IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0663

STATE OF MONTANA,

Plaintiff and Appellant,

v.

SKYLER L. GRIEBEL,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Ray J. Dayton, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUE

Whether the district court erred when it granted Griebel's second speedy trial motion.

STATEMENT OF THE CASE

Skylar Griebel was charged with deliberate homicide, or, alternatively, felony murder, predicated on assault with a weapon, for shooting and killing Tyler Netto on February 8, 2022. (Docs. 1, 2, 4.)

The court initially set Griebel's trial for October 24, 2022, and continued it four times with a final setting of September 11, 2023. (Docs. 21, 51, 61, 92, 190.)

Griebel filed two motions to dismiss on speedy trial grounds. On July 25, 2023, the court denied Griebel's February 23, 2023 motion. (Docs. 150, 249 (App. 1).) Griebel's July 7, 2023 motion was granted by the court on October 20, 2023, after an evidentiary hearing. (8/23/23 Tr. (Hr'g); Docs. 150, 344 (App. 2.).)

STATEMENT OF THE FACTS

In early February 2022, when Summer Overguuaw ended her relationship with Tyler, he moved out and stayed with his friend, Walter Brandon. (Doc. 1;

Doc. 322 Exs. B-3, B-4.)[1] On February 4, 2022, Tyler texted a Park County Sheriff's Office (PCSO) deputy that Griebel and Summer were involved in drug activity and that Griebel, who had a gun, had threatened him with violence. (Doc. 1.) Griebel, who was staying at Summer's house, learned about Tyler's texts. (*Id*.)

On February 7, 2021, Summer asked Griebel to leave because he was acting strangely, but he refused. (Doc. 1.) In the early morning of February 8, Summer messaged Tyler that she needed help and that Griebel had a .22 caliber gun. (*Id*.; Ex. B-3.) Walter and Tyler drove to Summer's home. (Doc. 1; Exs. B-3, B-4.) Tyler brought bear spray and brass knuckles. (*Id*.) Before arriving, Summer messaged Tyler that he did not need to come because Griebel had fallen asleep, and she took his gun. (*Id*.) Tyler and Walter decided to go anyway to make sure things were alright. (*Id*.)

When they entered Summer's house, Tyler and Walter acted causal, like they were unaware that Summer was scared. (Doc. 1; Exs. B-3, B-4.) Walter had started to make a sandwich when Griebel came around the corner and put a gun to his head. (*Id*.) The gun was a silver with black carbon fiber .22 caliber, semiautomatic pistol. (*Id*.) Walter remained calm and talked Griebel down. (*Id*.)

[1]Unless otherwise specified, citations to exhibits will be those attached to Docs. 322 and 323.)

Griebel then accused Tyler of being a snitch and chased Tyler to the back bathroom. (*Id.*) Tyler locked himself inside the bathroom and Griebel pounded on the door, yelling he would kill him. (*Id.*) While he was in the bathroom, Tyler messaged Deputy Luther that he was trapped in Summer's bathroom and Griebel was on the other side of the door with a gun. (*Id.*)

Walter had gone out to his vehicle. (*Id.*) Summer was in the kitchen when she heard the bear spray deploy. (Doc. 1; Exs. B-3; B-4.) Griebel ran out the front door and, as Tyler came through the kitchen, he told Summer he had contacted the police. (*Id.*) As Summer ran out the back door, she heard a gunshot and believed Griebel shot at Tyler. (*Id.*) Upon hearing Tyler yell "mother fucker," Summer believed Griebel had missed him. (*Id.*) Summer feared Griebel would shoot her next and kept running. (*Id.*)

As Walter pulled away, he heard a gunshot and saw Griebel standing on the driveway aiming the pistol back at the house where Tyler was standing. (Doc. 1; Exs. B-3, B-4.) Walter left, unsure if it was a warning shot. (*Id.*) When Walter returned a short time later, Griebel's Explorer was gone and Tyler was lying on his stomach just inside the house, still breathing. (*Id.*) Walter noticed the house smelled of bear spray and saw Tyler had brass knuckles on his right hand. (*Id.*) Walter called 911 at 4:50 a.m. (*Id.*; Exs. B-1, B-2.) Walter thought he could

transport Tyler to the hospital, so he dragged him outside, but the dispatcher told him to stay there. (*Id*.)

When Deputy Lynch arrived, Tyler was unresponsive. (Doc. 1; 2/8/23 Tr. at 95-123.) When she moved Tyler's shirt to begin CPR, she observed a small caliber gunshot wound to the right side of Tyler's chest. (*Id*.) Tyler was declared dead at 5:46 a.m. (*Id*.) Walter told Deputy Lynch that Griebel shot Tyler and relayed the same information when he was later interviewed at PCSO.[2] (*Id*.; Ex. B-3.)

Undersheriff Herbst discovered Griebel's Explorer abandoned near the Green Boxes. (Docs. 1, 323.) While officers searched the area, Todd Ryan arrived in his truck with Griebel as his passenger. (*Id*.) Griebel had walked to Ryan's house and Ryan helped him wash off bear spray. (*Id*.) Officers arrested Griebel and placed him in a patrol vehicle. (*Id*.) No weapons were found on Griebel or in his Explorer. (*Id*.) Officers located a shirt in Griebel's Explorer that tested positive for methamphetamine, gunshot residue, and bear spray. (Docs. 304, 333 at 19.)

Detective Hopkin and Deputy Lynch arrived after Griebel was in custody. (2/8/23 Tr. at 45-123.) Griebel told Deputy Lynch that he had fallen asleep on the

[2]Jamie Rebsom interrupted Walter's interview, stating that Griebel's father had hired her. (Doc. 146 at 2 n.1; Ex. B-3.) Walter explained he was not Griebel and declined Rebsom's offer to represent him. (*Id*.)

couch after arguing with Summer about him relapsing and being paranoid. (*Id*.; Tr. Exs. 1, 2; Docs. 246, 203, Exs. B, C.) Griebel said he was asleep when Tyler and Walter came in and that he and the men had "words" and were "talkin' shit." (*Id*.) Griebel told Detective Hopkin that Tyler was angry and "threatening shit." (*Id*.)

Griebel said he and Summer were in the back bedroom when Tyler sprayed bear spray from inside the bathroom and Griebel ran outside. (Tr. Exs. 1, 2; Doc. 203 Exs. B, C.) The next thing Griebel said he remembered was driving off the road because his eyes were watering from the bear spray. (*Id*.) Griebel walked to Ryan's house and Ryan helped him wash and gave him a clean, dry shirt. (*Id*.) Griebel denied knowing anything about a gun when he talked to Detective Hopkin, but when he talked to Deputy Lynch a few moments later, Griebel said there were guns at Summer's and that one of the men who entered had a gun, bear spray, and something else in his hand. (*Id*.) When Deputy Lynch told him a person had been shot and killed, Griebel replied, "Holy Fuck," and volunteered that he did not "even recall hearing a gunshot." (*Id*.) When the officers placed Griebel under arrest for deliberate homicide and tested his hands for GSR, he did not question what was happening. (*Id*.)

