IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0562

STATE OF MONTANA

Plaintiff and Appellee,

v.

ROBERT EARL STAUDENMAYER,

Defendant and Appellant.

# BRIEF OF APPELLANT

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

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## STATEMENT OF THE ISSUES

Issue One: The United States and Montana Constitutions guarantee a criminal defendant the right to confront those who bear testimony against him. At trial for the charge of bail jumping, the State of Montana introduced the district court's minute entries into evidence. These minute entries described what occurred at an arraignment hearing and an omnibus hearing. They also included paraphrased statements by other individuals present at the hearings. The clerk who wrote the minute entries did not testify at trial or at any previous hearing, nor did the individuals paraphrased. The minute entries were testimonial because a reasonable, objective declarant would expect the statement to be used by the prosecution at trial. Did the district court violate Appellant's Sixth Amendment rights by introducing these statements without subjecting the declarants to cross-examination?

Issue Two: Did the District Court abuse its discretion in denying Appellant's motion to continue the trial when defense counsel was appointed to represent the Appellant only a month before the trial, required additional time to prepare, and no reasonable explanation was provided to deny the motion?

## STATEMENT OF THE CASE AND FACTS

On October 25, 2018, the State filed an Information charging Robert Staudenmayer ("Robert") with theft, money laundering, and robbery. (D.C. Doc. 40.) Lake County District Court Judge Manley issued an Order on the same day ordering that an arraignment on this Information be set for the first Wednesday following Robert's arrest at 9:00a.m. (State's Exhibit 1.) The Order set conditions pending resolution of the matter, including that the "Defendant shall make all court appearances in person." Upon violation of these conditions, the Order stated that the defendant's bond and release would be revoked and a warrant issued.

On November 14th, 2018, an arraignment hearing was held with Robert present. (State's Exhibit 2.) Robert pled not guilty. According to the minute entry, Robert was aware of his rights, charges, and possible punishment. The omnibus hearing was set for March 13, 2019, at 9:00 a.m. A verbatim record was created by Barb Marshall, the court reporter, and a minute entry was created by Krisstyn Leiter, Deputy Clerk of District Court.

On March 13, 2019, the omnibus hearing was held. (State's Exhibit 3.) According to the minute entry, Robert was not present and Robert's attorney, Ashley Morigeau, had no information about the non-appearance of Robert. A verbatim record was created by Barb Marshall, and the Minute Entry was created by Krisstyn Leiter, Deputy Clerk of District Court.

On March 15, 2019, the State filed a Motion and Affidavit for Leave to File an Information in Lake County District Court charging Robert with the offense of bail jumping, in violation of § 45-7-308, MCA. (D.C. Doc 1.) The Information was filed by the State on March 18th, 2019. (D.C. Doc 3.) Robert was arrested on June 14th, 2019. (D.C. Doc 6.) He was arraigned and pled not guilty to bail jumping on June 19th, 2019. (D.C Doc 9.) The district court scheduled a jury trial for December 2nd, 2019, labeled "First Jury Trial Setting" (D.C. Doc 10.) On September 20th, 2019, the State filed a motion to dismiss the bail jumping charge due to the defendant receiving a 20-year sentence for separate offenses in another case. (D.C. Doc 11.) The State had agreed to dismiss the bail jumping charge if Robert pled guilty to the separate

offenses, which he did. The motion to dismiss was granted. (D.C. Doc 12).

On March 3rd, 2020, the State filed a Motion and Affidavit for Leave to File an Information to re-charge Robert with the offense of bail jumping. (D.C. Doc 13.) In the preceding months, Robert was allowed to withdraw his plea to the other charges because he was not fully advised of the possible penalties. The district court allowed him to withdraw this plea but advised Robert that one consequence of withdrawing this plea is that the bail-jumping charges would be reinstated. (D.C. Doc 19.) The State filed a Motion to Set aside the Dismissal on March 6, 2020. (D.C. Doc 19.) This motion was granted. The Court scheduled Jury Trial for August 31st, 2020 and this was labeled the "Second Jury Trial Setting". (D.C. Doc 25.)

