

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0173

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH PAUL DEWISE,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Eighteenth Judicial District Court,  
Gallatin County, The Honorable Holly Brown, Presiding

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## **STATEMENT OF THE ISSUE**

Did the district court properly exercise its discretion in denying Appellant's demand for new counsel without an evidentiary hearing when, after an initial adequate inquiry, Appellant did not raise seemingly substantial complaints to demonstrate that he and his counsel had an irreconcilable conflict or a complete breakdown in communication?

## **STATEMENT OF THE CASE**

On February 2, 2018, the State charged Appellant Joseph Paul DeWise with Deliberate Homicide for shooting his estranged wife Lauren to death, and Attempted Deliberate Homicide for repeatedly shooting and attempting to kill Lauren's roommate Ashley. (D.C. Doc. 4.) Court appointed counsel Annie DeWolf and Alex Jacobi represented DeWise from the inception of the charges. (D.C. Docs. 9, 12.) On June 19, 2018, the district court set DeWise's case for a nine-day jury trial to begin February 19, 2019. (D.C. Doc. 20.)

In a handwritten letter to the district court dated November 21, 2018, DeWise wrote that he did not have "effective counsel" and requested a new attorney. (11/21/18 Letter attached to D.C. Doc. 36, attached hereto as App. A.) On November 27, 2018, the district court issued an order, to which it attached the

Office of the State Public Defender (OSPD) Client Grievance Procedure. (D.C. Doc. 36, Order and Policy, attached as App. B.)

In a handwritten letter to the district court dated November 28, 2018, DeWise again complained about the representation that his two attorneys and an investigator were providing him and again requested new counsel. (11/28/18 Letter and attachments, attached to D.C. Doc. 38, and attached hereto as App. C.) The district court issued an order notifying the parties of the letter. In the order, the district court explained that, since it had just provided DeWise with a copy of the grievance procedure he needed to follow, there was nothing more the court could do until the OSPD had the opportunity to review and consider DeWise's complaints and his request for new counsel. (D.C. Doc. 38, attached as App. D.)

On December 3, 2018, defense counsel filed a motion in limine to exclude evidence of DeWise's prior bad acts. (D.C. Doc. 40.) Defense counsel also filed a motion to suppress DeWise's statements. (D.C. Doc. 41.) In ex parte letters to the district court dated December 28, 2018, and January 3, 2019, DeWise expressed his displeasure with defense counsel filing either motion, again demanding new counsel. (12/28/18 Letter attached to D.C. Doc. 83, attached hereto as App. E; 1/3/19 Letter attached to D.C. Doc. 83, attached hereto as App. F.) On January 8, 2019, the district court attached the letters to its order explaining that it could not address anything further regarding DeWise's request for new counsel until he

exhausted his remedy with the OSPD. The court also explained it could not accept pro se filings from DeWise since he was represented by counsel. (D.C. Doc. 83, attached as App. G.)

After the OSPD denied DeWise's request for new counsel, the district court issued an order outlining the procedure for DeWise to request new counsel through the district court. (D.C. Doc. 145, attached as App. H.) The district court further provided that DeWise's list of reasons for requesting new counsel, along with his current counsels' response to that list, would be filed under seal. (*Id.*) The district court denied DeWise's request for new counsel without holding an evidentiary hearing. (D.C. Doc. 165, attached to Appellant's Br. as App. A.)

DeWolf and Jacobi represented DeWise at the jury trial occurring on December 2, 2019, through December 10, 2019. (12/2/19-12/10/19 Transcript of Jury Trial [Tr.]) From the district court record, it does not appear that DeWise raised any additional complaints about his counsel between the time the district court issued the order denying his request for a new attorney and the jury trial.

The jury found DeWise guilty of Deliberate Homicide and Attempted Deliberate Homicide and found that DeWise had used a weapon to commit both offenses. (D.C. Doc. 302.) The district court sentenced DeWise to 100 years in prison for each offense, consecutive, imposed a 10-year consecutive weapon

enhancement for each offense, and pronounced DeWise ineligible for parole. (D.C. Doc. 318, attached to Appellant's Br. as App. B.)

## **STATEMENT OF THE FACTS**

### **I. The crimes<sup>1</sup>**

In the spring of 2017, Audria Butler (Audi) met DeWise's wife Lauren through community business groups and a fitness facility. Audria met DeWise at the gym once when DeWise accompanied Lauren as she went to the gym. (Tr. at 257-59.) Audi and Lauren developed a friendship and spent time together socially. In August 2017, Lauren confided to Audi that DeWise had been physically abusing her for a long time. (Tr. at 259-60.) Audi had previously volunteered for Haven, the local domestic violence nonprofit, and was friends with the director, Eric. Audi arranged for Lauren to have lunch with Eric so Lauren could hear about some options that were available to her. (Tr. at 261.)

