

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. DA 23-0049

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STATE OF MONTANA,

Plaintiff-Appellee,

vs.

JOSE FRANK PATINA,

Defendants-Appellant.

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**APPELLANT'S OPENING BRIEF**

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On Appeal from the District Court of the Thirteenth Judicial District  
of the State of Montana, In and for the County of Yellowstone,  
Before the Honorable Rod Souza  
Cause No. DC 21-937

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## **STATEMENT OF THE ISSUE**

The district court abused its discretion by denying Appellant, Jose Frank Patina's ("Patina") request for new counsel by not holding a hearing following the district court's initial inquiry when Patina made seemingly substantial complaints regarding his appointed counsel.

## **STATEMENT OF THE CASE**

On July 12, 2021, Patina was charged by information with five counts of assault with a weapon. These charges arose from a July 11, 2021, incident where Patina was accused of firing a 9mm pistol into a vehicle occupied by five individuals.

Patina maintained his innocence throughout and proceeded to three-day jury trial, which occurred May 31, 2022 through June 2, 2022. On the first day of trial, after addressing several motions, the district court inquired of Patina if he had the chance to review discovery while considering any offer from the State. Mr. Patina complained he had only recently seen discovery materials and had only seen some of it two days prior. Having heard this complaint and defense counsel's explanation, the district court proceeded with trial.

At the outset of the third day of trial, Patina requested to address the district court directly in order to request new counsel.

Outside the presence of the State, the district court conducted an initial inquiry into Patina's concerns. Patina based his request on his belief that he was unprepared

for trial because his counsel had not provided him with discovery in a timely manner and were generally ineffective, biased against him, and a communication breakdown had occurred. In response to questioning by the district court, Patina directly stated his belief there was no longer a possibility of working with his assigned counsel.

Despite Patina raising these concerns, the district court ultimately denied Patina's request for new counsel. The district court determined that defense counsel had been effective up until the point of the initial inquiry, so he was not entitled to new counsel. In doing so, the district court ignored the Patina's seemingly substantial complaints regarding his counsel and erred by not conducting an additional hearing as required by this Court's precedent.

Patina asserts this was an abuse of discretion by the district court which entitles him to a new trial.

### **STATEMENT OF THE FACTS**

On July 11, 2021, Billings Police Department responded to a report of a firearm being discharged into an occupied vehicle. Motion for Leave to File Information and Supporting Affidavit, Docket No. 1. After investigation, the officers determined that 16 shots had been fired at the vehicle and witnesses identified Patina as the alleged shooter, who was later arrested and charged. *Id.* Patina maintained his innocence, no significant pre-trial motions were filed, and Patina proceeded to trial by jury. See Docket, generally.

On May 31, 2022, the first day of Patina’s trial began with the district court resolving evidentiary issues. Transcript of Trial Proceedings, May 31, 2022 (“Tr. Day 1”), 4:5-29:8. Thereafter, the district court inquired whether Patina had been presented and considered all offers from the State. Tr. Day 1, 29:8-13. Then, without the State present, the district court inquired of Patina regarding his desire and preparedness to proceed to trial. Tr. Day 1, 30:7-34:9.

During the district court’s inquiry, Patina first raised his concerns regarding not having been provided discovery, as part of the following exchange:

THE COURT: In discussing that plea offer, have you had the opportunity to discuss the nature of the State's evidence, the anticipated presentation by the prosecution, and your defense of the case?

THE DEFENDANT: The only thing that I was concerned about, Your Honor, is, we did go over Watch -- you know, a WatchGuard -- WatchGuard evidence and audio -- audio evidence, but I have not -- I - - I just recently received my transcripts and everything just two days ago of my discovery. I have not received pictures of my discov -- from my discovery, the evidence held against me, I've seen it all in the -- the WatchGuard about three days ago. So I have not received, you know, the full discovery in hand.

THE COURT: Ms. Hammack or Ms. Fiscus? (Defense Counsel)

MS. HAMMACK: Our office, per policy, provided Mr. Patiña with the written discovery, which is the police reports. We do not send out digital discovery to a defendant if they are in custody, as they are not able to look at it. There is also special software that is used to play WatchGuard videos.

I met with Mr. Patiña extensively. Prior to trial, I reviewed all of the State's evidence. It is not a practice for us to provide transcripts, but he did have an opportunity to listen to the statements. And I did as a

courtesy, give him the transcripts after they were received. I have reviewed everything in the file and have advised him according to my review of the file. So – which is my standard practice with all the cases I have.

THE COURT: Did the witness statements -- excuse me, did the law enforcement reports contain summaries of witness statements?

MS. HAMMACK: Yes, Your Honor. Officer Weekes, who conducted all of the victim interviews has summarized each interview in her police report.