On March 9th, 2020, attorney Lisa Kaufman was appointed to represent Robert and he was arraigned on these charges on March 25th, 2020, entering a plea of not guilty. (D.C. Doc 24.) On March 30th, 2020, Robert filed a motion for substitution of Judge, which was granted. (D.C. Doc 27.) Upon assuming Jurisdiction, Lake County District Judge Christopher issued an order scheduling jury trial on June 29th, 2020,

labeled "Third Jury Trial Setting"—two months earlier than the previously scheduled trial date. (D.C. Doc 31.)

On May 28th, 2020, Lisa Kaufman submitted a motion to withdraw as attorney of record for Robert, which was granted. (D.C. Doc 46.) On June 10th, the District Court issued an order rescheduling the jury trial to July 13th, 2020, labeled "Fourth Jury Trial Setting". (D.C. Doc 48.) The case was reassigned to counsel Amanda Gordon and the Notice of Reassignment was filed on June 15th, 2020. (D.C. Doc 49.) Prior to Kaufman withdrawing, the State had filed its first witness and exhibit list, a motion in limine, and its proposed jury instructions.

On June 23rd, Robert moved to continue the July 13th jury trial date. (D.C. Doc 51.) Robert's counsel Amanda Gordon argued she lacked sufficient time to prepare for trial, supported by the fact she was only appointed on June 3, 2020, had yet to receive discovery in the matter, and had not been able to speak to Robert in person due to COVID outbreaks in the jail. The State objected to the motion, arguing that Robert himself had already been provided discovery in this matter, without addressing the fact that current counsel had not yet received discovery. (D.C. Doc 52.) The State also argued that bail jumping was a

very simple charge to prepare for and that moving to continue was more about trial strategy than actually needing additional time to prepare. The motion was denied on July 9th, 2020, four days before the trial. (D.C. Doc 58.) The district court stated that Defendant was now on his fourth jury trial setting and further delay prejudices the State.

On July 9th, 2020, the State filed an amended list of witnesses and exhibits. (D.C. Doc 55.) On the same day the State filed a second amended list of witnesses and exhibits. (D.C. Doc 57.) The new witnesses and exhibits were related to a phone call between Robert and a third party that occurred on July 8th, 2020.

On July 10th, 2020, Robert submitted a motion in limine that was partially granted and partially denied. (D.C. Doc 61; D.C. Doc 64.) The following defense motions were denied: Defense's motion to exclude minute entries due to lack of foundation and due to a violation of the confrontation clause, Defense's motion to exclude evidence and witnesses to a jail phone call that occurred on July 8th due to short notice, and Defense's motion to deny the State the ability to continue amending its witness and exhibit list prior to the date of trial. (D.C. Doc 64.)

The two minute entries in question were created by the Deputy Clerk of Court and described the events of two hearings, the Nov. 14th, 2018, arraignment hearing and the March 13th, 2020, omnibus hearing, (State's Exhibit 2 and State's Exhibit 3, respectively.) The minute entries contained the following relevant statements.

- "Defendant present with Counsel Ashley Morigeau;" State's Exhibit 2.
- "Information has been received and reviewed, Defendant is aware of his rights, the charges, and possible punishment." State's Exhibit 2.
- "Reading of Information is waived." State's Exhibit 2.
- "This matter is set for an Omnibus Hearing on Wednesday, March 13, 2019, at 9:00 a.m., with a Jury Trial commencing Monday, April 15, 2019, at 9:00 a.m." State's Exhibit 2.
- "Defendant not present, represented by Counsel Ashley Morigeau;" State's Exhibit 3
- "Ms. Morigeau has no information on the non-appearance of her client." State's Exhibit 3.

A Jury Trial was held on July 13th and 14th. The State called as a witness the Clerk of Court Lyn Fricker to testify about what occurred in these hearings and to lay foundation for the minute entries. (7/13/20 Tr. at 134-152.) The minute entries were created by Deputy Clerk Krisstyn Leiter, not Lyn Fricker. (7/13/20 Tr. at 106; 109; and 148.) Lyn Fricker was the head Clerk of Court and supervisor of the deputy clerks, but