Montana Highway Patrol Trooper Wager participated in the search for Griebel and stopped at the Green Boxes. (2/8/23 Tr. 126-46.) Trooper Wager had

no direct contact with Griebel. (*Id*.) Trooper Wager noted Griebel was yelling at the officers, but he could not hear what they were saying. (*Id*.) When asked later to review his patrol car recording from that night, Trooper Wager discovered it had been automatically deleted after six months because it had been classified as "agency assist." (*Id*.)

Inside Summer's house, officers discovered a methamphetamine pipe, cell phones, and drug paraphernalia. (Docs. 1, 121, Ex. A.) The master bathroom was covered in bear spray and officers found a white can of bear spray in the front yard. (*Id*.) Officers found a spent .22 shell casing about 70 feet from the doorway where Tyler was standing when he was shot. (*Id*.; Docs. 147 at 2, 164, 323.) After learning about the shooting, Deputy Luther noticed the text message Tyler had sent when he was trapped in Summer's bathroom. (*Id*.)

On February 19, 2022, after the snow had melted, Detective Green searched the area where Griebel's Explorer was abandoned and located a Ruger SR-22, two-tone semi-automatic pistol. (Doc. 1.) Ballistic and forensic testing established that the casing found in Summer's yard had been fired from that gun and that gun had Griebel's DNA on it. (Docs. 122 at 9, 165, 183, 304 at 12.) Additional testing established that Griebel's sweatshirt found in his Explorer had particles consistent with GSR, methamphetamine, and bear spray. (Doc. 304.)

The court directed the parties to provide reciprocal discovery and submit a completed Omnibus form by June 1, 2022, so the court could set a trial date. (Docs. 7-8; 3/14/22 Tr.)

In May 2022, Griebel filed a *pro se* letter alleging that District Court Judge Gilbert had a "very clear and unambiguous conflict" based on her personal relationship with a witness and asked for new counsel. (Docs. 16, 17.) On May 25, 2022, Rebsom and Kirsten Mull Core replaced Griebel's assigned counsel. (Doc. 19.) The State forwarded its completed portion of the Omnibus form to Griebel, but Griebel did not complete it as instructed. (2/8/23 Tr. at 161-63; Doc. 181 at 3, 333 at 5.)

Griebel filed a motion for discovery on June 14, 2022. (Doc. 20.) That same day, the court set Griebel's jury trial for October 24, 2022. (Doc. 21.) The court's discovery order did not adopt the specific items or language from Griebel's discovery motion. (Doc. 22.) The court directed the State to, within 30 days, "provide full disclosure of all materials known or discovered by it pertinent to this case" which included everything within the State's possession or knowledge "between now and the time of trial." (*Id*.)

Griebel filed motions to reduce bond and dismiss for lack of probable cause, arguing that the affidavit supporting the Information "point[s] to a complete defense of justifiable use of force [JUOF]." (Doc. 25-27; 8/14/22 Tr. at 18, 28.)

Griebel also filed a motion for a probable cause hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), based on his claim that the charging documents omitted information that he had acted in self-defense when he shot Tyler. (*See, e.g.*, Docs. 33, 121, 175, 188, 143.)

On August 18, 2022, Griebel filed a motion to compel arguing that the State had failed to provide discovery. (Doc. 31.) The State explained that other than limited social media materials it was waiting to receive from law enforcement, it had provided all discovery in its possession. (Doc. 41.) The State further explained it was having difficulty accessing Tyler's cell phone and downloading data from Summer's cell phone. (*Id.)*

At the September 12, 2022 jury verification hearing the court continued the trial to December 12, 2022, because of Griebel's pending motions. (9/12/22 Tr. at 36; Docs. 46, 51.) On October 11, 2022, the court continued the December trial date to January 9, 2023, based on the unavailability of the prosecutors. (Docs. 55, 61.)

On October 31, 2022, the court denied in part and granted in part Griebel's August 18 motion to compel. (Doc. 71.) The court acknowledged the State's difficulty in accessing Tyler's cell phone data and narrowed the time frame for requested phone/social media data. (*Id.)* The court ordered the State to provide

copies of messages between Tyler and Deputy Luther and all audio and video recordings made by responding officers. (*Id.)*

On November 7, 2021, Griebel filed a motion to disqualify Judge Gilbert, claiming that after interviewing Summer, "Mr. Griebel discovered" that the judge was personally acquainted with potential witnesses. (Doc. 73.) A week later, Judge Gilbert recused herself. (Doc. 78.) On December 7, 2022, Judge Dayton assumed jurisdiction. (Doc. 89.) Judge Dayton scheduled Griebel's trial for March 27, 2023. (Doc. 92.)

As part of his request for bond reduction, Griebel asserted the State was not sending discovery and implied the State was at fault for the defense only "just" sending everything off to the defense pathologist.[3] (12/29/22 Tr. at 22.) Based on counsel's comments during the hearing, the court emphasized to the defense that "if there's going to be a speedy trial motion, file it! And I'll rule on it!" (*Id.* at 77.)

Early in 2023, Grievel requested the State test Summer's DNA against the DNA found on the gun. (2/17/23 Tr.) Summer refused to voluntarily provide a sample. (*Id.)* Once a warrant was obtained, it took time to locate Summer to collect her DNA. (*Id.)* On January 11, 2023, Griebel filed a motion for more time to file pretrial motions, alleging that discovery and witness interviews were not

[3]The State had provided the autopsy report and photographs four times in 2022 (April, July, September, and October). (Doc. 115.)

complete and advising he had not "solidified his defenses." (Doc. 105.) The State disputed it was withholding/delaying the discovery and took issue with inflammatory and inaccurate descriptions of the discovery process. (Doc. 115.)

On February 10, 2023, Griebel gave notice of his intent to rely upon JUOF. (Doc. 140.) Griebel explained he would prove his defense through the testimony of Walter, Summer, Dr. Roland Kohr, Rhonda Birkeland,[4] Crystal Rego, Julie Cruz, law enforcement officers, a crime scene investigator, and persons from the crime lab. (*Id.)* However, a week later, defense counsel stated they had not conclusively decided to assert JUOF because they were waiting for the gun to be tested for Summer's DNA. (2/17/23 Tr.) When the defense explained it still planned to file a speedy trial motion, the court replied that if "it's something that could have been brought sooner, you know, it's going to be problematic." (*Id.* at 38.)