THE COURT: Okay. Okay. Well, Mr. Patiña, it sounds like the witness interviews were summarized. Also, although you have not had written transcripts until recently -- I should first confirm, I'm not be disrespectful, but you do read and write the English language.

THE DEFENDANT: Yes, Your Honor.

THE COURT: So you were to review the reports?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you were able to listen to those audio statements well in advance, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So you've had the benefit of all the discovery?

THE DEFENDANT: Yes, sir.

At the outset of the third day of trial, Patina requested to speak with the district court and place a statement on the record. Transcript of Trial Proceedings, June 2, 2022 (“Tr. Day 3”), 518:25-519:3. Outside the presence

of the State, the district court conducted an inquiry into Patina's concerns with his representation and request for new counsel. Tr. Day 3, 519:4-543:16.

Patina addressed many concerns, some of which were explained by the district court and appear to be a misperception of events that occurred. For instance, Patina complained that he had been told of a status hearing only to later be told by his counsel the hearing had been cancelled and counsel filed a report on his behalf. 519:13-22. This was explained by the district court to Patina as a situation where the court itself cancelled the hearing and directed the attorneys to file a status report. Tr. Day 3, 524:2-4.

Patina's most ardent concern was that he had only been provided discovery a few days prior to trial. Tr. Day 3, 521:25-522:4. Patina further alleged that he had only learned of a portion of the evidence against him on the first day of trial. Tr. Day 3, 522:5-11.

The district court explained to Patina that in order to grant a mistrial and appoint new counsel, the court would need to find a "manifest necessity as a result of breakdown in communication" between Patina and his counsel. Tr. Day 3, 535:19-23. When asked if he believed there was a breakdown in communication, Patina responded he did believe there was a substantial breakdown in communication. Tr. Day 3, 529:9-10. Patina referenced defense counsel's statements regarding liking or being approving of one of the

witnesses against Patina, leading Patina to believe his counsel was not working to his benefit or thoroughly cross examining the witness. Tr. Day 3, 529:11-20.

After explaining the legal standard and differences between trial strategy and a communication failure to Patina, the district court inquired directly on the key issue:

THE COURT: Well, no, I -- so my question is, can you move forward on the trial? Do you have a sufficient relationship with Ms. Hammack and Ms. Fiscus to work with them and go forward on the trial?

Again, this is -- you need to tell me the truth.

THE DEFENDANT: No, I don't.

Tr. Day 3, 537:4-9.

Despite Patina's continued assertion that he could not move forward with his current counsel, and Patina's vocalized concern that a breakdown in communication had occurred, the district court determined that defense counsel had been effective up until this point and denied Patina's request for new counsel, and proceeded with trial. Tr. Day 3, 543:5-16.

Ultimately, Patina was found guilty of five counts of Assault with a Weapon and sentenced to 12 years per count run consecutively for a total sentence of 60 years. See Judgment, Doc. 82.

## **STANDARD OF REVIEW**

This Court reviews a district court’s denial of a request for the appointment of new counsel for an abuse of discretion. *State v. Holm*, 2013 MT 58, ¶ 16, 369 Mont. 227, 305 P.3d 843, citing *State v. Hammer*, 2013 MT 203, ¶ 12, 371 Mont. 121, 305 P.3d 843.

In determining whether a district court abused its discretion, this Court considers both the procedures employed by the district court during the initial inquiry into defendant's complaints, and the court's analysis of whether a defendant's claims are seemingly substantial, necessitating a further hearing. *State v. Khongwiset*, 2020 MT 215, ¶ 23, 401 Mont. 142, 471 P.3d 51, citing *State v. Schowengerdt*, 2018 MT 7, ¶ 16, 390 Mont. 123, 409 P.3d 38.

## **SUMMARY OF THE ARGUMENT**

The district court correctly made an initial inquiry into Patina’s request for new counsel, but either incorrectly determined Patina’s claims were not “seemingly substantial,” or applied the wrong legal standard to Patina’s claims.

When the district court failed to conduct a further and more complete hearing on Patina’s claims, the district court abused its discretion. Patina raised concerns regarding the breakdown in communication between himself and his counsel, alleging that counsel had failed to timely provide him with discovery materials, and voiced his belief that counsel was potentially biased in favor of a witness against

Patina, leading counsel to fail to adequately represent Patina. Finally, when asked directly Patina stated his relationship with counsel had deteriorated to the point that he could no longer continue with his assigned counsel. These claims rise to the level of being “seemingly substantial” and required a further hearing. By not conducting an additional hearing to determine the validity of Patina’s claims, the district court abused its discretion.

### **ARGUMENT**

Article II, Section 24 of the Montana Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel at every critical stage of the proceedings. *State v. Gazda*, 2003 MT 350, P 29, 318 Mont. 516, 82 P.3d 20.