Audi knew that Lauren was afraid of repercussions if she ever tried to leave DeWise. Audi also got the feeling that Lauren had no idea how to leave him. Audi

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<sup>1</sup> The State provides a summary of facts related to the criminal offenses to give context for the Court to understand the circumstances surrounding defense counsels' role in representing DeWise. Because the facts of the offenses are for context, the State's abbreviated Statement of Facts in no way reflects the entirety of the evidence the State presented against DeWise at trial or how defense counsel contended with the State's evidence.

recalled seeing bruising on Lauren's leg on one occasion and, on another occasion, Lauren had a black eye. (Tr. at 262.) Lauren believed that DeWise was physically following her and knew her location by tracking her through her phone or her vehicle. (Tr. at 262-63.)

DeWise began contacting Audi through Facebook Messenger, which seemed odd to Audi since she had only met DeWise once. DeWise's messages vacillated between being aggressive and controlling and apologetic. Audi did not respond to the messages. (*See* State's Ex. 3, admitted at trial.) Within the same day, DeWise would erratically send Audi angry messages followed by apologetic ones. And Lauren showed Audi a Facebook post DeWise had authored that was extremely critical of Lauren on a very public forum. (Tr. at 265-66.)

In mid-November 2017, Lauren asked Audi if she could come and stay with her and Audi's other roommate, Ashley VanHemert. (Tr. at 266, 300.) After Lauren's first night at Audi's house, Audi got up in the morning and opened her garage door. Lauren's car was gone and there was a truck parked in the driveway. Lauren checked her phone and found 30 text messages from DeWise, including one that ordered her to "Open the door." DeWise had texted that he had been beating on the door. (Tr. at 267.) From that point forward, Audi, Lauren, and Ashley routinely locked the door—something they had no need to be mindful of before Lauren moved in. (*Id.*) Audi also borrowed a shotgun from a friend and kept



it behind her closet door. (Tr. at 268.) DeWise had never been to Audi's house as a guest. (Tr. at 269.)

During the two months that Lauren stayed at Audi's house, Audi read a string of erratic, aggressive, threatening Facebook messages that DeWise sent to Lauren, which he would follow up with messages apologizing for his behavior and pleading with Lauren to come home. (Tr. at 270.)

On January 4, 2018, Lauren went to the family home to celebrate her daughter's fourth birthday. When she returned to Audi's house she was extremely upset because DeWise would not allow her to enjoy her time with their daughter and instead badgered her about when she planned to move back home. After that, Lauren felt it would be impossible for her to return to the family home again. (Tr. at 271.)

On January 6, 2018, Audi had worked all day in Livingston and had dinner with a friend before returning home around 8:30 p.m. (Tr. at 271.) Audi had evening plans with another friend in Belgrade. Audi had some misgivings about leaving the house again but Lauren encouraged her to go and remarked that she felt happier and safer than she had in years. Audi left her home and did not return until the following morning. (Tr. at 272.)

When Audi walked into her home the next morning around 8:55 a.m., she noticed that pieces of the doorframe around her back door were broken on the

floor. Because the doorframe was not that sturdy, Audi initially assumed that one of her roommates had tried to pull the door open without knowing it was locked and the doorframe broke. (Tr. at 273-75; State's Ex. 5.)

Audi walked to the back door to look out and saw large boot prints in the snow on the back deck. (Tr. at 275; State's Ex. 6.) Audi's first thought was that DeWise had been there because "that would have been the only conflict that, in [her] mind, could have arisen with anyone in [their] home[.]" (Tr. at 276.) Audi quickly went upstairs to make sure Lauren was okay. (Tr. at 277.)

Upstairs, Audi immediately noticed that her bedroom door was open. Audi always kept her bedroom door closed when she was gone. (*Id.*) Audi quickly proceeded to Lauren's room and began calling to her. As she got close to the door threshold, she saw Lauren in her bed and knew she was dead. (*Id.*; State's Ex. 7.)<sup>2</sup> Audi rushed to Ashley's room and pushed the door open. Audi found Ashley lying on the floor with blood around her. Ashley was conscious and uttered, "Please help me." (Tr. at 279.) Audi later explained:

I screamed. I stood there briefly trying to decide if I could help her, and I turned around, and I—after seeing her alive—was concerned he was still in my home. So I ran down the stairs and out the front door.

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<sup>2</sup> Lauren had sustained five gunshot wounds from small caliber bullets, resulting in her death. (Tr. at 478, 488, 492.)

(*Id.*) Audi was afraid that DeWise was in her bedroom so she ran to her neighbor's house and her neighbor called 911. (Tr. at 279-80.)

Audi explained that she automatically thought DeWise was responsible:

Because of all of the threatening things he said to Lauren. Because of all of the terror he had already caused her. Because of the aggressive things he had said to me. Because he had already been to my home, and frankly, the act of switching those vehicle[s] was very upsetting to me—the first day—and it's one of those culminations of all of the factors. I don't question it at all.

(Tr. at 280.)

