IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0477

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACHARY EUGENE NORMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, the Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUES

1. Appellant Zachary Norman shot and killed two assailants in self-defense, simultaneously or within moments of each other. After a hung jury mistrial, the District Court acquitted him of one count of deliberate homicide but found him guilty of the other count, in a bench trial. Did the court err in denying a motion to dismiss the charges for insufficient evidence in the jury trial or in returning a guilty verdict in the bench trial?

2. Applying an erroneous standard to the burden of production for the justifiable use of force defense in the bench trial, the District Court required Mr. Norman to testify in support of his affirmative defense. Did the court commit structural error?

3. Mr. Norman spent 548 days in custody between his arrest and his first trial due to institutional delay and the State's lack of diligence in preparing for trial. Did the District Court err in denying a motion to dismiss for a violation of Mr. Norman's right to a speedy trial?

4. During a custodial interrogation, Mr. Norman told detectives he would answer questions, but said, "I'd like a lawyer too." Did the District Court err in denying a motion to suppress statements elicited after the request for counsel?

5. Mr. Norman was arrested without incident outside his home. Officers entered the home without a warrant to conduct a "protective sweep," despite lacking a reasonable belief that anyone was inside. Observations from the trespass were incorporated into a search warrant. Did the District Court err in denying a motion to suppress evidence located during the warrantless search?

STATEMENT OF THE CASE

On February 10, 2022, the State charged Appellant Zachary Norman with two counts of deliberate homicide and two counts of tampering with evidence. (D.C. Doc. 4.) The State alleged that Mr. Norman shot and killed Brendan Estabrook and Chase Estabrook in the early morning of January 15, 2022, and subsequently left the scene, washed his clothes, and placed his firearm in the back of a closet. (D.C. Doc. 1, ¶¶ 1–2, 5, 26–27.) Mr. Norman pleaded not guilty and provided notice that he intended to rely on the defenses of general denial and justifiable use of force. (D.C. Doc. 8; 45, at 2–3; 61.)

Mr. Norman filed multiple motions to suppress evidence and post-arrest statements (D.C. Doc. 57; 58; 59; 60 & 63), which were all denied (2/23/23 Tr. 4, attached as App. F; D.C. Doc. 412, attached as App. G). The court set a jury trial for March 21, 2023. (D.C. Doc. 33.)

About two weeks before trial, the State filed a motion to continue after receiving a defense expert report pointing out the State's failure to conduct forensic testing on certain pieces of evidence. (D.C. Doc. 176.) Mr. Norman, who had been incarcerated since his arrest, strenuously objected to a continuance and offered not to call the expert. (D.C. Doc.

177.) The District Court concluded that the disclosure of the report was procedurally proper but nevertheless granted a continuance and scheduled the jury trial to begin July 17—548 days after Mr. Norman's arrest. (D.C. Doc. 213; 219, at 3.) On May 12, 2023, Mr. Norman filed a motion to dismiss based on the violation of his right to a speedy trial. (D.C. Doc. 219.) The court denied the motion. (7/18/23 Tr. 9–10, attached as App. E.)

At the jury trial, at the close of the State's case, Mr. Norman moved for a ruling that he had satisfied the burden of production for justifiable use of force and to dismiss for insufficient evidence. (7/24/23 Tr. 104, 131.) The District Court held that he had satisfied the burden but denied the motion to dismiss. (*Id.* at 129; *id.* at 136, attached as App. C.) Mr. Norman called two expert witnesses and declined to testify himself. The jury convicted Mr. Norman of both counts of tampering with evidence but could not reach a unanimous verdict on either deliberate homicide count. (D.C. Doc. 329, 330.) The State filed notice of its intent to retry Mr. Norman. (D.C. Doc. 331.)

Prior to the second trial, Mr. Norman waived his right to a jury trial (D.C. Doc. 400), and, with consent of the State, proceeded to a

bench trial on April 17, 2024 (D.C. Doc. 434). Once again, at the close of the State's case, Mr. Norman moved for a ruling that he had satisfied burden of production for justifiable use of force. This time, the court ruled that he had not satisfied the burden. (4/22/24 Tr. 152–56, attached as App. D.) As a result, Mr. Norman testified in his own defense, after which point the court held that justifiable use of force had been raised and the burden shifted to the State. (*Id.* at 207.) The court ultimately found Mr. Norman not guilty of deliberate homicide of Brendan Estabrook, and guilty of deliberate homicide of Chase Estabrook. (D.C. Doc. 446, attached as App. B.)

On June 17, 2024, the District Court sentenced Mr. Norman to 110 years to the Montana State Prison, with no time suspended. (D.C. Doc. 456, attached as App. A.) Mr. Norman timely appeals. (D.C. Doc. 464.)

STATEMENT OF THE FACTS

I. Background.

Just before 3:30am on January 15, 2022, on a frozen street corner at the edge of Three Forks, Zachary ("Zac") Norman found himself on the wrong side of a two-against-one beatdown. Zac's assailants, brothers

Chase and Brendan Estabrook, were heavily intoxicated and looking for payback. (7/21/23 Tr. 145, 152.) Earlier, the three young men had an argument that devolved into a fight. (7/18/23 Tr. 108–09.) After Zac left the altercation and started toward home, Chase and Brendan pursued him into the freezing January night. (7/19/23 Tr. 42–43.) When the brothers caught Zac about 45 yards down the road, they punched, kicked, and wrestled him to the frozen ground. (4/22/24 Tr. 168.) Zac strained to protect his head from the repeated blows and pulled one brother down by the boot that was kicking him. (*Id.*) The other brother put Zac in a headlock and raised him to his feet to continue punching him. (*Id.* at 169.)

Like the Estabrook brothers, Mr. Norman had been drinking that night. (7/21/23 Tr. 36–39.) But with each blow, he came to the sober realization that he had to make a terrible choice to survive the unrelenting assault. (4/22/24 Tr. 165.) While entangled with one of his assailants, he drew his concealed firearm and started pulling the trigger. (*Id.* at 170; 7/19/23 Tr. 69–70.) The struggle continued, and Mr. Norman fought to retain the firearm, shooting through the left arm of his own sweater. (4/22/24 Tr. 93–94, 170.) When the beating finally

stopped, Zac looked up and saw Chase and Brendan on the ground. (*Id.* at 170–71.) He panicked and ran home. (*Id.* at 172.)

Mr. Norman did not go out that night looking for a fight. He was 24 years old, worked in HVAC, and lived with his father, Rob Norman, in Three Forks. (D.C. Doc. 448, at 1.) Zac's childhood friend, Ian Amicucci, lived with Zac's mother, Shireen Norman. (7/21/23 Tr. 34–35.) On January 14, 2022, Zac drove to Shireen's house to meet up with Ian. (*Id.* at 35.) The two hung out for a bit, smoked marijuana, and went to the Sacajawea Bar for dinner, where they each had a few drinks. (*Id.*) After a while, Ian and Zac left the bar with a mutual acquaintance, Dylan Strozzi. (4/19/24 Tr. 58.) Zac dropped his car at Dylan's house, and Dylan drove the group to Teaser's Gentleman's Club, just outside Three Forks. (*Id.* at 58–59.) After only 30 minutes, the group left Teaser's and stopped by the Frontier Club as it was closing. (*Id.* at 59–60.)

Chase and Brendan Estabrook were from Butte. (7/18/23 Tr. 14.) Like Zac, the brothers went out drinking on January 14. Like Zac, they went to Teaser's Gentleman's Club, followed by the Frontier Club,

where they crossed paths with Zac's group around closing time. (*Id.* at 177; 4/17/24 Tr. 77.)

With the Frontier Club closing, a larger group that included Brendan, Chase, Zac, Ian, Dylan, and Rainie Setter drifted back to the Sacajawea Bar. (7/18/23 Tr. 80.) After bartender Nick Thieme served the group more drinks, including a round of shots ordered by one of the brothers, Dylan invited everyone back to his house on 6th Avenue in Three Forks. (7/18/23 Tr. 105–07.) Zac got a ride back to Dylan's; Chase and Brendan drove themselves. (*Id.* at 106–07.) The brothers parked Chase's truck on the street south of Dylan's house. (4/17/23 Tr. 215.) The group drank beer and socialized in Dylan's garage. (*Id.* at 78–79.)

Nick Thieme had a drink, closed up the bar, and met the group at Dylan's house. (7/19/23 Tr. 76.) When Nick arrived shortly after 3:00am, he walked into an argument and saw Chase and Brendan shoving Zac toward the garage exit, telling him to leave. (4/17/24 Tr. 137.) As the men were arguing, Chase gave Zac a hard push, forcing Zac back a few steps back. (*Id.* at 164.) Zac punched Chase in the face and Brendan immediately tackled him. (*Id.* at 140–41, 168.) While Brendan and Zac tussled on the ground, Chase tried to get back into the fray. (*Id.* at 142,

168.) Nick pulled Brendan off of Zac, and Zac left the garage. (*Id.* 142–43.)

