

Timothy Baldwin  
BALDWIN LAW OFFICES, P.A.  
Office: 210 2<sup>nd</sup> St. W., Ste. 200  
Mail: PO Box 1520  
Kalispell, MT 59903  
Office: (406) 393-2330  
Fax: (406) 393-2330

Attorney for Defendant

CLERK OF DISTRICT COURT  
2014 MAY 27 PM 1:42  
FILED  
BY \_\_\_\_\_  
DEPUTY

**IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT  
OF THE STATE OF MONTANA AND FOR THE COUNTY OF FLATHEAD**

STATE OF MONTANA,  Plaintiff,  vs.  Cory Robert Franklin,  Defendant.	Case No: DC-13-465(C)  <b>MOTION TO COMPEL; FOR SANCTIONS; AND TO RECUSE DEPUTY COUNTY ATTORNEY, KENNETH R. PARK</b>
---	--

COMES NOW the Defendant, Cory Robert Franklin, by and through the undersigned counsel, and pursuant to Section 46-15-329, MCA, hereby files this motion to compel discovery and for sanctions for Deputy County Attorney Kenneth Park's willful refusal to comply with his obligations under Section 46-15-322, MCA; and to recuse Deputy County Attorney, Kenneth R. Park, from prosecuting this case because he has violated his special responsibilities as a prosecutor. The Defendant offers the following brief in support of this motion.

**FACTS**

The State charged the Defendant with two felonies, Conspiracy in the Criminal Distribution of Dangerous Drugs and Criminal Possession of Dangerous Drugs With Intent to Distribute, on December 6, 2013. The Court issued a bench warrant for his arrest and set the bail amount at \$50,000. The State arrested the Defendant on March 23, 2014 in a new case and charged the Defendant on March 25, 2014 with one felony and two misdemeanors, Criminal Possession of Dangerous Drugs, Criminal Possession of Dangerous Drugs and Criminal Possession of Drug Paraphernalia, in case number DC-14-128, Flathead County, Montana.

Defendant's initial attorney in this case, Sean Hinchey, requested discovery from Deputy County Attorney on December 11, 2013. Deputy County Attorney provided only minimal discovery in the State's possession as shown below. The Office of Public Defender reassigned this case to this attorney on April 16, 2014. On May 2, 2014, this attorney demanded discovery from Deputy County Attorney because he found that the Deputy County Attorney failed to disclose mandatory discovery. A true and accurate copy of said demand is attached hereto as **Exhibit A**. This attorney demanded the following evidence from the Deputy County Attorney:

1. A copy of the application for search warrant;
2. A copy of all statements made by the Defendant in this case;
3. All evidence the State intends to use against the Defendant of prior bad acts in its case-in-chief;
4. A copy of all interviews and statements of all witnesses and arrestees in this case;
5. A copy of all recorded surveillance related to this case;
6. A copy of all of Alan Ray Harnett's crimes of dishonesty ("The Montana Supreme Court has indicated that the following acts are probative of dishonesty: forgery, bribery, suppression of evidence, false pretenses, cheating, and embezzlement. *State v. Gollehon* 262 Mont. 1, 16, 864 P.2d 249, 259 (1993)." *State v. Giddings*, 2007 Mont. Dist. LEXIS 15, 4 (Mont. Dist. Ct. 2007));
7. A copy of Cory Franklin's criminal record;
8. A copy of all photographs taken in this case;
9. A copy of, or an opportunity to inspect, any tangible evidence, including notes, records, or documents in whatever format, relative to the following statement made in FCSO report no. 201333918: "At approximately 0231 hours, Agent Stahlberg received information that Harnett was located in a truck at the Kalispell Super One Foods parking lot."
10. A copy of any written agreements or a copy of the terms of any oral agreements the State of Montana has made with any of the witnesses in this case to provide information to or testify for the State, including the confidential informant;
11. A copy of all officers' notes and memorandums in this case;
12. A copy of the warrant that Agent Capser used to arrest Cory Franklin in this case;
13. All of the officers' names not already provided in the officers' report who were present at the scene of Cory Franklin's arrest;

14. All of the witnesses names and contact information (i.e. addresses and phone numbers) not already provided in the officers' report who were involved in this case; and
15. A copy of all photographs or pictures the officers or any agents thereof have displayed or shown of Cory Franklin to any of the witnesses in this case regarding his identity.

On May 2, 2014, the same day that said demand was delivered to the Deputy County Attorney, this attorney filed a *Motion For Order To Reset Omnibus Hearing; and Grant Relief For Any Defense Motion Waiver* because this attorney found, through the minimal discovery provided by the Deputy County Attorney, that there was a good faith basis for a motion to suppress for illegal search and seizure; namely, that the officers did not have particularized suspicion to perform a *Terry* stop of both Harnett and the Defendant. Deputy County Attorney filed an opposition to said motion.

In said opposition, Deputy County Attorney stated,

The State has sent, or made available, discovery to counsel for the Defendant in this case as required by the above statute. The remaining requests have been, or will be, provided as received by the State in accordance with the discovery requirements of the prosecution...The State has complied with all case law and State law in this matter. If new information arises prior to trial it will be provided to counsel for the Defendant as it becomes available...Mr. Baldwin...is attempting to use illegal requests for information...as the basis for this request.

*Response to Motion To Reset the Omnibus Hearing; and Grant Relief For Any Defense Motion Waiver* ("Response"), page 3, lines 1-3, 8-9, 13-16. This *Response* indicates that the Deputy County Attorney believes he has fully complied with all requisite discovery disclosures (see, "That State has complied with all case law and State law in this matter"). Other than Deputy County Attorney's *Response*, he has not responded to this attorney's demand for discovery and has not filed a motion for protective order pursuant to Section 46-15-328, MCA. To date, Deputy County Attorney has provided no additional discovery to this attorney.

