IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0280

STATE OF MONTANA,

Plaintiff and Appellee,

v.

VAUGHN JAMES,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twentieth District Court,
Lake County, The Honorable Deborah Kim Christopher, Presiding

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Appellant replies to the State's contention it did not (1) violate James' right against double jeopardy, (2) discriminate by eliminating Indian jurors, or (3) prejudice James by withholding exculpatory evidence. The State's response underscores a fundamental misunderstanding of Tribal sovereignty and Indian law that contaminated James' prosecution. In a revealing comment, the District Court succinctly framed the threshold jurisdictional issue: "But the circumstances of this event become very unique to a reservation, but unfortunately, they're unique to a reservation." (Trial Tr. (Tr.) at 219.)

James is a member of the Confederated Salish and Kootenai Tribe of the Flathead Nation (CSKT or Tribe), his conduct occurred on the Flathead Reservation (the Reservation), and he was arrested by a non-tribal officer who immediately contacted a Tribal officer to relinquish custody. The Tribal Court adjudicated James' June 28, 2007 conduct and punished him under Tribal law. As a matter of comity, this Court accords tribal court judgments with the same deference as those of foreign sovereigns. *State v. Spotted Eagle*, 2003 MT 172, ¶ 30, 316 Mont. 370, 71 P.3d 1239. Here, the Tribal Court's judgment was not accorded the required comity or deference.

The State subsequently prosecuted James for the same June 28, 2007 conduct adjudicated by the Tribe. In a county with 23% Indians, the State used peremptory challenges to convict James before a jury purged of Indian

participation. (http://quickfacts.census.gov/qfd/states/30/30047.html (12/22/2009).) (App. A.) After trial, James learned the State withheld an exculpatory photograph of his alleged PFMA victim.

I. THE DISTRICT COURT ERRED AND ALLOWED JAMES TO BE SUBJECTED TO DOUBLE JEOPARDY.

A. The State and District Court Lacked Subject Matter Jurisdiction (Contrary to State's Introduction Assertion Regarding Jurisdiction of Any State or Federal Court).

Jurisdictional issues are at the heart of every double jeopardy claim. Tribal/State jurisdiction infused these proceedings. The State failed to recognize its prosecutorial authority over an Indian's conduct within the Flathead Nation has been proscribed by a State/Tribal cooperative agreement signed by Montana's Attorney General, and failed to so inform the District Court.

Indian tribes retain an inherent sovereignty, subject to limited federal jurisdiction over certain major crimes. *Spotted Eagle*, ¶ 23, *citing United States v. Wheeler*, 435 U.S. 313, 322 (1978); *Glover v. United States*, 219 F.Supp 19, 20 (D.Mont. 1963). States generally cannot prosecute an offense on a reservation involving an Indian defendant or victim. *State v. LaPier*, 242 Mont. 335, 340, 790 P.2d 983, 986 (1990) (citation omitted).

A court must have subject matter jurisdiction before it acts. *State v. Evert*, 2004 MT 178, ¶ 13, 322 Mont. 105, 93 P.3d 1254. "Lack of subject matter jurisdiction cannot be waived"; it "may be raised at any stage of a judicial

proceeding by a party or *sua sponte* by the court." *Evert*, ¶ 13; Mont.R.Civ.P 12(h)(3). Jurisdiction is defined by law, and cannot be conferred by consent of the parties or the court. *Evert*, ¶ 14. A court's duty is to *sua sponte* examine and determine its jurisdiction, whether raised by a party or not. "It is elementary that the first question which must be determined by a court in every case is that of jurisdiction." *Endresse v. Van Vleet*, 118 Mont. 533, 539, 169 P.2d 719, 720 (1946). The District Court misapprehended the Reservation's "unique circumstances."

