IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 23-0136

STATE OF MONTANA,
Plaintiff and Appellee,

v.

WILLIAM TREVOR CASE,
Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court, Deer Lodge County, the Honorable Kurt Krueger, Presiding.

Appearances:

Nathan D. Ellis
Ellis Law, PLLC
2047 North Last Chance Gulch, #482
Helena, Montana 59601
Phone: (406) 475-5900
Email: nate@ellis.law

Christopher R. Betchie
Hull, Swingley, & Betchie, P.C.
P.O. Box 534
Helena, Montana 59624
Phone: (406) 204-5710
Email: christopher@hullmtlaw.com

Attorney for Defendant and Appellant

Austin Miles Knudsen
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401

Ben Krakowka
Deer Lodge County Attorney
800 Main Street
Anaconda, Montana 59711

Attorneys for Plaintiff and Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ISSUES PRESENTED

I. May police officers make a warrantless entry to an individual's residence during a "welfare check" based on a report from an ex-girlfriend that the occupant is armed, suicidal, but does not want contact with the police or their "assistance?"

II. Did the State committed a Brady Violation by failing to disclose that Sgt. Pasha had been shot at on June 19, 2021, approximately three months prior to the incident in the present case, when an element of the charged offense is the reasonableness of the officer's apprehension of serious bodily injury?

III. Does Mont. Code Ann. § 45-5-210 require more than mere possession of a weapon to constitute assault on a peace officer?

STATEMENT OF THE CASE AND FACTS

On the evening of September 27, 2021, Defendant, William Trevor Case had been engaged in an argument over the phone with his ex-girlfriend, Jennifer Harris, while he was sitting at his house alone. (D.C. Doc. 27.) After Mr. Case abruptly ended the call, Jennifer called Anaconda-Deer Lodge County Police Department ("ADLCPD") Dispatch to report that he "was threatening suicide and the phone just went silent, and she didn't get a response;" and that "he said he had a loaded gun,

and all I heard was clicking and, **I don't know**, **I thought** I heard a pop at the end, **I don't know**." (*Id.* (emphasis added).)

Sergeant Richard Pasha and Officer Blake Linstead arrived at Mr. Case's residence first, parking around the corner and sneaking up on foot to surveil the property as part of their welfare check. (D.C. Doc 55.1.) Officer Linstead and Sergeant Pasha stalked the front of Mr. Case's house, looking in windows with their flashlights. *Id.* Captain Dave Heffernan arrived shortly thereafter, and the three consulted for a moment before returning to search Mr. Case's residence through the windows. *Id.* Jennifer Harris then arrived on scene and spoke briefly with the officers on scene mainly about the layout of Mr. Case's home and his possible location. *Id.*

After searching the first floor of Mr. Case's home through various windows for five minutes and 28 seconds, while observing no signs of distress, movement, injury, or the need for imminent aid, Sergeant Pasha finally knocked on Mr. Case's front door. *Id.* Mr. Case did not answer the door and made no indication of being home. *Id.*

After about seven and a half minutes of searching Mr. Case's home from the exterior, Officer Linstead noticed an empty holster on the kitchen table and alerted the other officers to its presence. *Id.* The officers continued to search the house from the front exterior and proceeded to the backyard after having been on scene for approximately nine and a half minutes. *Id.*

The three officers then proceeded to enter the backyard and continued to search the house for approximately another six minutes by looking through windows with flashlights and entering his back porch and looking through his back door. *Id.* Still the officers have observed no indicia of Mr. Case, a struggle, injury, or emergent situation requiring immediate action/entry of the officers. *Id.* At this point, Officer Linstead heard someone walking down the alley behind Mr. Case's house, at which time the officers ceased searching Mr. Case's home from the backyard and exited into the alley behind Mr. Case's home. *Id.*

After speaking to a neighbor in the alley, the officers then returned to the front of Mr. Case's home, after more than 18 minutes on scene. *Id.* After further discussion between the three officers, Sgt. Pasha stated "I don't know, do you make entry and then all of a sudden he pulls a gun and then you shoot him, if he's actually not dead." *Id.* Followed by Officer Linstead asking, "or you leave him?" *Id.*

Sergeant Pasha then returned to searching the front of Mr. Case's home, while Officer Linstead approached Jennifer Harris to obtain Mr. Case's phone number, to call him. *Id.* Before he could obtain Mr. Case's phone number from Jennifer Harris, Sgt. Pasha called Officer Linstead over to the front porch to show him a notebook, with about a paragraph of writing in it, that he had observed located on Mr. Case's coffee table in his living room. *Id.* Officer Linstead then abandoned efforts to contact Mr. Case via telephone, and he and Sergeant Pasha concluded that the paragraph

long handwritten entry in a notebook was a suicide note, despite not being able to read the contents of the writing. *Id.*

Officer Linstead and Sergeant Pasha then met with Captain Heffernan, who was sitting in his vehicle while on the phone with ADLCPD Police Chief William "Bill" Sather. *Id.* Officer Linstead and Sergeant Pasha notified Captain Heffernan of the handwritten document on Mr. Case's coffee table continuing to claim that it was a suicide note, without any substantiation. *Id.* While approaching Captain Heffernan's vehicle Sergeant Pasha stated, "if we go in there, we gotta be careful man, just in case he didn't actually shoot himself." *Id.* After conferring with Captain Heffernan, Sergeant Pasha admitted the existence of his belief that Mr. Case was not in immediate need of aid, by stating "I'm scared that maybe he didn't actually shoot himself, because he can't and he's tried suicide by cop before, and he like left us all this so we're gonna go in the house and he's gonna fucking pull a gun on us, is what I'm worried about." *Id.* In response, Officer Linstead and Sgt. Pasha discussed if he should retrieve their personal AR-15 rifles, and Officer Linstead ultimately retrieved both rifles. *Id.*

Shortly after retrieving the rifles, Officer Linstead and Sergeant Pasha took up a defensive position on the other side of Mr. Case's truck and waited for Chief Sather to arrive. *Id.* Captain Heffernan then approached and relayed vague information allegedly received from Jennifer Harris, roughly claiming that Mr. Case

said something to the effect that he would shoot it out with law enforcement or come out guns blazing should they illegally enter his residence. *Id.* Unfortunately for Mr. Case, her exact words cannot be quoted as Captain Heffernan's body worn camera (BWC) was inexplicably turned off during that conversation. *Id.*

