand. Ellison has initiated a PCR action in Yellowstone County, which is the proper venue for bringing a collateral attack upon a conviction. *See* §§ 46-21-101 and -103, MCA. Ellison's PCR claims cannot be raised in this appeal. *Cf. State v. Clark*, 2008 MT 391, ¶ 35, 347 Mont. 113, 197 P.3d 977 (discussing defendant's challenges as being "outside the scope of remand.").

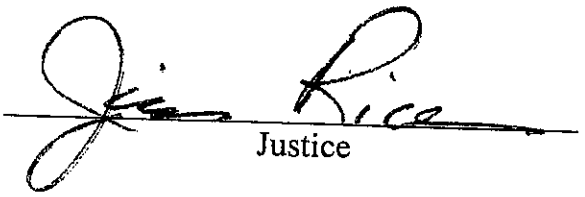
Ineffective assistance of counsel

¶12 Ellison alleges he received ineffective assistance of counsel (IAC), both during the guilt phase of his trial and during his first appeal. Ellison raised an IAC claim in his direct appeal, upon which he was granted relief. *Ellison*, ¶ 26. However, further IAC claims are beyond the scope of the remand for resentencing, and cannot be pursued in this appeal.

Ellison has commenced a PCR proceeding that may be the appropriate vehicle to raise such claims, subject to properly establishing them in that forum.

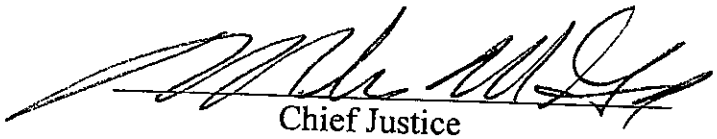
¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. Appellant has not demonstrated that the District Court committed error upon remand for resentencing.

¶14 Affirmed.

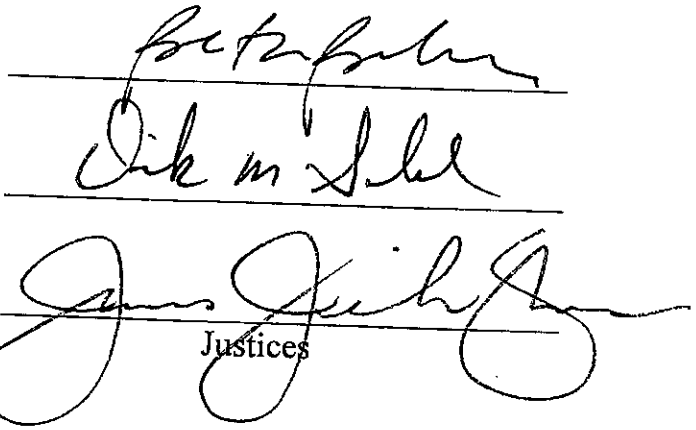


Justice

We concur:



Chief Justice



Justices

Additional material from this filing is available in the Clerk's Office.