Public Law 280 gave tribes located in Montana an option to consent to State jurisdiction over certain crimes. Such tribal consent remains subject to withdrawal. Mont. Code Ann. § 18-11-108; *State v. Haskins*, 269 Mont. 202, 210, 887 P.2d 1189, 1194 (1994); *United States v. Lawrence*, 595 F2d 1149, 1151 (9th Cir. 1979). CSKT lawfully withdrew its consent to the State's unlimited criminal jurisdiction. In 1993, CSKT voluntarily entered into a cooperative law enforcement agreement, known as the Retrocession Agreement.[1]

[1] The Retrocession Agreement was executed under the State-Tribal Cooperative Agreements Act to promote cooperation with a "sovereign tribal government." Mont. Code Ann. § 18-11-101(2). With the Montana Attorney General's approval, the State and Lake County renewed the Retrocession Agreement in 2007 and it has been codified in CSKT law. (§ 18-11-105; Apps. B-D.) The procedure for activating the State's criminal jurisdiction over Indians is defined in the four corners of the Retrocession Agreement. §§ 18-11-103(3) and -104(2)(d).

Here, the Retrocession Agreement was followed by Sergeant Duryee of the Lake County Sheriff's Office (LCSO), but not the State or the District Court.

Duryee arrested James on the Reservation, but did not cite him after identifying him as an Indian, because "then it's customary for someone from Tribal Law and Order to become involved in the case." (Tr. at 290.) Duryee followed the Retrocession Agreement's procedure and relinquished James to Tribal jurisdiction. (Apps. B-D, § I(B)(1)-(C)(1).) The Tribe exercised its sovereign prosecutorial discretion and charged James' June 28, 2007 conduct under CSKT law.

The Retrocession Agreement provides the Tribe and State with concurrent felony jurisdiction. (Apps. B-D, § II(B)). Procedurally, once the Tribe charges an Indian, the Tribal prosecutor is vested with the authority to seek a felony upgrade, if warranted, by contacting the county attorney. (Apps. B-D, § II(C)(2).) There is no evidence the Tribal prosecutor requested a felony upgrade from the State. The State lacked jurisdiction to charge James with felony criminal endangerment absent the Tribal prosecutor's request. (App. B-D, §II(C)(2).)

Although the District Court first raised "unique circumstances" on the reservation, it failed to examine its fundamental jurisdictional authority over an Indian's alleged crime on the Reservation, failed to determine whether the State followed the Retrocession Agreement's cooperative procedure, and failed to follow Montana's well-settled judicial precedent of according Tribal adjudications with

comity and deference extended to a foreign sovereign. *Spotted Eagle*, ¶ 30. The District Court lacked subject matter jurisdiction. The criminal endangerment charge must be dismissed.

B. The District Court Stripped James of Montana's Broad Statutory Protection Against Double Jeopardy.

The State conceded James met the first two prongs of the three-prong double jeopardy test in *State v. Tadewaldt*, 277 Mont. 261, 268, 922 P.2d 463, 467 (1996). The third prong analyzes whether the State's prosecution was based on an offense arising out of the same transaction. (Appellee's Br. at 21.)

The District Court erred at the third-prong by focusing on the difference in the elements of the charges (*Blockburger* rule), which is inapplicableto the "same transaction" analysis under Montana law. *Tadewaldt,* 277 Mont. at 269, 922 P.2d at 467, *citing State v. Sword*, 229 Mont. 370, 375, 747 P.2d 206, 209 (1987); *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Blockburger* was not mentioned by name, but James' motion was denied on the grounds the State had to prove an element not necessarily at issue in the Tribe's charge (substantial risk of death or serious bodily injury):

> the tribal charge of FLEEING FROM OR ELUDING A POLICE OFFICER does not necessarily create a substantial risk of death or serious bodily injury to another necessary for the State charge of CRIMINAL ENDANGERMENT.

(D.C.Doc. 20.)

The District Court's narrow *Blockburger* analysis denied James the broad statutory protection against double jeopardy afforded under Mont. Code Ann. § 46-11-504(1). *Tadewaldt*, 277 Mont. at 268, 922 P.2d at 467.

C. James' June 28, 2007 Conduct Gave Rise to Both Prosecutions and Arose From the Same Transaction (Contrary to State's Assertion James Had Two Criminal Objectives: Thwarting Orderly Public Administration and Creating a Hazard).