Sergeant Pasha then pushed his narrative that Mr. Case was seeking to commit "suicide by cop" for the fourth time and continued to speculate that Mr. Case was not injured and was waiting for the officers to enter, which was interrupted by Captain Heffernan, stating "we just go in and watch each other's backs." *Id.* Officer Linstead then offered the idea that they could utilize the ballistic shield, because it "takes the gun out of the fight." *Id.* Notably, the officers had still not observed any indicia of an exigent situation that would require immediate entry, and all three officers on scene up to that point had stated that it was unlikely Mr. Case required immediate aid, but rather he was likely lying in wait for them to commit suicide by cop. *Id.*

After Chief Sather arrived, the officers discussed everywhere in Mr. Case's home that they had been able to search and the locations they hadn't been able to see into. *Id.* The officers generally stated that they had observed an empty darkened home, an empty holster on the table, beer cans on the counter, and a handwritten note that they were unable to read on the coffee table. *Id.* While Captain Heffernan

was retrieving the ballistic shield, Sergeant Pasha again pushed his suicide by cop theory, to which Chief Sather replied, "I don't think he's going to shoot us." *Id.*

Sergeant Pasha yet again began to mention that he's concerned about the possibility of an officer created jeopardy by stating that Mr. Case "is going to **make them come into his house** and …" but he trailed off and began discussing the handwritten document on Mr. Case's coffee table. *Id.* Sergeant Pasha then recounted the "note" and "holster" found during their search of Mr. Case's home from the exterior, and then finished expressing his concern "that he's gonna make us come into this house and he's gonna want to shoot it out, and so I want to be prepared." *Id.* Chief Sather responded with "he ain't got the guts." *Id.*

Captain Heffernan eventually returned with the ballistic shield and the four officers then began discussing who's going to use the shield and how they would make entry to Mr. Case's house. *Id.* After entering the house and thoroughly searching the first floor, the officers reached a stairwell that led to both the basement and second floor. *Id.* Sergeant Pasha and Officer Linstead proceeded upstairs, while Chief Sather and Captain Heffernan proceeded downstairs. *Id.*

As Sergeant Pasha entered the first upstairs bedroom and began sweeping the room with his rifle, the curtain covering part of the closet began to move open, revealing Mr. Case's left side of his body. *Id.* Sergeant Pasha rapidly turned and fired one shot at Mr. Case, striking him in the left arm and lower left abdomen. *Id.*

Sergeant Pasha immediately exclaimed "oh shit!" *Id.* Mr. Case immediately began falling to the floor. *Id.* While none of the officers testified to seeing a firearm prior to the shooting, the BWC footage shows that Mr. Case had a black handgun by his side in his right hand that can be seen emerging from behind the curtain and then being dropped into a nearby laundry basket after he was shot. *Id.* Notably, no weapon or outline of a weapon was visible until after Mr. Case was shot and already halfway to the floor. *Id.*

After the other officers joined Sergeant Pasha, Captain Heffernan noticed the handgun Mr. Case dropped and picked it up from a laundry basket full of toys and blankets. *Id.* Holding the handgun, Captain Heffernan then asked, "who's is this?" *Id.* To which Sergeant Pasha admitted, "I don't know where that came from." *Id.* To which Captain Heffernan responded, "it was laying right there." *Id.* Mr. Case was then repeatedly offered a chest seal for his gut shot and was then escorted downstairs to the ambulance that had just arrived. *Id.*

After Mr. Case and Officer Linstead proceeded downstairs, Captain Heffernan handed Sergeant Pasha Mr. Case's handgun. *Id.* Sergeant Pasha asked, "where did you find that at Dave?" *Id.* Captain Heffernan replied, "right there" and pointed to the laundry basket where he found the gun. *Id.* Sergeant Pasha then said, "maybe he dropped it, I don't know." *Id.* He continued "I came in here to clear it and that fucking curtain flew open and I just fucking let one fly." *Id.* Before heading

downstairs Sergeant Pasha said to Captain Heffernan "I wonder if he did have it and he fucking dropped it?" *Id.* To which Captain Heffernan responds, "well it was right there." *Id.* Mr. Case was then taken to the hospital by emergency services. *Id.*

The ADLC County Attorney filed the packet of charging documents on October 1, 2021 (five days before DCI investigators interviewed the four officers involved in the warrantless entry of Mr. Cases home). (D.C. Docs. 1-4.) The State's Motion for Leave to file an Information and Affidavit in Support, was rife with gross mischaracterizations and patently untrue statements including that: Ms. Harris heard a "pop" from inside the house, when Ms. Harris reported that she "thought she heard a pop" over the phone; that upon arrival the officers made entry, despite officers waiting over 40 minutes before making entry; that officers observed a bullet hole in the kitchen floor, though this was not discovered until DCI began their investigation; that all four officers proceeded upstairs; and that Mr. Case pointed the pistol towards Sgt. Pasha. (D.C. Doc. 1.)

Mr. Case made his initial appearance on October 13, 2021, and entered a plea of not guilty. (D.C. Doc. 11.) Upon Defendant's motion, the court ordered the State to produce 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 his punishment, therefore." (D.C. Docs. 9 & 10.) Although the State produced numerous videos, audio recordings, and written documents, it failed to disclose that Sgt. Pasha

had been shot at three months prior to incident at issue, and whether he had undergone any evaluations or counseling for the incident. (D.C. Doc. 133.)

On December 20, 2021, Mr. Case filed Motions to Suppress, to Dismiss, and *in Limine*, requesting the exclusion of any evidence obtained as a result of the warrantless search of the home and seizure of Mr. Case, and an evidentiary hearing was held on February 14, 2022. (D.C. Docs. 25-29.)

At the hearing, Ms. Harris testified that she heard a "pop" and never said gunshot. (Tr. of 2/14/22 Evidentiary Hearing, 19:21-20:2.) Likewise, when asked if he saw a body or blood while searching Mr. Case's home from the exterior, Cpt. Heffernan stated they saw an empty holster and empty beers. (Tr. of 2/14/22 at 28:1-17.) When asked how long they waited, Cpt. Heffernan testified half an hour, when the BWC footage clearly shows it was forty to forty-five minutes that they waited. (Tr. of 2/14/22 at 37:4-13.) Cpt. Heffernan was then questioned about whether they considered applying for a warrant. *Id.* He responded "no" and that the reason they didn't apply for a warrant was that "it wasn't a criminal thing." *Id.* Further Cpt. Heffernan testified about the preparations made for officer safety and that being part of the delay before making entry. (D.C. Doc. 55.1 & Tr. of 2/14/22 at 37:8-39:6.)

