

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0483

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN CHARLES WALLA,

Defendant and Appellant.

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**UNOPPOSED MOTION TO STAY APPEAL IN ORDER TO  
RECONSTRUCT THE RECORD UNDER MONT. R. APP. P. 8(7)**

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Pursuant to Mont. R. App. P. 8(7), Appellant and Defendant Kevin Charles Walla moves the Court to stay this appeal to allow trial counsel and the District Court to reconstruct the record of a motion hearing that occurred on September 13, 2021, and an informal omnibus hearing that occurred on October 18, 2021.

In relevant part, the two hearings at issue addressed Defense Counsel's opposed motion for (1) a trial continuance to obtain a mental health evaluation concerning Mr. Walla's previously diagnosed condition of combat-related Post Traumatic Stress Disorder ("PTSD") and (2) a new omnibus hearing. (D.C. Docs. 119 at 2—3; 126 at 2.) The

State opposed a continuance, the request for a PTSD expert, a mental health evaluation, and a new omnibus hearing, but indicated it would not oppose a new scheduling conference. (D.C. Doc. 123.) The record reveals that the District Court granted a continuance and set a new scheduling conference. (D.C. Docs. 127, 128.) On February 15, 2024, the court reporter notified the Court and the parties that due to a recording equipment failure no record of the 09/13/2021 hearing was available.

A second omnibus order was filed in October 2021, following “an Informal Omnibus Hearing.” The order established some new deadlines, but did not establish a new deadline for expert disclosures. (D.C. Docs. 27 at 3, 5; 130 at 1.) No minutes of that hearing are listed on the case register. Prior to the informal omnibus hearing, the Defense filed a Note of Issue indicating the PTSD expert witness and mental health evaluation issues remained unresolved. (D.C. Doc. 129 at 2, ¶¶ 1 – 5.) No written record of the 10/18/2021 informal omnibus hearing exists beyond the second omnibus order.

In *State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (“*Deschon I*”), this Court applied a two-part test established by the

United States Supreme Court in *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), and followed in *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir. 1989), to determine whether the district court's failure to record a portion of a criminal trial violated due process: “(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.” *Deschon I*, ¶ 26 (citation omitted).

Mont. R. App. P. 8(7)(c) requires a motion to reconstruct the record to be filed within 15 days of the notice of appeal. That deadline, however, cannot be met by the Appellate Defender Division. Here, the *Deschon I* criteria weigh in favor of Mr. Walla’s request to stay appellate briefing in order to reconstruct the record of the 09/13/2021 motion hearing and the 10/18/2021 Informal Omnibus Hearing, concerning his requests for a mental health evaluation by a PTSD expert and a new deadline for disclosing expert witnesses. The existing record is inadequate for discerning the District Court’s resolution of Mr. Walla’s requests or any additional argument the parties may have made at the two hearings. Mr. Walla may have meritorious issues

concerning these requests depending on how they were argued and resolved in the two hearings. Reconstructing the record of the 09/13/2021 hearing and any subsequent argument or rulings at the 10/18/2021 informal omnibus hearing is essential for the undersigned to represent Mr. Walla competently. Mr. Walla possesses a due process right to a complete record for appellate review concerning issues that implicate his fundamental rights to present a complete defense, a fair trial by an impartial jury, and effective assistance of counsel.

Mr. Walla, therefore, seeks leave to proceed under Mont. R. App. P. 8(7)(c)—(d). Under this procedure, Mr. Walla’s trial counsel, Fred Snodgrass and David A. Merchant II, would have 15 days to file “a motion with the clerk of the district court for leave to prepare a statement of the unavailable evidence from the best available means, including the party’s recollection.” Mont. R. App. P. 8(7)(c). “The motion must be in writing, and identify the trial or proceeding which was not reported or the transcript which is not otherwise available, along with a statement of the reason for such failure, to the best of the movant’s knowledge and belief.” Mont. R. App. Pro. 8(7)(c)(i). The motion must be served upon the prosecutors who were present at the hearings in

question, Patrick N. Dringman and David A. Buchler, who shall have 15 days in which to respond in writing. Mont. R. App. Pro. 8(7)(c)(i). (D.C. Docs. 127 at 1, 130 at 1.)

If the district court grants the motion, defense counsel must, within 20 days of the district court's order, prepare, serve, and file with the clerk of the district court "a statement of the unavailable evidence from the best available means, including the party's recollection." Mont. R. App. P. 8(7)(c)(ii). "This statement must specify the source or sources of the party's statements of evidence and shall be limited to unavailable evidence which is relevant to the issues on appeal." Mont. R. App. P. 8(7)(c)(ii). The State shall have 15 days from filing to respond in writing. Mont. R. App. P. 8(7)(c)(ii).

The district court shall examine the statement of unavailable evidence and any response and may hold a hearing. Mont. R. App. P. 8(7)(d). The district court shall then "promptly file with the clerk of the district court an order adopting or rejecting, in whole or in part, the statement of unavailable evidence such that any statement adopted by the district court most accurately reflects the unavailable evidence." Mont. R. App. P. 8(7)(d). The parties shall have 15 days from the

order's filing to file written objections with the clerk of the district court with contemporaneous service on the opposing party. Mont. R. App. P. 8(7)(d).

The district court's order entered pursuant to this procedure "shall then constitute the record on appeal as to the unavailable evidence." Mont. R. App. P. 8(7)(e). "Any properly preserved objection to the district court's order or to the proceedings under this rule may be raised in an amended notice of appeal or cross-appeal filed and served within 15 days of the transmission of the district court's order and associated documents by the clerk of the district court to the clerk of the supreme court." Mont. R. App. P. 8(7)(e).

Mr. Walla respectfully requests the Court to stay the appellate briefing schedule during this district court process and to order his opening brief on appeal due 30 days after the district court either denies defense trial counsel's motion or transmits its order adopting a statement of the unavailable conference to the Clerk of this Court.

Counsel for the State has been contacted regarding this motion. Based on the particular circumstances of this case and without agreeing with Mr. Walla's account of the hearings at issue, the State does not

object to Mr. Walla's procedural request to move the district court to establish a record of 09/13/2021 motion hearing and the 10/18/2021 informal omnibus hearing regarding his requests for a mental health evaluation by an expert in combat-related PTSD and an extension of the expert witness disclosure deadline.

Respectfully submitted this 28th day of February 2024.

OFFICE OF STATE PUBLIC DEFENDER  
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By: /s/ Deborah S. Smith  
DEBORAH S. SMITH  
Assistant Appellate Defender

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Century Schoolbook 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 1,230, excluding caption, Certificate of Service, and Certificate of Compliance.

/s/ Deborah S. Smith  
DEBORAH S. SMITH



## **CERTIFICATE OF SERVICE**

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed to the following on 02-28-2024:

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Dated: 02-28-2024