she was not present at the hearings. (7/13/20 Tr. at 106; 109; and 148.) Robert objected to these minute entries in his motion in limine (D.C. Doc 61.), at trial before opening statements were made (7/13/20 Tr. at 107-109), and again during Fricker's testimony (7/13/20 Tr. at 139.) Robert's objection argued that the minute entries were testimonial hearsay that violated the confrontation clause since the declarant was not available to testify, and that Fricker was not present at the hearings and therefore lacked personal knowledge to testify about the hearings. Robert also objected to the 03/13/2019 minute entry (State's Exhibit 3), because it included a hearsay statement from another witness, Robert's previous defense attorney Ashley Morigeau, who also was not testifying at trial and had not been previously cross-examined. (7/13/20 Tr. at 142.) Robert argued that Morigeau's statement was also testimonial and violated the confrontation clause if admitted.

Neither the State nor the district court responded to the argument that these statements were testimonial and therefore violated the confrontation clause. (7/13/20 Tr. at 106-110.) Instead, both the State and district court focused solely on the objection that the testifying witness lacked personal knowledge of the hearings and could not lay

foundation for these statements. Acknowledging that Fricker was not present at the events in question and that she did not create the minute entries, the district court nevertheless agreed with the State that minute entries qualify as business records, that business records are admissible, and that Fricker could testify about the minute entries because she was the custodian of the records. (7/13/20 Tr. at 110; and 142.)

In the morning on the first day of trial, the State made an additional modification to the exhibit list by substituting out an exhibit, an "Information", and inserting another exhibit in its place, an "Order". (7/13/20 Tr. at 4-6; 11-12; 96; and 102.) Robert objected to this new exhibit due to short notice. (7/13/20 Tr. at 5; and 97-105.) The objection was denied. (7/13/20 Tr. at 100.) The State argued that because the State must redact prejudicial language from the Information, it was no longer the best document to use. (7/13/20 Tr. at 4; 96; 98; and 101.) In its place, the State inserted the "Order". The Order did not contain as much prejudicial information. It also established the condition that required Robert to make all court appearances, which was not listed in the Information. (7/13/20 Tr. at 96; 102; and 104.) The State argued

that this Order was necessary to prove an element of the offense, that Robert was released on bail subject to certain conditions. (7/13/20 Tr. at 96.) Specifically, the Order stated that "The Defendant shall make all court appearances in person." (State's Exhibit 1.) It was only through this Order that the State could establish the first element of bail jumping, "that the defendant was set at liberty by court order, with or without security, upon condition that the subsequently would appear at a specified time and place". § 45-7-308(1), MCA.

The jury convicted Robert of bail jumping. (7/14/20 Tr. at 25; D.C. Doc 66.) The district court sentenced Robert to ten years in prison with no time suspended and he was made ineligible for parole. (9/17/20 Tr. at 31; D.C. Doc 75.) Robert timely appealed. (D.C. Doc 81.)

## STANDARDS OF REVIEW

The Montana Supreme Court reviews a trial court's conclusions of law and its interpretation of statutes *de novo* for correctness. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 226, 392 P.3d 607. The Court's review of constitutional questions is plenary and therefore it reviews *de novo* a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II, Section 24

of the Montana Constitution. *State v. Stock*, 2011 MT 131, ¶ 16, 361 Mont. 1, 5, 256 P.3d 899, 902.

This Court reviews for abuse of discretion a district court's ruling on a motion to continue trial. *State v. Garcia*, 2003 MT 211, ¶ 10, 317 Mont. 73, 75 P.3d 313. A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *State v. Hardground,* 2019 MT 14, ¶ 7, 394 Mont. 104, 433 P.3d 711.

## SUMMARY OF THE ARGUMENT

The district court violated Robert's 6th Amendment right to confront witnesses by allowing testimonial statements into evidence without allowing Robert to cross-examine the declarants. The court admitted its own minute entries after concluding they fell under the business records exception to the rule prohibiting hearsay. However, the business records exception does not satisfy the 6th Amendment requirement that testimonial statements be subject to cross-examination. A defendant must have the opportunity to cross-examine testimonial statements, regardless of whether they are otherwise deemed reliable. By admitting the minute entries the court violated

Robert's 6th Amendment constitutional rights. Robert's defense was prejudiced by this violation because he was not allowed to cross-examine the declarants Kristtyn Leiter or Ashley Morigeau. It is only through cross-examination of declarants that the reliability of testimonial statements can be assessed.