"Offenses arise from the same transaction when 'a defendant's underlying conduct of each prosecution is motivated by a purpose to accomplish the same criminal objective.'" *State v. Cech*, 2007 MT 184, ¶ 19, 338 Mont. 330, 167 P.3d 389 (citations omitted.) James' facts are similar to *Neufeld*, *Sword*, and *Cech*, where offenses arose from the same transaction and barred subsequent prosecution.

Where charging documents reference the same time and same conduct, offenses arose from the same transaction. *State v. Neufeld*, 2009 MT 235, ¶¶ 19, 21, 351 Mont. 389, 212 P.3d 1063. Here, Tribal and State charging documents reference the same time (June 28, 2007; 10:20 p.m.), same conduct (speeding up to 100 mph, improper passing in no passing zones), and same place (Highway 35). (D.C.Doc. 20 at Ex. A; D.C.Doc. 2.) The same witness (Duryee) observed James' conduct. Duryee informed the Tribe and testified for the State that on June 28, 2007, at 10:20 p.m., James pulled away from Duryee, sped up to 100 mph and passed in no passing zones on Highway 35 between milemarkers (MM) 15 and 11.

(Tr. at 167-68, 227, 229, 233, 275-76.) Like *Neufeld*, both of James' charging documents reference the same time and same conduct.

False statements on a trophy license application "were motivated and necessary or at least incidental to the accomplishment of the criminal objective of possessing, carrying, and transporting of a grizzly bear taken unlawfully." *Sword*, 229 Mont. at 374, 747 P.2d at 209. Similarly, if James created a substantial risk of death or serious bodily injury, it was motivated or at least incidental to accomplishing his criminal objective of eluding Duryee by speeding and passing improperly between MM15 and 11 on Highway 35.

Where the underlying conduct of stealing a vehicle was the basis for charges in two jurisdictions, offenses arose from the same transaction. *Cech*, ¶¶ 22-23. Similarly, James' underlying conduct of speeding and making improper passes was the basis for charges in two jurisdictions. Like *Cech*, the State could not charge James with criminal endangerment absent his underlying speeding and improper passing conduct.

Conversely, James' facts are not similar to *Tadewaldt* and *Gazda* where double jeopardy was not found because distinct conduct was charged in separate prosecutions. In *Tadewaldt*, driving under the influence was completed and unrelated to drugs later found in the defendant's possession. *Tadewaldt*, 277 Mont. at 266, 922 P.2d at 466. In *Gazda*, a felon's gun possession occurred prior to and

was distinct from causing a death. *State v. Gazda*, 2003 MT 350, ¶ 17, 318 Mont. 516, 82 P.3d 20. Unlike *Tadewaldt* or *Gazda*, the State did not allege discrete conduct or a discrete incident. The State belatedly attempts on appeal to claim James was speeding "before Sergeant Duryee entered the picture." (Appellee Br. at 25.) No discrete conduct or incident was alleged in the Information or Amended Information. (App. E.) The State cannot expand its reach post-trial.

The State invalidly asserts James' analysis means he could not be charged if there had been a death or injury. (Appellee Br. at 25-26.) This response underscores the State's misunderstanding of the cooperative Retrocession Agreement. If it had been clear to Duryee that James' conduct warranted a felony, Duryee would not have transferred custody to the Tribe. (Apps. B-D, § I(B)(1).) If James was in Tribal custody when evidence of a death or injury became known, the Tribal prosecutor would function like other prosecutors who make charging decisions based on evidence. In the event of a death or injury, the Tribal prosecutor could seek a felony upgrade. (Apps. B-D, § II(C)(2).)

Finally, State and Tribal prosecutors are required to meet, exchange information, and cooperate to ensure each is prosecuting cases appropriate for their respective jurisdictions in good faith. (Apps. B-D, §§ I(H), II(F).) The State did not raise concerns with the Tribe before charging James.

The State obtusely asserts James was prosecuted once for thwarting orderly public administration and once for creating a hazard. (Appellee's Br. at 26.) James was clearly prosecuted and punished twice for offenses arising from the same transaction based on underlying conduct (speeding/improper passing on Highway 35) motivated by his sole criminal objective to elude police. Any alleged criminal endangerment was at least incidental to James' criminal objective of eluding Duryee. The State alleged no discrete conduct or incident beyond the speeding and improper passing. (App. E.) The State's subsequent prosecution is based on the same transaction and underlying June 28, 2007 conduct adjudicated by the Tribe.