Prior to the March 2023 trial, Judge Dayton issued several orders rejecting the majority of Griebel's claims that the State was not providing discovery in a timely and complete manner. (*See* Docs. 149, 165, 169, 170, 171, 172, 194.) For instance, the court rejected Griebel's October 18, 2022 motion to dismiss,

[4]Despite repeated requests to the defense, the State did not interview Birkeland. (Docs. 177 at 17 n.2; 260 at 8.) It was not until the August 2023 hearing that the State learned the alleged content of Birkeland's statements/knowledge. (Doc. 177 at 17 n.2; Hr'g.)

concluding the State had not failed to produce exculpatory evidence. (Doc. 171.) The court found: the delay in providing items did not violate due process; the delay in testing Griebel's clothing for GSR did not violate due process because it was unlikely to change the outcome of the proceeding; and Griebel failed to establish the exculpatory nature of the social media accounts or GSR testing from Summer. (*Id.)*

The court did not find the State was in contempt for "withholding" Tyler's cell phone data and social media records and found the State had made good faith efforts to obtain/distribute discovery and that it lacked sufficient cause to obtain additional social media records. (Docs. 85, 90, 170.) The court denied Griebel's motion to dismiss, finding that the State "has provided all law enforcement video and audio that is in its possession" and that the State's failure to secure Trooper Wager's recording was not a violation of due process because other comparable evidence was available and it was not obvious that the recording would have been material, of substantial use, or exculpatory. (Doc. 170.)

In its order on the State's motion in limine, the court reiterated that the State did not have any obligation to conduct testing or gather evidence on behalf of the defense. (Doc. 169.) The court ordered that Griebel must declare whether he was relying on JUOF by March 17. (Doc. 172.)

On March 14, 2023, the court again rejected the majority of Griebel's March 1 motion to compel claims where Griebel alleged the State had failed to provide 13 items. (Docs. 154, 177, 194.) Several of Griebel's claims had been mooted by the court's recent orders. (*Id.)* Additionally, Griebel failed to delineate any substantial need and instead erroneously asserted the State was obligated to provide the material. (*Id.)* Nonetheless, the court ordered the State to disclose: relevant portions of Gallatin County Dispatch radio traffic and additional CAD-like documents in its possession; its communications with the crime labs; crime scene measurements not already provided; a list of people interviewed by Detective Hopkin who mentioned theories about Tyler's death; a list of law enforcement recordings; and any outstanding transcripts. (*Id.)* The court further ordered that, upon receipt, the State must forward the ATF test firing photographs and the reports for the GSR on Griebel's clothing and Summer's DNA. (*Id.)*

Griebel filed his first speedy trial motion on February 23, 2023. (Doc. 150.) Griebel reiterated his complaints about the State allegedly failing to collect/test items and withholding information. (*Id.)* Griebel claimed to have suffered "great anxiety" in jail, especially since his case was "one of clear [JUOF]." (*Id.* at 17, 23.) Griebel argued that had the State provided him with discovery a year ago, he could have retained a ballistics expert sooner and blamed the State for not being

able to interview Tyler's mother, Lori Glasson, now deceased, who had allegedly "told the defense investigator, she knew 'things.'" (*Id.* at 27.)

Two weeks before trial, and while three defense pleadings remained pending (*i.e.*, speedy trial, motion to compel, and supervisory control petition[5]), Griebel moved to continue the trial. (Doc. 183.) Griebel asserted his experts needed the State's crime scene measurements and ATF records and he needed to hire a DNA expert. (*Id*.) The State disputed Griebel's characterization of discovery and requested an emergency hearing. (Doc. 184.) At the hearing Griebel explained his experts were not ready so the court continued the trial to September 11, 2023. (3/14/23 Tr.; Doc. 190.)

On May 12, 2023, the court granted Griebel's emergency request for his expert to view Summer's property and directed the State to forward 15 specific pieces of evidence to the expert for testing.[6] (Docs. 205, 208, 211.) That same day, Griebel filed a motion for contempt relative to the court's March 14 Order. (Doc. 212.)

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[5]On March 9, 2023, Griebel petitioned this Court for a writ of supervisory control challenging the court's February 15, 2023 Order denying his request for a *Franks* hearing. This Court denied the petition on March 21, 2023. *Griebel v. Sixth Jud. Dist. Ct.*, No. OP 23-0158, 2023 Mont. LEXIS 324.

[6]Griebel requested an emergency ruling because of a "recent Supreme Court ruling against" Judge Dayton. (Doc. 205.)

On June 5, 2023, Griebel filed a motion to disqualify Judge Dayton. (Docs. 218-219, 225-226.) In addition to alleging improper comments and asserting Judge Dayton had acted improperly towards "Griebel's female lawyers," Griebel asserted the defense should have been notified about the pending complaint against Judge Dayton. (*Id*.) This Court denied Griebel's motion on June 13, 2023, finding that defense counsel's accusations took the judge's comments out of context and mischaracterized the proceedings.[7] (Doc. 232.)

Griebel filed a second speedy trial motion on July 7, 2023, alleging the same discovery violations and adding two arguments related to prejudice (anxiety and "spoilation of evidence"). (Doc. 239.) Although Griebel claimed he could not formulate a defense theory due to lacking discovery, Griebel asserted that two "vital" defense witnesses had died (but failed to explain how their testimony was "vital"). (*Id*.)

On July 17, 2023, the court denied Griebel's May 12 motion for contempt, finding that:

> the [c]ourt remains in the same position it has been throughout this case—it does not have any evidence to indicate that the State has not provided everything in its possession or that [the State] is not working to provide everything in its possession. The [c]ourt is

[7]On June 28, 2023, Judge Dayton issued an order denying Griebel's *pro se* letter asking the judge to recuse himself. (Doc. 237.)

> assured that the State understands its discovery obligations under the law and by court order.

(Doc. 243.)

On July 25, 2023, the court denied Griebel's first speedy trial motion. (App. 1.) The court found the total period of delay was 580 days (date of arrest (2/8/22) to trial date (9/11/23)) and attributed the five periods of delay to the State as institutional delay based on inherent delays in the criminal justice system or events outside the State's control. (*Id*.) The court found Griebel showed a "sincere desire to be brought to trial," but also found his motion to disqualify Judge Gilbert was untimely and observed that when the January 9, 2023 trial date was continued, Griebel did not raise any issues. (*Id*.) The court concluded the third factor weighed "only slightly in" Griebel's favor. (*Id*. at 9.) The court further determined the fourth factor weighed against a speedy trial violation. (*Id*.)

The court concluded that Griebel was not prejudiced finding that: Griebel's incarceration was not excessive and due to the severity of the charge and his own prior conduct; Griebel's mental health maladies were attributable to the nature of the charges, and he had not shown the jail conditions were inappropriate; and the defense was not impaired by the delay given the experts and hundreds of pieces of evidence. (App. 1.) The court concluded that the State's highly persuasive showing of the lack of prejudice outweighed the institutional delays and the defendant's varied responses to the delay. (*Id*.)

The same day, Griebel petitioned the United States District Court challenging this Court's March 23, 2023 Order denying Griebel's petition for writ of supervisory control and June 13, 2023 Order denying Griebel's motion to disqualify Judge Dayton. (App. 3.)[8]

Three days later, Griebel requested an evidentiary hearing so he could present evidence concerning his anxiety and prejudice to his defense. (Doc. 250.) In response to Griebel's second speedy trial motion, the State reasserted its arguments from the first speedy trial motion and refuted his newly alleged discovery violations. (Doc. 250.) The State pointed out Griebel had failed to provide any discovery about deceased "vital" witnesses and explained the defense had not cooperated in scheduling witness interviews or in reviewing the evidence and noted that Griebel had still not disclosed expert witnesses. (*Id*.)