Additionally, the district court abused its discretion in denying Robert's motion to continue the trial to allow his defense counsel adequate time to prepare. The time between Robert's arraignment and his trial was only 110 days. The time between the trial and Robert's attorney being appointed to represent him was only 40 days. Several factors show that defense counsel was not properly prepared for trial and no reasonable explanation was given for why the continuance was denied. Additionally, multiple blunders were made by defense counsel before and during the trial that could have been avoided had counsel been afforded a reasonable amount of time to prepare.

## ARGUMENT

### I. The trial court violated Robert's right to confront witnesses by admitting testimonial hearsay statements through exhibits and third-party witness testimony.

The Confrontation Clause is a constitutional right established both in Article II, Section 24 of the Montana Constitution and the Sixth Amendment of the United States Constitution. *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696. This right guarantees a criminal defendant the right to confront or to face the witnesses against him. *Baker,* ¶ 18. The essential purpose of the right to confront witnesses is to secure the opportunity to test witnesses' testimony through cross-examination. *Baker,* ¶ 18. In *Crawford v. Washington*, the United States Supreme Court held that testimonial hearsay statements of witnesses absent from trial are inadmissible under the Confrontation Clause of the Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). This opinion abrogated prior precedent that allowed an unavailable witness's out-of-court statement to be admitted so long as it had adequate indicia of reliability. *Id.*, 541 U.S. at 42. After *Crawford*, if the statement is "testimonial" then it must be subject to cross-examination, regardless of whether it would otherwise be admissible. *Id.*, 541 U.S. at 68.

The Court stopped short of giving a comprehensive definition of "testimonial." It did observe, however, that testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford,* at 51. It also cited examples of testimonial statements such as 1) "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," 2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and 3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* at 51-53. The Court was clear that nontestimonial hearsay is exempt from Confrontation Clause scrutiny, but testimonial statements demand unavailability and a prior opportunity for cross-examination. *Crawford*, at 68.

Here, the district court's ruling that the minute entries fell under the "business records" exception to the general prohibition against

hearsay is therefore irrelevant to whether they contained testimonial statements subject to the Confrontation Clause. The question is whether the minute entries were testimonial in nature, and whether the statements contained in the minute entries were testimonial in nature. If they are testimonial, then they must be subject to cross-examination from the declarants who made the statements.

The test for determining if statements are testimonial hearsay is whether the statements were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Crawford,* at 51-53. The minute entries were created by Kristtyn Leiter, the Deputy Clerk of Court. (State's Exhibit 2; and State's Exhibit 3.) Leiter did not testify at trial or at any previous hearing, but she did "bear witness" against the defendant by making "a solemn declaration or affirmation made for the purpose of establishing or proving some fact" in the form of the minute entries she prepared. *Crawford*, at 51.

At trial, the district court reasoned, "These minute entries are made by the clerks of court for the purpose of making essentially a documentation of the court's rulings at the time." (7/13/20 Tr. at 108.)

Therefore, by the court's own admission, the purpose of minute entries fits the definition provided in *Crawford* as a declaration made for the purpose of establishing or proving some fact. The facts established by these statements are that Robert was present in court at the arraignment, was notified of his next hearing, ordered to be at that hearing, did not appear for that hearing, and his attorney had no information about his absence. (See State's Exhibit 2 and State's Exhibit 3.)

These statements are also ones a declarant would "reasonably expect to be used prosecutorially." *Crawford,* at 51-53. Minute entries are typically written at the time of the hearing or soon after the hearing. They are formal records of the court proceedings and they typically would not be done under duress or in a hurried manner. Furthermore, a deputy clerk of court is someone who works specifically for the court and is exposed to trials and court hearings almost every day. Obviously, a reasonable person in the clerk's position would expect that their written statements about court proceedings could be used in later prosecution. Therefore, both minute entries were testimonial statements.