The State's charge, based on conduct already addressed by a tribal court of competent jurisdiction, violated James' broad statutory right to be free from double jeopardy. Mont. Code Ann. § 46-11-504(1). The District Court erred in finding otherwise.

The criminal endangerment charge must be dismissed.

II. THE DISTRICT COURT ERRED WHEN IT DENIED JAMES' *BATSON* CHALLENGE AND ALLOWED THE STATE TO PURGE INDIANS FROM THE JURY.

James alternatively argued trial counsel was ineffective for failing to make a timely *Batson* challenge. (Appellant's Br. at 31.) The State has not claimed the

Batson challenge was untimely, nor does the record contain support for such a finding.

A. The District Court Failed to Fully Develop the *Batson* Record for Review (Contrary to the State's Assertion James Did Not Sufficiently Rebut the State's Race-Neutral Explanations).

The United States Supreme Court recognized peremptory challenges permit "those to discriminate who are of a mind to discriminate." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (citation omitted). This Court has repeatedly warned it may be fatal for a trial court to rely on a transcript deeming the State's *Batson* explanations credible. *State v. Parrish*, 2005 MT 112, ¶ 19, 327 Mont. 88, 111 P.3d 671, *citing State v. Ford*, 2001 Mont. 230, ¶ 18, 306 Mont. 517, 39 P.3d 108. Recently, this Court admonished trial courts to "provide more detailed reasoning" and "to follow the procedural mandate of *Ford* and *Parrish* to build a record and provide a full explanation" for a *Batson* denial. *State v. Barnaby*, 2006 MT 203, ¶ 55, 333 Mont. 220, 142 P.3d 809 (citations omitted). Here, the District Court failed to build a record or provide a full explanation. Numerous errors are fatal to the *Batson* denial.

The District Court allowed a *Batson* challenge to be raised and discussed in an unrecorded sidebar. (Appellee's Br. at 28, n. 4). Argument was heard later in chambers, but the District Court required no sworn testimony or evidence from the State. *Barnaby*, ¶ 53 (State's *voir dire* notes admitted to support race-neutral

explanations). The District Court entered no findings of fact on the sufficiency of the State's explanations, *sua sponte* added its own personal viewpoint to supplement the State's explanation for striking Indians, and relied upon "shared concerns" to deny James' *Batson* challenge. (Tr. at 149.) The District Court failed to address James' rebuttal that the State's explanation actually confirmed Durglo was stricken due to his Indian race and ethnicity. (Tr. at 147-51.)

Later in the day, the District Court *sua sponte* supplemented its earlier *Batson* denial with a discussion of non-Indian Johnson's time constraints. Contrary to the State's contention that the District Court's discussion of Johnson supports its *Batson* denial, the "Johnson delayed supplement" is not relevant and should not be included in this Court's appellate review. (Appellee's Br. at 32.) First, the State did not mention Johnson when it explained its reasons for striking Indians. Johnson's *voir dire* had no bearing on the State's record-based reasons for striking Durglo and Rogers. Second, the District Court did not mention Johnson as a factor when it denied James' *Batson* challenge. Third, the District Court did not think of Johnson until later, after ruling, and after checking the record before belatedly adding Johnson as support. (Tr. at 159.)

Finally, in this supplemental Johnson rationale, the District Court erroneously determined "the State challenged all of the people who represented on the record that they really didn't want to be present." (Tr. at 160.) The State's

reasons did not include the rationale it had stricken all jurors who did not want to serve. The State struck Durglo because it "was uncomfortable with, with the discussion that happened about the jurisdictional issue with Tribal court," and struck Rogers because she was a student and "was concerned that her mind wasn't going to be focused on the trial." (Tr. at 147.) The record does not support a finding Indians Durglo and Rogers were unwilling to serve in the same manner as non-Indian Johnson, who unequivocally stated he did not want to be there. (Tr. at 136.)