Deputy County Attorney stated in his *Response* too that the "State will oppose that motion [to continue the jury trial] if it is filed" (*Response*, page 3, line 25-26), indicating that the Deputy County Attorney intends to go to trial on the discovery provided to the Defendant as of the date of his *Response*, which is incomplete. The only evidence that Deputy County Attorney has disclosed to the Defendant is the following:

1. FCSO Incident Report – 201333918, dated 12-17-13, 19 pages;

2. FCSO Incident Report – 201333918, follow-up 1, dated 12-17-13, 15 pages;
3. Photo of note from Kime to Davis;
4. File Direct Packet consisting of:
  - a. *Motion for Leave to File an Information, Affidavit in Support of Motion for Leave to File an Information*, dated 12/6/13, 1 page;
  - b. *Order Granting Leave To File an Information*, dated 12/6/13, 1 page;
  - c. *Information*, dated 12-6-13, 2 pages; and
  - d. *Warrant for Arrest*, 12/6/13, 1 page.

A true and accurate copy of said discovery is attached hereto as **Exhibit B** (page numbers added at the bottom for identification), excluding the items listed in 4(a)-(d) above.

In addition to the demands for discovery made to Deputy County (see **Exhibit A**), the discovery provided by Deputy County Attorney explicitly shows he has refused to disclose the discovery. In particular, the Incident report 201333918 shows that the Deputy County Attorney has withheld the following discovery (the corresponding page numbers are referenced following the evidence item from **Exhibit B** to show that the evidence clearly exists and is clearly discoverable):

1. Pictures of evidence taken from the search of the 2002 gray Ford F350. Pages 8, 14, 15, 18, 22, 34, 35.
2. Audio/Visual recordings of witnesses Jessica Kim, Sam Davis, and Sam Davis (part 2). Page 9, 19, 24,
3. Audio/Visual recordings of Defendant, Corey Franklin. Page 9.
4. Identity of confidential informant. Page 11.
5. "Information [Agent Stahlberg] received that Harnett was located in a truck at the Kalispell Super One Foods parking lot." Page 11.
6. How Venezio was "able to ascertain that Franklin had a misdemeanor arrest warrant for failure to wear a seat belt." Page 11.
7. Application for search warrant pf 2002 gray Ford F350. Pages 12, 13, 26-27.
8. Audio/Visual recordings of witness Harnett. Page 12.
9. Pictures of evidence taken from Harnett. Page 16.
10. Pictures of evidence taken from Kime's vehicle. Pages 17, 18.

11. K-9 report of the 2002 gray Ford F350. Page 22.
12. Application for search warrant for Aero Inn Kalispell. Page 28-29.
13. Application for search warrant for 1996 green 4 door Mercury Mystic. Pages 30-31.

The Deputy County Attorney refuses to provide any of these items of discovery and believes he is not required to do so, as he expressly stated in his *Response*.

On April 23, 2014, only seven days after this attorney was assigned to represent the Defendant in this case, this attorney sent an email to Deputy County Attorney requesting discovery and asking him about plea offers. A true and accurate copy of said email is attached hereto as **Exhibit C**. Prior to this e-mail, this attorney and Deputy County Attorney had no discussions whatsoever about this case. On April 30, 2014, Deputy County Attorney responded to this attorney's email, a true and accurate of which is attached hereto as **Exhibit D**. In said email, Deputy County Attorney made an offer, the substance of which is contained in **Exhibit D**. In the last paragraph of that email, Deputy County Attorney said to this attorney and effectively to the Defendant,

This offer expires at 5:00 pm on Wednesday May 7, 2014, or upon the filing of ANY motions of any sort from your office except a motion for a change of plea. Should this offer be rejected, or a motion is filed, the state will proceed to trial and pursue maximum sentences for Cory on all of his cases and recommend he face federal charges with the other co-defendants. This offer is not open to any further negotiation.

On April 24, 2013, this attorney received a phone call from the Defendant's wife. During that call, she informed this attorney that she talked to the Deputy County Attorney and that he told her that because his attorney is Tim Baldwin, he was not going to dismiss any charges; would not talk to this attorney about his case; and would seek the maximum penalties of law. A true and accurate copy of Kristina Franklin's Affidavit will be filed to support this brief. Additionally, Mrs. Franklin stated that prior to this attorney representing the Defendant, the Deputy County Attorney told her that he intended to dismiss the charges in DC-14-128A, Flathead County, Montana against the Defendant because the Defendant and she had given considerable help to law enforcement. However, now that this attorney is representing the Defendant, Deputy County Attorney revoked his assurance of dismissal.

### ISSUES

1. Whether the Court should compel the Deputy County Attorney to disclose discovery?
2. Whether the Court should order sanctions against the Deputy County Attorney for not disclosing discovery?



3. Whether the Court should recuse the Deputy County Attorney to ensure the Defendant has a fair and impartial trial?

BRIEF

**I. Issues 1 and 2 - Justice Requires Order to Compel and for Sanctions**

Section 46-15-329, MCA provides this Court with authority to compel discovery and order sanctions for a violation of discovery rules. It states,

If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of this part or any order issued pursuant to this part, the court may impose any sanction that it finds just under the circumstances, including but not limited to:

- (1) ordering disclosure of the information not previously disclosed;
- (2) granting a continuance;
- (3) holding a witness, party, or counsel in contempt for an intentional violation;
- (4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or
- (5) declaring a mistrial when necessary to prevent a miscarriage of justice.