Zac retreated backward down the driveway and turned north, toward his home. (4/17/24 Tr. 173.) Brendan and Chase exited the garage and followed Zac up the street, in the opposite direction of Chase's truck. (*Id.* at 145–46.)

Nick heard someone say, "do you want to die tonight," and walked outside. (*Id.* at 146.) After the shooting, Nick ran back inside to alert Dylan and Rainie. (7/19/23 Tr. 48–49.) The three eventually went outside, saw Chase and Brendan on the ground, called 911, and attempted to administer first aid. (*Id.* at 49.) Brendan and Chase were lying at about a ninety-degree angle, with their heads touching, on the northwest corner of North 6th Avenue East and East Ash Street. (State Jury Ex. 154, admitted 7/18/23 Tr. 46.) Twelve bullet casings lay in close proximity to the bodies, and there was apparent blood on the snow along the corner, including two relatively large patches several feet south of Brendan. (*Id.*) Three pieces of blue fabric consistent with Chase's shirt were nearby—two just next to Brendan, and the other just

south of the blood patches. (State Jury Ex. 20, 27, 28, admitted 7/18/23 Tr. 46.) An officer covered the bodies in wool blankets. (7/18/23 Tr. 134.)

Officers took statements from Nick, Dylan, and Rainie shortly after the shooting. Nick confirmed that Chase and Brendan followed Zac after he broke away from the garage fight and started walking down the driveway. (D.C. Doc. 1 ¶ 9.) As Nick approached the corner, he saw Chase and Brendan "beating" Zac and saw a gun in someone's waistband. (*Id.*) The three men were in a "pile" when Nick heard gunshots ring out. (*Id.* ¶ 10.)

After officers identified Zac as a suspect, the Gallatin County Special Response Team ("SRT") assembled to take him into custody. (1/27/23 Tr. 14.) In the early hours of January 15, the SRT responded to Zac's home in Three Forks. (*Id.* at 16.) At around 7:15am, an officer called Rob Norman and asked him to wake Zac and have him walk outside to be taken into custody. (1/27/23 Tr. 67–69.) When Rob woke his son, he noticed that Zac "looked pretty beat up." (*Id.* at 80.) Zac exited the house and was taken into custody without incident. (*Id.* at 70.) Rob and his girlfriend, Joyce, complied with officer requests to

leave the residence as well. (*Id.* at 70–72.) Officers declined to pat search Rob or Joyce when they left the house. (*Id.* at 74–75.)

After everyone left the house, Officer Zachary Garfield entered the home without a warrant to conduct a "protective sweep." (1/27/23 Tr. 19.) During the sweep, Officer Garfield observed a pile of wet clothes in a bathtub and a black Glock pistol in the closet of Rob's bedroom, slid into a 3-inch space between the closet wall and a water heater. (*Id.* at 26, 30.) Officer Garfield's observations were incorporated into an application for a warrant to search the residence. (D.C. Doc. 59, Ex. A ¶¶ 15–16.) The warrant was issued and the search conducted; the clothes and the gun were seized. (7/18/23 Tr. 173–74.)

Meanwhile, Zac was transported to the Gallatin County Law and Justice Center for questioning by Detectives Michael Emens and Nate Webb. (1/27/23 Tr. 112, 115.) He would remain in the interrogation room for approximately the next 10 hours. (*See* State Evidentiary Ex. 21, admitted 1/27/23 Tr. 113 ("Interrogation Video").) Det. Emens's impression, upon seeing Zac, was that he "obviously got into a fight." (4/18/24 Tr. 124.) He observed a blood-covered abrasion on Zac's left eyelid; an abrasion behind his right ear; a cut inside his left cheek; two

scratch marks on his abdomen; a scratch mark on the upper right side of his torso; a red mark on the upper portion of his left arm; abrasions on the knuckles of both his hands; possible bruising and red marks on his knees and shins; bruising on his left calf; a large abrasion on the right side of his lower back; and small scratch marks on his back; and Zac complained of pain to the right side of his head, just above his ear. (7/20/23 Tr. 29–30; 4/18/24 Tr. 124–25.)

At the beginning of the interview, Det. Emens read Zac the standard *Miranda* warning. (Interrogation Video 00:04:10–28.) The following exchange then occurred:

> Q: You understand these rights as I have read them to you?
>
> Okay. Having these rights in mind, do you want to talk to us about what happened last night?
>
> A: Um, I'd like a—I'd like to be reminded. *I'd like a lawyer too*, but I'll answer any questions you guys have. Absolutely.
>
> Q: Okay. So you want to talk to us?
>
> A: If you have a question, ask it—
>
> Q: Okay.
>
> A: —and I'll answer it to the best of my abilities, absolutely.

(*Id.* at 00:04:28–50.) The officers continued the interview. After Zac signed and dated a *Miranda* waiver form, he told the detectives: "And I apologize. I really don't know what's going on." (*Id.* at 00:05:25–30.)

The detectives' questions, combined with Zac's injuries, make him realize, over the course of the interview, that he had been in an altercation and someone was hurt. (*Id.* at 00:50:00–40.) Although the detectives urged him to recall details and share his perspective, Zac struggled to remember anything after arriving at the Frontier Club. (*E.g.*, *id.* at 00:10:00–15, 00:32:20–59, 00:35:00–32, 00:47:00–30.)

Later in the interrogation, the detectives asked Zac for consent to swab his hands for gunshot residue. He responded, "Now, I'm like—now, I'm like, should I get a lawyer? But yeah sure." (*Id.* at 02:46:40–45.) The detectives reviewed a consent to search form, when Zac asked: "I'm pretty confident that whatever I did I—I just worry. I just worry like, should I get a lawyer or not? I want to—I'm pro cop, so I'm here to help. But man, I don't want to end up in a bad situation here, not that I'm not already in one, right?" (*Id.* at 02:47:38–54.) Toward the end of the interview, the detectives asked for consent to conduct a blood draw. Again, Zac stated, "I'd like to ask a lawyer, but sounds like a good plan.

Just don't know," (*id.* at 02:56:58–57:03) and then asked, "How—how fast can you get me a lawyer?" (*id.* at 02:57:16–20.) The questioning continued.

The State played nearly four hours of the interview in both trials (State Ex. 65, admitted 7/18/23 Tr. 46, 4/17/24 Tr. 7; published 7/20/23 Tr. 11, 4/18/24 Tr. 93) and repeatedly referenced the interview to argue that Zac was lying about not remembering anything and was not reasonable in his use of force (*e.g.*, 7/26/23 Tr. 70–71, 84, 87; 4/24/24 Tr. 39, 49, 53, 63–64).

II. Motions to Suppress.

Mr. Norman filed numerous pretrial motions, including motions to suppress evidence seized from his residence and statements made in the post-arrest interview after his first request for counsel. (D.C. Doc. 57, 59, 63.) On January 27, 2023, the District Court held an evidentiary hearing on the suppression motions.

Officer Garfield of the Bozeman Police Department testified about the SRT response and search of 439 Frontage Road. He stated that the SRT conducts protective sweeps as a matter of course when they arrest a barricaded subject. (1/27/23 Tr. 15.)

Here, Officer Garfield said they conducted a protective sweep because a homicide had been reported, they did not know if anyone was inside the house, and they had not recovered a firearm. (*Id.* 19–20.) Garfield claimed to locate the firearm while checking to see if anyone was hiding behind a water heater in Rob's bedroom closet and the pile of wet clothes while searching the north bathroom. (*Id.* at 26, 46, 50.) Afterward, he informed the undersheriff so that his observations could be incorporated in a search warrant. (*Id.* at 31.)

Officer Garfield acknowledged that he "did not have any concrete facts that somebody else was in the residence" or consent to search. (*Id.* at 42, 57.) When asked why the SRT could not get a warrant and then conduct a protective sweep, Officer Garfield said he did not understand the question. (*Id.* at 55.)

The court denied the motions to suppress on the record at the final pretrial conference and promised to issue a written order explaining his decision. (App. F.) Over one year later, the court filed an opinion holding that "a clear exception to the warrant requirement existed both under exigent circumstances and in the form of a protective sweep necessary to protect law enforcement officers from hidden danger,"

because Mr. Norman was a suspect in a double-homicide involving a firearm that had not been found. (App. G, at 12.) As for the post-arrest statements, the District Court held that Mr. Norman's request for a lawyer "was not an unequivocal request for an attorney and a reasonable officer under the circumstances would not have understood the statement to be a request for a lawyer." (*Id.* at 18.)