This Court has held "[i]t is not a district court's role to rehabilitate" a juror's spontaneous responses on *voir dire*. *State v. Falls Down*, 2003 MT 300, ¶ 23, 318 Mont. 219, 79 P.3d 797. It follows it cannot be the District Court's role to belatedly rehabilitate and supplement the State's race-neutral explanations for a prima facie case of Indian discrimination in juror selection. The District Court erred in doing so.

B. The State Failed to Show Permissible Racially Neutral Reasons for Striking Indian Jurors Durglo and Rogers.

James' *Batson* challenge appeal is not limited to Juror Rogers as alleged by the State. (Tr. at 147; Appellee's Br. at 12, n. 2.) At trial, the State explained its strikes against Durglo and Rogers, and the District Court addressed both strikes. (Tr. at 146-51.)

It is well known prejudices "often exist against particular classes in the community, which sway the judgment of jurors" and may operate to deny persons of those classes the full protection enjoyed by others. *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005). "[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality.'" *Miller-El*, 545 U.S. at 238 (citation omitted). The State must show "permissible racially neutral selection criteria and procedures" produced the monochromatic, non-Indian jury in James' case. *Batson*, 476 U.S. at 94.

Contrary to the State's assertion, "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for striking jurors of a certain race. *Miller-El*, 545 U.S. at 252. There is a "practical difficulty of ferreting out discrimination" in peremptory challenges. *Miller-El*, 545 U.S. at 238. The United States Supreme Court has recognized that proof of discriminatory impact may sufficiently support a discriminatory purpose "because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Batson*, 476 U.S. at 93 (citation omitted). "An invidious discriminatory purpose may often be inferred from the totality of relevant facts," including whether the peremptory strike classification bears more heavily on one race. *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (citation omitted).

The State's invidious discriminatory purpose to eliminate Indian jurors is evident in a review of the totality of relevant facts in the *voir dire* chronology and does not comport with its proffered race-neutral explanations. "Native" issues were raised early through Juror Hill, who is not subject to James' *Batson* challenge, but the State's treatment of her is relevant. At the inception of the State's voir dire, Hill said it would be hard to be a juror, "[e]specially in a native community." (Tr. at 23.) The State immediately challenged Hill, and renewed its challenge when she stated she was a Tribal health representative. (Tr. at 25.) The State's action toward Hill demonstrates its early concern over "Native" issues and informs this Court's totality of relevant facts review.

1. The State Was Initially "Looking For" a Juror Like Durglo, Then Used a Peremptory Strike After He Disclosed His Indian Heritage.

Durglo disclosed his nephew works for LCSO, but stated it would not sway his view of law enforcement testimony. Initially, the State was satisfied with Durglo: "That's what we're looking for." (Tr. at 32-33.)

Later, Durglo identified himself as an Indian. Rogers also identified herself as "descendant Salish and Choctaw enrolled." No others identified as Indians. (Tr. at 126-27.)

Durglo disclosed his understanding of Tribal Court proceedings. The District Court stated "I think we can give you more specific jury instructions with

regard to how to understand the law," and gave "the quickest lesson in jurisdiction that I've given in a while." (Tr. at 130-31.) Durglo then agreed he could listen to the evidence, be fair to both sides, and make a fair decision. (Tr. at 132.) Durglo had no fixed opinions he would be unable to lay aside; he could reach a verdict based solely on evidence presented. Durglo was qualified to serve on James' jury. *Falls Down*, ¶ 23. Initially, the State was "looking for" a juror like Durglo, even with his family tie to LCSO. *Falls Down*, ¶ 23. The State's favorable view changed after it learned of Durglo's Indian heritage and his knowledge of tribal legal custom.

The drastic change in the State's attitude was due to Durglo's Indian ethnicity and culture, an argument made by James. (Tr. at 147-48.) That the District Court shared the State's concern over Durglo does not alter the invidious discriminatory intent found in a dissection of the "about-face" regarding Durglo's acceptability. The District Court told Durglo there would be a specific jury instruction on the law. (Tr. at 130.) The Court *sua sponte* drafted Jury Instruction No. 7, and gave it over James' objection "with regard to this issue about how the jury is supposed to deal with the circumstances out of Tribal Court." (App. F; Tr. at 307, 326-29). The District Court stated striking Durglo was the only way to remove the Tribal issue from the jury's discussion. (Tr. at 149-150.)

