

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-5240
Cori.losing@mt.gov

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 24-0330

CLAY LEVI COLE FRASER,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT
COURT, CASCADE COUNTY, THE
HONORABLE DAVID J. GRUBICH,
PRESIDING,

Respondent.

**ATTORNEY GENERAL'S RESPONSE TO PETITION FOR
WRIT OF SUPERVISORY CONTROL**

The Attorney General's Office, on behalf of the State of Montana, and pursuant to this Court's May 30, 2024 Order, submits the following summary response to Clay Levi Cole Fraser's Petition for Writ of Supervisory Control.

In his Petition, Fraser challenges the district court's denial of Fraser's May 2024 motion for substitution of district court judge. (Pet. at 2.) Without

agreeing to all the factual assertions or arguments advanced by Fraser, and with the consent of the Cascade County Attorney's Office, the State concedes that this Court should exercise supervisory control and reverse the district court's order denying Fraser's May 2024 substitution motion.

STATEMENT OF THE CASE

On May 8, 2023, the State, in Eighth Judicial District, Cascade County Cause No. DC-23-301, charged Fraser by Information with two counts of Assault With Weapon, in violation of Mont. Code Ann. § 45-5-213(1)(a) and (1)(b). (Pet. Ex. A.) The case was assigned to the Honorable David J. Grubich. (*See id.* at 1.) Two days later, Fraser timely moved to substitute Judge Grubich. (Pet. Ex. B at 1.) The Honorable John W. Parker accepted jurisdiction of the case on May 12, 2023. (Pet. Ex. C.)

On October 12, 2023, the State, in Eighth Judicial District, Cascade County Cause No. DC-23-753, charged Fraser by Information with one count of Attempted Tampering with Witnesses or Informants.¹ (Pet. Ex. D at 1.) The case was assigned to Judge Grubich. (*See id.*) At that time, Fraser did not move to substitute Judge Grubich from presiding over DC-23-753. (*See State's Ex. 1.*)

¹ The tampering charge involves the same victim, M.D., as one of the Assault With Weapon counts. (*See Pet. Exs. A, D.*)

On April 9, 2024, the State amended the Information in DC-23-753 to include the two counts of Assault With Weapon as previously charged in DC-23-301. (Pet. Ex. G.) Based on the Amended Information in DC-23-753, the State then moved to dismiss the Information in DC-23-301. (Pet. Ex. H.)² Judge Grubich arraigned Fraser on the Amended Information on April 25, 2024. (Pet. Ex. J.) On May 6, 2024, Fraser moved to substitute Judge Grubich, which the State opposed. (Pet. Exs. K, L.) Judge Grubich ultimately denied Fraser’s motion as untimely. (Pet. Ex. M.)

STATE’S RESPONSE

I. Based on the circumstances of this case, the State agrees that this Court should exercise supervisory control.

This Court possesses “general supervisory control over all other courts.” Mont. Const. art. VII, § 2(2). Granting supervisory control is an extraordinary remedy that may be invoked “when urgency or emergency factors exist making the normal appeals process inadequate” and “the case involves purely legal questions.” M. R. App. P. 14(3). In addition to those two requirements, the appellant must also show one of the following circumstances: “(a) The other court is proceeding under a mistake of law and is causing a gross injustice; (b) Constitutional issues of

² Judge Parker granted the State’s motion to dismiss without prejudice on April 10, 2024. (Pet. Ex. I-B.)

state-wide importance are involved; and (c) The other court has granted or denied a motion for substitution of a judge in a criminal case.” M. R. App. P. 14(3).

The State agrees that this Court should exercise supervisory control. *See Anderson v. First Jud. Dist. Ct.*, OP 23-0607, 2023 Mont. LEXIS 1137 (Mont. Sup. Ct. Nov. 7, 2023). Relying on Mont. Code Ann. § 3-1-804(5), this Court, in *Anderson*, explained that supervisory control is appropriate in cases in which the district court erroneously denied a motion to substitute, because any subsequent actions of that district court “would be void as lacking jurisdiction.” *Anderson*, *1-2. Because the State ultimately concedes that this Court should reverse the district court’s order denying Fraser’s May 2024 substitution motion, the State agrees it is appropriate, in this instance, for this Court to exercise supervisory control.

II. The State concedes that this Court should instruct the district court to reverse its order denying Fraser’s May 2024 substitution motion.

“Each adverse party is entitled to one substitution of a district judge.” Mont. Code Ann. § 3-1-804(1). A motion for substitution, in a criminal action, “must be filed within 10 calendar days after the defendant’s arraignment.” Mont. Code Ann. § 3-1-804(1)(b). Here, Fraser, before his arraignment, timely moved to substitute Judge Grubich from Cause No. DC-23-301. After Judge Grubich granted Fraser’s May 2023 substitution motion, Judge Parker assumed jurisdiction over

DC-23-301 until April 10, 2024, when he granted the State's motion to dismiss the Information, which was based on the State amending the Information in DC-23-753 on April 9, 2024, to include the Assault With Weapon counts as charged in DC-23-301.

The inclusion of the Assault With Weapon in DC-23-753 that Fraser had already substituted Judge Grubich off in DC-23-301 prompted Fraser to again move to substitute Judge Grubich. The district court, however, ultimately adopted the State's reasoning that Fraser's substitution motion was untimely because Fraser was arraigned on the initial Information in DC-23-753 on November 2, 2023, and an arraignment on an Amended Information does not trigger a new ten-day substitution period pursuant to Mont. Code Ann. § 3-1-804(1)(b). (Ex. M.)

In doing so, both the district court and the State overlooked that Fraser had timely moved to substitute Judge Grubich on the two counts of Assault With Weapon in DC-23-301 that were later amended into the Information in DC-23-753. In other words, it is immaterial, here, whether the ten-day substitution period reset the ten-day substitution period because Fraser had already timely moved to

substitute Judge Grubich on the two counts of Assault With Weapon when those counts were before Judge Grubich in DC-23-301.³

Because the denial of Fraser's request to substitute Judge Grubich undermined the statutory process for substitution of judges, the State, without agreeing to all the arguments advanced by Fraser, agrees that this Court should reverse the district court's order denying Fraser's May 2024 substitution motion with instructions for the district court to immediately substitute-in a new judge to preside over the remainder of the proceedings, including any substantive motions filed after the May 6, 2024 substitution motion.

Respectfully submitted this 11th day of June, 2024.

AUSTIN KNUDSEN
Montana Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Cori Losing
CORI LOSING
Assistant Attorney General

³ The State's concession to the ultimate remedy—substitution of Judge Grubich—does not equate to the State agreeing to Fraser's arguments concerning the statutory interpretation that Mont. Code Ann. § 3-1-804(1)(b)'s 10-day substitution period is triggered with each arraignment conducted throughout a criminal case. Nor does this Court need to decide that issue to conclude, here, that the district court should have granted Fraser's May 2024 substitution motion because he had already substituted Judge Grubich on the two counts of Assault With Weapon when they were filed in DC-23-301.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response 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 1,103 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ *Cori Losing*
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 06-11-2024:

Kyle J. Workman (Attorney)
P.O. Box 1167
Hamilton MT 59840
Representing: Fraser Levi Cole Clay
Service Method: eService

Ashlee Alexis Kummer (Govt Attorney)
121 4th Street N, Suite 2A
Great Falls
Montana
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

David Grubich (District Court Judge)
415 2nd Ave. N.
Great Falls MT 59401
Service Method: eService
E-mail Address: David.Grubich@mt.gov

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 06-11-2024