A defendant is entitled to substitute counsel 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 counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant. *State v. Johnson*, 2019 MT 34, ¶ 19, 394 Mont. 245, 435 P.3d 64.

When a defendant raises complaints against his attorney seeking substitution of counsel, the district court must make an adequate initial inquiry into the nature of those complaints and determine if they are seemingly substantial. *State v. Cheetham*, 2016 MT 151, ¶ 20, 384 Mont. 1, 373 P.3d 45. An appellate review of the district

court's inquiry is not an examination to determine if counsel was ineffective, but rather, whether the district court's inquiry into the claim was adequate. *State v. MacGregor*, 2013 MT 297, ¶ 25, 372 Mont. 142, 311 P.3d 428. A district court's inquiry is adequate when the "court considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints." *Schowengerdt*, ¶ 17. A district court's inquiry is inadequate if it fails to conduct "even a cursory inquiry" into the defendant's complaints. *Cheetham*, ¶ 20.

The initial inquiry serves only to establish whether a defendant has a seemingly substantial claim; it is not a hearing on the merits of that claim. *Gazda*, at ¶ 32.

Here, it cannot reasonably be alleged the district court did not meet the requirement to conduct an initial inquiry into Patina's claims. The district court spent a good deal of time inquiring into Patina's concerns with his counsel, then heard from counsel regarding those concerns before ultimately denying Patina new counsel. The district court's actions would surpass the requirement of conducting "even a cursory inquiry."

However, the district court erred by determining Patina's complaints were not "seemingly substantial." It does not appear this Court has specifically defined "seemingly substantial," so the words are given their common and ordinary

meaning. *Murray v. BEJ Minerals, LLC*, 2020 MT 131, ¶ 30, 400 Mont. 135, 464 P.3d 80.

“Seemingly” is used to indicate how something appears or seems; for example, a seemingly simple problem, is a problem that appears to be simple.<sup>1</sup>

“Substantial” is defined as having great meaning or lasting effect and is synonymous with significant or important.<sup>2 3</sup>

In other words, the initial inquiry is not to determine the merits of any claim, rather it is to determine if a claim appears to be significant or important. *Gazda*, at ¶ 32.

Here, Patina raised issues which appear to have been significant, but the district court took no action beyond the initial inquiry to determine the validity of Patina’s claims.

First, Patina claimed he was not provided with discovery in an adequate or complete manner prior to trial. Patina alleged that his counsel had only days before shown him the bulk of discovery in his case, and that he had not seen the Watchguard videos.

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<sup>1</sup> Merriam-Webster Dictionary, Seemingly, retrieved on February 19, 2024, from <https://www.merriam-webster.com/dictionary/seemingly>.

<sup>2</sup> Merriam-Webster Dictionary, Substantial, retrieved on February 19, 2024, from <https://www.merriam-webster.com/dictionary/substantial>.

<sup>3</sup> Merriam-Webster Thesaurus, Substantial, retrieved on February 19, 2024, <https://www.merriam-webster.com/thesaurus/substantial>.

Further, Patina voiced his concern that his counsel was biased in favor of one of the witnesses, which Patina believed led defense counsel to hold back or not thoroughly cross examine the witness.

Finally, Patina explicitly stated, on multiple occasions, during the initial inquiry that the relationship between himself and his counsel was no longer viable and that he could not proceed with his current counsel because of a lack of communication.

All of Patina's complaints rise to the level of being "seemingly substantial" and required additional hearing. However, the district court did not conduct an additional hearing to determine the factual basis for Patina's complaints, rather the district court effectively combined the initial inquiry with the required additional hearing to determine that Patina's complaints were unfounded, and that defense counsel's performance had been effective. While this may have been the ultimate outcome of the hearing, by not conducting the required hearing to make that determination, the district court abused its discretion.

### **CONCLUSION**

The district court abused its discretion by failing to conduct a hearing into the validity of Patina's complaints about his counsel and request for new counsel, after the district court's initial inquiry revealed seemingly substantial complaints were made by Patina. Based upon these errors, Patina was effectively denied the effective

assistance of counsel, and this Court should reverse and remand this case for a new trial.

DATED this 19th day of February, 2024.

PEACE LAW GROUP, LLC

/s/ Rufus I. Peace \_\_\_\_\_  
Rufus I. Peace  
*Attorney for Plaintiff-Appellant*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I the undersigned hereby certify that the foregoing Appellant’s Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word is 3,064 words, excluding the caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 19th day of February, 2024.

PEACE LAW GROUP, LLC

*/s/ Rufus I. Peace* \_\_\_\_\_  
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**APPENDIX**

Excerpt from Transcript of July 2, 2022, Jury Trial Day 3 .....Appendix A

## CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-19-2024:

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