IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0147

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALEXANDER GARRETT LAFORGE III,

Defendant and Appellant.

# REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald Harris, Presiding

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## REPLY

### I. Mr. LaForge had no meaningful opportunity to participate in his own defense due to the lack of communication with counsel.

A breakdown of an attorney-client relationship severe enough to prevent effective representation creates a right to substitute counsel. *State v. Johnson*, 2019 MT 34, ¶ 18, 394 Mont. 245, 435 P.3d 64. Mr. LaForge appeared before the district court and reasonably requested an attorney who would meet with him more than two times, review the State's key evidence with him, and form a trial theory and strategy with him. Mr. LaForge wanted to be included in the preparation for his homicide trial. Whether communication broke down, or was never established to begin with, the hearing on October 1, 2021, exposed that Mr. LaForge and Mr. Merchant's attorney-client relationship was insufficient to support effective representation. The district court erred when it denied Mr. LaForge's request for new counsel.

The need for a continuance of the trial was manifest. Mr. LaForge was less than a week out from his deliberate homicide jury trial and was scared because he had met with his attorney a total of two times in the previous year of representation. The State had just disclosed its most damaging evidence days before trial. The late disclosed evidence

consisted of statements from, in Mr. Merchant's words, "the three witnesses who this case depends upon for a conviction … the only three witnesses that are necessary." 10/1/21 Hearing at 20.

According to Mr. Merchant, the tardy discovery was patently material and was not only disclosed late, but caused him to have to change his approach to the case: "…these things are coming late in the game, and they are concerning; and briefly flipping through them, it does change the tenor of the case for us." 10/1/21 Hearing at 20. Neither Mr. Merchant nor Mr. LaForge had read all of the discovery as of the Friday before the Monday jury trial. 10/1/21 Hearing at 20. Mr. Merchant then explained that he thought Mr. LaForge might have meant to ask for a continuance rather than asking for new counsel. 10/1/21 Hearing at 20. Although Mr. Merchant articulated the need for a continuance and the fact that he thought Mr. LaForge wanted a continuance, he never requested a continuance. No explanation for the omission was ever given. 10/1/21 Hearing at 20-21.

Mr. LaForge, in the dark about what the State's evidence was, or what his attorney had been doing for the past year, on the last business day before being tried for deliberate homicide, wondering if Mr.

Merchant had a trial strategy, or a theory of the case and if so what it might be, and just having received 300 pages of statements from the State's star witnesses that he would not be able to read in time, clearly articulated to the court that he wanted new counsel. The district court denied him.

Mr. LaForge never wavered and counsel never denied that communications between the two of them had broken down, or perhaps more accurately never been established. Mr. Merchant met with Mr. LaForge only twice over the course of the more than ten months that he represented Mr. LaForge. 10/1/21 Hrg. at 4, 12. Mr. Merchant expressed confusion about what Mr. LaForge wanted in the hearing despite the fact that Mr. LaForge's request was plain and unambiguous that he wanted an attorney who would meet with him to review discovery and share his trial strategy. Mr. Merchant then failed to request a continuance even though it was clear that it was both desired and needed.

Mr. LaForge's complaints and specific requests were not mere "vague displeasure" as the State describes. Resp. Br. at 20. The State suggests that because Mr. LaForge is not claiming ineffective assistance

of counsel for failure to request a continuance, the need or desire for a continuance did not exist. Resp. Br. at 25. Mr. Merchant did not say on the record *why* he chose not to ask for a continuance of the trial when the district court indicated that there was ample grounds and invited one. The answer to that question in this case can only be found outside the record. Thus, the issue of whether failure to request a continuance was ineffective assistance of counsel cannot be addressed on direct appeal. *State v. Kougl*, 2004 MT 243, ¶¶ 14-22, 323 Mont. 6, 97 P.3d 1095 (holding that if an ineffective assistance claim is based on matters outside of the record, this Court will refuse to hear it). The only reason Mr. LaForge does not claim ineffective assistance of counsel on direct appeal for Mr. Merchant's failure to request a continuance is because he is prohibited from doing so. *See also State v. Aker*, 2013 MT 253, ¶34, 371 Mont. 491, 310 P.3d 506.

That Mr. LaForge was not communicating with Mr. Merchant such that he could receive effective representation was also manifest. Mr. LaForge had only two consultations with his attorney over the course of ten months of representation on a deliberate homicide charge. Three days before trial was to begin, Mr. LaForge did not know what

Mr. Merchant's trial strategy was or if he even had one. Neither Mr. LaForge nor Mr. Merchant had read all of the witness statements that had been disclosed days before trial and that were the most potent evidence in possession of the State, and Mr. LaForge most likely would not have an opportunity to do so before trial started. And when the court invited Mr. Merchant to move for a continuance so that he may meet with Mr. LaForge to talk about his theory of the case, and so that Mr. LaForge might see the State's key inculpatory evidence, Mr. Merchant inexplicably chose not to do so. Instead, Mr. LaForge was ushered straight into his trial uninformed of the State's key evidence and his own counsel's trial strategy. The State's position would endorse a practice where homicide defendants go to trial having no idea what their counsel's trial strategy is and no meaningful relationship with counsel, so long as counsel claims they can proceed.