Cpt. Heffernan then testified that he turned his BWC off while the three officers were in front of Mr. Case's home discussing whether Mr. Case needed emergency assistance or lying in wait for them. (Tr. of 2/14/22 at 45:7-22; 53:5-24.)

Further, upon redirect, Cpt. Heffernan testified about exigent circumstances being the same as emergency situations, and how the promptness of action is measured against the "prudence of running in." (Tr. of 2/14/22 at 54:9-22.)

Officer Linstead and Sgt. Pasha testified similarly regarding exigent circumstances and the time on scene prior to entering Mr. Case's home. When asked about whether he considered getting a warrant before entry, Officer Linstead testified "Um, I wasn't in there to, to search anything. I wanted to find Mr. Case, make sure he was okay. If he wasn't I needed to get him medical attention and I, I was not in there for any reason other than that." (Tr. of 2/14/22 at 78:24-79:4.)

On cross examination Officer Linstead testified that he observed no signs of Mr. Case having a gunshot wound or having injured himself. (Tr. of 2/14/22 at 93:9-17.) His BWC was shown to the court, and when asked why they made entry into Mr. Case's home, he testified that with the "unknown status of Mr. Case's wellbeing" they had to go in "to make sure he was okay," with no testimony about exigent circumstances or indications that Mr. Case needed emergency aid. (Tr. of 2/14/22 at 110:20-111:9.)

When Sgt. Pasha testified, he indicated that he did not observe blood or a body or any indicia of a person in need of emergency care. He did testify that there was an empty holster, beer cans, and a handwritten paragraph, none of which indicated to him or the others that they must make an immediate entry to render emergency

aid or medical care. (Tr. of 2/14/22 at 129:1-131:3.) Sgt. Pasha later testified about the black object coming out of the curtain for the first time, which was inconsistent with his statements to DCI after he had watched his BWC. (Tr. of 2/14/22 at 143:24-144:18 When asked on cross examination if there was any external indication of a need for aid being rendered prior to entry, Sgt. Pasha testified "no, not necessarily, no." (Tr. of 2/14/22 at 162:15-20.)

In the court's verbal order at the end of the hearing, the court denied both motions. In its reasoning for denying the Motion to Suppress the court opined, the district court stated that:

> You know we can slice the bologna as thin as we want about exigency versus emergency, you know, and different statutory definitions in different context, but police department got a call.
>
> ***
>
> But that micro analysis here says, yes for the purpose of whether or not there was an exigency when they went in because they still didn't know was he in there? Was he dead? Was he waiting for them? Was he gonna do it the suicide by cop thing? You know, what was going to happen? They had to be careful. But it was an exigent circumstance. They went into the house without a warrant. Uh, does not render what came as a result of that inadmissible. The Motion to Suppress is denied.

(Tr. of 2/14/22 at 213:18-215:14.) Notably, the district court found that exigent circumstances in the absence of probable cause excused the officers' warrantless entry into the house. *Id.*

Defendant filed his Renewed Motion to Suppress, Brief in Support, and Motion and Brief in Support of Motion in Limine on July 18, 2022. (D.C. Docs. 79-81.) A hearing on the renewed motions was held on September 28, 2022. (D.C. Doc. 102.1 & 103.) The Court denied the renewed Motion to Suppress and the State's Motion in Limine and granted Defendant's Motion in Limine at the hearing. *Id.* Judge Dayton recused himself due to inappropriate comments made about witness, Jenifer Harris, which were heard by County Attorney Ben Krakowka, who reported it to the Judicial Practices Committee. (D.C. Doc. 104.)

A four-day trial was held between December 5, 2022, and December 8, 2022. During the trial Sgt. Pasha was called to testify. (Tr. of 12/5/22 to 12/8/22 at 41:1-80:10.) Throughout his direct examination Sgt. Pasha only testified that he saw "what he believes to be a dark object" with no testimony of actually seeing the weapon Mr. Case was holding at his right side. *Id.*

Chief Sather then testified that it would not have been appropriate for the other three officers to "just go right in." (Tr. of 12/5/22 to 12/8/22 at 91:1-4.) He then stated that he made the decision to delay while Cpt. Heffernan retrieved the bullet shield from the station, which he incorrectly stated was across the street. (Tr. of 12/5/22 to 12/8/22 at 91:5-11.) Chief Sather further testified about the "note" found on the coffee table stating that, "it wasn't a usual suicide note that we usually see on

suicides. . . it wasn't finished. It was only half a note there." (Tr. of 12/5/22 to 12/8/22 at 92:7-11.)

During his resumed direct, Sgt. Pasha went through a series of still frame shots from his BWC footage, indicating where he believes he began to see the "dark object" protrude from the curtain. (Tr. of 12/5/22 to 12/8/22 at 102:8-108:22.) The State later recalled Sgt. Pasha for rebuttal, where he testified that the dark object he saw just as easily could have been a shadow as a gun. (Tr. of 12/5/22 to 12/8/22 at 37:22-374:4.)

Following closing arguments, the jury found Mr. Case guilty of assault on a peace officer, Montana Code Annotated § 45-5-210(b). (Tr. of 12/5/22 to 12/8/22 at 416:16-23.) As such, Defendant moved for a new trial on January 6, 2023, to which the State responded on January 12, 2023. (D.C. Docs. 129-131.)

However, Defense counsel learned on January 19, 2023, that Sgt. Pasha was shot at in June of 2021, and as such raised the issue of a Brady violation for the first time in their reply brief. (D.C. Doc. 133.) The State responded to the newly raised Brady issue in a separate response brief. (D.C. Doc. 134.) The Motion for new trial was denied by written order on February 9, 2023, and Mr. Case's sentencing hearing was set by an order issued that same day. (D.C. Doc. 135 & 136.) Mr. Case was sentenced on February 24, 2023, and defense counsel filed this appeal on the same day. (D.C. Doc. 140.)

STANDARDS OF REVIEW

When reviewing a decision to grant or deny a motion to suppress evidence, the Court determines "whether the court's findings of fact are clearly erroneous and whether those findings were correctly applied as a matter of law. *State v. Ellis*, 2009 MT 192, ¶ 20, 351 Mont. 95, 210 P.3d 144. "A trial court's findings are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if our review of the record leaves us with a definite and firm conviction that a mistake has been made." *Id.*

This Court's "review of constitutional violations, including alleged *Brady* violations, is plenary." *State v. Ilk*, 2018 MT 186, ¶15, 392 Mont. 201, 422 P.3d 1219.

SUMMARY OF THE ARGUMENT

Both the conviction and sentence of Mr. Case for assault on a peace officer must be overturned as the conviction and sentence was based solely upon evidence illegally obtained by ADLCPD during their warrantless search of the home and seizure of Mr. Case.