III. Speedy Trial Motion.

Mr. Norman moved for a bail reduction about a month after his arrest. (D.C. Doc. 12, 19.) At the hearing, the decedents' stepfather threatened that the court would have to preside over another trial if Mr. Norman were released. (D.C. Doc. 296, attachment at 3.) The court denied the motion. (D.C. Doc. 20.) Mr. Norman immediately requested a trial date. (D.C. Doc. 23.)

On May 25, 2022, at the first setting of the omnibus hearing, he again requested a trial date, and the court promised to review the trial calendar. (D.C. Doc. 32.) On June 2, 2022, at the next omnibus setting, the District Court set the case for trial on March 21, 2023. (D.C. Doc. 33.) The parties filed an omnibus hearing order on July 27, 2022. (D.C. Doc. 45.)

On October 24, 2022, Mr. Norman provided written notice of his intent to call as an expert witness Gary Dale, a medical doctor and former state medical examiner. (D.C. Doc. 64, at 1, 3.) The notice stated that Dr. Dale would "opine regarding injuries sustained by decedents and defendant" and that an interview with him could be arranged through the public defender's office. (*Id.* at 1.)

On January 3, 2023, and February 10, 2023, respectively, the State's trial attorneys filed notices of appearance. (D.C. Doc. 112, 160.) On February 27, 2023, defense counsel received discovery from the State Crime Lab and disclosed it to Dr. Dale. (D.C. Doc. 177, at 1–2.) On March 1, 2023, defense counsel received a 76-page PowerPoint document from Dale; 71 of the pages were photographs previously disclosed by the State, with notes made by Dale. (*Id.* at 2.) The defense disclosed the report to the State on March 3. (*Id.*)

On March 6, the State moved to continue the trial or exclude Dale from testifying. (D.C. Doc. 176.) The prosecution explained that its experts would not have time to "meaningfully review the entirety of the PowerPoint, the conclusions therein, and meet with the attorneys all before trial is set to begin." (*Id.* at 2.) The State later added that the

report contained "approximately seven statements regarding how further testing or better examination of physical evidence could result in 'more conclusions,'" and said the State lacked time to conduct further testing and examination. (D.C. Doc. 199, at 2.) On March 7, the defense disclosed a 17-page supplemental PowerPoint report generated by Dale. (3/8/23 Tr. 5.)

Mr. Norman opposed the motion to continue, principally arguing that the State failed to demonstrate diligence in preparing for trial. (D.C. Doc. 177, at 2.) As Mr. Norman explained, the State had notice of Dale's testimony since October 2022 and never requested to interview him. (*Id.*) Moreover, the report consisted almost entirely of material disclosed by the State in discovery. (*Id.* at 3.)

At the motions hearing, the State advanced a different argument: that Dale's opinions exceeded the scope of the expert disclosure. (3/8/23 Tr. 14.) Judge Brown demurred, saying that the admissibility of Dale's testimony was a separate, trial issue. (*Id.* at 17.) Defense counsel emphasized that the prosecution moved for a continuance because Dale's report informed them of something they should have known: the

State Crime Lab never tested the decedents' clothes and needed a continuance to conduct the testing. (*Id.* at 27–28; *id.* at 33–34.)

Eventually, defense counsel explained that they would rather not call Dale than have the trial continued, and offered: "What if we didn't call him at all? What if we didn't call him at all, Judge?" (*Id.* at 37.) Judge Brown took a recess to consider the issue further. (*Id.* at 41–42.)

Upon resuming the bench, Judge Brown declared that "the Defense has made the proper disclosures" and "has done exactly what the omnibus order and what the statute requires it to do." (*Id.* at 51.) Nevertheless, he concluded: "I think I have to give the State a fair chance to respond. And I think that's what the law requires . . . ." (*Id.* at 51–52.) The court vacated the trial date of March 21 and reset trial for July 17 (*id.* at 53–54), a decision memorialized in a follow-up written order (D.C. Doc. 211).[1] The order reiterated that Mr. Norman complied with the expert witness notice requirements but also found that the PowerPoint disclosure "contains new conclusion and opinions that fall

[1] Following the decision, Mr. Norman petitioned this Court for a writ of supervisory control. *Norman v. Eighteenth Judicial Dist. Court*, OP 23-0168. This Court denied the petition after finding that the ruling was discretionary. (D.C. Doc. 209, at 3.)

outside Mr. Norman's initial disclosure of Dr. Dale's proposed expert testimony." (*Id.* at 1.)[2]

The prosecution made good use of its additional time. In May 2023, the State sent the decedents' clothes to the crime lab (4/18/24 Tr. 102); in June 2023, the State requested muzzle pattern residue tests (7/24/23 Tr. 76–77). The State also provided notice of new expert, Kevin Winer, to testify regarding crime scene investigations, blood spatter, and physical evidence analysis (D.C. Doc. 214), and conducted defense expert interviews (D.C. Doc. 298).

Mr. Norman moved to dismiss for violation of his right to a speedy trial and for a bail reduction. (D.C. Doc. 219, 231.) The court denied the bail motion. (D.C. Doc. 268.) On the first day of trial, Judge Brown noted that he had previously denied the speedy trial motion in an off-the-record conference call. (App. E.) On March 6, 2025—nearly 600 days after the jury trial and over 6 months after the Notice of Appeal—the District Court issued a written order adopting the State's analysis that the State was responsible for 321 days of delay and that Mr.

[2] The report was not submitted to the court and is therefore not in the record. (*See* D.C. Doc. 213, at 1–2 (objecting to court making its finding without reviewing the report.)

Norman was responsible for the remaining 227 days of delay "due to his repeated Omnibus Hearing continuances and his late-disclosed expert report." (D.C. Doc. 471, at 3.)[3]

IV. Jury Trial.

The jury trial began on July 17, 2023, and lasted ten days. The State called 28 witnesses. The only witness to the shooting was Nick Thieme, the bartender. He described the two-against-one melee as follows:

> They were all kind of wrestling. It looked like fighting kind of in a pile. Chase was standing up, like he had fallen down again and was getting up. And it looked like Brendan kind of had Zac in, like, a headlock almost, like, over top of him at least, and Zac's shirt was up and I could kind of see something in his waistband.
>
> I wasn't sure what it was at first and then he reached back and pulled it up and I could see it was a gun. At which point I yelled no. And the gun came around. I heard shots fired and I just turned around and ran back into the garage.

(7/19/23 Tr. 44–45.) When asked about the number of shots, Nick testified that he heard four to six shots, "an initial little burst and then

[3] Mr. Norman filed a motion to strike this opinion from the record on appeal because the District Court lacked jurisdiction when it was filed. (Appellant's Mot. to Strike.) This Court has taken the motion under advisement. (1/6/26 Order.)

a little pause and then another burst." (*Id.* at 79.) However, Nick did not see the gunshots. (7/19/23 Tr. 48.) Nick confirmed that the fight was two-against-one and he saw both brothers throw punches while they were fighting. (*Id.* at 65, 68–69.) Nick testified that Chase was no more than one to two feet away from Zac and moved toward Zac in the moments after the gun came out. (*Id.* at 71–73.)

The State called twelve law enforcement officers to the stand. All the officers generally agreed that a two-against-one fight constitutes a disparity in force, and that death or serious bodily injury could be caused by punching, kicking, pushing someone down on frozen ground, or knocking someone out in below-freezing weather. (7/18/23 Tr. 69–70 (Officer Austin Owens); *id.* at 148–49 (Deputy Sheriff Daryl Rogers); *id.* at 224–25 (Detective Ryan Douma); 7/19/23 Tr. 117–18 (Detective Andrew Kappler); *id.* at 136–37 (Deputy Sheriff John Fricke); *id.* at 164–65 (Sergeant Ryan Jern); *id.* at 195–96, 199–200 (Captain Ian Parker); 7/20/23 Tr. 103–04 (Detective Sandy Schroeder).)

The officers also generally confirmed that they were trained in firearm retention and would be worried about being killed by their own firearm in a two-against-one altercation. (7/18/23 Tr. 71 (Officer

Owens); *id.* at 149–50 (Deputy Sheriff Rogers); *id.* at 226–27 (Detective Douma); 7/19/23 Tr. 138 (Deputy Sheriff Fricke); *id.* at 165 (Sergeant Ryan Jern); *id.* at 200 (Captain Parker); 7/20/23 Tr. 79 (Detective Nathan Webb); *id.* at 122–23 (Detective Nicholas Redburn).). Finally, officers confirmed that wool blankets should not have been placed on the bodies (7/19/23 Tr. 154) and that the blankets could have compromised forensic evidence (*id.* at 150–54; 7/18/23 Tr. 225–26).