The Deputy County Attorney is required to disclose evidenced pursuant to Section 46-15-322, MCA, which states in full as follows.

46-15-322. Disclosure by prosecution. (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

- (a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief;
- (b) all written or oral statements of the defendant and of any person who will be tried with the defendant;
- (c) all written reports or statements of experts who have personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;
- (d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and

- (e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.
- (2) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:
- (a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;
  - (b) whether an investigative subpoena has been executed in connection with the case; and
  - (c) whether the case has involved an informant and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and 46-15-324(3).
- (3) The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under subsection (1)(d).
- (4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.
- (5) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court, in its discretion, may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The prosecutor may not be required to prepare or disclose summaries of witnesses' testimony.
- (6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at a later time as the court may for good cause permit, together with their statements, a list of the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses to evidence of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

The following reasons justify the Defendant's motion to compel and for sanctions.

The Defendant has requested discovery pursuant to Section 46-15-322, MCA; however, the Deputy County Attorney has wilfully failed to comply with this statute. The

evidence listed in the Defendant's demand (**Exhibit A**) and within the State's disclosed evidence (**Exhibit B**, listed in the FACTS section above) fall within the mandatory disclosures by the prosecutor under Section 46-15-322 et. seq., MCA, but the Deputy County Attorney claimed in his *Response* that said demand is "illegal".

With regard to **Exhibit A** specifically, the Defendant offers the following to support his motion.

1. **A copy of the application for search warrant.** The Defendant is entitled to this information to determine if there is a defense motion relative to issues of probable cause. See, Article 2, Section 11, Montana Constitution (1972) ("The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing"). "An application for a search warrant must state facts sufficient to show probable cause for the issuance of a warrant." *State v. Wing*, 2008 MT 218, P29, 344 Mont. 243, 252, 188 P.3d 999, 1006, 2008 Mont. LEXIS 307, 19 (Mont. 2008), citing *State v. Barnaby*, 2006 MT 203, P30, 333 Mont. 220, 227, 142 P.3d 809, 816, 2006 Mont. LEXIS 399, 14 (Mont. 2006). See also, Fourth Amendment, United States Constitution. "The exclusionary rule...excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well...Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression." *Alderman v. United States*, 394 U.S. 165, 171, 89 S. Ct. 961, 965, 22 L. Ed. 2d 176, 185, 1969 U.S. LEXIS 3287, 10 (U.S. 1969) (citations omitted).
2. **A copy of all statements made by the Defendant in this case.** See, Section 46-15-322(1)(b), MCA.
3. **All evidence the State intends to use against the Defendant of prior bad acts in its case-in-chief.** Deputy County Attorney said in his *Response* (page 3, line 8) that he disclosed this to the Defendant. However, this attorney is unaware of any such disclosure.
4. **A copy of all interviews and statements of all witnesses and arrestees in this case.** See, Section 46-15-322(1)(a)-(b), MCA.
5. **A copy of all recorded surveillance related to this case.** See, Section 46-15-322(1)(e) and (2)(a), MCA.



6. **A copy of all of Alan Ray Harnett's crimes of dishonesty.** "The Montana Supreme Court has indicated that the following acts are probative of dishonesty: forgery, bribery, suppression of evidence, false pretenses, cheating, and embezzlement." *State v. Giddings*, 2007 Mont. Dist. LEXIS 15, 4 (Mont. Dist. Ct. 2007), citing *State v. Gollehon*, 262 Mont. 1, 16, 864 P.2d 249, 259 (1993). From the Incident report, it appears the State's key witness against the Defendant is Harnett. Therefore, the Defendant has a right to know what crimes of dishonesty he has been convicted of in the past so the Defendant can prepare his defense.

7. **A copy of Cory Franklin's criminal record.** Should the Defendant decide to testify on his own behalf, the State may attempt to introduce particular felony convictions. It is necessary, therefore, that the Defendant have a copy of his criminal history record so his attorney may advise him properly, in addition to counseling him regarding potential sentencing should a conviction result. See, Section 46-15-322(1)(d), MCA.

8. **A copy of all photographs taken in this case.** See, Section 46-15-322(1)(d) and (e), MCA.

9. **A copy of, or an opportunity to inspect, any tangible evidence, including notes, records, or documents in whatever format, relative to the following statement made in FCSO report no. 201333918: "At approximately 0231 hours, Agent Stahlberg received information that Harnett was located in a truck at the Kalispell Super One Foods parking lot."** See, Section 46-15-322(1)(a), (c)-(e), MCA.

10. **A copy of any written agreements or a copy of the terms of any oral agreements the State of Montana has made with any of the witnesses in this case to provide information to or testify for the State, including the confidential informant.** See, Section 46-15-322(1)(e), MCA.

"The State may claim the privilege to refuse to disclose the identity of a confidential informant. However, this privilege is not absolute and is subject to the balancing test enunciated in *Roviaro v. United States* (1957), 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639. In *Roviaro*, the United States Supreme Court explained,

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the

possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro, 353 U.S. at 62. This Court has repeatedly applied this test since we first recognized it in *State ex rel. Offerdahl v. Dist. Ct. Of Eighth Jud. Dist.* (1971), 156 Mont. 432, 481 P.2d 338. See, e.g., *State v. Sarbaum* (1995), 270 Mont. 176, 180-81, 890 P.2d 1284, 1287; *State v. Campbell* (1992), 254 Mont. 425, 429-30, 838 P.2d 427, 430; and *State v. Crowder* (1991), 248 Mont. 169, 176, 810 P.2d 299, 303. 'In this balancing test the burden is on the defendant to show the need for disclosure, and this need must be one which overrides the government's interest. Mere speculation will not suffice.' *Campbell*, 254 Mont. at 430, 838 P.2d at 430 (citation omitted) (emphasis in original)."