The officers' warrantless entry into the residence was not excused under either the exigent circumstances or the community caretaking doctrine, and as such, all evidence obtained should have been suppressed. Specifically, the U.S. Supreme Court in *Caniglia v. Strom*, 141 S. Ct. 1596, 1599-1600 (2021), clearly held that the

community caretaking doctrine never existed and does not permit government agents to make a warrantless entry to a residence, thus impliedly overruling this Court's holding in *Estate of Frazier v. Miller*, 2021 MT 85, ¶ 25, 484 P.3d 912, to the extent that opinion permits police to make warrantless entries when performing welfare checks.

Likewise, Montana, which allegedly has a constitution that provides greater privacy protections than the U.S. Constitution, requires that officers show both exigent circumstances in addition to probable cause before their warrantless entry to a home is excused under the exigent circumstances exception. However, all the officers in this case testified under oath that they had no probable cause to suspect that Mr. Case had committed any wrongdoing prior to their warrantless entry.

Further, even if this Court decides to adopt the Federal emergency aid doctrine, the officers' significant delays and statements on scene betray their argument that an ongoing exigent situation existed at the time they finally made entry to the residence.

Further, Mr. Case's conviction and sentence must also be overturned because the county attorney suppressed and refused to disclose exculpatory *Brady* evidence that Sergeant Pahsa had a recent near-death incident on the job where he was shot at for the first time in his career, which again requires reversal of Mr. Case's conviction and sentence as this suppressed evidence is favorable to Mr. Case, is directly relevant

to an essential element of the alleged crime, was known by the State given the same county attorney tried each case, and because this evidence is material in that it not only goes to an essential element of the alleged crime, the reasonableness of Sergeant Pasha's apprehension, as well as new avenues for impeachment of the State's main and only witness to the alleged crime.

Finally, Montana law requires more than the mere possession of a weapon, but some tangible use of the weapon for an act to constitute assault on a peace officer. As such, Mr. Case's conviction and sentence should be overturned due to these serious constitutional violations.

ARGUMENT

I. Neither the exigent circumstances exception nor the community caretaking doctrine excused the officers' warrantless entry into Mr. Case's residence more than 40 minutes after arriving on scene to perform a "welfare check" at the insistence of an ex-girlfriend.

In theory, Montanans enjoy stronger constitutional protections against government searches and seizures than provided by the U.S. Constitution. *Ellis*, ¶ 22. However, the District Court's Order, not only holds that probable cause is no longer required to make a warrantless home entry under the exigent circumstances exception when accused of experiencing a mental health crisis, but it also conflates three completely distinct doctrines by stating "we can slice the bologna as thin as we want about exigency versus emergency . . . and different statutory definitions." Under that ruling Montanans are now stripped of all rights to refuse police entry to

their home and are subjected to armed raids and potential execution should they fail to obey every order of the State's agents, regardless of constitutionality of the orders. Likewise, the State's last-minute invocation of the community caretaking doctrine at the suppression hearing is futile as the U.S. Supreme Court has recently ruled that this doctrine does not permit warrantless home entries.

In addition to being contrary to established Montana law, the District Court's Order defies a basic premise of constitutional law, as a right that can only be complained about after the protections are violated is not a right but rather a state issued privilege. As a result of operating under a mistake of law, not only will Mr. Case be subjected to continued gross injustice, but now the rights of all Montanans to be free from unreasonable searches and seizures in their own homes are in jeopardy.

1. While Federal interpretation of the exigent circumstances exception to the 4th Amendment allows for prompt entry in cases of in progress suicides under the emergency aid doctrine, Montana law clearly requires exigency plus probable cause in order to excuse a warrantless entry to a residence.

The officers' illegal home raid was not excused under Montana's exigent circumstances exception to the warrant requirement as the officers involved have all testified under oath that there was no probable cause to suspect that Mr. Case had committed a criminal offense, which is a required element the State must satisfy to excuse its warrantless entry into Mr. Case's residence.

The United States Supreme Court and the Montana Supreme Court have repeatedly held that a person's home is sanctified and should be safeguarded against arbitrary invasions by governmental officials. *Ellis*, ¶ 73. "The home is the most sanctified of all 'particular places' referred to in the Fourth Amendment, and it is for that reason that the exceptions to the warrant requirement are, concomitantly, jealously guarded and carefully drawn." *Id.* (citing *State v. Graham*, 2004 MT 385, ¶ 22, 325 Mont. 110, 103 P.3d 1073). Searches of a home without a warrant are presumed unreasonable both at the State and Federal levels. *Ellis*, ¶ 24.

The Montana Constitution guarantees a greater level of protection from unlawful searches. *Ellis*, ¶ 22. However, there are delineated exceptions to the warrant requirement for searching a home in Montana, and they: are voluntarily and freely given consent, *State v. Bieber*, 2007 MT 262, ¶ 29, 339 Mont 309, 170 P.3d 444; a search incident to a lawful arrest, *State v. Hardaway*, 2001 MT 252, 307 Mont. 139, 36 P.3d 900; and the presence of exigent circumstances only in combination with probable cause, *State v. Stone*, 2004 MT 151, ¶ 18, 321 Mont. 489, 92 P.3d 1178. Notably, Montana has not adopted the emergency aid doctrine, which generally allows warrantless entries without probable cause. *State v. Saale*, 2009 MT 95, ¶ 14, 350 Mont. 64, 204 P.3d 1220; *State v. Saale*, ¶6, 2008 Mont. Dist. LEXIS 242.

The present matter clearly does not contain a consent exception. Likewise, there is no argument to be made for a search incident to a lawful arrest, as Mr. Case was later shot and then arrested after the search of his home was commenced. As such, the only remaining exception is that of the presence of exigent circumstances coupled with probable cause under the Montana Constitution.

a) Montana law requires probable cause prior to making a warrantless entry under the exigent circumstance's exception and has not adopted the Federal emergency aid doctrine.

The officers' illegal home raid was not excused under Montana's exigent circumstances exception to the warrant requirement as all four officers testified under oath that there was no probable cause to suspect that Mr. Case had committed a criminal offense thus permitting a warrantless entry into his residence. Nor could they testify to articulable facts that would demonstrate that Mr. Case needed emergency assistance or was facing imminent injury, as their entire testimony at both the motion's hearing and trial were speculative and unsure whether Mr. Case was dead, injured, facing imminent injury, or lying in wait for them.