The medical examiner testified to the autopsy results. Brendan was shot eight times and had signs of bruising on his right knuckles. (7/21/23 Tr. 145, 177.) At the time of death, Brendan's blood alcohol content was .294. (*Id.* at 145.) He sustained four gunshot wounds to his left side under the arm; two to his buttocks; one to his lower back; and one to his left hip. (*Id.* at 153–54.) Seven of the eight bullet entry wounds had signs of close-range gunfire, such as soot and stippling. (*Id.* at 165–68.) The bullets produced three exit wounds. (*Id.* at 133–34; State Jury Ex. 106.2, admitted 7/18/23 Tr. 46.) The medical examiner could not determine the order in which the wounds were sustained. (7/21/23 Tr. 135.)

Chase was shot twice, once in the hand and once in the neck. (7/21/23 Tr. 148.) At the time of death, Chase had a blood alcohol content of .338. (*Id.* at 152.) In addition to the gunshot wounds, Chase had abrasions on his forehead and left shoulder, contusions to his left eye and left arm, and a possible low-speed bullet wound to the left thigh. (*Id.* at 175–76.) Though there was no evidence of soot or stippling, the examiner agreed the wounds may have been sustained at close range. (*Id.* at 172–73.) Because the palm is relatively thick, it is harder to see stippling on the hand, and an intervening object would block soot or stippling. (*Id.* at 173–74.) Blood found on the grip of Mr. Norman's firearm contained Chase's DNA. (*Id.* at 97–98.)

The firearm and toolmark examiner, Lynette Lancon, agreed that Chase may have been shot at close range. (7/24/23 Tr. 93, 98–99.) Lancon's tests indicated that Mr. Norman's gun would leave a pattern of residue within 39 inches of the muzzle. (7/24/23 Tr. 68.) Lancon offered no opinion, however, that Chase was over 39 inches away from the gun when he was shot, given the likelihood that the bullets passed through an intervening object before hitting Chase. (*Id.* at 87–88.) Having tested Zac's sweater for firearm residue, Lancon confirmed that

it had a bullet hole in the left upper arm and could have been an intervening object. (*Id.* at 78, 91.)

After the State rested, Mr. Norman moved for a jury instruction on justifiable use of force. The State had moved pretrial to prohibit Mr. Norman from raising the defense, (D.C. Doc. 164, at 4), a request the court ruled was not ripe for decision (D.C. Doc. 416). Judge Brown understood the stakes of this motion; on trial day three, he said, "if anyone's going to force Mr. Norman to testify, it's going to be me, because if I find that he has not made a sufficient showing, then he has to make the decision whether or not he's going to testify." (7/19/23 Tr. 25–26.) The court ultimately concluded that Mr. Norman could raise the defense without testifying, principally because Nick Thieme's eyewitness testimony established that Mr. Norman purposefully and knowingly fired the shots that killed Brendan and Chase. (7/24/23 Tr. 129–30.) The court then denied Mr. Norman's motion to dismiss for insufficient evidence. (App. C.)

Mr. Norman called two defense witnesses. First, Dr. Danny Benmoshe, a neurologist, testified about concussions and resulting memory recall issues. (7/24/23 Tr. 142, 147.) Second, George Carr, a

firearms instructor and expert on the use of force, testified about the factors that are relevant to a use-of-force situation. Given the evidence, Carr was "100% positive" of his opinion that Mr. Norman was justified in using deadly force. (*Id.* at 162.) Mr. Norman did not testify.

In rebuttal, the State called Kevin Winer, the expert they found using the additional time granted by the continuance of the original jury trial date. (7/26/23 Tr. 11.)

After deliberating for approximately 16 hours over 3 days, the jury returned a partial verdict, finding Mr. Norman guilty of tampering (D.C. Doc. 329) and deadlocking on deliberate homicide (7/28/23 Tr. 10; D.C. Doc. 330).

V. Bench Trial.

Between the jury trial and bench trial, the State filed a renewed motion to exclude the justifiable use of force defense, arguing that Mr. Norman could not raise the defense without taking the stand and testifying to his subjective beliefs. (D.C. Doc. 354.) Judge Brown announced that he would require Mr. Norman to present prima facie evidence of justified use of force. (D.C. Doc. 437, at 3–4.) He stopped

short, however, of endorsing the State's argument that Mr. Norman must testify. (*Id.* at 5.)

The bench trial initially proceeded much like the jury trial. By the time the State rested, the District Court had heard substantially similar testimony, with the principal exception that the State called Kevin Winer in its case-in-chief, rather than as a rebuttal witness. (4/22/24 Tr. 106.)

As in the first trial, Nick Thieme testified that he witnessed a two-on-one fight on the corner, saw Zac pull out a gun, and heard the sound of five to seven gunshots, with a short pause between the first and second group of shots. (4/17/23 Tr. 149.) Nick described the scene on the corner as follows:

> They're fighting still. I mean, it looked like Brendan and Zac were kind of, like, locked on the groundish, or kind of trying to push each other to the ground, and then Chase was again getting up off the ground. I think he didn't really have his feet under him. So he was standing up, in the process of standing up. Then I saw, as I walked towards them, the person who's back was to me, their shirt came up and they had something in their waistband. I saw them reach back and I realized it was a gun. I yelled, like, no, and then the gun came up and shot.

(*Id.* at 147–48.) Nick understood that the fight was two-against-one and that Chase was an active participant, as he was no more than a couple

of feet away from Brendan and Zac when shots rang out. (*Id.* at 153–54, 176.)

The bench trial diverged dramatically from the jury trial after the State rested and Mr. Norman moved for a ruling that he met the burden of production for his affirmative defense. Though Nick Thieme's testimony satisfied the burden in the first trial (7/24/23 Tr. 130), the court treated the issue differently the second time around. Judge Brown explained that it was "unclear to me what Mr. Norman perceived" and there was "conflicting evidence about what his subjective belief was," concluding that Mr. Norman failed to make a "prima facie showing of why deadly force was threatened." (App. D, at 155.) As a consequence, the court ruled that George Carr could not testify because his testimony was relevant only to justifiable use of force. (*Id.* at 156.)

Given this ruling, Mr. Norman took the stand. (4/22/24 Tr. 159.) He acknowledged his inability to recall the events during the post-arrest interrogation, but explained that the discovery and trial testimony helped him reconstruct some but not all of his memories. (*Id.* at 160–61.) Mr. Norman testified that after the argument broke out, he thought that the Estabrook brothers wanted to "take it outside"; he

resisted because he did not want to fight two people in the street. (*Id.* at 164–65.) He threw a punch only after getting shoved hard. (*Id.* at 165.) After Brendan tackled and hit him a few times, Mr. Norman decided he had enough and immediately left the garage, only to hear, "you don't get to walk away" and "you don't get to leave." (*Id.* at 166.)

Mr. Norman testified to backing up and apologizing in an effort to deescalate. (*Id.*) The brothers responded by striking Mr. Norman, knocking him down. (*Id.*) Mr. Norman ran, but they quickly caught him. (*Id.* at 167.) After some wrestling and another attempt to escape, the brothers both had hold of Mr. Norman on the ground. (*Id.* at 168.) Mr. Norman covered his head and tried to avoid getting hit in the face; then, he started getting kicked, until he pulled one of them down by the boot. (*Id.* at 168–69.) The other brother pulled Zac up and started punching him in the face. (*Id.* at 169.) Mr. Norman testified that he felt he exhausted his options and was scared. (*Id.*) Only then did he draw his gun, which he put against the person in front of him. (*Id.* at 170.) As he was firing, one or both of the brothers tried to grab the gun. (*Id.*) When Mr. Norman finally looked up, he saw the two men on the ground, panicked, and went home. (*Id.* at 171–72.)

Following Norman's testimony, the court concluded that Mr. Norman had satisfied the initial burden of justifiable use of force on both counts. (4/22/24 Tr. 207.)

The defense then called George Carr and Lisa Grajewski to the stand. As in the first trial, Carr testified about how the "triad" of ability, opportunity, and jeopardy can help determine when the use of force is reasonable. (4/18/24 Tr. 215–17.) Carr emphasized that because Mr. Norman did not use his firearm in the garage, he distinguished between different levels of jeopardy and used his firearm only when necessary. (*Id.* at 220–21.) Carr also explained that it is difficult to retain a firearm when facing two assailants and, in his opinion, the bullet hole in Mr. Norman's sweater indicated that there was a struggle for control of the weapon. (*Id.* at 235–36.)

Grajewski, a psychologist, testified as a blind expert about trauma and its effect on memory. She explained that someone can sustain trauma during a life-threatening event where they face physical harm. (4/24/24 Tr. 13.) Some people who experience trauma may develop dissociative-type behavior, block out entire events, and have difficulty remembering events. (*Id.* at 16.) Though traumatic events can cause

amnesia, Grajewski testified that memories are sometimes recovered through therapy or other triggers. (*Id.* at 19, 22.)