Similar to the comparative analysis discussed in *Turner*, the District Court failed to consider or explain why Jury Instruction No. 7 was sufficient to instruct non-Indian jurors, but insufficient to instruct Indian Durglo. *Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997). The District Court failed to use *Turner*'s well-established, comparative analysis tool at *Batson*'s third step to fully develop the record and explore the possibility the State's facially race-neutral reasons were a pretext for discriminating against Durglo. *Miller-El*, 545 U.S. at 241.

Based on the totality of relevant facts, this Court must reverse the *Batson* ruling related to Juror Durglo.

2. The State Applied Different "Time Constraints" Standards to Non-Indian Mackey and Indian Rogers (Contrary to State's Assertion Mackey Was Willing to Serve and Rogers Was Not).

The pretextual nature of the State's time constraints standard is apparent in its disparate application between non-Indian Juror Mackey and Indian Juror Rogers. Mackey said he had a career class the following week, and stated "I should be doing homework on it right now actually . . . ." (Tr. at 71.) The State was clear it could not guarantee the trial would be over before Monday. Mackey was equally clear: "I'm not coming Monday." (Tr. at 72.) Contrary to the State's assertion that Mackey was "on board" and willing to serve, Mackey was unwilling to serve past Friday. Mackey's "on board" comment was based on 99% assurance

the trial would not extend into the following week. "I would be pretty upset if it rolls over to [Monday]." (Tr. at 133-34.)

Indian Rogers said she was missing classes and mid-terms for professional development, and explained "I will stay here and I will do my job. I will do my duty." (Tr. at 135, emphasis added.) Rogers understood her obligation to serve. She was willing and able to do so without specialized time parameters. Mont. Code Ann. § 3-15-301. Rogers was peremptorily stricken by the State, allegedly due to a race-neutral concern over time constraints. The State's explanation for striking Rogers was pretextual and prohibited purposeful discrimination.

In stark contrast to Rogers, Mackey was clear he would disregard his statutory duty under Mont. Code Ann. § 3-15-301. Non-Indian Mackey was not only allowed to serve, the District Court made special arrangements to facilitate his service. Without a request from the State, the District Court *sua sponte* ordered an alternate chosen to serve in the event Mackey became unavailable. (Tr. at 150.) Such special treatment was accorded no other juror. Notably, had the District Court taken additional time to fully develop the *Batson* record for review, James' trial could have gone into Monday, and Mackey's time constraints could have precluded his service.

The State's invidious discriminatory intent is found in a comparative analysis of non-Indian Mackey and Indian Rogers, and its "pretextual significance

does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Like *Miller-El*, "the whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking [Rogers] in an implausible light." *Miller-El*, 545 U.S. at 252. The District Court's denial of James' *Batson* challenge related to Indian Rogers must be reversed.

III. THE DISTRICT COURT ERRED BY DENYING JAMES A NEW TRIAL BASED ON THE STATE'S *BRADY* VIOLATION.

The District Court erred by denying James' motion for a new trial. Although neither the District Court or James had seen the exculpatory photograph withheld by the State, the District Court denied James' request for an evidentiary hearing. (1/22/09 Tr. at 2-4.)

A. <u>There is No Evidence to Support the District Court's "Reasonable Diligence" Finding: James was Prohibited from Contacting Shaw</u>.

The District Court erred in finding James could obtain the exculpatory photograph with reasonable diligence due to his relationship with Shaw. The State did not respond to James' assertion that even if he had known of Shaw's booking photograph, it is confidential criminal justice information (CCJI) that could not be obtained through an independent source with reasonable diligence. (Appellant's Br. at 38-39, *citing* Mont. Code Ann. §§ 44-5-103(3)(c) and -303(1)). Thus, the State has conceded James could not obtain Shaw's CCJI.

Additionally, as a condition of his release on the PFMA charge, James was prohibited from any unwanted direct or indirect contact with his alleged victim. (App. G.) Shaw did not testify at James' trial. There is no testimony regarding contact between them after June 28, 2007. Absent a hearing, no evidence was admitted to support the District Court's finding that with reasonable diligence, James could have learned of the booking photograph from Shaw.