Demonstrating that this Court's numerous statements concerning the stronger protections provided under the Montana Constitution were not hollow and meaningless, Montana's exigent circumstances exception requires not only the existence of exigent circumstances, which are nonexistent in this case, but also that there be probable cause to believe the suspect had committed an offense. In

describing the two elements of Montana's exigent circumstances exception, this Court in *Stone*, defined exigent circumstances as follows:

> Exigent circumstances exist if the situation at hand would cause a reasonable person to believe that prompt action is necessary to prevent physical harm to an officer or other person, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating law enforcement efforts.

Stone at ¶ 18 citing (*State v. Wakeford*, 1998 MT 16, ¶ 24, 287 Mont. 220, 953 P.2d 1065)(emphasis added). This Court then went on to define probable cause as existing "if the facts and circumstances within the officer's personal knowledge, or imparted to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that the suspect has committed an offense." *Stone* at ¶ 18 citing (*State v. Saxton*, 2003 MT 105, ¶ 26, 315 Mont. 315, 68 P.3d 721). In proving whether said requirements have been met, "[t]he State bears the heavy burden of showing the existence of exigent circumstances and can meet that burden only by demonstrating specific and articulable facts." *State v. Ruggirello*, 2008 MT 8, ¶ 18, 341 Mont. 88, 176 P.3d 252 (citing *State v. Logan*, 2002 MT 206, ¶ 17, 311 Mont. 239, 53 P.3d 1285.)

As is clear from *Stone*, an officer must have probable cause, in addition to exigent circumstances, to make a warrantless entry into a personal residence. Yet, in this case the district court found exigent circumstances excused the warrantless entry despite a lack of probable cause, even though the officers were not able to point to

specific and articulable facts other than mere speculation and conjecture, in defiance of Montana law. *See* Tr. of 2/14/22, 209:7-216:3. Specifically, officers Pasha, Sather, Heffernan, and Linsted have all testified under oath that there was no probable cause that Mr. Case had committed a criminal offense. Tr. of 2/14/22, 47:19-24; 92:12-17; 154:17-22; 195:7-12. Further the officers were unable to testify to any articulable facts that were indicative of Mr. Case having harmed himself, or that he was facing the threat of imminent harm that would lead a reasonable person to believe that prompt action was necessary. The entirety of their testimony, as well as their statements on scene, were indicative of a lack of knowledge of Mr. Case's status, and that entry was necessary to fact find and determine the status of his wellbeing. As such, the district court was clearly mistaken in refusing to grant Mr. Case's motion to suppress by holding that the exigent circumstances exception excused the officers' warrantless home raid.

b) Even if this Court decided to adopt the Federal emergency aid doctrine, there was no observable evidence of an active emergency that would excuse their warrantless entry, nor was the delay excused by the alleged need for officer safety.

Although the Federal emergency aid doctrine permits officers to make a prompt entry into a residence without a warrant in order to administer emergency aid to someone who is clearly in need of immediate assistance or facing the threat of imminent harm, it does not provide a blank check to make entry whenever the

officers feel safe to. Specifically, the emergency aid doctrine requires the existence of an emergency situation that requires prompt action, which was missing in this case where the officers did not observe any evidence of an ongoing emergency and spent over 40 minutes collecting intelligence, waiting for senior personnel, retrieving additional equipment from across town, and obtaining additional weapons from their vehicles in preparation for what Sgt. Pasha described as one of the only two possible outcomes: that Mr. Case was already dead inside or "that he's gonna make us come into this house and he's gonna want to shoot it out, and so I want to be prepared." (D.C. Doc. 55.1.)

While there does not appear to be a firm time limit for government agents to make entry under the emergency aid doctrine, review of the testimony in this case demonstrates that the situation was a far cry from the facts and circumstances of *Brigham City v. Stuart*, 547 U.S. 398 (2006) and *Michigan v. Fisher*, 558 U.S. 45 (2009), in which the U.S. Supreme Court excused warrantless entries under the emergency aid doctrine.

In *Brigham City* officers were responding to a complaint about a loud party. Upon arrival "officers heard shouting from inside," entered the backyard after observing minors consuming alcohol, and observed inside the house through windows and a screen door "an altercation in the kitchen between four adults and a juvenile, who punched the face of one of the adults, causing him to spit blood in a

sink." After observing this, an officer made immediate entry, announcing his presence multiple times trying to cease the altercation. *Brigham City*, 547 U.S. at 401. While the Court upheld the warrantless entry under the emergency aid doctrine, it is notable that Justice Stevens, in his concurrence, states that the U.S. Supreme Court should not have granted certiorari as the Utah Supreme Court "has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment." *Brigham City*, 547 U.S. at 408.

In *Fisher*, officers responded to a complaint of disturbance at or near Fisher's address. *Fisher*, 547 U.S. at 45. Upon arrival officers actively observed a household in "considerable chaos;" damage done to a truck, the home, and the property outside the home; blood on the pick-up, some clothes inside the truck, and an exterior door. *Fisher*, 547 U.S. at 45-46. Further, through a window, they observed Mr. Fisher throwing things and screaming inside the house. *Id.*

As opposed to *Brigham City* and *Fisher*, in the present matter officers arrived to find a quiet and empty home. There existed no active indicia of an individual facing imminent harm, in need of emergency aid, nor of a suicide in progress. The officers were responding to an unsubstantiated report of a potentially suicidal male from an ex-paramour (who repeatedly testified that she was tired of talking to Mr. Case and failed to understand his need for repeated communication after the cessation of their "hanging out"), metallic clicking, and what she thought was a pop.

After more than twenty minutes of searching the home from the exterior officers were able to observe the sum total of an empty holster, some empty beer cans, and a handwritten document on the coffee table. The antithesis of the active and tumultuous environments that required prompt action in *Fisher* and *Brigham City*.

Furthermore, as Justice Stevens notes in *Brigham City*, much like the citizens of Utah, Montanans enjoy a much greater protection of privacy in their homes, pursuant to the Montana Constitution and this Court's repeated holdings in various cases. *Ellis*, ¶22 (the Montana Constitution also affords its citizens additional privacy protections: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest,"); *State v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992) (Thus, Montanans enjoy a greater right to privacy exceeding even that provided by the federal constitution.); etc. As such the emergency aid doctrine should remain unadopted in Montana, as it was rejected by this court in *Saale*, ¶ 14 ("We likewise reject the District Court's conclusion that the prospect of Saale having sustained serious injuries justified the warrantless entry.")

However, even if this Court should adopt the Federal emergency aid doctrine, the officers' entry was still not excused as they did not make immediate, or even prompt, entry, but rather waited over 40 minutes so that they could obtain additional personnel, weapons, and equipment for their coordinated and thorough search of Mr.