In closing, the State argued that Chase must have been more than 39 inches away from the firearm and that Mr. Norman shot Brendan first, paused, and then shot Chase twice. (4/24/24 Tr. 41–42, 52.) Mr. Norman countered that Chase was very much part of the fight and was within feet of Brendan and Zac, reaching for the firearm, when he was shot. (*Id.* at 78–79.)

After recessing for the night, the court delivered its verdict on day seven of the bench trial. On Count One, deliberate homicide of Brendan Estabrook, Judge Brown found Mr. Norman not guilty. (4/25/24 Tr. 4.) On Count Two, deliberate homicide of Chase Estabrook, Judge Brown found Mr. Norman guilty. (*Id.*)

At sentencing, the decedents' father announced that he smuggled a shank into the courtroom to kill Mr. Norman during the trial and that the shank remained hidden in the courthouse. (6/17/24 Tr. 13–15.) The court responded, "Thank you, Mr. Estabrook." (*Id.* at 16.) Mr. Norman asked the District Court to waive the mandatory minimum sentence for deliberate homicide under § 46-18-222(3), MCA, because he killed

Chase while under unusual and substantial duress. (6/17/24 Tr. 40–41.) The court denied the request, and explained:

> I basically, to go back to my decision in this case, I think that there was unusual and substantial duress, but in my mind, that ended once Mr. Norman had shot and killed Brendan Estabrook as they were fighting hand to hand.
>
> Once Brendan Estabrook was incapacitated, the disparity of force in this case shifted in Mr. Norman's favor. Instead of two verses [sic] one, it was now Mr. Norman one on one versus Chase Estabrook, and Mr. Norman had the advantage because he had now drawn his pistol and he was armed.

(*Id.* at 61.)

Judge Brown sentenced Mr. Norman principally to 100 years to the Montana State Prison for deliberate homicide, with a consecutive 10-year term for the firearm enhancement, and 10 years in prison for each of the tampering counts, to run concurrently with the other counts. (*Id.* at 64–65; App. A.)

STANDARDS OF REVIEW

When the sufficiency of the evidence supporting a conviction is appealed from a bench trial, the standard is "whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Ahmed*, 278 Mont. 200, 212, 924 P.2d 679

(1996) (quotation omitted). The denial of a motion to dismiss for insufficient evidence under § 46-16-403, MCA, is reviewed de novo, under the same sufficiency of the evidence standard. *State v. Dulaney*, 2025 MT 67, ¶ 49, 421 Mont. 251, 566 P.3d 534.

Judge-made findings of fact in a bench trial are reviewed under the clearly erroneous standard. *State v. Bower*, 254 Mont. 1, 7, 833 P.2d 1106 (1992). A finding of fact is clearly erroneous if it is not supported by substantial credible evidence, the district court misapprehended the effect of the evidence, or this Court has a definite and firm conviction upon review of the record that the lower court otherwise erred. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473. Conclusions of law are reviewed de novo for correctness. *Ahmed*, 278 Mont. at 207.

The speedy trial analysis is a question of constitutional law reviewed de novo to determine whether the lower court correctly interpreted and applied the law. *State v. Chambers*, 2020 MT 271, ¶ 6, 402 Mont. 25, 474 P.3d 1268. Any factual findings supporting a speedy trial analysis are reviewed for clear error. *Id.*

When reviewing the denial of a motion to suppress, this Court considers whether a district court's findings of fact are clearly

erroneous. *State v. Manyhides*, 2025 MT 204, ¶ 7, 424 Mont. 96, 575 P.3d 943. The court's interpretation and application of law is reviewed de novo. *State v. Summers*, 2025 MT 109, ¶ 8, 422 Mont. 88, 569 P.3d 542.

SUMMARY OF THE ARGUMENT

If two men start a fight, follow you out of a house, chase you down the block, and start beating you on a desolate, freezing street corner and you are not justified in defending yourself, the natural right of self-defense is no right at all. And what use is the right if you are allowed to defend yourself against one, but not both assailants?

Zachary Norman trusted the court to understand the sanctity of this right and apply the law dispassionately in a difficult case. On one side stood State prosecutors and a grieving family, demanding justice for the tragic loss of two brothers. On the other stood Mr. Norman, a young man backed by the affirmative defense of justifiable use of force.

Confronted with a weighty decision, Judge Brown returned an astonishing verdict. He split the difference. Unable to deny that Mr. Norman was justified in using force but unwilling to acquit him entirely, the court found Mr. Norman not guilty of the deliberate

homicide of Brendan Estabrook but guilty of the deliberate homicide of his brother, Chase.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Norman was justified in using force against Brendan but not Chase. The evidence that demanded an acquittal for the homicide of Brendan applies equally to Chase, and Mr. Norman was justified in using force against Chase even if his objectively reasonable belief of the danger he faced was mistaken. Even viewed in the light most favorable to the prosecution, there was no meaningful difference between the imminent threat posed by the two brothers, and the District Court's basis for distinguishing the two rests on an unsubstantiated and irrelevant assumption about the order of shots. The District Court erred in finding Mr. Norman guilty of deliberate homicide in the bench trial and in finding that the State's case was strong enough to go to the jury in the first trial.

Several additional errors also require reversal. First, the court applied a heightened and incorrect standard for the justifiable use of force defense in the second trial, demanding to hear Mr. Norman's perspective before he would consider his affirmative defense. This

decision impermissibly burdened Mr. Norman's constitutional rights and constitutes structural error. Second, the court erred in denying Mr. Norman's motion to dismiss for a speedy trial violation, after the State's lack of diligence ensured Mr. Norman spent 548 days incarcerated pretrial, all while the memory of the only eyewitness dimmed with time. Third, the court erred in denying two motions to suppress: one based on the violation of his clear and unambiguous request for an attorney in his post-arrest interrogation, and the other based on a flagrantly unconstitutional, warrantless search of his home after his arrest. Each of these errors provides independent grounds to reverse the judgment.

Hard cases make bad law, and this was a terribly hard case. It began in tragedy when two men lost their lives. The District Court compounded that tragedy through a series of legal errors and an inexplicable compromise verdict, which traded a modicum of solace to a grieving family for the liberty of Zachary Norman. But tragedy needs not bookend this case. This Court must reverse Mr. Norman's conviction and ensure that justice has the last word.

ARGUMENT

I. The Evidence Was Insufficient to Sustain the Deliberate Homicide Conviction.

In both trials, the State failed to present evidence establishing beyond a reasonable doubt that Mr. Norman was not justified in using deadly force. As a result, the deliberate homicide charges should not have gone to the jury in the first trial, nor produced a guilty verdict in the second. This Court should correct the error and acquit Mr. Norman of deliberate homicide.[4]

Under Montana law, a person commits the offense of deliberate homicide if "the person purposely or knowingly causes the death of another human being." § 45-5-102(1)(a), MCA. Justifiable use of force is a complete affirmative defense to deliberate homicide. *State v. Polak*, 2018 MT 174, ¶ 26, 392 Mont. 90, 422 P.3d 112.

"The right of self-defense has its foundation in the law of nature." *State v. Merk*, 53 Mont. 454, 459, 164 P. 655 (1917). The right was recognized at common law, though its application was strict, and most states, including Montana, passed laws liberalizing the defense. *Id.* at

[4] Mr. Norman does not challenge the sufficiency of evidence supporting his conviction for tampering with evidence.

460. In Montana, the right of self-defense is codified in relevant part as follows:

> A person is justified in the use of force . . . against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense . . . against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person . . . .

§ 45-3-102, MCA. The "reasonable belief" standard is an "objective one that may be discerned from the totality of the circumstances surrounding an incident." *State v. Fredericks*, 2024 MT 226, ¶ 15, 418 Mont. 220, 557 P.3d 32 (citing *State v. Courville*, 2002 MT 330, ¶ 39, 313 Mont. 218, 61 P.3d 749).

In 2009, the Montana Legislature reaffirmed that "self-defense is a natural right" and expanded the scope of the protection. H.B. 228, ch. 332, 2009 Leg., 61st Reg. Sess. (Mont. 2009). The bill made two significant changes. First, it declared that a person who is lawfully present in a location and threatened with bodily injury or death "has no duty to retreat from a threat or summon law enforcement assistance prior to using force." § 45-3-110, MCA. Second, it shifted the ultimate burden of proof for the affirmative defense from the defendant to the

State, such that "when the defendant has offered evidence of justifiable use of force, the state has the burden of proving beyond a reasonable doubt that the defendant's actions were not justified." § 46-16-131, MCA.

In both trials, the District Court found that Mr. Norman *did* offer evidence of justifiable use of force. As a result, the State bore the burden of proving beyond a reasonable doubt that a person in Mr. Norman's position would not reasonably believe that using force against Chase was necessary to prevent imminent death or serious bodily harm.