Ashley had never met DeWise, but recalled an occasion in late December 2017 when someone had been pounding on the front door around midnight. The “knocking” awakened Ashley. The knocking persisted and got louder. Ashley finally went downstairs and found Lauren in the dark. Lauren signaled Ashley not to say anything because she wanted it to appear that no one was home. The house was dark. Ashley and Lauren went upstairs while the knocking continued. Ashley suggested that they call the cops, but Lauren was adamant that they should not do so. (Tr. at 310.)

On the evening of January 6, 2018, Ashley went to Livingston with her boyfriend Ralph. She left the house around 7 p.m. and returned between 11:30 p.m. and midnight. (Tr. at 313-14.) Ashley and Ralph had had a very nice evening. Ralph took Ashley home, and before she got out of the car Ashley kissed him goodnight. Ralph waited to make certain that Ashley got inside safely before he

left. (Tr. at 314-15.) Ashley recalled that the front door was locked. The house was dark, and Ashley assumed Lauren was asleep. Ashley believed she had locked the front door behind her. (Tr. at 315-16.) The last thing Ashley remembered was getting ready for bed. The next thing she remembered was waking up in a hospital. Ashley had sustained gunshot wounds but had no recollection of how that had occurred. Ashley had been shot in the back of the head, in the carotid artery, and in her right arm. Upon her release from the hospital, Ashley completed an inpatient rehabilitation program and continues to participate in outpatient physical therapy, occupational therapy, and speech therapy. (Tr. at 320.) At the time of trial, Ashley was still not ready to return to work. (Tr. at 321.)

DeWise's son and Lauren's stepson, J.D., who was 15 years old in January 2018, recalled the events that transpired on January 6 into the early morning hours of January 7, 2018. (Tr. at 758-865.) During the evening of January 6, DeWise sat in front of the television, staring, until he finally got up and started collecting items from around the house and putting them into a bag. (Tr. at 788-89.) DeWise instructed J.D. to get ready for something. J.D. asked where they were going, but DeWise simply told him to get ready. (Tr. at 790.)

When J.D. realized that his dad had driven to Belgrade, he "started getting a real bad feeling because before we left the house, he told me to leave my phone on my bed, and that's very odd." (Tr. at 792.) J.D. asked multiple times what was

going on, but never received a reply. (*Id.*) J.D. knew that his stepmom, Lauren, was living on Idaho Street in Belgrade because she had texted him her address. When DeWise drove to Idaho Street, J.D. was afraid and “was getting a bad feeling that [his] dad was going to do something.” (Tr. at 793.) DeWise parked the car a few houses down from where Lauren was living. (*Id.*) It was around midnight. (*Id.*)

After DeWise parked, he pulled out a black, small caliber, semiautomatic pistol from his waist band. (Tr. at 794; State’s Ex. 53.) At trial, J.D. identified the pistol depicted in State’s Exhibit 53 as the pistol his dad pulled out from his waistband. (Tr. at 795.) DeWise told J.D. that if he did what DeWise said everything would be okay. (Tr. at 793.) DeWise gave J.D. plastic gloves and a mask and put on a mask and gloves himself. (Tr. at 796-97.) DeWise and J.D. proceeded to the back of the house where Lauren was living, and they ended up at the back deck area of the house. (Tr. at 803-04.) Both DeWise and J.D. were wearing work boots. (Tr. at 801-02.) DeWise paused briefly before kicking in the door. DeWise pushed J.D. into the residence. (Tr. at 803-04.)

DeWise checked all the rooms downstairs and then went upstairs with J.D. following behind him. (Tr. at 804.) DeWise was holding the pistol in his right hand when he opened a bedroom door, turned on the light and shot the woman in the room multiple times in the span of a few seconds. (Tr. at 805-06.) DeWise opened the door of another bedroom but did not turn on the light. J.D. heard a terrified

gasp followed by DeWise shooting his pistol multiple times. (Tr. at 806.) DeWise then turned to face J.D. and told him to go. They both got back to the car and left immediately. DeWise drove to a Town Pump. He tucked the pistol back into the waist band of his pants and went inside. J.D. remained in the car. He felt sick and tried to control his breathing. (Tr. at 810.) DeWise returned to the car with a six-pack of beer. (Tr. at 811.)

When DeWise and J.D. got inside their house, DeWise instructed J.D. to give him his boots, to put all his clothes in the washing machine, and to take a shower. DeWise left in the car, and J.D. had no idea where he went. (Tr. at 811.) DeWise took J.D.'s boots with him, and J.D. had no idea what he did with them. (Tr. at 813.) By the time J.D. got out of the shower, DeWise had returned. DeWise ordered J.D. to dispose of some old smoke grenades and .22 ammunition at the Bozeman Pond Park. It took J.D. several trips to do so. (Tr. at 814.)

When J.D. returned from his final trip to the Bozeman Pond Park, DeWise sat down on the couch with J.D. and told him what to say about the events of the evening. DeWise instructed J.D. not to incriminate him because J.D. would not want to know the consequence if he did so. If he was asked, DeWise instructed J.D. to say the family was at home together all evening watching television. (Tr. at 815.) J.D. was afraid and did as DeWise told him. (Tr. at 816.)