Case's home. Likewise, the officers noted prior to entry that due to their delay, there was essentially no chance that Mr. Case would still be alive at the time of entry had he shot himself. As such, based upon the officers' admissions and the lack of objective exigent circumstances, the officers' entry would still be illegal under the emergency aid doctrine.

Additionally, none of the officers could articulate specific exigent circumstances in this case. The only stated basis for them to make entry was Mr. Case's failure to answer the door, which they all testified that he had no obligation to answer, the report of a "pop" heard by an ex-girlfriend over the phone, a notebook on a table, which the officers could not read, and an empty holster. While these may indicate that a person may have already committed suicide or intends to commit suicide, these observations do not confirm that there is a suicide in progress for which their assistance is immediately needed. Notably missing was any evidence of actual exigency, such as screaming, calls for help, a visible body on the floor, a pool of blood, etc.

Finally, in support of its holding, the district court stated that police are not required to run directly into a building without assessing the potential risks to officer safety and that it was therefore reasonable for them to spend over 40 minutes collecting additional intelligence about the interior of the residence, retrieving additional weapons from their vehicle, and returning to their police station to pick

up a ballistic shield that was immediately placed on the couch after making their entry. However, there is no "officer safety" exclusion to the law which permits officers to disregard all other laws.

As such, even should this Court adopt the emergency aid doctrine, the officers' entry would still not be excused as there is no "officer safety" exception to the requirement to make prompt entry that would permit them to delay entry for over 40 minutes, and while even admitting that there was little to no likelihood of Mr. Case's survival had he shot himself.

2. The U.S. Supreme Court has clearly held that the community caretaking doctrine does not permit police to make a warrantless entry into a residence, and as such, has impliedly overruled this Court's holding in *Estate of Frazier v. Miller*.

This Court first recognized the community caretaking doctrine in *State v. Lovegren*, 2002 MT 153, 310 Mont. 358, 51 P.3d 471, which involved a police officer stopping to check on a motorist who was parked on the side of the highway. In recognizing the community caretaking doctrine, this Court first looked to the U.S. Supreme Court opinion in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), and its definition of the community caretaking doctrine, *Lovegren*, ¶ 17.

While there was a brief mention of police-citizen contact in a home or office, this was merely made in comparison to the substantial contact a citizen could have in public with law enforcement while operating a vehicle. In contrast, although *Lovegren* only involved a stopped vehicle on a public highway, this Court adopted

a broadly worded test that did not appear limited to the vehicle/public highway situation. *Lovegren*, ¶ 25. However, in *Estate of Frazier v. Miller*, 2021 MT 85, 484 P.3d 912, this Court applied the community caretaking doctrine to excuse another warrantless entry by the ADLCPD that resulted in the death of another individual receiving a "welfare check" inside their residence.

While the facts in this case are significantly different those of *Estate of Frazier*, in that there were no signs of an immediate crisis or exigent circumstance in progress, nor did Mr. Case contact police and ask for their assistance, nor did he confront them at the entrance to his house while threatening suicide by cop, among other distinguishing facts, it simply does not matter as the following month the U.S. Supreme Court clearly held that community caretaking/welfare checks may not be performed in a personal residence without a warrant. *Caniglia*, 141 S. Ct. at 1599-1600.

In *Caniglia*, the petitioner had retrieved a gun from his bedroom during an argument with his wife, placed it on the dining room table, and asked his wife to shoot him and get it over with, 141 S. Ct. at 1598. The wife declined to shoot him and stayed the night at a hotel. *Id.* She called the police to request a welfare check the following morning after she was unable to reach her husband by phone. *Id.* Although petitioner confirmed his argument the previous night, he denied being suicidal. *Id.* Only after being promised that the police would not confiscate his

firearms did he agree to voluntarily go to the hospital for a psychological evaluation. *Id.* Once petitioner had left, the officers lied to the wife and seized petitioner's firearms. *Id.* After discussing the history of the community caretaking doctrine and its historical application to vehicles in public spaces, **the Court held that the community caretaking doctrine did not permit warrantless entries into personal residences**. *Id.* at 1599-1600. Further *Caniglia* held that there is no broad community caretaking exception at all, but most especially in the home. In Justice Alito's concurrence, he noted:

> "The Court holds—and I entirely agree—that there is no special Fourth Amendment rule for a broad category of cases involving "community caretaking."
>
> ***
>
> The Court's decision in *Cady v. Dombrowski*, 413 U. S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), did not recognize any such "freestanding" Fourth Amendment category. See ante, at 209 L. Ed. 2d, at 607, 608. The opinion merely used the phrase "community caretaking" in passing. 413 U. S., at 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706.

Id. at 1600.

As such, binding U.S. Supreme Court precedent does not allow warrantless home searches and seizures of individuals suffering alleged mental health crises under a community caretaking doctrine or Montana Code Annotated § 53-21-129. This of course makes sense, as the alternative leads to the absurd result of providing more constitutional protections to suspected criminals than law abiding citizens.

Finally, although Justice Kavanaugh notes in his concurrence that federal law concerning exigent circumstances permits entries without probable cause under the Federal emergency aid doctrine, *Caniglia*, at 1603-1604, as argued above in great length, Montana law requires probable cause and exigent circumstances for this exception. Likewise, Montana has not adopted the emergency aid doctrine. As such, the community caretaking doctrine provides no excuse for the officers' illegal home raid.

II. The State committed a Brady Violation by failing to disclose Sgt. Pasha had been shot at on June 19, 2021, approximately three months prior to the incident in the above-entitled case, as this evidence went directly to the essential element of whether Sgt. Pasha's apprehension of serious bodily injury was reasonable.

By failing to disclose that Sgt. Pasha had been shot at approximately three months prior to the incident in this case, the State knowingly withheld exculpatory evidence that was directly relevant to the issue of whether the officer's apprehension of serious bodily injury was reasonable.