The District Court erred in finding James could have obtained the exculpatory photograph with reasonable diligence.

B. The Evidence Does Not Support the District Court's "Cumulative Evidence" Finding: The State Told the Jury to Infer Bodily Injury Based on Testimony Shaw Had a Red Mark on Her Face.

The District Court correctly determined the photograph withheld by the State is material to James' defense but erred that it was an uncontested issue. (D.C. Doc. 94, Concls. Law 3.) Absent the evidentiary hearing requested by James, the District Court misapprehended there was no testimony regarding visible physical injuries to Shaw and erred in finding the exculpatory photograph was cumulative evidence. (1/22/09 Tr. at 2, 6; D.C. Doc. 94, Find. Fact 11) The State contributed to the error by failing to correct that "the State, through its witnesses, never claimed that Shaw had physical signs of injuries." (Appellee's Br. at 36.)

In fact, the record shows four instances where the State raised physical signs of injuries. First, Reedstrom testified that he saw a red mark on Shaw's face after

James allegedly "knocked her to the ground" ("her face, you know, seemed red and stuff."). (Tr. at 179.)

Second, the State relied on Reedstrom's "red mark" testimony when it opposed James' directed verdict motion ("One of those witnesses testified that when he approached the woman he observed a red mark on her face. Granted, she hasn't testified. But I think the jury can infer from those facts that there was bodily injury in this case."). (Tr. at 297.)

Third, the District Court relied on the State's "red mark/bodily injury" inference to deny James' directed verdict motion. (Tr. at 298.)

Finally, the State emphasized "red mark" in closing argument ("[Reedstrom] testified that when he got to Tracy Shaw, seeing her laying there on the ground, that he noticed a red mark on her face."). (Tr. at 341.)

The State withheld a materially relevant, exculpatory photograph of Shaw's face, showing no marks, taken an hour or so after the alleged assault. The State's good faith in failing to disclose this evidence is irrelevant. *State v. Jackson*, 2009 MT 427, ¶ 52, 354 Mont. 63, ___ P.3d ___, *citing State v. Hatfield*, 269 Mont. 307, 311, 888 P.2d 899, 901-02 (1995); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Following trial, a juror said photographs of Shaw would have helped. (Appellant's Br. at 36; D.C. Doc. 92.) Had the exculpatory photograph been disclosed, there is a reasonable probability the jury would not have inferred bodily

injury based on "red mark" testimony and the State's emphasis of it in closing. There is a reasonable probability of a different outcome, and James was thereby prejudiced. *State v. Thompson*, 2001 MT 119, ¶ 31, 305 Mont. 342, 28 P.3d 1068 (citation omitted); *State v. Kills on Top*, 2000 MT 340, ¶ 23, 330 Mont. 164, 15 P.3d 422.

Additionally, James could have enlightened the jury about the circumstances surrounding the exculpatory photograph. The State's empathetic response to its Indian victim's purported bodily injury was to immediately arrest her and book her into detention. Such novel treatment for an alleged traumatic assault would have assisted the jury in evaluating the credibility of the State's "red mark/bodily injury" inference argument.

The District Court misapprehended the exculpatory photograph was cumulative evidence that James could have obtained with reasonable diligence. The District Court erred in finding there was no testimony on Shaw's injuries and erred in holding the exculpatory photograph was not vital to the defense but was "more evidence of the same." (D.C. Doc. 94.) The District Court must be reversed.

CONCLUSION

James' criminal endangerment conviction must be reversed and dismissed with prejudice on the grounds the State lacked jurisdiction and violated James' broad statutory right to be free from double jeopardy. Confidence in both the criminal endangerment and PFMA convictions is undermined because the State tried James before a jury cleansed of Indians in an invidious, purposeful, discriminatory manner. Further, James' PFMA conviction must be reversed as the State withheld evidence material to the contested issues at trial. Alternatively, the case should be remanded for a new trial.

Respectfully submitted this _____ day of January, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,930 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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EILEEN A. LARKIN