In early August 2023, the State forwarded to the defense text messages that Ann Shilling sent in March 2023 to her friend who was a paralegal at the Park County Attorney's Office. (Docs. 257, 319, 322, Ex. A; Hr'g at 114-16.) Schilling's messages relayed hearsay about Walter and speculated what happened the night Tyler was killed. (*Id*.)

[8]The United States District Court rejected Griebel's petition for relief. (App. 3; Hr'g at 5-9.)

On August 7, 2023, Griebel filed an emergency motion for three DNA reference samples to be sent to the defense DNA expert, which the court granted. (Docs. 262, 264.) Eight days later, Griebel filed a second emergency motion because the expert needed DNA *extracts*, not *references*, as Griebel had specified on August 7. (Doc. 274; Hr'g at 25-26.)

Griebel filed a second motion to dismiss for alleged discovery violations, arguing that the State had not timely disseminated Schilling's texts or the report that the gun used to kill Tyler had been stolen. (Doc. 262.)

The State asserted Griebel failed to show the material at issue had been withheld or was exculpatory. (Doc. 304.) The stolen gun reports were provided to Griebel as soon as they were received and did not constitute exculpatory evidence because it was undisputed Griebel had held the gun that was used to shoot Tyler so it was irrelevant who may have stolen the gun a year before. (*Id*.) The State asserted that the delay in disclosing Schilling's text messages was reasonable given the need for an internal investigation about allegations concerning the prosecutors and there was sufficient time to interview the chain of people behind the texts. (*Id*.) Additionally, the State asserted the texts were not exculpatory, their veracity was undeniably questionable, and they constituted inadmissible hearsay. (*Id*.)

The day after the August 9, 2023 pretrial hearing, Griebel filed emergency motions to obtain a police report concerning Tyler assaulting someone and an

unredacted report concerning the original box for the recovered .22 gun. (Docs. 268-269.) The State explained the report about Tyler was irrelevant to what Griebel may claim he knew about Tyler's propensity for violence and the gun box information was also irrelevant given Griebel's DNA was on the recovered .22 that killed Tyler. (Doc. 276.) The court granted Griebel's motions, but emphasized the police report must be kept confidential and noted if the report was "essential" to his defense, Griebel must provide the necessary foundation. (Docs. 280, 281, 282, 290.)

Twenty-five days before trial, Griebel filed a "preliminary" witness and exhibit list. (Doc. 278.) Compared to Griebel's February 10, 2023 JUOF notice, Birkeland was the only missing witness. (*Id*.; Doc. 140.) Griebel also filed notices of three expert witnesses: Matthew Noedel (forensic scientist); Gary Marbut (self-defense expert); and Dr. Kohr (pathologist). (Docs. 278, 286-288.) Griebel included reports/evaluations from Marbut and Dr. Kohr that supported his JUOF defense. (*Id*.) Griebel did not file notices of expert witnesses for Brian Bowman (digital data expert) and Kristen Harty-Connell (DNA expert) but they were listed on his preliminary witness list and testified at the evidentiary hearing. (*Id*.; Hr'g.)

Harty-Connell testified that Griebel first contacted her March 15, 2023, but did not send her the ATF bench notes/reports until after she was retained on April 24, 2023. (Hr'g at 12-32.) Harty-Connell then requested ATF's policy/procedures

and electronic data, which she received July 19. (*Id*.) On August 7, 2023, Harty-Connell requested DNA *extracts* from the gun but Griebel obtained DNA *references* samples, and a new request had to be made to get her the correct material. (*Id*.) From the court's questioning, Harty-Connell confirmed that the presence of DNA on a gun would not establish who fired the weapon, only who had touched it. (*Id*.)

Griebel did not retain Brian Bowman (digital data expert) until June 26, 2023. (Hr'g at 32-56.) Bowman did not review the data until July 5, 2023, at which time he believed data was missing or inaccessible. (*Id*.) Nearly a month later, Bowman contacted Griebel about allegedly missing data. (*Id*.) On August 4, the State, defense counsel, and Bowman had a Zoom conference to assist him with opening files. (*Id*. at 73-76.) Although Griebel indicated Bowman had what he needed, 18 days later, the defense advised the State they needed a different file, which the State overnighted to Bowman three days later. (*Id*.)

Griebel testified about the conditions at the jail that he felt were horrendous and admitted videos and photographs of the jail. (Hr'g at 136-202; Exs. E1-E5; and 16 photos.) Captain Jay O'Neil's rebuttal testimony refuted Griebel's claims about the jail's poor conditions. (*Id*. at 203-23.)

Defense counsel prepared exhibits summarizing Griebel's version of events related to discovery. (Hr'g at 56-136.) The court admitted the exhibit over the

State's objection challenging the reliability of the information. (*Id*.) The State successfully challenged the veracity and misleading nature of the summary through cross-examination. (*Id*.) Instead of calling the defense investigator, Linda Sanem, to testify about alleged prejudice from deceased witnesses or witnesses' faded memories, Griebel and Core repeated what Sanem had allegedly learned. (Hr'g.)

During direct examination, when counsel asked Griebel how he felt about the State's handling of discovery relative to JUOF statutes, he stated it was "horrific." (Hr'g at 152.) During cross-examination, the State challenged Griebel's complaint that the State failed to investigate JUOF, pointing out that Griebel denied knowing anything about a gun or a shooting when he was first interviewed. (*Id*. at 183-197.) Over the defense's objection, the court allowed the inquiry and noted that it needed to hear if Griebel planned to assert JUOF, to which Rebsom answered, "Yes," and the court discussed the process of making an offer of proof. (*Id*.)

Griebel expressed frustration with the State "cover[ing] up the fact that [Tyler had] been threatening to kill me and threatening to use the exact weapons he brought with him." (Hr'g at 190.) When the State pointed out that Griebel's expert said he was 40 feet away from Tyler when he shot him, Griebel disagreed, claiming there were multiple different opinions. (*Id*. at 191.) The State then asked "is it your testimony that you were not 40 feet away when you shot?" and Griebel

replied, "No, I was 20 . . . ." (*Id*.) Although defense counsel indicated Griebel's testimony has provided an offer of proof for JUOF, when followed up by asking Griebel if he shot Tyler, he would not answer and repeated he was "not on trial today." (*Id*. at 196.)

While acknowledging Griebel's right to speedy trial and the tension between that right and effective representation, the court stated, "I think your trial date's in trouble" and noted the possibility of an ineffective assistance of counsel claim for not timely obtaining defense experts. (Hr'g at 225-31.) The court *sua sponte* vacated the September 11, 2023 trial date and, after additional briefing, granted Griebel's second speedy trial motion on October 20, 2023. (Doc. 315; App. 2.)

The court found 39 additional days of delay and referred to the first speedy trial order for attributing periods of delay. (App. 2 (citing App. 1 at 5-7).) The court made the same determinations for Factors 1, 2, and 3 as its first order, but concluded that Factor 4 now weighed in Griebel's favor and granted his motion to dismiss. (*Id*.) The court found no oppressive incarceration or aggravated anxiety, but concluded the death of three witnesses and diminished memory of Trooper Wager and Walter impaired Griebel's defense. (*Id*.)