*State v. Ayers*, 2003 MT 114, P55, 315 Mont. 395, 410, 68 P.3d 768, 779, 2003 Mont. LEXIS 190, 28-29 (Mont. 2003). In our case, the Defendant has met his burden to require disclosure of the confidential informant, as well as the information that person gave to the officers leading to the officers' stop of Harnett and the Defendant.

The Defendant has a constitutional right to challenge any unconstitutional stop. See Article 2, Section 11, MCA (1972); Sections 46-13, et. seq., MCA. Particularly, the Defendant needs to interview the confidential informant and discover the information he or she gave to the officers on the date in question to determine whether or not those alleged facts formed particularized suspicion to perform a *Terry* stop of Harnett in the 2002 Ford F350 and the Defendant. Unlike the actions of the police in the *Ayers* case (*State v. Ayers*, 2003 MT 114, P57, 315 Mont. 395, 410, 68 P.3d 768, 779, 2003 Mont. LEXIS 190, 30 (Mont. 2003) ("the investigative report provided to Ayers accurately summarized the interview between law enforcement officers and the CI, and omitted only the CI's identity"), the officers in our case did not provide *any facts* obtained from the confidential informant relative to their *Terry* stop and gave no reasons of what supposedly formed the basis for particularized suspicion to stop Harnett and the Defendant. And since the Deputy County Attorney has failed to provide the application for search warrant, this attorney does not have privy to any facts that may shed light on this issue. Thus, the Defendant has no way of knowing why the officers stopped Harnett and the Defendant, which later led to the officers arresting the Defendant and applying for a search warrant of the 2002 Ford F350.

That the officers intentionally neglected to report this essential information gives the Defendant reasonable belief that this evidence will benefit him and harm the State's case—and if that is the case, then this demonstrates the blatant discovery and constitutional violation the Deputy County Attorney has committed by refusing to provide to the Defendant exculpatory evidence.

Since there was no search or arrest warrant to stop Harnett in the 2002 Ford F350 or the Defendant, if the officers lacked particularized suspicion of criminal activity under Section 46-5-401, MCA to make such stop, then the stop of Harnett and the Defendant subsequently were unlawful, and all evidence obtained thereto must be suppressed. In short, the State would have no evidence to prosecute the Defendant. And it is this very information that the Deputy County Attorney has wilfully failed to provide this attorney.

In addition, the State has alleged no confidentiality interest of any citizen or any compelling state interest in refusing to provide the information requested, especially those items the Defendant knows it has in its possession. The Defendant's right to confront witnesses cannot be denied or outweighed by any other interest. *State v. Duffy*, 300 Mont. 381, 6 P.3d 453 (2000). Even if the State provided "confidentiality interests," they are far outweighed by the Defendant's interest in discovery whether the stop of him was constitutional or not.

11. **A copy of all officers' notes and memorandums in this case.** See, Section 46-15-322(c)-(e), MCA.

12. **A copy of the warrant that Agent Capser used to arrest Cory Franklin in this case.** See, Article 2, Sections 11, 17, Montana Constitution (1972).

13. **All of the officers' names not already provided in the officers' report who were present at the scene of Cory Franklin's arrest.** See, Section 46-15-322(1)(a), MCA. If there are no other witnesses to be disclosed, then the Deputy County Attorney should state this for the record. Instead, he has refused to provide this attorney and the Court with any explanation for his refusal to respond to this request.

14. **All of the witnesses names and contact information (i.e. addresses and phone numbers) not already provided in the officers' report who were involved in this case.** See, Section 46-15-322(1)(a), MCA. If there are no other witnesses to be disclosed, then the Deputy County Attorney should state this for the record. Instead, he has refused to provide this attorney and the Court with any explanation for his refusal to respond to this request.

15. **A copy of all photographs or pictures the officers or any agents thereof have displayed or shown of Cory Franklin to any of the witnesses in this case regarding his identity.** See, Section 46-15-322(1)(d)-(e), MCA.

The Defendant reasonably believes that the requested information will tend to mitigate or negate the defendant's guilt as to the offenses charged. To deny the Defendant

this information denies his constitutional right of due process. *State v. Baker*, 8 P.3d 817, 301 Mont. 323 (2000), *State v. Duffy*, 6 P.3d 453, 300 Mont. 381 (2000). Coupled with the exculpatory nature of the evidence requested, the Defendant needs said materials for impeachment purposes at trial, and he is entitled to the same. *Kills on Top v. State*, 273 Mont. 32, 42, 901 P.2d 1368, 1374 (1995).

WHEREFORE, the Defendant moves this Court to:

- (1) order the State to provide copies of the evidence demanded to the Defendant, or in the alternative to order that all requested information be provided for the Defendant's review for an opportunity to provide reasons why the evidence is exculpatory, necessary for impeachment or necessary for defense preparation;
- (2) inspect the State's file in-camera to determine if the State has complied with discovery; and
- (3) order sanctions against the State for willful violation of Section 46-15-322 et. seq., MCA, namely, to dismiss this action with prejudice and any other sanctions this Court deems appropriate.