The other significant statement at issue is a written statement included in one minute entry that paraphrased defense counsel Ashley Morigeau. The statement reads: "Mrs. Morigeau has no information on the non-appearance of her client." (State's Exhibit 3.) In this instance, Fricker is reading off a minute entry written by Leiter that paraphrased another individual's statement in court. This is hearsay within hearsay. More importantly, it is a testimonial statement. Mrs. Morigeau's declaration about having no information on her client's absence was a statement made directly in court to the Judge. This statement clearly is testimonial because it was made under interrogation by the sitting judge and the primary purpose of this interrogation was to establish or prove past events potentially relevant to later criminal prosecution. The bail-jumping charges were filed against Robert just two days after this hearing. (D.C. Doc 1.) Morigeau also did not testify at the trial or at any previous hearing.

**A. The error was not harmless**

The error is not harmless where controversial evidence is admitted at time of trial and a showing was made that substantial rights might well have been effected. *See Beil v. Mayer, 242 Mont. 204,*

*211, 789 P.2d 1229, 1234 (1990); see also*, *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423; *see also, State v. Van Kirk*, 2001 MT 184, ¶¶ 42-44, 306 Mont. 215, 32 P.3d 735. The State bears the harmless error burden to demonstrate that there is no reasonable possibility that this erroneous admission of this evidence "might have contributed" to Robert's conviction. *Van Kirk*, ¶ 42. This is a "very high bar" that the State must meet. *Reichmand*, at¶ 23.

To convict Robert of the charge of bail-jumping, the State had to prove two elements: 1) that the defendant was set at liberty by court order, with or without security, upon condition that he subsequently would appear at a specified time and place; and 2) that the defendant purposely failed without lawful excuse to appear at that time and place. § 45-7-308, MCA.

The three pieces of evidence the State offered to prove the first element were: the court "Order" (State's Exhibit 1), the 11/14/18 minute entry (State's Exhibit 2), and Lyn Fricker's testimony (7/13/20 Tr. at 134-152.) Both State's Exhibit 2 and Lyn Fricker's testimony about the arraignment hearing contained testimonial statements and should have been excluded. This leaves only State's Exhibit 1 remaining as a

properly admissible piece of evidence. State's Exhibit 1 was an Order granting leave to file information, setting an arraignment and setting conditions. It established that a court order was granted requiring Robert to appear at all court hearings. However, it was only through State's Exhibit 2 and Lyn Fricker's testimony about the arraignment hearing that the State could establish that Robert was actually "set at liberty" by this court order. Without her testimony or State's Exhibit 2, there was no indication that Robert was ever told about this court order, told of his conditions of release, or informed about when the next court hearing was scheduled. Therefore, without the testimonial hearsay contained in State's Exhibit 2 and in Lyn Fricker's testimony about the arraignment hearing, the State had no way of proving the first element of the offense.

To prove the second element of the offense, the State used the testimony of Contessa Hines (7/13/20 Tr. at 153-159.) Her testimony was used to establish that Robert had spoken to Contessa Hines on July 8th, 2020 and said something about being on the run and that he left Montana for a couple weeks. (7/13/20 Tr. at 156.) Upon cross-examination Contessa Hines admitted that she was not talking to

Robert back in March of 2019 (when the alleged bail jumping occurred) and had no idea of whether he missed a court date or had any excuse for missing court if he did. (7/13/20 Tr. at 157.) Hines' testimony was properly admitted, but it is up to the jury to determine the relevance of her testimony, considering that she admitted she did not know what Robert was doing in March of 2019 or if he was referring to that time period when they spoke.

Another piece of evidence the State used to prove the second element of the evidence was the part of Lyn Fricker's testimony where she indicated that to her knowledge Robert had not contacted her office, had not told anyone that he would not be able to attend a hearing, nor provided an excuse why he would not attend the hearing. (7/13/20 Tr. at 146.) This is circumstantial evidence since it does not directly show that Robert had no lawful excuse to miss the hearing, but merely shows that he never contacted the court to provide them an excuse.

Both Hines' testimony and Fricker's testimony about Robert not contacting her office were properly admitted. However, neither of these pieces of evidence are as strong as State's Exhibit 3 or Lyn Fricker's testimony about State's Exhibit 3, which should have been excluded as

discussed above—and neither provides direct evidence that Robert knew he was required to appear in court on 03/13/19. In particular, the statement from State's Exhibit 3 that "Mrs. Morigeau has no information on the non-appearance of her client." was most persuasive of all because it directly stated Robert had no lawful excuse for not appearing, or at least that he never provided such an excuse to his attorney. Furthermore, State's Exhibit 3 was the only way the State could demonstrate that Robert was not at the omnibus hearing, which is crucial to proving the second element of the offense. If neither of these pieces of evidence related to State's Exhibit 3 were available, it is practically impossible that the State could have proven the second element of the offense.