STANDARD OF REVIEW

When considering a trial court's ruling on a speedy trial motion, this Court reviews the factual findings underlying the court's decision to determine if they are clearly erroneous and reviews the conclusions of law *de novo* to determine if they are correct. *State v. Hesse*, 2022 MT 212, ¶ 6, 410 Mont. 373, 519 P.3d 462.

SUMMARY OF THE ARGUMENT

The district court erred when it concluded the additional 39-day delay violated Griebel's right to a speedy trial because his defense was impaired.

Like its first order, the court improperly assigned the fourth and fifth periods of delay to the State as institutional delay and incorrectly attributed the final 39-day delay to the State. Griebel was responsible for the entire fourth period 77-day delay due to lack of diligence in moving to disqualify Judge Gilbert. Griebel was also responsible for the fifth and sixth periods of delay given his dilatory efforts in securing expert witnesses and repeatedly requesting new items for discovery. Factor 2 weighed against the finding of a speedy trial violation.

The court's findings and conclusions relative to Factor 3 were also erroneous. When viewed in total, Griebel's pleadings and actions did not convey a sincere desire to exercise his speedy trial right.

Also contrary to the district court's conclusion, Factor 4 weighed against a speedy trial violation. The court's findings that Griebel's defense was impaired by the death of three witnesses and alleged faded memories of two others were not supported by substantial evidence and the court misapprehended the effect of their "lost" testimony. None of the deceased witnesses had direct knowledge of Tyler's death. Griebel presented only hearsay and speculation about what evidence was "lost." Moreover, the court's conclusion failed to appreciate its earlier finding that Griebel's ability to present a defense was not compromised given the amount of available physical evidence and his JUOF expert witnesses.

ARGUMENT

I. The district court erred when it granted Griebel's second motion to dismiss for an alleged speedy trial violation.

"A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution." *State v. Ariegwe*, 2007 MT 204, ¶ 20, 338 Mont. 442, 167 P.3d 815. The right to a speedy trial has an "amorphous quality" in the sense that it is "impossible to determine with precision . . . how long is too long in a system where justice is supposed to be swift but deliberate." *Barker v. Wingo*, 407 U.S. 514, 521, 522 (1972). There is no set standard as to what constitutes a "long extension" past the 200-day trigger date because the right

to a speedy trial is "necessarily relative" and "depend[ent] upon circumstances." *Id.* (internal quotation marks omitted); *Ariegwe, supra*.

The following four-factors are balanced when determining whether a criminal defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's response to the delay; and (4) prejudice to the accused because of the delay. *Ariegwe*, ¶¶ 13, 34, 101. No one factor is dispositive by itself and, since the factors are related and must be considered together with any other relevant circumstances, each factor's significance will vary from case to case. *Ariegwe*, ¶¶ 105, 112.

"[A]ny delay not demonstrated to have been caused by the accused or affirmatively waived by the accused" is attributed to the State by default. *Ariegwe*, ¶¶ 63-72, 108-09, 113. *Id*. The reason or motive for the delay must be assigned to each period because the weight assigned to each period "will depend on the party's culpability in causing it." *Id*.

This Court has identified the following four levels of culpability: "valid" (*e.g*. needing additional time to prepare for trial in complex cases and key witness unavailability); "institutional" (*e.g*., realities of court dockets and basic judicial processes, including events beyond the control of the parties); "lack of diligence" or "negligence;" and "bad-faith" or deliberate attempts to impede the other party. *Ariegwe*, ¶¶ 67-72, 108-09, 113. Delays identified as "valid" or "institutional" are

considered more acceptable grounds for delay and are weighted less heavily against the party. *Ariegwe*, ¶¶ 63-72, 108-09, 113. "Lack of diligence" or "negligence" rests in the middle, but "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delay[]," and "bad-faith" is weighted the most heavily against the party who caused such delay. *Id*.

A. The district court correctly determined the length of delay and correctly attributed the first three periods of delay.

The total delay from Griebel's arrest to the order dismissing the case was 619 days (2/8/22 to 10/20/23), which triggered a speedy trial analysis. *Ariegwe*, ¶ 41.

The first period of delay, 258 days (2/8/22 to 10/24/22), was properly attributed to the State as institutional delay inherent to the criminal justice system.

While the State believes Griebel was partly at fault for the second period of delay given his pending motions unrelated to discovery, *see State v. Morrisey*, 2009 MT 201, ¶¶ 58-60, 351 Mont. 144, 214 P.3d 708, this 49-day period (10/24/22 to 12/12/22), was properly classified as institutional delay.

Finally, based on the unavailability of the prosecutors, the court correctly attributed the 28-day delay (12/12/22 to 1/9/23) for the third period to the State as institutional delay.

B. The district court erred in not attributing the last three periods of delay to Griebel.

The court erred in attributing the fourth period 77-day delay (1/9/23 to 3/27/23) to the State as institutional. (App. 1 at 6.) This delay should have been attributed to Griebel based on lack of diligence. "[D]elay caused by the defense counsel is charged against the defendant." *Vermont v. Brillon*, 556 U.S. 81 (2009); *State v. Kurtz*, 2019 MT 127, ¶ 16, 396 Mont. 80, 443 P.3d 479.

The court's finding was clearly erroneous because it found that Griebel's motion to disqualify Judge Gilbert was untimely given it was "based on evidence known to the defense at the commencement of this case." (App. 1 at 6, 8.) Additionally, the court noted that on December 15, 2022, when it moved the trial date to March 27, 2023, Griebel filed no response. (*Id.*) *See State v. Sartain*, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032 (defense waited four months to raise speedy trial claim).

Griebel's May 16, 2022 letter indisputably established the defense was aware of a possible conflict with Judge Gilbert six months before filing the disqualification motion. Core claimed the motion was filed in early November because the judge's son was a witness. But the State's interview with the judge's son was not provided in discovery until November 18, 2022. (Hr'g at 82; Docs. 16, 79, 317, Ex. C.)

The court's finding attributing the fourth period of delay to the State was "not supported by substantial credible evidence" and the court "misapprehended the effect of the evidence." *Ariegwe*, ¶ 119. "Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance." *State v. Velasquez*, 2016 MT 216, ¶ 32, 384 Mont. 447, 377 P.3d 1235. The court erred in not attributing the fourth setting to Griebel for lack of diligence.

The fifth setting 168-day delay (3/27/23 to 9/11/23) was the result of Griebel's motion to continue. (App. 1 at 6-7.) However, the court attributed this period to the State as institutional delay because the State was waiting on evidence/reports from the State Crime Lab and AFT.