In January 2018, N.D., DeWise's daughter and Lauren's stepdaughter, was 17 years old. (Tr. at 621.) N.D. described her relationship with her father:

My relationship with him was unhealthy, as in he had complete control over my decisions and my opinions. He instilled fear into me to where he was always in control. He was abusive. He would yell and scream at me until his face turned red. He would spit as he would yell. He was violent. He would throw things off the counter in one sweep to further intimidate me.

(Tr. at 627.) N.D. described that DeWise was violent and abusive to Lauren. He physically abused Lauren, leaving bruises. (Tr. at 640.) DeWise got a tracking device for Lauren's vehicle. (Tr. at 642.)

N.D. explained that after Lauren moved out DeWise pressured her to come back home. When Lauren came to the house to celebrate the fourth birthday of N.D.'s little sister, it was very tense because DeWise badgered Lauren to move back home. (Tr. at 646-47.)

On the evening of January 6, 2018, N.D. recalled that DeWise was watching something on Netflix about murders. N.D. saw some very bloody scenes on the television screen. N.D. went to bed around 10 p.m. (Tr. at 649.) Later, as N.D. was asleep in her room with her little sister, her dad flipped on her bedroom light. DeWise instructed N.D. to get up because he wanted to talk to her. (Tr. at 652.) DeWise told N.D. that he had done something bad—he had killed Lauren. DeWise said he took J.D. with him when he killed her. (Tr. at 653.) DeWise coached N.D. on what to say if anyone questioned her. (Tr. at 691.)

On January 7, 2018, around noon, Andrea Smith, her husband, and her dog went ice fishing at what is often referred to as the Costco Pond. (Tr. at 441-42.) While Andrea organized the fishing equipment and got set up, her husband made a beer run. (Tr. at 446.) As Andrea was walking around the pond looking for a good place to set up, she found a black pistol sticking up out of the snow. (Tr. at 450.) There were no rounds in the magazine but there was one live round in the chamber of the pistol. (Tr. at 452.) Andrea and her husband placed the pistol with their gear and proceeded to fish. (Tr. at 453.)

Andrea planned to take the pistol to the Law and Justice Center. Before she had the opportunity to do so, she heard about a shooting and a murder in Belgrade. Andrea read an article identifying the make and model of the pistol law enforcement believed had been used in the murder and shooting. Andrea realized that this was the make and model of the pistol she had found at the pond. Andrea immediately called law enforcement and an officer came to her house to retrieve the pistol. (Tr. at 455-57.) Andrea identified the pistol depicted in State's Exhibit 53 as the pistol she found at the pond. (Tr. at 451.)

N.D. admitted that she did not tell the truth about the events of January 6 and 7, 2018, until weeks before DeWise's trial. She explained that she did not immediately tell the truth:



Because my dad told me not to, and I felt that I was in danger if I would have told them the truth. I was afraid that he would come after me, and my brother, and [our sister], so I felt that I had to [lie].

(Tr. at 661.)

J.D. did not tell law enforcement what really happened until his mom arrived from Florida to take him and his older sister back to Florida. (Tr. at 825-26.) Since January 6, 2018, J.D. described that he had been “[j]ust sad all of the time and nothing is in color. Nothing really has meaning. It’s just bleak.” (Tr. at 828.)

After N.D. moved back to Florida with her mother, DeWise telephoned N.D. from jail. DeWise wanted N.D. to convince her brother J.D. to turn himself in and confess that he had shot Lauren and Ashley rather than DeWise. DeWise told N.D. that if her brother confessed to the shootings he would only be in jail for a little while and then his life would just go back to normal. (Tr. at 664.)

Detective Sprinkle of the Gallatin County Sheriff’s Office assisted in processing the crime scene and collecting evidence. (Tr. at 502.) Detective Sprinkle photographed the footwear impressions left in the snow in the backyard, coming from the east side of the residence, around the north of the residence, and then to the back door of the residence. (Tr. at 507, 512; State’s Exs. 23-30.) Detective Sprinkle also located, photographed, and collected four .22 shell casings from Lauren’s bedroom. (Tr. at 539-49; State’s Exs. 36-39.) And Detective

Sprinkle located, photographed, and collected five .22 shell casings from Ashley's bedroom. (Tr. at 557-59, 564; State's Exs. 42-45.)

On January 9, 2018, Detective Sprinkle conducted a search of DeWise's residence and outbuildings pursuant to a search warrant. (Tr. at 577.) Inside of DeWise's shed, officers located four unfired rounds that were .22 caliber. (Tr. at 581-82.) These cartridges bore the same brand markings, Super X, as some of the cartridges collected from the crime scene. (Tr. at 584.) During a second search of the shed the next day, officers found another .22 cartridge on the floor of the shed. (Tr. at 598; State's Ex. 52.) This cartridge also bore the Super X marking. (Tr. at 600.)

In the master bedroom of the house officers located two boxes of .22 ammunition labeled Aguila ammunition. (Tr. at 585-86; State's Ex. 49.) The bases of the cartridges were marked with an A. Some of the cartridges collected from the crime scene had the same A markings on the cartridge bases. (Tr. at 590-91.)