## **II. Issue 3 - Justice Requires the Court to Recuse Deputy County Attorney From Prosecuting This Case**

Among other obligations imposed on lawyers generally, the Preamble of the Montana Rules of Professional Conduct states: a "lawyer shall pursue the truth," has a "special responsibility for the quality of justice," "should use the law's procedures only for legitimate purposes and not to harass or intimidate others" and "should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials...and uphold legal process." Montana Rules of Professional Conduct, Preamble, Subsections 1, 2 and 6. In addition to the obligations imposed upon lawyers in general, Montana law imposes special responsibilities on prosecutors. See, Rule 3.8, Montana Rules of Professional Conduct. In *State v. Sanchez*, the Montana Supreme Court noted this, stating, "a prosecutor should seek justice and not simply an indictment or a conviction." *State v. Sanchez*, 2008 MT 27, P84, 341 Mont. 240, 268, 177 P.3d 444, 463, 2008 Mont. LEXIS 27, 60 (Mont. 2008) (citation omitted). Federal courts have recognized the same special responsibility of prosecutors. See *McKithen v. Brown*, 565 F. Supp. 2d 440, 463, 2008 U.S. Dist. LEXIS 55094, 62 (E.D.N.Y. 2008) ("the prosecutor's duty is to seek justice, not to seek what is legally presumed to be justice"); *Connick v. Thompson*, 131 S. Ct. 1350, 1362, 179 L. Ed. 2d 417, 430, 2011 U.S. LEXIS 2594, 26, 79 U.S.L.W. 4195, 22 Fla. L. Weekly Fed. S 887 (U.S. 2011) ("Among prosecutors' unique ethical obligations is the duty to produce Brady evidence to the defense... An attorney who violates his or her ethical obligations is subject to



professional discipline, including sanctions, suspension, and disbarment"); see also ABA Standards for Criminal Justice, 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict"); *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 415, 859 P.2d 992, 995, 1993 Mont. LEXIS 264, 6, 50 Mont. St. Rep. 992 (Mont. 1993), citing *People v. Trevino* (Cal. 1985), 704 P.2d 719, 724-25 ("the prosecutor may not seek victory at the expense of the defendant's constitutional rights").

The issue is, what actions constitute a violation of a prosecutor's special responsibilities. The ABA Standards for Criminal Justice sheds light on this issue and shows what it means for prosecutors not to seek conviction but to seek justice and respect the defendant's constitutional rights. *State ex rel. The Missoulain v. Montana Twenty-First Judicial Dist. Court*, 281 Mont. 285, 293, 933 P.2d 829, 834, 1997 Mont. LEXIS 36, 9, 54 Mont. St. Rep. 175, 25 Media L. Rep. 1577 (Mont. 1997) ("we adopted, in toto, Standard 8-3.2 of the American Bar Association Standards for Criminal Justice (2nd ed. 1978)"); *Hendricks v. State*, 2006 MT 22, P25, 331 Mont. 47, 54, 128 P.3d 1017, 1023, 2006 Mont. LEXIS 27, 14 (Mont. 2006) ("The American Bar Association's Standards for Criminal Justice provide that 'defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor.' ABA Standards for Criminal Justice Prosecution Function and Defense Function 4-3.5(g) (3d ed. 1993)"); *State ex rel. Paisley v. District Court*, 673 P.2d 815, 818, 1983 Mont. LEXIS 854, 11-12 (Mont. 1983) ("The American Bar Association Standards for Criminal Justice provide that if a motion for change of venue or continuance is made prior to the impanelling of the jury, the court may defer ruling until the completion of voir dire. Standard 8-3.3(6). That is precisely what the District Judge did in this case"). As shown below, the Deputy County Attorney has violated his special responsibilities, and the Court should recuse him from prosecuting this case.

#### A. Deputy County Attorney Willfully Violated Discovery Obligations

ABA Standards for Criminal Justice 3-3.11 instructs prosecutors on how they are to treat defense attorneys relative to disclosure of evidence. It states,

- (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
- (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
- (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.



Rules 3.4(a) and 3.8(d), Montana Rules of Professional Conduct also instructs similarly,

A lawyer shall not: (a) *unlawfully obstruct another party's access to evidence*, unlawfully alter, destroy or conceal a document or other material *having potential evidentiary value*, or counsel or assist another person to do any such act.

Prosecutors shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The Deputy County Attorney has violated these special responsibilities as shown below.

The Deputy County Attorney has intentionally refused to disclose mandatory discovery despite requests and demands. He has disregarded the interest of justice and the Defendant's constitutional and statutory rights; when this attorney attempted to refer him to the weaknesses of the State's case, both factually and legally, the Deputy County Attorney insists that the Defendant not file any defense motion and that doing so would result in his seeking maximum penalties and further prosecution by the federal government, though there is no factual basis whatsoever for any federal action. He is intentionally preventing and interfering with this attorney's duty to competently represent the Defendant pursuant to Rule 1.1, Montana Rules of Professional Conduct ("Rule 1.1 provides: "Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1, M.R.Prof.Conduct." *In re THE RULES OF PROFESSIONAL CONDUCT*, 2000 MT 110, P13, 299 Mont. 321, 325, 2 P.3d 806, 809, 2000 Mont. LEXIS 104, 8, 57 Mont. St. Rep. 433 (Mont. 2000)). He has pursued action against the Defendant without the requisite investigation necessary for felony criminal prosecution; namely, he is seeking the maximum penalties of law and encouraging federal prosecution not even knowing all of the facts and legal issues in the case and without regard to this attorney's attempt to explain the factual and legal defenses.