Despite Griebel's characterization, his request to continue the trial was not caused by the State's alleged failure to produce discovery nor was the State required to procure exculpatory evidence for Griebel. *See State v. Houghton*, 2010 MT 145, ¶ 28, 357 Mont. 9, 234 P.3d 904. The record, namely the multiple orders denying Griebel's unfounded motions to compel and dismiss, refutes Griebel's claim that the State delayed discovery. *See State v. Reynolds*, 2017 MT 25, ¶ 33, 386 Mont. 267, 389 P.3d 243 (alleged piecemeal discovery from State did not "align with the record;" State's efforts to provide voluminous

discovery was "ample"). Griebel's accusations that the State acted in "bad faith" are also not supported by the record or case law. The State did not engage in an "intentional or purposeful foot-dragging" and harbored no motive to cause undue delay. *State v. Johnson*, 2000 MT 180, ¶ 20, 300 Mont. 367, 4 P.3d 654.

The court failed to appreciate that Griebel's actions caused, or at least contributed to, the need to continue the March 2023 trial. Most notable is that the pending reports were not requested by Griebel until a month before trial.[9] Also, Griebel's jail calls with Summer delayed collection of her DNA, which defense had not requested until 2023. (Doc. 177.) Additionally, Griebel did not contact Harty-Connell until March 15, 2023 (the day after the trial was continued), did not retain Bowman until June 26, 2023, and did not seek permission for his ballistic expert to view the crime scene until early May 2023. (Doc. 205.) Griebel's claim that he needed more time to confer with those experts was disingenuous.

The court erred by not applying the findings it made during the March 14, 2023 hearing granting Griebel's motion to continue and in its order denying Griebel's second motion to compel. The court had "not bought into" Griebel's claims about the delay being the State's fault, and found that "this time is going to be time against the Defendant for sure on, any speedies, or future speedy trial

[9]*See* Doc. 177 (Griebel's request for additional ATF records was first made on March 1 and required an investigative subpoena to obtain; the inoperative equipment delayed the GSR report for another week).

analysis." (3/14/23 Tr. at 6.) In its July 17, 2023 order, the court reiterated that it "remains in the same position it has been throughout this case—it does not have any evidence to indicate that the State has not provided everything in its possession or that it is not working to provide everything in its possession." (Doc. 243 at 1.)

The court erred by failing to acknowledge that Griebel's actions created the need to continue the March 2023 trial. The reason for the delay was both institutional and lack of diligence on Griebel's part. *Kurtz*, ¶ 16.

The court did not make findings relative to the 39-day final period of delay (9/11/23 to 10/20/23). The September 2023 trial was continued because Griebel had not secured his experts or provided them sufficient information to render reports. *See Kurtz*, ¶ 16. The court noted the tension between continuing the trial or creating an IAC claim for failure to secure witnesses. And, Griebel's suggestion that the State should be fine with receiving the expert reports the week of trial, ignores the State's right to timely discovery. *See Reynolds*, ¶ 33 (State not responsible for defense's delay in securing experts or organizing defense). The 39-day delay should be attributed to Griebel for lack of diligence.

C. Summary of delay

The total amount of delay attributable to the State was 335 days. None of the delays were due to dilatory actions or bad faith, but were instead institutional, which are weighed less heavily against the State. *Johnson*, ¶ 20. The defense was

responsible for 284 days of delay of which 168 days were caused by both institutional/lack of diligence and 116 days from lack of diligence.

When balancing speedy trial factors and reasons for delay classifications, this Court has "recognized that the amount of pretrial delay that is expected, and therefore tolerable, is a function of the complexity of the charged offenses. *Ariegwe*, ¶ 41. Here, the case was a complex homicide/felony murder to which Griebel proposed varying defenses. One possible defense, JUOF, involved at least two experts (who wrote reports supporting Griebel's affirmative defense), crime scene investigator/scientists, and multiple law enforcement officers. Griebel also proposed using expert DNA testimony and a digital data expert, who were not ready for trial as of September 2023. The right to speedy trial is "genetically different" than other constitutional rights that protect the accused because a delayed trial may work to the benefit of the accused. *Ariegwe*, ¶ 75 (citing *Barker*, 407 U.S. at 519, 521).

Accordingly, given the complexity of this case and benefit to Griebel, a delay of 619 days was not egregious or indicative of a violation of speedy trial. *See Morrisey* (no speedy trial violation with delay of 1,168 days in complex case).

Factor 2 weighs against finding a speedy trial violation.

D. Defendant's responses to delay

Factor Three "serves an important role in the balancing test by providing insight into whether the accused actually wanted a speedy trial and what weights the court should assign to the other three factors in the analysis." *Ariegwe*, ¶¶ 74-85, 110. Thus, a court should consider a defendant's various responses "based on the surrounding circumstances--such as the timeliness, persistence, and sincerity of the objections, [and] the reasons for [any] acquiescence." *Ariegwe*, ¶¶ 80, 85, 110; *United States v. Loud Hawk*, 474 U.S. 302, 314-15 (1986).

The court found Factor Three weighed "only slightly in Defendant's favor," after noting (but not identifying) that some of Griebel's conduct indicated a desire to delay the trial. (App. 2 at 5.) Concluding that Factor Three weighed in favor of a speedy trial violation was erroneous.

Griebel was not interested in a speedy trial, but rather in thwarting the judicial process. *See Ariegwe*, ¶¶ 74-85, 110. For instance, Griebel:

> (a) failed to fill out the omnibus form;[10]
> (b) filed motions to compel and dismiss before prior discovery motions were ruled upon, creating confusing and misleading allegations;
> (c) waited seven months to disqualify Judge Gilbert;
> (d) failed to request additional discovery until three weeks before March 2023 trial;

[10] *See State v. Redlich*, 2014 MT 55, ¶ 51, 374 Mont. 135, 321 P.3d 82 (defense failure to timely return omnibus form "is indicative of his lack of concern for a speedy trial").

(e) waited to file a speedy trial motion until the end of February 2023 despite the March 23 trial date being set on December 15 and telling court at the end of 2022 that he planned to file a speedy trial motion;[11]

(f) waited to file the unsupported and baseless motion to disqualify Judge Dayton for at least a month after the judicial commission opinion was issued, waited another six weeks to seek federal habeas relief on the same issue, and submitted a *pro se* request to disqualify the judge;

(g) failed to contact DNA, ballistics, and digital data experts until after the fourth trial setting and not timely forwarding necessary evidence for their review;

(h) failed to submit notice of affirmative defenses until explicitly ordered by the court despite consistently asserting this was a JUOF case;

(i) failed to file the trial brief as ordered by the court;

(j) filed only a "preliminary," not final witness and exhibit list and failed to even list Hartly-Connell or Bowman as experts or provide the State with their reports;

(k) failed to provide reciprocal discovery or arrange witness interviews, namely with Birkeland;

(l) warned Summer that law enforcement was looking for her, thus delaying collection of her DNA; and

(m) despite there being no legal authority, sought a *Franks* hearing in district court, waited three weeks to pursue supervisory control from this Court, and then waited another eight weeks to seek relief in federal district court.