The court reached a confounding split verdict on the apparent basis of a factual finding that Brendan was killed before Chase was shot. Even if that assumption were supported by the evidence, and it is not, the verdict cannot stand. No rational trier of fact could have found that a person in Mr. Norman's position would not reasonably believe force was necessary to prevent imminent death or serious bodily injury from both brothers. And no rational trier of fact could have so found as to Chase but not as to Brendan, when the totality of the circumstances were the same.

A. Mr. Norman Was Justified in Using Force Against Chase Even if His Assessment of the Threat Was Mistaken.

The right to self-defense is judged under a standard of objective reasonableness, in the totality of the circumstances. The law's demand for reasonableness does not require perfection or precise, sequential deliberation when a person is responding to an evolving threat. Indeed, the objective reasonableness standard allows for reasonable but incorrect actions. It was therefore insufficient for the State to prove that Mr. Norman did not actually face the imminent threat of death or serious bodily injury from Chase; the sufficiency analysis must analyze whether the State's evidence establishes that a reasonable person in Mr. Norman's circumstances would not reasonably believe that the use of force was justified, even if that belief was wrong.

This principle comes from a long line of cases in which this Court has held that the right to self-defense must be judged under an objective standard, in the totality of the circumstances, with allowance for reasonable but incorrect actions. In one early case, this Court outlined the principles of self-defense as follows:

> If it appeared to the accused at the time of the homicide, as a reasonable person, that it was necessary for him to slay his

> assailant in order to save his own life or prevent receiving great bodily harm, he had a right to act upon such appearances, and slay his assailant, *although he was in no actual danger*.

State v. Rolla, 21 Mont. 582, 586, 55 P. 523 (1898) (emphasis added). As this passage shows, the analysis is an objective one, centering on the "reasonable person," who can lawfully act in the face of apparent, albeit not actual, danger.

The Court applied this principle in *State v. Merk*, 53 Mont. 454, 164 P. 655 (1917). In the early afternoon of June 2, 1916, William Merk and James King were amicably drinking at a saloon in Silver Star. *Merk*, 53 Mont. at 456. Eventually, a dispute over a mutton delivery escalated into a fight. *Id.* Once each man had "exhausted his very extensive vocabulary of vituperation and billingsgate," King seized Merk by the throat, slapped his face, and threw him behind the bar. *Id.* at 457, 459. Merk drew a pistol and ordered King to stand back; King drew his own pistol and both men fired shots. *Id.* at 457–58. Merk suffered nonfatal wounds, while King was killed. *Id.* at 458.

This Court reversed Merk's manslaughter conviction, holding that the evidence was insufficient to establish that Merk had not been justified in shooting King. *Id.* at 462. As the Court explained: "It is not

necessary . . . to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person to believe he was in danger of great bodily harm." *Id.* at 460–61 (quoting *State v. Houk*, 34 Mont. 418, 421, 87 P. 175 (1906)). The Court reasoned that a rule of "actual danger" would place individuals like Merk at great risk. Of course, King "might have awaited until he actually received great bodily harm, but if one who is attacked must restrain himself until subsequent events determine whether the attack will result fatally or in grievous bodily harm, then the right of self-defense is one in name only. This is not the law." *Merk*, 53 Mont. at 461. A reasonable man may meet force with force, and in some circumstances slay his assailant, even if "in fact he was not in any actual peril." *Id.* Implicit in this ruling, too, is that one does not forfeit the right of self-defense by drinking, as Merk, like his assailant, "had been drinking considerably during the afternoon and before the shooting occurred." *Id.* at 459.

The decision in *State v. Jennings*, 96 Mont. 80, 28 P.2d 448 (1934), lends further support. In the early morning of February 28, 1933, Joseph Jennings killed Eugene Robinson at a bar in Butte. *Jennings*, 96

Mont. at 83–84. The men had been drinking and arguing for much of the night when Jennings sat down on a bench against a back wall, between a hot stove and a poker table. *Id.* at 84. Robinson picked up a cast-iron cuspidor, advanced toward Jennings, and swung at him. *Id.* Jennings dodged the blow, Robinson dropped his weapon, and Jennings stabbed Robinson seven times. *Id.* at 84–85. A jury convicted Jennings of murder. *Id.* at 83.

This Court reversed, holding that Robinson's loss of the cuspidor midway through the fight did not deprive Jennings of the right to claim self-defense in his use of deadly force. *Id.* at 90–91. And though the Court concluded that Jennings could reasonably apprehend great bodily harm given the physical disparity between him and Robinson, it reiterated the proposition that a person may reasonably slay an assailant "although he was in no actual danger." *Id.* at 90 (quoting *Rolla*, 21 Mont. at 586).

Though these cases predate the current statutory scheme, the justifiable use of force statute codified prior law. *See* § 45-3-102, MCA, Criminal Law Commission Comments ("This section codifies prior Montana law in which the section is intended to test the right of self-

defense as measured by what a reasonable person would have done under like or the same circumstances."). And the principle that reasonableness encompasses situations of apparent if not actual danger has been reiterated more recently. A century after *Rolla*, this Court reiterated: "A person's belief of imminent death or imminent serious bodily harm may be reasonable even if it is mistaken." *State v. Miller*, 1998 MT 177, ¶ 28, 290 Mont. 97, 966 P.2d 721.

In sum, reasonableness does not require perfection, nor does it demand actual danger. The crucial question is not whether Chase actually posed an imminent threat of death or serious bodily injury to Mr. Norman. The question is whether, in the totality of the circumstances, the State proved beyond a reasonable doubt that a person in Mr. Norman's circumstances would not have reasonably believed that the use of force was necessary to defend himself against his pair of assailants—even if that belief was mistaken.

Here, the District Court ruled that the State failed to disprove justification as to one person who chased Mr. Norman 45 yards down the street to beat him on a frozen street corner. Given this ruling, it necessarily follows that the State could not disprove justification as to

the other person who chased Mr. Norman simultaneously to beat him on the same corner. Having acquitted Mr. Norman of the deliberate homicide of Brendan, the court could not, under the facts presented at trial, refuse to acquit Mr. Norman of deliberate homicide of Chase. Even if Mr. Norman's reasonable belief was mistaken, the law and facts require an acquittal.

B. The Totality of the Circumstances Apply Equally to the Shooting of Chase and Brendan.

No rational trier of fact could find that a reasonable person in the circumstances would have believed that the use of force was necessary against one brother, but not the other, for an additional, related reason: the totality of the circumstances apply equally to the shooting of Chase and Brendan. The District Court's split verdict reflects a blinkered analysis that cannot be reconciled with the law or evidence.

When evaluating whether a defendant reasonably believed that self-defense was necessary, the trier of fact must consider the "the totality of the circumstances" surrounding the incident. *Fredericks*, ¶ 15 (citing *Courville*, ¶ 39). "When evaluating the totality of the circumstances, a court considers the content of the information

available and reliability of that information." *City of Billings v. Rodriguez*, 2020 MT 9, ¶ 10, 398 Mont. 341, 456 P.3d 570.

In a recent case, the United States Supreme Court gave useful guidance on the correct analysis of objective reasonableness under the totality of the circumstances. Writing for a unanimous Court in a Fourth Amendment use-of-force case, Justice Kagan reversed a decision applying a "moment-of-threat rule," under which the court looked "only to the circumstances existing at the precise time an officer perceived the threat inducing him to shoot." *Barnes v. Felix*, 605 U.S. 73, 76 (2025). The Fourth Amendment's touchstone is reasonableness, "as measured in objective terms." *Id.* at 79. The operative question in a Fourth Amendment use-of-force case, then, is whether the force was justified from the perspective of a reasonable officer, considering the totality of the circumstances. *Id.* at 79–80. The moment-of-threat rule is incompatible with a totality of the circumstances analysis because "the 'totality of the circumstance' inquiry into a use of force has no time limit" and requires consideration of "earlier facts and circumstances" when relevant. *Id.* at 80.

Barnes v. Felix provides instructive guidance for the totality-of-the-circumstances inquiry in a self-defense case. Though the contexts are different, the Montana justifiable use of force inquiry is analogous to the Fourth Amendment use of force inquiry, as both assess objective reasonableness in a totality of the circumstances. In other words, both ask whether the force was justified from the perspective of a reasonable actor, considering the totality of the circumstances.

The error in the District Court's analysis is aptly demonstrated by its ruling at sentencing, when the court found that while there "*was* unusual and substantial duress" initially, that duress "ended" the moment Mr. Norman "shot and killed Brendan." (6/17/24 Tr. 60–61 (emphasis added).) Even if the court were correct in finding that Mr. Norman shot and killed Brendan first, the notion that his duress "ended" before he shot Chase defies belief. The only way to reach such a conclusion is through something like a moment-of-threat rule—a limited analysis of the circumstances at the precise time Mr. Norman pulled the trigger. But the totality of the circumstances analysis does not allow the reasonableness inquiry to reset on a shot-by-shot basis. Indeed, the court's reasoning would impose a burdensome requirement

on any individual facing multiple assailants: to defend against one assailant at a time before calling a timeout to reassess the situation. Such a requirement is contrary to law and is not reasonable given the reality of fast-paced, chaotic, split-second decisions that must be made by anyone faced with the imminent use of unlawful force. *Cf. Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (holding that reasonableness analysis must account for fact that "split-second judgments . . . about the amount of force that is necessary in a particular situation" are made in "circumstances that are tense, uncertain, and rapidly evolving").