The prosecution is required to give a defendant "all requested exculpatory information material either to the defendant's guilt or to punishment," which includes "all evidence significant for impeachment purposes." *Kills on Top v. State*, 273 Mont. 32, 41-42, 901 P.2d 1368 (1995). As such, a defendant's due process rights are violated when the State fails to disclose exculpatory evidence. *Ilk*, ¶ 28 (citing Brady *v. Maryland,* 373 U.S. 83, 87 (1963)). In order to "prove a due process

violation under Brady, a defendant must show: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *Ilk*, ¶ 28. Concerning the third element, the U.S. Supreme Court has stated that "[a] 'reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *U.S. v. Bagley*, 473 U.S., 667, 678 (1985). Finally, "the effect of the suppressed *Brady* material must be considered collectively rather than on an item-by-item basis." *Id.*

In *Kills on Top*, the defendant had argued in his post-conviction relief petition that his conviction and sentence should be overturned due to alleged *Brady* violations. 273 Mont. 32, 41-42, 901 P.2d 1368 (1995). Specifically, the defendant argued that he should have been provided with discovery concerning a co-defendant's alleged rape by a jailer while incarcerated, as well as with the co-defendant's criminal record as the co-defendant had accepted a plea offer and testified against defendant at his trial. *Kills on Top*, 273 Mont. at 42-43. After determining that the information should have been produced, this Court then discussed whether the defendant's conviction and sentence should be reversed. *Kills on Top*, 273 Mont. at 44-45. While this Court held that there was not a reasonable

probability that the sought after information would have changed the outcome of the conviction, as the co-defendant at issue was not the only witness to the crime, it also held that the results of the sentencing proceeding could have been different as the information directly related to defendant's contention that he had been manipulated by the co-defendant, which was a mitigating factor in sentencing. *Id.*

In *Gonzales v. Wong*, the defendant had been convicted of first-degree murder and received a death sentence after a finding of the special circumstance of killing a law enforcement officer engaged in the lawful pursuit of his duties and had brought a Federal post-conviction relief petition after his failed state petition. 667 F.3d 965, 971 (9th Cir. 2011). As an initial matter, the court noted that it "may only consider the record that was before the state court when it adjudicated the claim." *Gonzales*, 667 F.3d at 972. In evaluating the claims made to the California Supreme Court in his state post-conviction relief petition, the court noted that the defendant had argued that the prosecutor had failed to produce exculpatory material. *Id.* Specifically, during discovery in the Federal action, the state finally produced over six psychological reports concerning the State's main witness, William Acker, against the defendant which indicated that he "had a severe personality disorder, was mentally unstable, possibly schizophrenic, and had repeatedly lied and faked attempting suicide in order to obtain transfers to other facilities." *Gonzales*, 667 F.3d at 976. While the court concluded that the matter must be sent back to the state court

to be fully adjudicated, it went on to discuss the withheld materials and why it concluded that the defendant had "a colorable or potentially meritorious *Brady* claim such that a reasonable state court could find a *Brady* violation. *Gonzales*, 667 F.3d at 980.

The *Gonzalez* court first noted that there was a colorable argument that the psychological reports could have been used to challenge Acker's credibility. *Gonzales*, 667 F.3d at 981. Next, the court noted that "*Brady* does not require a showing that the state willfully or intentionally suppressed the evidence; even inadvertent suppression will satisfy this prong of the test." *Id.* While it noted that the reports at issue were in the prosecutor's possession prior to trial, this did not matter as "a prosecutor has a duty under *Brady* to 'learn of any exculpatory evidence known to others acting on the government's behalf." *Gonzales*, 667 F.3d at 981-982 (quoting *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997)). Finally, in discussing the materiality of the withheld evidence, the court noted that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Gonzales*, 667 F.3d at 981-982.

In reaching the conclusion that a reasonable state court could conclude that there was a reasonable probability of a different result had the withheld information

been available to the defense and presented to the juries, the court undertook a two-step inquiry. *Gonzales*, 667 F.3d at 982. First the court asked, "whether a reasonable state court could conclude that there was a reasonable probability that the new evidence would have changed the way in which the jurors viewed Acker's testimony." *Id.* Next, the court asked, "whether a reasonable state court could conclude that there was a reasonable probability that this change would have resulted in a different verdict during either or both phases." *Id.*

Concerning the juror's view of Acker, the court noted that "[t]here is a colorable argument that a factfinder would have found the information about Acker contained in these reports disturbing, and that it would have been difficult for anyone, let alone a reasonable factfinder, to trust the witness described in these reports." *Id.* While the state argued that the defendant was adequately able to impeach Acker at trial and therefore the new evidence was merely cumulative, the court noted that "withheld impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. *Id.* Where the withheld evidence opens new avenues for impeachment, it can be argued that it is still material." *Gonzales*, 667 F.3d at 984. Finally, the court noted that the defendant had:

> a colorable argument that the jury believed Acker despite the impeachment evidence presented to them. This argument could rest in part on the fact that Acker was an important witness for the government, especially during the penalty phase, and that '[i]n cases in which the

> witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility.'"

Gonzales, 667 F.3d at 985 (quoting *Benn v. Lambert*, 283 F.3d 1040, 1055, (9th Cir. 2002)).

The court then considered whether the new evidence would have led to a different outcome at either the guilt or penalty phase. *Gonzales*, 667 F.3d at 986. In concluding that a reasonable state court could conclude that further impeachment of Acker could have resulted in a different outcome, the court stated that "[w]hile there was other circumstantial evidence, Acker's testimony was the only direct evidence establishing that Gonzales had a premeditated plan to kill a police officer." *Gonzales*, 667 F.3d at 986. Ultimately, the court remanded the matter to the district court to stay proceedings pending review by the California Supreme Court, as it concluded that the defendant could make a potentially meritorious *Brady* claim. *Id.*

Here, the fact that Sergeant Pasha was shot at for the first time in his career on June 19, 2021, which by his own testimony in that matter made him rethink his career in law enforcement (a comment identical to one he made in the present case) is not only favorable to the defense, but it is also clear that the State had this suppressed favorable evidence as the same county attorney tried both cases. Further, this new information raises a reasonable probability that the outcome of the

proceedings would have been different had Sergeant Pasha's prior incident been disclosed as his mental state was an essential element of the alleged crime.

As noted above, Mr. Case was charged with assault on a peace officer, in violation of Montana Code Annotated § 45-5-210, which provides in relevant part: "[a] person commits the offense of assault on a peace officer or judicial officer if the person purposely or knowingly causes: …(b) reasonable apprehension of serious bodily injury in a peace officer or judicial officer by use of: (i) a weapon; or (ii) what reasonably appears to be a weapon." (emphasis added.) As such, any evidence that showed that the officer may not be responding reasonably due to past traumatic events is certainly favorable to the defendant as it goes to the essential element of the charged crime: whether Sergeant Pasha's apprehension of serious bodily injury was reasonable. Such evidence clearly concerns and could affect Sergeant Pasha's mental state and perceptions the night that Mr. Case allegedly caused Sergeant Pasha apprehension of serious bodily harm, as well as could affect his credibility in front of the jury.