With the testimonial statements excluded, the State had no way of proving the first element and it was extremely unlikely the State could have proven the second element. Therefore, the error of allowing these statements in was not harmless and clearly was essential in proving the elements of the offense.

## II. The District Court abused its discretion by denying defense counsel's motion continue.

The United States and Montana Constitutions guarantee the fundamental right to assistance of counsel. *State v. Craig*, 274 Mont. 140, 148, 906 P.2d 683, 688 (1995). This right to counsel contemplates the right to the "effective assistance" of counsel. *Craig*, 274 Mont. at 148, 906 P.2d at 688. "Though a district court has discretion over motions to continue, when a continuance is requested, that request is reasonable given all the relevant factors including the defendant's right to a fair trial and effective assistance of counsel, it constitutes abuse of discretion for the court to refuse to grant the continuance." *State v. Knox*, 2021 MT 208N, ¶ 14, 405 Mont. 537, 492 P. 3d 1227. Reversal is appropriate when a district court's denial of a motion to continue results in prejudice to a defendant. *Id.*

Section 46-13-202, MCA, governs a court's consideration of a motion to continue and states:

> (1) The defendant or the prosecutor may move for a continuance. If the motion is made more than 30 days after arraignment or at any time after trial has begun, the court may require that it be supported by affidavit.
>
> (2) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.

> (3) All motions for continuance are addressed to the discretion of the trial court and must be considered in the light of the diligence shown on the part of the movant. This section must be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the prosecution to a speedy trial.

Robert was arraigned on the re-filed bail-jumping charges on March 25th, 2020, and a jury trial was scheduled for August 31st, 2020. (D.C. Doc. 25, Second Jury Trial Setting Order.) When Judge Christopher substituted Judge Manley the trial was rescheduled to June 29th, 2020 and labeled "Third Jury Trial Setting". (D.C. Doc. 31, Third Jury Trial Setting Order.) When defense counsel Lisa Kaufman withdrew and the case was reassigned to Amanda Gordon the trial was rescheduled again to July 13th, 2020 and labeled "Fourth Jury Trial" (D.C. Doc. 48.)

In denying Defendant's Motion to Continue Jury Trial, the district court simply stated "Defendant is now on his Fourth Jury Trial Setting, any further delay prejudices the State." (D.C. Doc. 58.) The court's statement about it being the fourth trial setting implies that the trial was being postponed due to the defendant, but that was not the case. The first setting was vacated because the charges were dismissed not

because it was continued. (D.C. Doc 12.) When Robert was arraigned after the charges were re-filed the jury trial was set for August 31st, which was a later date than the eventual final setting July 13th. (D.C. Doc. 25; D.C. Doc. 48.) The rescheduling of the jury trial made the trial occur sooner rather than later. Altogether, the time between the defendant being arraigned and the date of the jury trial was less than four months, hardly a lengthy delay. Furthermore, there was no indication that Robert's right to a speedy trial was impaired.

The district court's statement that "any further delay prejudices the State" was not explained in any way nor supported by any facts. (D.C. Doc. 58.) The State previously listed only one witness for trial. (D.C. Doc. 40.) It updated this list to include two additional witnesses on July 9th, the same day the Court denied defense counsel's motion to continue. (D.C. Doc. 55; D.C. Doc 58.) There was no indication that any of these witnesses were only available at this trial setting or that it would be difficult for them to made available at a later setting. Nor was there any other indication that a delay in the proceedings would impact the State's ability to present its case.

The rationale for requesting the continuance was very straight forward. Defense counsel indicated that they were only appointed to represent Robert on June 3rd, which was approximately a month before the trial, and by June 23rd they still had not received discovery in the matter nor been able to speak to their client in person due to COVID outbreaks in the jail. (D.C. Doc. 51.) This motion to continue was made before the State disclosed two additional witnesses and before the State modified the exhibit list three additional times, including on the morning of trial. (See D.C. Doc. 51; D.C. Doc. 55; D.C. Doc. 57; and State's Exhibit 1.) Defense counsel simply needed more time to prepare and this was made especially difficult by the State continuously updating and modifying its witness and exhibit list right up to the morning of trial.