The totality of the circumstances that justified the shooting of Brendan in self-defense, including all the facts and circumstances leading up to the deadly confrontation, apply equally to the shooting of Chase. When Zac left the garage and walked in the direction of his home, the Estabrook brothers gave chase. Both brothers pursued Zac in the opposite direction of Chase's truck to a corner approximately 45 yards from the house. Both brothers engaged in the fight. Both brothers created a disparity of force. Chase and Brendan acted as a team; in the garage, after Chase shoved Zac and Zac hit back, Brendan immediately tackled him. Zac remained outnumbered on the frigid street corner,

facing two intoxicated and angry men who were more than capable of killing him or causing serious bodily injury with their fists and feet. If Mr. Norman was justified in using deadly force to defend himself against one of his assailants, he was justified in using deadly force against both assailants. No rational trier of fact could find otherwise.

C. The Evidence Does Not Establish that Chase Posed a Lesser Imminent Threat.

Even assuming that the District Court correctly assessed the evidence under the objective reasonableness standard in the totality of the circumstances, and it did not, the conviction must still be reversed. By the court's own admission, the verdict rested on a clearly erroneous finding not supported by the evidence at trial.

Having found that the State failed to disprove that the use of deadly force against Brendan was reasonable, the court had to identify a distinction to justify the split verdict. The court settled on the theory that the fight was one-against-one when Mr. Norman shot Chase; as Judge Brown said at sentencing, he believed that the use of force suddenly became unreasonable once Brendan was killed. (6/17/24 Tr. 61.) Even viewing the evidence in the light most favorable to the prosecution, it cannot bear the weight of this finding.

At the bench trial, Nick Thieme testified that he saw Brendan and Zac grappling each other on the ground, with Chase within a "[c]ouple feet." (4/17/24 Tr. 154.) He saw the gun come out and heard five to seven gunshots, with a short pause between two groups of shots. (*Id.* at 149.) But Nick did not see either Brendan or Chase actually sustain gunshot wounds. In fact, he did not know which of the three men had been shot until he went back outside following his retreat to the garage. (*Id.* at 156–57.)

The forensic evidence does not clarify matters. Most significantly, the State was unable to establish the order of the gunshot wounds. (4/19/24 Tr. 171 (medical examiner testifying that it was not possible to determine the order of the wounds).) Even if Brendan had been shot first, there is no evidence allowing the trier of fact to infer that Brendan was shot eight times—and certainly not that he was killed—before Chase was shot twice, or that they were not shot simultaneously, by one or more bullets passing through Brendan before hitting Chase.

At trial, the State ignored this issue and spent significant energy speculating that Chase was shot from a distance. To the contrary, the evidence established that Chase was within arm's length of Zac and

Brendan. Nick consistently testified that Chase was no more than "[c]ouple feet" from Brendan and Zac. (4/17/24 Tr. 154; *see also* 7/19/23 Tr. 73 (testifying that Chase was "a foot or two" to the side).) And the crime lab found Chase's blood on the grip of Mr. Norman's firearm—yet another sign of close proximity, not to mention a struggle for control of the firearm. (4/19/24 Tr. 138, 162–63.) Finally, Chase and Brendan were found lying next to each other, and two fragments of Chase's blue plaid shirt were found next to the bodies. (State Bench Ex. 27, 28, 180 admitted 4/17/24 Tr. 7–8.)

Though Chase's two wounds did not contain soot or stippling that would definitively indicate close-range fire (4/19/24 Tr. 184), the evidence did not establish that Chase was shot from a distance. Sunil Prashar, the medical examiner, testified that intervening objects, such as clothing or another body, can block stippling and other evidence of close-range fire. (*Id.* at 203–04.) For that reason, Dr. Prashar testified that Chase "could still be pretty close" when he sustained his wounds. (*Id.* at 204.) Lynette Lancon, the State Crime Lab firearm examiner, concurred. She testified that an intervening object, such as clothes or a

body part, would block evidence of close-range fire if it were between Chase and the firearm. (4/22/24 Tr. 99–100.)

The State's own evidence showed that there were two intervening objects. Zac was one of them, as a bullet undoubtedly passed through his sweater. (State Bench Ex. 133, 134, 135, admitted 4/17/24 Tr. 8.) Lancon's tests confirmed that the hole was created by a contact gunshot wound. (4/22/24 Tr. 78; *see also id.* at 93–94 (explaining that muzzle of firearm was against sweater when it was shot).) Brendan was the other. Chase had one wound to his thigh consistent with a low-energy bullet that passed through an intervening object. (4/19/24 Tr. 206.) If he was hit with one bullet that passed through Brendan, he was in a position to be hit by another.

Though the evidence did not definitively establish how many bullets passed through Brendan before hitting Chase, the State had the burden of proving that Mr. Norman's use of force was not justified. Yet the prosecution failed to take two actions that could have clarified the shooting timeline. First, the State declined to test the bullet fragments for DNA, even though such testing is within the capability of the State Crime Lab. (4/19/24 Tr. 136–37, 141 ("We do swab bullet fragments to

see if they have passed through a body . . . .").) And the prosecution never hired a scene reconstructionist, despite Kevin Winer's recommendation that they consider doing so. (4/22/24 Tr. 135–36.)

Winer's testimony about the crime scene did not move the needle for the State. Winer opined that Chase sustained his wounds "somewhere in the vicinity" or "generally in the location" of the two biggest blood patches on the scene. (4/22/24 Tr. 118–19.) Acknowledging that bloodstain pattern analysis is challenging to conduct on snow and that he could not determine the direction of the blood trail, Winer assumed that the blood pattern showed Chase moved from the blood patches to the location he was found. (*Id.* at 126.)

But Winer's opinion proves nothing about order or distance. As Winer acknowledged, he could testify only to where Chase lost blood, not to where Chase was shot. (4/22/24 Tr. 132.) Crucially, Winer could also provide no opinion as to Zac's location at the time Chase was shot. The State wanted to prove that Chase was far from Zac when he was shot. The blood location adds nothing without evidence of where Zac was standing in comparison.

The District Court's verdict rested on an assumption that is, at the very least, not supported by the evidence and, at the very most, undermined by it. The same evidence that supported the District Court's finding that Mr. Norman was justified in shooting Brendan in self-defense cannot support a finding that Mr. Norman was not justified in shooting Chase. The conviction for deliberate homicide must be reversed.

D. The Court Erred in Denying Mr. Norman's Motion to Dismiss for Insufficient Evidence in the Jury Trial.

Even if this Court concludes that the evidence at the bench trial was sufficient to support the District Court's verdict in the bench trial, the conviction should still be reversed because the District Court erred in denying Mr. Norman's motion to dismiss for insufficient evidence at the close of the State's case in the jury trial.

Where the evidence presented in a trial is so weak that it should not go to the jury, Montana law provides for dismissal. The statute provides, in relevant part:

> When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant.

§ 46-16-403, MCA. At the close of the prosecution's evidence in the jury trial, Mr. Norman moved to dismiss for insufficient evidence. The District Court denied the motion, and the case went to the jury.

Though the sufficiency inquiry is substantially similar for the bench trial and the jury trial, the State's evidence was weaker in the jury trial. First, the State did not call Kevin Winer in its case-in-chief in the jury trial, so at the time of Mr. Norman's motion, the State's case was not supported by blood pattern evidence. Second, the blood on the scene was only tested after the jury trial, so at the time there was no DNA evidence linking the large blood patches to Chase. Third, Nick Thieme's jury trial testimony provided more detail supporting Mr. Norman's defense than his bench trial testimony, which was given after his memory degraded even further, including: seeing Chase attempt to throw at least one punch in the garage (7/19/23 Tr. 41); seeing Chase and Brendan walk toward Zac as he was retreating down the driveway (*id.* at 42); hearing Chase and Brendan ask Zac "if he wanted to keep fighting"; and seeing all three of them wrestling on the corner, "fighting kind of in a pile" (*id.* at 44).

For these reasons and all the reasons discussed *supra*, even viewing the evidence in the light most favorable to the prosecution, the evidence in the State's case-in-chief was insufficient to prove beyond a reasonable doubt that Mr. Norman was not justified in using deadly force to protect himself from the unlawful imminent force of Chase and Brendan. Because the homicide counts should never have gone to the jury, this Court must reverse the judgment and order an acquittal on Count Two.