That the Deputy County Attorney has acted in this manner is remarkable considering that the Deputy County Attorney has provided little discovery; refuses to provide further discovery (even though it clearly exists and is clearly discoverable); has factually- and legally-weak cases in DC-13-465 and DC-14-128, as this attorney has detailed in his motions to suppress and dismiss; and misrepresents facts to this Court in his *Response*.

#### B. Deputy County Attorney Violated Plea Offer Ethics

The ABA Standards for Criminal Justice, 3-4.1 states,

(a) The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.

...

(c) A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

The Deputy County Attorney has violated this rule by threatening and intimidating the Defendant to plea guilty and not to question or challenge the validity of the State's cases, either on factual or legal grounds—even though the Defendant has a good faith basis in law and fact to file defense motions. Additionally, he stated he would aid federal criminal prosecution against the Defendant, even though there is no factual basis for the same and his doing so reveals that his only purpose is to punish the Defendant for exercising his statutory and constitutional rights.

ABA Standards for Criminal Justice, 3-4.2 also states,

(a) A prosecutor should not make any promise or commitment assuring a defendant or defense counsel that a court will impose a specific sentence or a suspension of sentence; a prosecutor may properly advise the defense what position will be taken concerning disposition.

(b) A prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.

(c) A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.

The Deputy County Attorney violated subsection (a) because he revoked the assurances he gave to the Defendant and his wife, that through their cooperation with law enforcement, he would dismiss certain criminal charges. He violated subsection (b) because he stated that he can influence how the federal government will proceed in criminal prosecution against him. He violated subsection (c) because the Defendant and his wife cooperated with law enforcement in exchange for the Deputy County Attorney's assurance of dismissing charges, but he has failed to comply with his promise.

#### C. Deputy County Attorney Has Tainted The Quality of Justice in this Case

"A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Montana Rules of Professional Conduct, Preamble, Subsection 2. The Deputy

County Attorney has tainted the quality of justice in this case by his unethical actions, including his threats against the Defendant should he exercise his constitutional and statutory rights of filing defense motions and challenging the legal validity of the State's case. Now, even if the Defendant were to eventually change his plea to guilty, there is no way he can honestly say, under oath, that his plea is being made absent any coercion or threats. As such, given the Deputy County Attorney's unethical actions against the Defendant and his attorney, the Defendant is going to be appealed regardless of the outcome on the trial level because the Deputy County Attorney has tainted the quality of justice in this case.

D. Deputy County Attorney Made Misrepresentations to the Court

Deputy County Attorney's statements in his *Response*. He states,

Mr. Baldwin wishes to have another omnibus hearing set, and the ability to file *voluminous motions*, and is attempting to use *illegal requests for information*...as the basis for this request. The fact that the Defendant has terminated the services of two competent attorneys after going through the omnibus hearing does not constitute good cause for the Court to grant another omnibus hearing or relief for the Defendant to file *baseless* untimely motions.

*Response*, page 3, lines 13-18 (emphasis added). The Deputy County Attorney had no basis to make these claims. He used misrepresentations of fact to persuade the Court to rule in the State's favor so he can continue his unethical prosecution against the Defendant. The Deputy County Attorney's statements about "voluminous motions," "illegal requests for information," and "baseless" motions are completely unfounded since this attorney has not even had the opportunity to file any defense motions but was only seeking the opportunity to do so.

*First*, the Defendant's request for discovery is not illegal. The Deputy County Attorney provides no support or basis for even making the accusation. As detailed in this motion, said requests are clearly legal, and this attorney has provided the basis in law and fact to support his claim. In truth, the Deputy County Attorney's refusal to provide that discovery is clearly illegal, which is why sanctions are appropriate. Adding to the Deputy County Attorney's misrepresentations, he moved in his *Response* the Court to take judicial notice that he has complied with discovery without any facts for the Court to do so.

*Second*, this attorney has a duty under law and professional responsibilities to file defense motions in good faith based in fact and law on behalf of the Defendant. This attorney has done so in this case, and will continue to do this with all motions. That the Deputy County Attorney personally considers them "voluminous" is irrelevant to any issue before the Court and further shows that the Deputy County Attorney is acting unfairly to a

Defendant who is merely trying to assert his legal defenses. If the Deputy County Attorney believes this attorney has filed motions in bad faith, he can seek remedies at law; but he has not done so.

*Third*, since this attorney has not yet had the opportunity to file any defense motions, the Deputy County Attorney had no basis in fact to assert that this attorney's motions would be "baseless." In fact, this attorney's motions are well-founded.

### Conclusion

The Deputy County Attorney has violated what the Montana Supreme Court's charge to prosecutors under their special responsibilities:

In all his activities, his duties are conditioned by the fact that he "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . ." [citations omitted] Thus, the prosecutor must execute the duties of his representative office diligently and fairly, avoiding even the appearance of impropriety that might reflect poorly on the state.

*State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 415, 859 P.2d 992, 995, 1993 Mont. LEXIS 264, 7, 50 Mont. St. Rep. 992 (Mont. 1993) (citations omitted). Not only is there an appearance of impropriety that reflects poorly on the State, there is also an obvious bias and prejudice towards the Defendant and/or his attorney to the most alarming point under our system of law: the violation of the Defendant's rights. As such, the Defendant is being denied basic due process of law and a fair trial through this prosecutor's involvement in this case. Now, every one of the Defendant's decisions in this case will be made in light of the Deputy County Attorney's threats and coercions against him, and appeal is inevitable. Given that the Deputy County Attorney has shown his disregard for the rights of defendants in the past, the Defendant is that much more concerned the Deputy County Attorney will do so against him in this case and in DC-14-128. See *State v. Criswell*, 2013 MT 177, 370 Mont. 511, 305 P.3d 760, 2013 Mont. LEXIS 220, 2013 WL 3324365 (Mont. 2013).