In another drawer in the master bedroom, officers also located an instruction manual for a Ruger Mark 2 .22 pistol. (Tr. at 592; State's Ex. 51.) Officers did not locate a .22 pistol of any kind at DeWise's residence. (Tr. at 594.)

DeWise testified at trial. (Tr. at 1374-1491.) He admitted to once hitting Lauren's arm repeatedly and leaving it very bruised. (Tr. at 1396.) DeWise claimed that Lauren had ended up with a black eye after their then three-year-old daughter

hit Lauren in the face with the back of her head while the two were reading a book. (Tr. at 1410.)

DeWise testified at trial that he was sick on January 6, 2018. He had spent the day and evening sitting in his recliner in the living room resting. (Tr. 1434, 1436.) DeWise claimed that the only time he left his house was around midnight when he went to the store to buy some beer. (Tr. at 1440.) DeWise stated that he then went to bed around 2 a.m., the early morning of January 7, 2018. (Tr. at 1441.) DeWise maintained that he had been “falsely accused” of the crimes. (Tr. at 1479.)

## **II. DeWise’s demand for new counsel**

In DeWise’s first ex parte letter to the district court, he raised concerns that his attorneys were not prepared for the trial scheduled in February 2019. DeWise specifically complained that he did not believe his counsel had reviewed all discovery and had decided against expert witnesses. (App. A.) DeWise urged that his counsel were not effective and asked for new counsel. (*Id.*) The district court, through a written order, provided DeWise with the OSPD Grievance Procedure so DeWise could follow that process. (App. B.)

In DeWise’s letter filed with the court on November 29, 2018, DeWise complained that his counsel continued to deny him access to discovery and were

neglecting him, perhaps because of counsels' large caseloads. (App. C at 1.) In the same letter, DeWise indicated that his counsel had previously provided him with a thick packet of discovery. (App. C at 2.) DeWise requested that the court reset his trial and assign him new counsel. (*Id.*) The district court promptly issued an order explaining that it could not act on DeWise's request until DeWise completed the grievance process with the OSPD. (App. D.)

In an ex parte letter that DeWise filed with the court on December 28, 2018, DeWise complained that he had learned through the news media that his attorneys filed a motion to suppress evidence in his case. (App. E.) DeWise did not believe his counsel should be filing any motions on his behalf because he wanted new counsel and a later trial date. While DeWise was displeased with his attorneys filing the suppression motion, he listed "facts" suggesting that such a motion was most likely appropriate because investigators had lied during his interview and used his children to manipulate the situation. But DeWise also viewed the motion to suppress his statements as a strategy to protect the investigators and to hide that the entire criminal investigation was biased and based on a misrepresentation of facts. (*Id.*)

In DeWise's ex parte letter filed with the court on January 3, 2019, DeWise demanded that the court suspend all pending motions until DeWise had access to new counsel. (App. F.) DeWise further requested that his daughter, N.D., be

removed from the State's witness list so DeWise could speak with her. DeWise characterized N.D. as the best witness for the defense. (*Id.* at 2.) DeWise also alleged that N.D. was afraid to cooperate with him in his defense based upon threats from the State and from N.D.'s mother. (*Id.*)

At a February 4, 2019, hearing on pending motions, DeWolf informed the court that DeWise wanted to request a new attorney. (2/4/19 Tr. at 3.) The district court questioned DeWise, who affirmed that he did not want to proceed with the hearing or trial with his current counsel. (*Id.* at 3-4.) Defense counsel explained that DeWise had completed the grievance process through the OSPD and his request for new counsel had been denied. (*Id.* at 5.)

The district court then explained to DeWise:

All right. So, Mr. DeWise, in order to proceed, I need to know what your concerns are with your attorneys. So I'm going to ask you to file a written motion outlining those concerns. It can be filed under seal, and once I look at that and determine that it appears—whether or not it appears to be seemingly substantial, then I will either set a hearing, or I will deny it after I reread these cases. And then, if we do set it for a hearing, counsel for the State need not attend that because [] those discussions would be confidential to your defense. And then once we determine that issue, then we can go forward. I don't have a hearing date to give you at the moment, so I'm going to ask you to file that motion. Once I receive that, then I can go ahead and review it, and then determine whether we need a hearing or whether it's going to be denied based on the review that's required under the cases.

(*Id.* at 9-10.) DeWise acknowledged that he would follow this process. The court vacated the hearing on pending motions and the February 2019 trial. (*Id.*)

DeWise filed his request for new counsel under seal on March 29, 2019. (Doc. 159, filed under seal.) Defense counsel filed their response on April 19, 2019. (Doc. 162, filed under seal.)