The State objected to Defendant's Motion to Continue Trial and argued that the Defendant had all of the discovery since March 13th, 2019. (D.C. Doc. 52.) The State failed to mention that Robert was no longer being represented by the same attorney as in 2019 and there was no indication that the new attorney had yet received the discovery. The State argued that the case was as simple as it gets and that the

documents to be used at trial had already been provided to Robert a long time ago. Ironically, despite the State's argument about the simplicity of the charge and the evidence to be used, the State misstated what evidence actually would be used at trial and had to make a substitution of exhibits on the morning of the proceedings. (7/13/20 Tr. at 4-6.) The substitution was absolutely necessary to prove the elements of the offense. The State also disputed the given rationale for requesting the continuance and asserted that it had more to do with trial strategy than ability to prepare. No further context was provided by either the State or the district court on why this would be a helpful strategy to Robert. Given all the relevant factors provided here including the defendant's Sixth Amendment right to a fair trial and effective assistance of counsel, it constituted an abuse of discretion for the District Court to deny the request to continue.

### A. The ruling prejudiced the Defendant.

The denial of the motion to continue prejudiced the Defendant for the reasons counsel indicated in its motion, including that the defense needed additional time to prepare, review discovery, interview their client face-to-face, review the exhibits, and interview the witnesses that

were continuously modified up until the day before trial. However, the denial also prejudiced the defense in ways that the counsel did not foresee or did not indicate. These reasons are listed below:

*1) Failure to interview witnesses*

Defense counsel failed to interview witnesses who were at the hearings in question. What was stated at the two hearings in question, the arraignment and the omnibus hearing, are the heart of the matter in this dispute. Yet there was no indication that Defense counsel even spoke with any of the individuals that were present, including: defense counsel Ashley Morigeau, deputy county attorney Benjamin Anciaux, Honorable Judge James A. Manley, court reporter Barb Marshall, and Deputy Clerk Krisstyn Leiter. It has already been demonstrated that preventing the defense from cross-examining declarants Krisstyn Leiter and Ashley Morigeau violated Robert's Sixth Amendment right to confront witnesses, but it appears that these individuals as well as the other witnesses in attendance were not even interviewed, informally or formally. Had defense counsel had more time to prepare she should have determined that she should interview or even depose these witnesses. It is possible that additional information could have been

obtained through interviewing these witnesses that would have aided in Robert's defense.

*2) Failure to obtain transcript of hearings*

Defense counsel failed to request a transcript of the hearings in question. Barb Marshall was listed as the Official Court Reporter in State's Exhibit 2 and State's Exhibit 3, yet no record or discussion of transcripts was ever made. Transcripts of hearing often take time to prepare and deliver to attorneys for review. If defense counsel had more time to prepare she could have requested the transcript be made available to prepare for trial. The transcript could have given additional insight to what was stated at these hearings and likely would have been the most accurate representation of what was actually discussed.

*3) Failure to object to non-public trial*

A defendant has the fundamental right to a public trial. *State v. Hatfield*, 2018 MT, ¶ 51, 392 Mont. 509, 426 P.3d 569. The Sixth Amendment's right to a public trial is applicable to the states. *In re Oliver*, 333 U.S. 257, 267-268, 68 S. Ct. 499, 504-506 (1948). This guarantee of a public trial is a safeguard against any attempt to employ our courts as instruments of persecution. *Oliver*, at 270. The right to a

public trial is not absolute. A closed courtroom is appropriate when the party seeking to close the proceeding advances an overriding interest that is likely to be prejudiced, the closure is not broader than necessary to protect that interest, the trial court considers reasonable alternatives to closing the proceeding, and the trial court makes findings adequate to support the closure. *Waller v. Ga.,* 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984).