WHEREFORE, the Defendant moves this Court to:

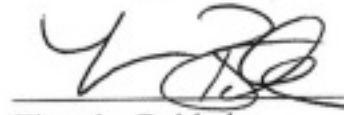
- (1) enter an order recusing Deputy County Attorney Kenneth Park from prosecuting this case; and
- (2) sanction him for his willful violation of his discovery obligations and special prosecutorial responsibilities towards other attorneys, the public, this Court, and the pursuit of justice.

Respectfully submitted this 27th day of May, 2014.

  
\_\_\_\_\_  
Timothy Baldwin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery to the Flathead County Attorney, 920 S. Main St., 2nd Fl, Kalispell, MT 59901, on May 27th, 2014.

  
\_\_\_\_\_  
Timothy Baldwin



# EXHIBIT A

Office: 210 2<sup>nd</sup> St. W, Ste. 200, Kalispell, MT 59901  
Mail: P.O. Box 1520, Kalispell, MT 59903  
Phone: (406) 393-2330  
Fax: (406) 393-2330  
Email: TimBaldwin@outlook.com

May 2, 2014

Flathead County Attorney's Office  
Attn: Kenneth Park  
920 S. Main St., Ste. 201  
Kalispell, MT 59901

Re: Matter: *State v. Cory Franklin*, DC-13-465 & 14-128  
Subject: Discovery Request

Mr. Park,

I received your email dated April 30, 2014, which is attached hereto, in response to my email asking for some discovery and what offers you have made and are making in this case and in DC-14-128. I appreciate your timely response. However, in light of the fact that you have not completed your discovery obligations in this case and thus I have very limited information in my file, I find it difficult to advise my client on your offer.

Seeing that there is a major search-and-seizure issue in both cases and seeing that Jaimz Doran testified, as did my client, that Cory Franklin possessed no drugs in the hotel room and was only there to take Doran another location, my client is unwilling to accept your offer. As I see DC-14-128 to date, there is no evidence to support even probable cause that Cory Franklin possessed any drugs at the hotel. Under these circumstances, my client would rather proceed with defending his rights in both cases than accept your plea offer.

I have reviewed the officers' reports in these cases and found many items missing in discovery. To that end, I am hereby requesting the following items from the State pursuant to Section 46-15-322, MCA for **DC-13-465**:

1. A copy of the application for search warrant;
2. A copy of all statements made by the Defendant in this case;
3. All evidence the State intends to use against the Defendant of prior bad acts in its case-in-chief;
4. A copy of all interviews and statements of all witnesses and arrestees in this case;
5. A copy of all recorded surveillance related to this case;
6. A copy of all of Alan Ray Harnett's crimes of dishonesty ("The Montana Supreme Court has indicated that the following acts are probative of dishonesty: forgery, bribery, suppression of evidence, false pretenses, cheating, and embezzlement. *State v. Gollehon* 262 Mont. 1, 16, 864 P.2d 249, 259 (1993)." *State v. Giddings*, 2007 Mont. Dist. LEXIS 15, 4 (Mont. Dist. Ct. 2007).)
7. A copy of Cory Franklin's criminal record;

8. A copy of all photographs taken in this case;
9. A copy of, or an opportunity to inspect, any tangible evidence, including notes, records, or documents in whatever format, relative to the following statement made in FCSO report no. 201333918: "At approximately 0231 hours, Agent Stahlberg received information that Harnett was located in a truck at the Kalispell Super One Foods parking lot."
10. A copy of any written agreements or a copy of the terms of any oral agreements the State of Montana has made with any of the witnesses in this case to provide information to or testify for the State, including the confidential informant;
11. A copy of all officers' notes and memorandums in this case;
12. A copy of the warrant that Agent Capser used to arrest Cory Franklin in this case;
13. All of the officers' names not already provided in the officers' report who were present at the scene of Cory Franklin's arrest;
14. All of the witnesses names and contact information (i.e. addresses and phone numbers) not already provided in the officers' report who were involved in this case; and
15. A copy of all photographs or pictures the officers or any agents thereof have displayed or shown of Cory Franklin to any of the witnesses in this case regarding his identity.

I am making the same request for discovery in **DC-14-128** as follows:

1. A copy of all recorded interviews of all witnesses in this case, including Jaimz Doran, Cory Franklin, and any officers;
2. All evidence the State intends to use against the Defendant of prior bad acts in its case-in-chief;
3. A copy of all statements made by the Defendant in this case;
4. A copy of the application for search warrant;
5. All of the officers' names not already provided in the officers' report who were involved in the investigation of Cory Franklin in this case;
6. A copy of all officers' notes and memorandums in this case;
7. All of the witnesses names and contact information (i.e. addresses and phone numbers) not already provided in the officers' report who were used by the officers at the hotel where the officers arrested Cory Franklin; and
8. A copy of all photographs relating to this case, including the cell phone photographs shown to the officer by the hotel employee;

I believe these items are essential for me to effectively assist my client and for the Defendant to defend himself in this case. To deny the Defendant this information denies his constitutional right of due process and to confront witnesses against him. *State v. Baker*, 8 P.3d 817, 301 Mont. 323 (2000), *State v. Duffy*, 6 P.3d 453, 300 Mont. 381 (2000). Coupled with the exculpatory nature of the evidence requested, the Defendant needs said materials for impeachment purposes at trial, and he is entitled to the same. *Kills on Top v. State*, 273 Mont. 32,

42, 901 P.2d 1368, 1374 (1995). The Defendant's right to confront witnesses cannot be denied or outweighed by any other interest. State v. Duffy, 300 Mont. 381, 6 P.3d 453 (2000). I also believe that the information requested is material to my client's defense and denial of this information will affect the outcome of the case.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'TBaldwin', with a long horizontal line extending to the right.