In its order denying DeWise's request for new counsel, the district court described DeWise's grounds for requesting new counsel as follows:

- 1) Lack of availability of counsel;
- 2) Failure to provide adversarial defense;
- 3) Lies, misinformation and "gas lighting" of Defendant by counsel;
- 4) Insults directed at Defendant by Jacobi and the defense investigator Eric Severson;
- 5) Retaliatory behavior by counsel following Defendant's complaint to OPD;
- 6) Threats of retaliatory behavior by counsel if Defendant continued seeking substitute counsel after his OPD complaint was denied;
- 7) Breach of confidentiality by counsel and threats of further breach if Defendant continued with his complaints;
- 8) Counsel providing assistance to the State in Defendant's prosecution.

(Appellant's App. A at 6.)

The district court also summarized defense counsels' response to DeWise's list of complaints, including that the defense team had provided DeWise with effective representation within the parameters of the Montana Rules of Professional Conduct and that communication between counsel and DeWise had not broken down. (*Id.* at 7.) Counsel affirmatively asserted they wished to continue to work with DeWise, and that they had been diligently preparing for trial and

would continue to do so. (*Id.*) The defense team had logged about 187 hours working on DeWise’s case in advance of trial and collectively had spent 53 hours personally with DeWise. (*Id.*) Defense counsel explained that at no time during those 53 hours did a breakdown in communication occur. Further no member of the defense team had been hostile or insulting to DeWise. (*Id.* at 8.)

Defense counsel further stated that “they [had] not lied to Defendant, not provided him with misinformation and not attempted to ‘gaslight’ him with psychological manipulation. Nor [had] they acted in any retaliatory manner toward Defendant as a result of his pursuit of his complaints with OPD.” (*Id.*) Defense counsel also explained that they made strategic decisions in filing motions addressing evidence that should be excluded from trial. Defense counsel never divulged any confidential information or in any way violated the attorney-client privilege. (*Id.* at 8-9.)

The district court concluded that DeWise’s complaints regarding counsel were not “seemingly substantial” and did not warrant a hearing because:

Many of Defendant’s complaints regarding counsel involve strategic and tactical decision-making or other such aspects of their representation. The gravamen of these complaints is Defendant’s belief that counsel are providing ineffective assistance. Ineffective assistance of counsel complaints are not to be considered by the Court as a basis for granting a request for substitution of assigned counsel. *Johnson*, ¶ 19.

The remainder of Defendant’s complaints revolve around his general dissatisfaction with the amount of time counsel is spending with him and his perception that counsel is treating him in a hostile or

retaliatory manner. However, nothing in Defendant's allegations indicates that these issues have resulted in a complete breakdown in communication between Defendant and counsel. To the contrary, DeWolf and Jacobi represent that they have been able, and will continue to, communicate effectively with Defendant and work diligently toward his defense. Moreover, Defendant has not established there is any irreconcilable conflict between himself and counsel or any actual conflict. *Johnson*, ¶ 19. As a result, the Court concludes, based on the criteria set forth by the Montana Supreme Court in *Johnson*, that Defendant's complaints regarding assigned counsel are not "seemingly substantial." On this basis the Court further concludes that no hearing on Defendant's Motion is warranted.

(*Id.* at 9-10.)

### **SUMMARY OF THE ARGUMENT**

DeWise has failed to demonstrate that his circumstances were any of the few circumstances warranting substitution of counsel. There is no question that the district court took DeWise's complaints about his defense team seriously and gave DeWise time to work through the OSPD grievance process before it formally considered DeWise's request for new counsel. The district court postponed DeWise's trial to adequately consider DeWise's concerns. Defense counsel filed a written response to DeWise's list of reasons he was requesting new counsel. The district court considered DeWise's reasons and defense counsels' responses before deciding that DeWise did not raise seemingly substantial complaints because DeWise's complaints were more disagreements about trial strategy and tactics and



about his unhappiness with the amount of time the defense team spent with him personally.

DeWise did not describe circumstances of an irreconcilable conflict or a complete break down in communication between him and his defense team.

Rather, DeWise complained about what his counsel did or did not do and argued that the defense team did not spend nearly enough personal time with him. If

DeWise believes that he did not receive effective representation pretrial or at trial, he can raise that claim in a postconviction proceeding. Defense counsel expressed their desire to continue representing DeWise and assured the district court there was not an irreconcilable conflict or a complete breakdown in communications.

The district court properly exercised its discretion in denying DeWise's request for new counsel.

## **ARGUMENT**

### **I. The standard of review**

Denying a request to substitute counsel is within the sound discretion of the district court, and this Court reviews such a denial for an abuse of discretion.

*State v. Aguado*, 2017 MT 54, ¶ 8, 387 Mont. 1, 390 P.3d 628. A district court abuses its discretion if it acts arbitrarily, without the employment of conscientious

judgment, or exceeds the bounds of reason, resulting in substantial injustice.

*State v. Cheetham*, 2016 MT 151, ¶ 13, 384 Mont. 1, 373 P.3d 45.