The trial took place on July 13th, 2020, in Polson, MT. The COVID-19 pandemic in Montana began roughly in March of 2020 when the first known cases were detected within the state. By the summer of 2020 the state was still under heavy restrictions. Buildings, including courts of law, were under strict capacity restrictions. The Court here indicated that this was the first trial in Lake County during the pandemic. (7/13/20 Tr. at 4.) Numerous references were made to the unusual circumstances and the difficulty in hearing that occurred. (7/13/20 Tr. at 6; 8; 11; 13; 16; 21; 22; 33; 51; 59.) This is presumably because of the social-distancing that was required. There is no indication from the transcript that any individuals attending the trial were members of the general public and not participating in the trial itself. Based on the

discussion in the transcript, the circumstances of the state of Montana in summer of 2020, as well as Robert's own recollection of the trial, it appears this trial was not open to the public. Additionally, no indication is made and nothing in the transcript discusses anything related to video appearances either by Zoom or other video technology that would allow the public to watch the trial remotely.

The public health crisis created by the COVID-19 pandemic likely satisfies the requirement in *Waller* as an overriding interest to justify a closed courtroom. *Waller*, at 48. However, the second part of the analysis requires the trial court to consider reasonable alternatives to closing the trial to the public. *Waller*, at 48. The use of Zoom or other video technology could have been used to allow the safety of the participants while still preserving the right to a public trial. There is no indication that even the possibility of using video technology was discussed. In the transcripts provided, there is no indication that defense counsel objected to the non-public trial. This was another blunder that may have been prevented had counsel been afforded additional time to prepare.

*4) Substitution of exhibit on morning of trial*

Finally, the substitution of an exhibit at the last minute on the morning of the trial clearly prejudiced the defense due to it being disclosed on such short notice. This substitution was especially prejudicial considering that Robert's motion to continue was denied. Up until the day of trial, the State had listed as one of its exhibits an exhibit labeled Information – DC-18-379. (D.C. Doc. 40. State's List of Witnesses and Exhibits.) On the morning of trial, this exhibit was substituted with another exhibit, labeled Order – DC-18-379 (State's Exhibit 1.) There were two reasons offered for why the exhibit was switched. The first was that the district court had ruled that any exhibits used must be redacted to hide prejudicial information. (D.C. Doc. 61.) The Information contained a description of all the counts that Robert was previously charged with, meaning that redacting this content would result in redacting nearly the entire document. The second and more crucial reason was because the Information did not state anything about requiring the Defendant to make all court appearances in person. Only the Order stated so. (7/13/20 Tr. at 96.) As previously stated, the first element of bail-jumping the State must prove is "that the defendant was set at liberty by court order, with or

without security, upon condition that the subsequently would appear at a specified time and place". § 45-7-308(1), MCA. The Order was necessary to establish this element.

The significance of this substitution cannot be overstated. Without the Order, the State could not prove the first element of the offense. Furthermore, the Defense had been preparing for trial with the assumption that no document was going to be presented stating anything about a condition that a Defendant must appear at all court hearings, or any evidence to show that there ever was an order of any kind. The Sixth Amendment guarantees both the right to assistance of counsel as well as the right to be informed of the nature and cause of the accusation against you. *State v. Tower*, 267 Mont. 63, 67, 881 P.2d 1317, 1320 (1994). Defense counsel should have objected to this exhibit on 6th Amendment grounds. The order was a crucial piece of evidence that was not previously listed by the State as an exhibit. It was fundamentally unfair to present this new evidence to the defense on the morning of trial, deny defendant's objection to exclude this evidence, and still continue to deny defendant's motion to continue the trial for lack of time to adequately prepare. Had this piece of evidence been

previously disclosed, it would have required a substantial reevaluation of Robert's trial strategy and preparation. It may have even compelled renewed plea negotiations. Instead, the defense was forced to deal with it on the spot at trial with no prior notice.

By denying defense counsel's request to continue the trial, a request that was reasonable considering the relevant factors, the district court abused its discretion. Furthermore, the denial of the continuance prejudiced Robert due to the mistakes defense counsel made in preparation for and during trial.

## CONCLUSION

Robert respectfully requests the Court reverse and remand for a new trial.

Respectfully submitted this 19th day of March, 2022.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced expect for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 6,622, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

Karl Pitcher

KARL PITCHER

# APPENDIX

## CERTIFICATE OF SERVICE

I, Karl Pitcher, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-19-2022:

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