As the United States Supreme Court explained, defendants may have incentives to employ delay as a "defense tactic:" delay "may work to the accused's advantage because witnesses may become unavailable or their memories may fade" over time." *Barker*, 407 U.S. at 521. As the United States Supreme Court

[11] *See Sartain*, ¶ 20*; State v. MacGregor*, 2013 MT 297A, ¶ 37, 372 Mont. 142, 311 P.3d 428 (delay in asserting speedy trial motion was disingenuous tactic to give more weight to motion to dismiss).

observed, the defendant's conduct was "reminiscent of Penelope's tapestry," because while they were filing speedy trial claims they were simultaneously submitting "indisputably frivolous petitions for rehearing and for certiorari" as well as filling the trial court's docket with "repetitive and unsuccessful motions." *Loud Hawk*, 474 U.S. at 314-15; *State v. Stops*, 2013 MT 131, ¶ 40, 370 Mont. 226, 301 P.3d 811 ("Conduct that demonstrates a defendant's desire to avoid trial weighs against him in the overall balancing.")

When examined in total, Griebel's conduct demonstrates he was not interested in a speedy trial. Factor Three weighs against finding a speedy trial violation.

E. Prejudice to the defendant

"Because the speedy trial guarantee 'does not purport to protect a defendant from all effects flowing from a delay before trial,' prejudice should be assessed 'in the light of the interests of defendants which the speedy trial right was designed to protect." *Ariegwe*, ¶ 86 (citations omitted). When the speedy trial test is triggered, there is a presumption of prejudice that "determines the necessary showings *both* parties must make under Factor Four." *Ariegwe*, ¶ 58 (emphasis in original). Both parties must provide evidence on this issue, "but because the presumption that pretrial delay has prejudiced the accused intensifies over time, the necessary showing by the accused of particularized prejudice decreases, and the necessary

showing by the State of no prejudice correspondingly increases, with the length of the delay." *Id.* (internal citation and quotation marks omitted). In some cases, delays are beneficial to the defense. *See Morrisey*, ¶ 71; *Sartain*, ¶ 25.

When evaluating an accused's claim of prejudice, courts determine if the defendant suffered oppressive pretrial incarceration or undue prolonged disruption of the defendant's life and/or aggravated anxiety and concern, and whether the ability to present an effective defense was impaired. *Ariegwe*, ¶¶ 88, 111. "Impairment of defense is arguably the most important of the three [prejudice] factors to consider because a defendant's inability to adequately prepare his case undermines the fairness of the entire trial system." *Ariegwe*, ¶ 98.

Here, the court correctly found Griebel suffered no oppressive pretrial incarceration or aggravation of anxiety. However, the court's findings concerning alleged impairment of the defense were clearly erroneous and it incorrectly concluded the additional 39-day delay tipped the prejudice prong to Griebel's favor.

"Though a lengthy delay requires less from the accused to demonstrate prejudice, 'it would be virtually impossible for the State to rebut presumed prejudice from an allegedly impaired defense without some *showing* by the defendant of *actual* impairment resulting in prejudice.'" *State v. Daly*, 2023 MT 142, ¶ 34, 413 Mont. 100, 533 P.3d 326 (citation omitted) (emphasis added).

While the court correctly determined that most of the alleged witnesses with faded memories was not prejudicial to Griebel's defense, the court erred when it concluded that the death of three witnesses and the alleged diminished memories of Walter and Trooper Wager impaired Griebel's defense. (App. 2 at 7-8.) The court's conclusion was erroneous as Griebel failed to provide substantial credible evidence or establish how his defense was impaired by the "loss" of witnesses or diminished memories of other witnesses.

NO CREDIBLE EVIDENCE. At the evidentiary hearing, Griebel did not call either Trooper Wager or Walter to testify about their alleged lapses in memory. As for alleged "lost" testimony from the death of witnesses, Griebel submitted no recordings or notes from interviews with those witnesses. Instead, he presented only vague speculations based on hearsay.

The only "firsthand" evidence came from Griebel when he testified about what Anderson allegedly told him in jail. Although defense investigator Linda Sanem allegedly interviewed Glasson and Birkeland, rather than calling Sanem to testify at the hearing, Core and Griebel repeated what Sanem allegedly told them. Submission of Sanem's affidavit (five days after the hearing) did not cure the lack of direct, credible evidence establishing how Griebel's defense was impaired.

By failing to appreciate that Griebel presented no direct evidence demonstrating how his defense was impaired, the court misapprehended the effect of the information presented. *See Daly*, ¶ 34; *State v. Taylor*, 1998 MT 121, ¶ 24, 289 Mont. 63, 960 P.2d 773 (when claiming prejudice in preaccusation delay, "bare speculation that a lost witness's testimony would have been exculpatory is insufficient to prove actual prejudice"); *State v. Laird*, 2019 MT 198, ¶ 54, 397 Mont. 29, 447 P.3d 416 (same).

NO CAUSAL CONNECTION. Other than Birkeland, Griebel failed to establish a causal connection between the "loss" of witnesses and the delay in holding his trial. *See State v. Spang*, 2007 MT 54, ¶ 31, 336 Mont. 184, 153 P.3d 646 (for loss of witness to be prejudicial, defendant must show witness was "unavailable as a result of the pretrial delay").

First, Anderson was killed on September 19, 2022 (not December 16, 2022, as the court erroneously found) which was before the first trial setting. Second, Glasson passed away one day before the second trial.

Lastly, Griebel did not establish that the delay in getting to trial caused Walter's or Trooper Wager's alleged faded memories. As early as February 2023, Trooper Wager only recalled seeing Griebel yelling when he was apprehended and did not know the content of what he or the arresting officers said. Griebel speculated that Walter's memory had faded because his statements were

inconsistent, but the defense emphasized Walter's alleged inconsistent statements from the beginning of this case. The only witness that was "lost" because the trial was continued to September 11, 2023, was Birkeland.

LIMITED VALUE OF "LOST" TESTIMONY. According to Griebel, Anderson told him there was a rumor that another car was near Summer's on February 7, 2022, and that "those guys" had a .22 revolver. (Hr'g at 154-55.) Core, relying on Griebel's hearsay, alleged that Anderson could have testified that he sold methamphetamine to Tyler and Walter "before they went out on this." (*Id*. at 129.) However, on cross-examination, Core agreed that the text messages showed Tyler and Anderson had only discussed drug sales. (*Id*.)

Additionally, even if Anderson had sold Tyler methamphetamine, it would not impact the trial since Tyler's toxicology report indicated he had ingested methamphetamine. Statements about Tyler selling drugs would have been inadmissible character evidence precluded by the court's orders granting the State's motion in limine. Griebel's and Core's hearsay statements about Anderson's rumor knowledge was not substantial credible evidence. *See State v. Hasser*, 2001 MT 6, 304 Mont. 63, 20 P.3d 100 (no impairment of defense when witnesses with alleged memory loss did not witness the crime and were character witnesses so their "memory of witnessed events would be marginal at best").

Nor did the double hearsay statements that Glasson "knew stuff" constitute substantial credible evidence. Glasson had allegedly said things at a bar and told Sanem she "knows stuff." Significantly, Core admitted she did not know whether Glasson's testimony would have been admissible or relevant since they had not interviewed her. (Hr'g at 117-19, 153-54.)