**II. The district court properly exercised its discretion in denying DeWise’s request for new counsel without an evidentiary hearing because DeWise did not make a substantial showing of an irreconcilable conflict or a complete breakdown in communication.**

**A. Introduction**

The United States Constitution and the Montana Constitution guarantee a criminal defendant the right to effective assistance of counsel. *State v. Johnson*, 2019 MT 34, ¶ 14, 394 Mont. 245, 435 P.3d 64, citing U.S. Const. amend. VI, Mont. Const. art. II, § 24. But the right to effective assistance of counsel does not grant a defendant the right to counsel of his choice. *State v. Dethman*, 2010 MT 268, ¶ 15, 358 Mont. 384, 245 P.3d 30. A defendant only has the right to substitute counsel in a few circumstances. Those circumstances do not include when a defendant lacks confidence in counsel or simply does not approve of counsel. *Cheetham*, ¶ 18.

In *Johnson*, this Court clarified that a defendant is entitled to substitute counsel only if he presents material facts showing good cause for the substitution as demonstrated by: (1) an actual conflict of interest; (2) an irreconcilable conflict between defense counsel and the defendant; or (3) a complete breakdown in

communication between defense counsel and the defendant. *Johnson*, ¶ 19. A defendant is not entitled to substitute counsel based on a general claim of ineffective assistance of counsel. This Court explained:

To avoid confusion, the trial court's inquiry into a defendant's substitution request should focus not on specific disagreements between counsel and defendant regarding trial strategy or on whether defense counsel's chosen techniques are effective, but instead should focus on whether the defendant presented material facts showing good cause for his substitution request as demonstrated by: (1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant.

*Id.* ¶ 20.

When faced with a defendant's request to substitute counsel, the trial court must first perform an adequate initial inquiry to determine whether the defendant's complaints supporting his request for new counsel are seemingly substantial.

*Id.* ¶ 21. A district court's inquiry is inadequate if the court fails to conduct “‘even a cursory inquiry’ into the defendant's complaints.” *State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371.

A district court's initial inquiry is adequate if it considers a defendant's factual complaints together with counsels' specific explanations addressing the complaints. *State v. Schowengerdt*, 2015 MT 133, ¶ 17, 379 Mont. 182, 248 P.3d 664. If the district court performs an adequate initial inquiry and determines the defendant's complaints are not seemingly substantial, the court does not need to

conduct a hearing to address the defendant's complaints. *Gallagher*, ¶ 15. But, if the district court determines the defendant's complaints are seemingly substantial, the court must conduct a hearing to address the validity of the complaints. *State v. Happel*, 2010 MT 200, ¶ 14, 357 Mont. 390, 240 P.3d 1016.

The district court should only grant the defendant's substitution motion if the defendant presents material facts showing (1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant. *Johnson*, ¶ 22. In making its decision the district court should consider the circumstances surrounding the defendant's substitution motion, including the degree to which the conflict prevented the mounting of an adequate defense. *Id.*

**B. The district court made an adequate initial inquiry, after which it correctly found that DeWise's complaints were not seemingly substantial.**

DeWise does not allege that the district court failed to make an adequate initial inquiry into his complaints about his attorneys. Rather, DeWise urges that the district court abused its discretion when it found that DeWise failed to demonstrate at the outset that his complaints against his attorneys were seemingly substantial. (Appellant's Br. at 37.) When determining whether a complaint is "seemingly substantial," the threshold issue is not whether counsel was ineffective, but, rather, whether the district court adequately considered the defendant's claim.

*Happel*, ¶ 14. During this initial inquiry, the district court does not need to determine if the claims are meritorious, only whether the claims are “seemingly substantial.” *Id.*

DeWise cannot establish that the district court abused its discretion when it found that he did not raise seemingly substantial complaints within the parameters of *Johnson*. Here, after making a thorough inquiry, the district court correctly observed that the majority of DeWise’s complaints against his attorneys were ineffective assistance of counsel claims that did not have a bearing on or did not establish an irreconcilable conflict between the defense team and DeWise or a complete breakdown in communication. DeWise can raise any non-record-based ineffective assistance of counsel claims in a postconviction proceeding. *Johnson*, ¶ 27.

In DeWise’s initial letter of complaint, he wrote that he did not have “effective” counsel, but he did not discuss or suggest any irreconcilable conflict or a complete breakdown in communication. (App. A.) In DeWise’s second letter of complaint, DeWise asserted his counsel were neglecting him due to their large caseloads and were denying him access to discovery. But, in the same letter, DeWise acknowledged his counsel had provided him with a thick packet of discovery. (App. C.) DeWise also wanted a postponement of his February 19, 2019, trial date—which he received.

In DeWise's third letter of complaint, he expressed his frustration at learning through the news media that his counsel had filed a motion to suppress some statements that he made after his arrest. (App. E.) DeWise did not want his attorneys to suppress his statements because he believed this was simply a strategy to benefit the investigators rather than him. (*Id.*) In DeWise's fourth letter to the district court, he demanded that the court prohibit his attorneys from filing any more motions because he wanted new counsel, presumably counsel who would strictly follow all his wishes despite counsel's independent assessments. (App. F.)