This Court should reverse the district court's denial of Mr. LaForge's request for new counsel, vacate the judgment, and remand for a re-trial with new counsel.

## II. The district court's denial of a cautionary jury instruction for the State's key witness who testified in return for a favorable plea deal was erroneous.

The State argues that the jury instructions adequately instructed the jury to examine incentivized witness testimony with greater caution than that of ordinary witnesses, and that even if the court erred in failing to give the requested instruction, Mr. LaForge was not prejudiced because of the strength of the other evidence against Mr. LaForge and the fact that Mr. LaForge's counsel was able to cross-examine the witnesses.

The State challenges Mr. LaForge's reliance on *Grimes* and cites cases advancing the proposition that a specific cautionary instruction about a witness motivated by personal gain is not necessary where more general witness credibility pattern instructions are provided. Response Brief at 28. The fact remains that *Grimes* is good law and applies here: when a government witness is motivated by personal gain such as a favorable plea deal in return for testimony that is crucial to the State's case, district courts must instruct the jury to examine that testimony with greater caution than that of ordinary witnesses. *State v. Grimes*, 1999 MT 145, ¶ 45, 295 Mont. 22, 982 P.2d 1037. When a district court fails to do so, as here, the case must be reversed if there is

a reasonable possibility that the error might have contributed to the conviction. *Grimes*, ¶ 46.

What makes a specific cautionary instruction necessary here is the importance of Ms. Alden's testimony to the State's case. Her testimony filled in key gaps left by all the others' testimony. All the other testimony offered by the State, while inculpatory, simply did not hit as hard as Ms. Alden's:

- Ms. Alden testified that Mr. LaForge was essentially the ringleader of the group of people who was present when Mr. Ness was shot. 10/5/21 Hrg. at 174-175.
- Ms. Alden testified unequivocally that Mr. LaForge was the one who shot Mr. Ness. 10/5/21 Hrg. at 181.
- Ms. Alden testified that Mr. LaForge admitted directly to her that he killed Mr. Ness, saying, "He's fucking dead, I killed him." 10/5/21 Hrg. at 181.
- Ms. Alden testified that Mr. LaForge threatened to kill both her and another person if they told anyone. 10/5/21 Hrg. at 187.

- Ms. Alden testified that Mr. LaForge told her to destroy her own car by having it crushed to prevent the police from finding it. 10/5/21 Hrg. at 188.

Here, considering Ms. Alden's brutally inculpatory testimony, there clearly is a reasonable "*possibility*" that the court's failure to give the requested specific instruction regarding Ms. Alden "*might*" have contributed to the conviction. *Grimes*, ¶ 46 (citing *Brodiak v. State* (1989), 239 Mont. 110, 115, 779 P.2d 71, 74.) Ms. Alden's testimony was uniquely inculpatory: more persuasive than that of any of the other witnesses both in quantity and quality. *See* Opening brief at 23.

Additionally, as the State points out in its response, the district court *did* issue a special instruction that James's testimony "ought to be viewed with distrust," in recognition that the general instructions were insufficient to alert the jury to possible bias by incentivized witnesses. See Resp. Br. at 31. It was unclear why the district court instructed the jury on James's potential bias as prescribed in *Grimes*, but declined to do so for Ms. Alden, who was similarly situated. The jury knew from both direct and cross-examination that Ms. Alden, like James, was incentivized to inculpate Mr. LaForge. 10/5/21 Hrg. at 188, 199. Given

the cautionary instruction for James but the lack of a similar instruction for Ms. Alden, the jury could have concluded that they were *not* supposed to view Ms. Alden's testimony in that same light, contrary to *Grimes's* mandate. *Grimes*, ¶ 46.

Ms. Alden's testimony was crucial to Mr. LaForge's conviction. It was singularly compelling in both quality and quantity compared to all the other evidence. This case must be reversed for the lack of cautionary instruction specific to Ms. Alden. *Grimes*, ¶ 46.

## III. The district court erred when it granted the State's restitution request for lost profits for Mr. Ness's parent's business.

The State argues that "it is not this Court's role to second guess" the district court's weighing of Ms. Ness's testimony. Resp. Br. at 38. While a district court's judgment on the credibility of a witness is subject to deference by this Court, it is incorrect to suggest that this Court has no role in adjudicating whether a restitution award was substantiated by the evidence in the record. Mr. LaForge is not asking this Court to second-guess Ms. Ness's credibility, but rather to conduct the judicial review to which every defendant is entitled, and to enforce Mont. Code Ann. § 46-18-243(1)(a), which requires restitution to be "substantiated by evidence in the record."

The State does not address Mr. LaForge's specific arguments regarding the lack of substantiation for the $72,000 request of lost income, instead rehashing Ms. Ness's general testimony. Mont. Code Ann. § 46-18-243(1)(a) requires record evidence substantiating the losses. In this case, the State presented no more than bare numbers and speculation. Mr. LaForge stands on his argument and request for this Court to reverse the award of restitution and remand to the trial court for a hearing to determine the proper amount of restitution. *Aragon*, ¶ 21.

Respectfully submitted this 18th day of April, 2025.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief 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 1,961, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
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## CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-18-2025:

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