The second element is likewise easily met in this matter, as both cases had the same prosecutor. As such, it would be disingenuous for the State to argue that it didn't suppress this information.

Finally, the undisclosed evidence would have called into question whether Sgt. Pasha was even fit for duty on the night in question in the present case and

would have explained his unreasonably heightened levels of fear and anxiety when responding to a welfare check. Further, the knowledge that Sgt. Pasha had been shot at and his methods, or lack thereof, of dealing with such traumatic event in the three months between the incidents definitely would have impacted the Jury's view of Sgt. Pasha and his credibility about the apprehension he allegedly felt. Further the impact of such knowledge would have called into further question the stark contrast in the difference between Sgt. Pasha's statements at the scene and in the court room over a year later, as well as, whether Sgt. Pasha had unresolved PTSD or similar trauma difficulties that led to him shoot a target before fully identifying it and crafting a narrative after having watched his BWC footage before giving his statement. Further, it would have contrasted the difference in the method of DCI's investigation in the present case, and whether officers were interviewed cold or after having watched their BWC footage, which by the State's own expert is not the standard operating procedure in Montana. The State's failure to disclose such evidence absolutely undermines the outcome of the trial.

Second, being that Sgt. Pasha was the alleged victim in this case, his recent trauma of being shot at months prior would have undoubtedly put the whole case into such a different light as to undermine the confidence in the verdict. As in *Gonzales*, Sergeant Pasha was the main and only witness to the alleged crime, other than Mr. Case, and the evidence directly related to his mental state at the time of the

alleged crime. This is the opposite of the situation in *Kills on Top*, where there were several other witnesses of the alleged crime. While Sergeant Pasha was impeached concerning his conflicting statements made on different occasions under oath, this did not touch on the issue of his mental health and the reasonableness of his alleged apprehension. As such, this new information is not cumulative, but rather opens new avenues for impeachment of the witness.

Finally, the undisclosed evidence must be taken as a whole and not piecemeal. It is without doubt that Sgt. Pasha's traumatic experience on June 19, 2021, whether he sought any counseling or therapy afterwards; whether he was placed on any type of leave following the incident of June 19, 2021; whether he was experiencing PTSD or anxiety as a result of the June incident; whether he was fit for duty the night of September 26, 2021; his comments at the scene and in his interview with DCI following the June incident; and his propensity for unreasonable fear after the incident, when taken as a whole would alter the light of the present case and any confidence in the present verdict. As such, the State violated its *Brady* obligations in failing to disclose Sgt. Pasha's recent near-death experience.

III. Assault on a peace officer objectively requires mor than the mere possession of a weapon or what reasonably appears to be a weapon, and requires some tangible or articulable use of the weapon.

The Montana Supreme Court has held that an officer does not need to observe a weapon to experience reasonable apprehension of bodily harm by the use of it. In

State v. Kirn, 2012 MT 69, 364 Mont. 356, 274 P.3d 746, Officers were responding to a noise complaint, and contacted Defendant. Defendant disengaged from the interaction with officers, retreated to a back room, the officers discussed that they suspected he was retrieving a weapon, and Defendant then came back and assumed a bladed stance obscuring the weapon from the officers' view. *Id.* (*See also State v. Steele*, 2004 MT 275, 323 Mont. 204, 99 P.3d 210; *State v. Hagberg*, 277 Mont. 33, 920 P.2d 86, 90 (1996); *State v. Misner*, 234 Mont. 215, 763 P.2d 23, 25 (1988).

There exists a significant difference between all the above referenced cases and the present case. Mr. Case had not been accused of any crime prior to his interaction with Sgt. Pasha and there were no other indicia that Mr. Case was in the possession of a weapon that he may use to harm Sgt. Pasha prior to the shooting. Further, there was no interaction between Mr. Case and Sgt. Pasha, other than Mr. Case opening the curtain to come out, before being shot. In all the cases cited above, the officers were responding to a report of suspected criminal activity and had a significant prior interaction with the defendants that would lead the officers to believe the defendants were armed despite not seeing the weapons. Mr. Case was home alone and actively avoiding contact with law enforcement who were conducting welfare check. Sgt. Pasha shot Mr. Case, admittedly without seeing the gun in question or having any knowledge of its presence until well after Mr. Case was bleeding on the floor. Sgt. Pasha repeatedly and exclusively testified that he saw

what he thought was a dark colored object between the curtain and Mr. Case's shirt, which admittedly could have merely been a shadow.

CONCLUSION

Mr. Case's conviction and sentence should be overturned as it was based solely upon illegally seized evidence collected during a warrantless home search and seizure of Mr. Case, and there were no valid exceptions to the warrant requirement that excused their entry. Likewise, the State's decision to knowingly withhold exculpatory *Brady* evidence is not surprising, but still requires the reversal of both Mr. Case's conviction and sentence as the evidence goes directly to the issue of guilt as the suppressed evidence, if presented to the jury, would have allowed Mr. Case to demonstrate the unreasonableness of Sergeant Pasha's alleged apprehension of serious bodily injury, as well as open new avenues for impeachment of this officer. As such, Mr. Case's conviction and sentence should be overturned due to these serious constitutional violations.

//

//

//

//

//

Respectfully submitted this 12th day of May, 2023.

ELLIS LAW, PLLC

/s/ Nathan D. Ellis
Nathan D. Ellis
Attorney for Defendant and Appellant

HULL SWINGLEY & BETCHIE, P.C.

/s/ Christopher R. Betchie
Christopher R. Betchie
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted, indented material; and the word count calculated by Microsoft Word is 9,838, excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendices.

DATED this 12th day of May, 2023.

/s/ Nathan D. Ellis
Nathan D. Ellis
Attorney for Defendant and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2023, I caused a true and accurate copy of the foregoing **OPENING BRIEF** to be electronically served to:

Austin Miles Knudsen
Montana Attorney General
215 North Sanders
Helena, Montana 59620

Ben Krakowka
Deer Lodge County Attorney
800 Main Street
Anaconda, Montana 59711

/s/ Nathan D. Ellis
Nathan D. Ellis
Attorney for Defendant and Appellant

APPENDIX

CERTIFICATE OF SERVICE

I, Nathan Daniel Ellis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-12-2023:

Christopher R. Betchie (Attorney)
PO Box 534
Helena MT 59624
Representing: William Trevor Case
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Ben Krakowka (Govt Attorney)
Office of the County Attorney
800 Main
Anaconda MT 59711
Representing: State of Montana
Service Method: eService

Electronically Signed By: Nathan Daniel Ellis
Dated: 05-12-2023