Considering DeWise's complaints raised in his ex parte letters in total, the complaints do not rise to seemingly substantial material facts supporting or even suggesting an irreconcilable conflict or a total breakdown in communication. Rather, the complaints suggest that DeWise believed his attorneys had not spent enough time with him personally, they had not developed a perfect, iron-clad defense, and they did not always agree with him on strategic matters.

The same is true of DeWise's list of reasons for demanding new counsel. Defense counsel specifically denied most of DeWise's allegations, such as providing DeWise misinformation, insulting DeWise, retaliating against DeWise because he requested new counsel, breaching confidentiality, and conspiring with the State to assist it in obtaining a conviction.

Defense counsel readily admitted they could not meet with DeWise personally as often as they might ideally have wished to, but the defense team still devoted many, many hours to DeWise's representation. Regarding DeWise's concern about defense counsel establishing a successful defense, defense counsel could only work within the confines of the facts and evidence collected in DeWise's case. DeWise denied that he had been at the crime scene and denied that he committed the offenses. Defense counsel had to present that defense within the confines of what the State's evidence would likely show at trial. DeWise might not have liked the State's evidence, but defense counsel did not have the power to change it. Rather, they could only challenge it and test it through the adversarial process and the rules applicable to that process—the same as any other defense attorney.

DeWise directs this Court to its decisions in *Gallagher* and *State v. Hendershot*, 2007 MT 49, 336 Mont. 164, 153 P.3d 619, to support his assertion that he raised seemingly substantial complaints sufficient to justify a hearing. Both cases are distinguishable and demonstrate that in DeWise's case the district court did not abuse its discretion. For example, in *Gallagher* defense counsel himself explained to the district court that his client believed that he and defense counsel had a "severe personality conflict." And Gallagher testified that his defense counsel had "more or less" told him he was guilty and the two were unable to work

together on a defense. *Gallagher*, ¶ 23. This Court concluded that Gallagher's complaints, along with defense counsel's own observations, were sufficient to trigger the need for a hearing. *Id.* ¶ 26.

Here, defense counsel denied that there was an irreparable conflict or a total breakdown in communication. Defense counsel declared that they were prepared to proceed to a jury trial where they would provide DeWise with the best defense possible. While defense counsel acknowledged that they had had to cancel some scheduled meetings with DeWise, and indeed that their schedules were full, this is a daily reality for state public defenders. But a busy workload does not equate to an irreconcilable conflict or a complete breakdown in communication. Defense counsel can only intensely prepare for one trial at a time. While DeWise might have felt impatient for his turn at the intense preparation, his impatience cannot establish gross neglect, an irreparable conflict, or a complete breakdown in communication. Rather, it is inevitable frustration that defendants experience as they await their trial dates.

Similarly, in *Hendershot*, defense counsel's partner acknowledged that there had been a complete breakdown in communication and asked that the firm be removed from Hendershot's case. *Hendershot*, ¶ 12. This Court also explained that defense counsel had not attended two substantive procedural hearings but sent his associate in his place. Defense counsel had also scheduled a change-of-plea



hearing without ever discussing a guilty plea with Hendershot. *Id.* ¶ 25. In sum, Hendershot's complaints were related to the complete breakdown of the attorney/client relationship rather than an assessment that defense counsel was not performing effectively on trial preparation and strategy. And defense counsel's associate reinforced that there had been a complete breakdown in communication between defense counsel and Hendershot.

Here, defense counsel promptly responded to DeWise's complaints by denying some allegations, explaining the reality of defense work, affirming that they wanted to remain on DeWise's case, and assuring the court and DeWise that they were prepared to proceed to trial where they intended to provide DeWise with an adequate defense. After making an initial adequate inquiry, the district court properly denied DeWise's request to substitute counsel because he did not make a substantial showing that he had an irreconcilable conflict with counsel or a complete breakdown in communication.

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## **CONCLUSION**

The State respectfully requests that this Court affirm the order of the district court denying DeWise's request for substitution of counsel and thereby affirm his convictions for Deliberate Homicide and Attempted Deliberate Homicide.

Respectfully submitted this 6th day of May, 2022.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 7,374 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell  
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0173

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH PAUL DEWISE,

Defendant and Appellant.

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**APPENDICES**

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November 21, 2018 Letter (attached to D.C. Doc. 36) .....	Appendix A
November 27, 2018 Order and OSPD Client Grievance Procedure Policy (D.C. Doc. 36 and attached Policy) .....	Appendix B
November 28, 2018 Letter and attachments (attached to D.C. Doc. 38) .....	Appendix C
November 29, 2018 Order giving OSPD opportunity to review complaints and request for new counsel (D.C. Doc. 38) .....	Appendix D
December 28, 2018 Letter (attached to D.C. Doc. 83).....	Appendix E
January 3, 2019 Letter (attached to D.C. Doc. 83) .....	Appendix F
January 8, 2019 Order re: Ex Parte Communication (D.C. Doc. 83) .....	Appendix G
February 12, 2019 Order re: Defendant's Request for New Counsel (D.C. Doc. 145) .....	Appendix H

## **CERTIFICATE OF SERVICE**

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-06-2022:

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