Finally, Griebel failed to demonstrate how Birkeland's testimony was "vital to our defense." (Hr'g at 117-19, 125-28.) Significantly, Core admitted they had never interviewed Birkeland and had instead relied on Griebel's and Summer's versions of what Birkeland would say. Griebel testified that he and Summer stayed at Birkeland's house February 6, 2022, because they were afraid of Tyler and alleged Tyler had messaged Birkeland that he wanted to kill Griebel. (Hr'g at 153, 185-87.) Griebel claimed Birkeland was "crucial" to his defense because she would testify about what he and Summer were doing the day before the homicide and Tyler's "state of mind, his propensity, all kinds of things" and Core asserted the defense needed Birkeland to "provide more context." (*Id.)*

The court misapprehended the importance of Birkeland's theoretical testimony. Both Summer and Griebel were available to explain why they stayed away from Summer's house and Birkeland would not have been allowed to repeat their hearsay. Additionally, Birkeland's theoretical statements would have been cumulative since Tyler had messaged several others, including Summer, about

wanting to harm Griebel. (S*ee* Doc. 107.) *State v. Steigelman*, 2013 MT 153, 370 Mont. 352, 302 P.3d 396 (in DUI trial, relevancy of alleged lost testimony of bar tender was questionable given defendant's admissions to drinking 8-10 beers).

Birkeland's "vital," yet unknown, testimony was not necessary to provide "context" for Tyler's texts. What Birkeland knew or did not know about Tyler's feelings towards Griebel was irrelevant to Griebel's JUOF because as the court ruled, to support that defense, *Griebel* would have to explain that he had shot Tyler out of fear for his life. (*See* Doc. 172.) The court misapprehended the record when it found the "lost" testimony of Anderson, Glasson, and Birkeland impaired Griebel's defense. Likewise, the court's findings that Griebel's defense was impaired by diminished recollections of Trooper Wager and Walter were clearly erroneous.

The court's finding that Griebel was prejudiced by the trooper's "faded memory" is inconsistent with the court's prior determination that it was not obvious that the trooper's recording would have been material, of substantial use, or exculpatory. (*See* Doc. 170.) *MacGregor*, ¶ 39. The court also had found Griebel had other comparable evidence to draw from. The impact of "losing" Trooper Wager's testimony was negligible.

Griebel provided no evidence that Walter's memory had faded since March 2023. Rather, Griebel simply asserted Walter's versions of events were

inconsistent. *See MacGregor*, ¶ 39 (no allegation of what favorable witness testimony was forgotten or how a clearer memory would aid defense). Notably, the court also failed to consider that since Walter was a main witness for the State, Griebel may benefit from his failure to recall events. *Hesse*, ¶ 22.

Unlike State v. Kipp, 1999 MT 197, 295 Mont. 399, 984 P.2d 733, where delay caused the defense to lose a main witness, Walter, Trooper Wager, Anderson, Glasson, and Birkeland were not key witnesses for the defense. The court's finding that the "loss" of testimony and clear recollections of the witnesses impaired Griebel's defense was clearly erroneous.

Griebel's alleged impaired defense is akin to the unsuccessful claims in *State v. Rose*, 2009 MT 4, 348 Mont. 291, 202 P.3d 749, where this Court observed the alleged "lost" evidence would not have provided exculpatory evidence. *Rose*, ¶ 82. This Court also noted Rose offered no evidence that "a witness forgot exculpatory evidence" and "nothing in the record reveal[ed] what the witnesses Rose claims could not be located could have testified to, nor is there a showing of how their testimony could have been relevant to his defense." *Id. See also State v. Burnett*, 2022 MT 10, ¶ 40, 407 Mont. 189, 502 P.3d 703.

Finally, the court failed to acknowledge, as it had done three months before in the order denying Griebel's first speedy trial motion, that although memories may have faded, "the experts and hundreds of pieces of evidence in this case

ensure the [c]ourt that the duration of time will not impair [Griebel's] defense." (App. 1 at 10.) This would apply to Griebel's ability to present his JUOF defense because his expert witnesses were still available. Additionally, Walter's alleged loss of memory would be mitigated because the parties could use his prior interviews to either refresh his memory or impeach him. *See State v. Jefferson*, 2003 MT 90, ¶ 37, 315 Mont. 146, 69 P.3d 641 (both witnesses to crime testified and earlier statements were preserved).

The court's findings that "lost" testimony from Anderson, Glasson, and Birkeland together with the allegedly faded memories of Trooper Wager and Walter impaired Griebel's defense were not supported by substantial credible evidence and the court misapprehended the value of what their testimony would have been. Factor Four weighs against finding Griebel's speedy trial right was violated.

F. Balancing

"[N]one of the foregoing four factors is either a necessary or a sufficient condition to the legal conclusion that the accused has been deprived of the right to a speedy trial. Rather, the factors must be considered together with such other circumstances as may be relevant." *Ariegwe*, ¶ 102. "[E]ach factor's significance will vary from case to case, and a court assessing a speedy trial claim must weigh the four factors accordingly—*i.e.*, based on the facts and circumstances of the particular case." *Ariegwe*, ¶ 105.

The court made the same determinations it did in its first order for Factors 1, 2, and 3, but concluded that Factor 4 weighed in Griebel's favor despite the additional delay being only 39 days. The court's findings and conclusions were erroneous in many aspects.

The Second Factor weighs against a speedy trial violation because any reasons for delay attributable to the State were institutional while the delay caused by the defense was the result of a lack of diligence.

The Third Factor weighs against a speedy trial violation because Griebel did not demonstrate a sincere desire for a speedy trial and his defense strategies and conduct provide guidance for balancing the other factors. *Ariegwe*, ¶¶ 78, 110. Finally, the Fourth Factor also weighs against a speedy trial violation because the State refuted Griebel's claims of prejudice, particularly by demonstrating the negligible value the "lost" testimony had on his JUOF defense. *Daly*, ¶ 36 (unlikely speedy trial right violated when no actual prejudice).

Even if "the length of the delay entitled [a defendant] to some presumption of prejudice, such presumed prejudice will not weigh heavily in a defendant's favor except in the rare case of governmental bad faith or "'other egregious conduct.'" *State v. Llamas*, 2017 MT 155, ¶ 22, 388 Mont. 53, 402 P.3d 611. When delay attributable to the State was for acceptable reasons (valid and institutional), as is the case here, and the defendant's conduct did not demonstrate

a sincere desire to go to trial, it is less likely a speedy trial violation occurred. *See State v. Hodge*, 2014 MT 308, ¶ 25, 377 Mont. 123, 338 P.3d 8. The record here lacks evidence that the State was dilatory or failed to act in good faith.

Notably, other than an additional 39-days, the only factor that differed in the court's order granting Griebel's motion to dismiss was its erroneous determination that Griebel's defense was impaired; but that determination was not supported by substantial credible evidence.

CONCLUSION

This Court should reverse the district court's order granting Griebel's second motion to dismiss and remand this matter for trial.

Respectfully submitted this 27th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this opening 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 9,923 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0663

STATE OF MONTANA,

Plaintiff and Appellant,

v.

SKYLER L. GRIEBEL,

Defendant and Appellee.

APPENDICES

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