Timothy Baldwin

[Close](#)[Print](#)

From: **Kenneth Park** (kpark@flathead.mt.gov)

Sent: Wed 4/30/14 9:47 AM

To: timbaldwin@outlook.com

Tim,

Cory initially received an offer of 15 years straight to the Montana State Prison for DC-13-465C only. Since that time there has been cooperation by Cory and on his behalf. Cory's offer is this for both cases and the pending revocation from DOC. Keeping in mind that he is a PFO in two cases, and these cases are being reviewed by the federal government for his gun and drug violations, I'm going to make this simple. Cory can take 20 years with 10 suspended right now with a recommendation that he goes to NEXUS or the METH ITU program before he is eligible for parole, and we will drop the PFO designation. We will also speak to the agent on the federal charges and recommend that the case does not go to the AUSA for further federal prosecution. Cory will be required to continue to assist the agent on other federal and state charges that he has been assisting on, including but not limited to conducting interviews, testifying in state or federal courts and/or in front of a grand jury. This will resolve all of his cases in Flathead County including the pending revocation of his probation that he is facing. As you should know, should Cory choose to proceed to trial on two PFO cases he will be subject to a minimum sentence of 15 years MSP in addition to whatever time he is facing on the revocation plus prosecution from the federal government.

This offer expires at 5:00 pm on Wednesday May 7, 2014, or upon the filing of ANY motions of any sort from your office except a motion for a change of plea. Should this offer be rejected, or a motion is filed, the state will proceed to trial and pursue maximum sentences for Cory on all of his cases and recommend he face federal charges with the other co-defendants. This offer is not open to any further negotiation.

Kenneth R. Park



# EXHIBIT C

Close

To: Kenneth Park

I recently received the appointment on these cases, and I have reviewed the files. Below are my initial thoughts and requests for discovery:

13-402. I need this discovery: the application for search warrant and recorded audio/video of the interviews. I notice that the OMNI form has been signed and filed. However, given that discovery is not complete, I may need to file defense motions, depending on what I find in that discovery. Have you made any offers in this case?

14-126.  
Sean Hinchey told me that there may be some arrangement in the works here. Sean said that Agent Johns has something to do with this. I don't have any details at this point as to what that means. When Sean told me that, I called and left a message for Agent Johns to call me so I can get updated on that arrangement. I presume you would know what kind of arrangement is going on between Agent Johns and Franklin, but Sean indicated that you may not and that Agent Johns was going to talk to you about it. Here is the discovery I am requesting: 7 pictures taken by Natasha Rogers and the application for search warrant. There appears to be an illegal search of the hotel room, which if a MTS were granted, would be dispositive of the case. I presume you would oppose any MTS, but I don't know for sure. If you would oppose it and if there are no offers on the table that Franklin is going to take, I will want to interview witnesses, which names I can give you when we're ready for that. Have you made any offers in this case?

Thank you for your attention to these matters.

Tim Baldwin  
210 2<sup>nd</sup> St. West, Ste 200  
PO Box 1520  
Kalispell, MT 59903  
(406) 393-2330  
[timbaldwin@outlook.com](mailto:timbaldwin@outlook.com)  
[tim@libertydefenseleague.com](mailto:tim@libertydefenseleague.com)

5/21/2014 1:42 PM

receipt by, any unauthorized persons. If you have received this electronic mail transmission in error, please delete it from your system without copying it, and notify the sender by reply e-mail so that our address record can be corrected. Thank you for your assistance.

# EXHIBIT D

[Print](#)

From: **Kenneth Park** (kpark@flathead.mt.gov)  
Sent: Wed 4/30/14 9:47 AM  
To: timbaldwin@outlook.com

Tim,

Cory initially received an offer of 15 years straight to the Montana State Prison for DC-13-465C only. Since that time there has been cooperation by Cory and on his behalf. Cory's offer is this for both cases and the pending revocation from DOC. Keeping in mind that he is a PFO in two cases, and these cases are being reviewed by the federal government for his gun and drug violations, I'm going to make this simple. Cory can take 20 years with 10 suspended right now with a recommendation that he goes to NEXUS or the METH ITU program before he is eligible for parole, and we will drop the PFO designation. We will also speak to the agent on the federal charges and recommend that the case does not go to the AUSA for further federal prosecution. Cory will be required to continue to assist the agent on other federal and state charges that he has been assisting on, including but not limited to conducting interviews, testifying in state or federal courts and/or in front of a grand jury. This will resolve all of his cases in Flathead County including the pending revocation of his probation that he is facing. As you should know, should Cory choose to proceed to trial on two PFO cases he will be subject to a minimum sentence of 15 years MSP in addition to whatever time he is facing on the revocation plus prosecution from the federal government.

This offer expires at 5:00 pm on Wednesday May 7, 2014, or upon the filing of ANY motions of any sort from your office except a motion for a change of plea. Should this offer be rejected, or a motion is filed, the state will proceed to trial and pursue maximum sentences for Cory on all of his cases and recommend he face federal charges with the other co-defendants. This offer is not open to any further negotiation.

Kenneth R. Park