II. The Court Committed Structural Error by Requiring Mr. Norman to Testify in Support of His Affirmative Defense.

Between the jury and bench trial, the District Court ratcheted up the standard for raising the defense of justifiable use of force. The District Court then clearly erred in finding that Mr. Norman had not presented evidence of justification at the close of the State's case. As a consequence, Mr. Norman was forced to take the stand and testify in his own defense at the bench trial. Because the court's decision violated Mr. Norman's unconditional right against compelled testimony and is not amenable to a harmless error analysis, this Court must vacate Mr. Norman's homicide conviction and remand for a new trial.

As this Court recently clarified, the standard for raising the affirmative defense is relatively simple. "The district court must give the justifiable use of force instruction if the theory is 'supported by evidence presented at trial, even if conflicting evidence is also presented.'" *State v. Holcomb*, 2025 MT 190, ¶ 8, 423 Mont. 507, 574 P.3d 872 (quoting *State v. Marquez*, 2021 MT 263, ¶ 17, 406 Mont. 9, 496 P.3d 963). Giving the instruction (or, in a bench trial, considering the defense), is not a matter of discretion—"[t]he court *must* give the instruction whether the evidence is direct or stems from 'some logical inference.'" *Holcomb*, ¶ 8 (quoting *Marquez*, ¶ 17) (emphasis added).

In the bench trial, the District Court purported to enforce a "prima facie" standard for the first time. Whether a prima facie standard meaningfully differs from the *Holcomb* standard is immaterial. Whatever Judge Brown meant by "prima facie," the standard applied was contrary to this Court's precedent.

In the jury trial, Mr. Norman argued that his defense was supported by evidence in the State's case, such as Nick's testimony. After making the same argument in the bench trial, the court determined for the first time that it did not know "what Mr. Norman

perceived" and that "conflicting evidence about what his subjective belief was" precluded the use of force defense. Thus, the court ruled that justifiable use of force was not on the table.

This decision contains two critical errors. First, in demanding to know "what Mr. Norman perceived," the court misunderstood the measure of the defense. The reasonable belief is an "objective one," *Fredericks*, ¶ 15, that does not depend on an individual's subjective perception. In requiring Mr. Norman to tell his side of the story, the court contorted an objective standard into a subjective one. Second, by requiring the defense to sort out "conflicting evidence about . . . his subjective belief," the court misapplied the relevant standard. As *Holcomb* makes clear, the defense must be considered if it is "supported by evidence. . . even if conflicting evidence is also presented." *Holcomb*, ¶ 8 (quotation omitted).

The court's decision forced Mr. Norman to waive his right against self-incrimination and testify. To be sure, in any case where a district court finds that the evidence does not support a justifiable use of force instruction, the decision exerts pressure on the defendant to take the stand without necessarily burdening the defendant's rights. But the

unique facts of this trial distinguish it from the typical case, for at least three reasons.

First, the court's decision was wrong. Mr. Norman presented sufficient evidence to raise the defense. One consequence of asserting justifiable use of force is the concession of acting voluntarily and using force purposefully and knowingly. *See Dulaney*, ¶ 26. In offering evidence to support justifiable use of force, Mr. Norman made those concessions. When the court ruled that Mr. Norman could not rely on the defense notwithstanding his concessions, his conviction on both counts was guaranteed unless he could testify and change the court's mind. The decision to testify was therefore no decision at all.

Second, Mr. Norman had previously demonstrated his desire to retain his right against self-incrimination when he declined to testify in the jury trial. Mr. Norman only took the stand in the second trial because of the court's decision.

Third, the record suggests the court's ruling was motivated by a desire to make Mr. Norman testify. During the jury trial, the parties debated whether Mr. Norman had to testify to raise the defense, and Judge Brown commented, "if anyone's going to force Mr. Norman to

testify, it's going to be me." (7/19/23 Tr. 25–26.) The court understood that Mr. Norman would have to testify depending on the ruling and, after he did not testify in the jury trial, the court made the opposite ruling in the bench trial. If the court's motive was not clear enough, the demand to know "what Mr. Norman perceived" says the quiet part loud. (4/22/24 Tr. 155.)

Under these circumstances, the court's erroneous decision constitutes structural error that is automatically reversible. *See State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735. "'Structural' error is that type of error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* (quotation omitted). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 582 U.S. 286, 294–95 (2017). The Supreme Court has recognized at least three broad principles supporting the doctrine. "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* at 295. "Second,

an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* "Third, an error has been deemed structural if the error always results in fundamental unfairness." *Id.* at 296.

At least two of these rationales apply to the court's error in requiring Mr. Norman to testify. First, the right against compelled testimony is designed to protect against something other than an erroneous conviction. It protects higher values, including a defendant's fundamental right against self-incrimination under the Fifth Amendment and Article II, § 25. *See Brooks v. Tennessee*, 406 U.S. 605, 610–11 (1972) (noting a defendant's "unconditional right not to take the stand"). Additionally, a defendant's right to make his own decision about whether or not to testify is, like the right to conduct his own defense, "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U.S. at 295. As the Supreme Court has recognized, violation of that right is structural error. *Id.*

Second, the effects of the error are impossible to measure. Mr. Norman's testimony on direct was consistent with his defense, but the

State subjected him to a lengthy cross-examination covering his interview, his intoxication, and his memory. It is difficult to tell, especially on appellate review, the effect of the impeachment and cross-examination on the ultimate verdict. Because the State will "find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' the efficiency costs of letting the [State] try to make the showing are unjustified." *Weaver*, 582 U.S. at 295–96 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (citation omitted). Under either rationale, the court's decision constitutes structural error.

Though the court may have wanted to hear Mr. Norman's side of the story, it had an obligation to faithfully apply the law and respect Mr. Norman's right to remain silent. Instead, the court contradicted its own prior ruling and erroneously applied the relevant law to force Mr. Norman to the stand. Because this decision constituted structural error, the judgment should be reversed and remanded for a new trial.

III. The Court Erred in Denying Mr. Norman's Motion to Dismiss for Lack of a Speedy Trial.

A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article II, § 24, of the Montana Constitution. *State v. Ariegwe*, 2007

MT 204, ¶ 20, 338 Mont. 442, 167 P.3d 815. The United States Supreme Court has identified four factors relevant to a speedy trial claim: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

In *Ariegwe*, this Court adopted a similar test. *Ariegwe*, ¶ 34. Because the Montana speedy trial right derives from Article II of the Montana Constitution, Montana courts may give independent meaning to *Barker*'s four factors. *Id.* ¶ 35. However, the *Ariegwe* analysis must meet or exceed the federal constitutional floor established in *Barker*. *Id.* Pursuant to *Ariegwe*, if the delay between accusation and trial exceeds 200 days, the court must balance four factors to determine whether the accused has been denied the right to a speedy trial: (1) the length of the delay, (2) the reasons for the delay, (3) the accused's responses to the delay, and (4) prejudice to the accused. *Ariegwe*, ¶¶ 106–11. The balancing test is a fact-specific exercise and each factor's significance will vary based on the case's unique facts and circumstances. *Id.* ¶ 105. No single factor is dispositive. *Chambers*, ¶ 7.

The delay between Mr. Norman's arrest and first trial was 548 days. Under Factor One, the significant length of delay intensifies the presumption that Mr. Norman was prejudiced, increases the State's burden under Factor Two, and decreases Mr. Norman's burden under Factor Four. *Ariegwe*, ¶ 107; *State v. Rose*, 2009 MT 4, ¶ 46, 348 Mont. 291, 202 P.3d 749 (holding that 507-day delay "substantially" increased presumption of prejudice and State's burden).

Given the length of delay, the State must make "particularly compelling justifications" for the delay under Factor Two, the reason for the delay. *Ariegwe*, ¶ 123. The District Court apparently concluded that the State was responsible for 321 days of institutional delay and Mr. Norman was responsible for the remaining 227 days due to continuances to the omnibus hearing and the disclosure of Dr. Dale's expert report. Because the District Court's speedy trial opinion was filed without jurisdiction and must be struck from the appellate record, this Court should give no deference to its factual findings. Regardless, the court's speedy trial analysis was incorrect and the factual findings were clearly erroneous.

In truth, the record demonstrates the entire delay is attributable to the State, which may explain the prosecution's desperate attempts to manufacture delay attributable to the defense. To start, Mr. Norman requested a trial date each time he appeared in Court after his arraignment, and the timing of the omnibus hearing had no bearing on the schedule. On March 17, 2022, Mr. Norman requested a trial date after the court denied his motion for a bail reduction. (D.C. Doc. 23.) On May 25, 2022, at the first setting of the omnibus hearing, he again requested a trial date, and the court promised to review the trial calendar and advise counsel of availability. (D.C. Doc. 32.) On June 2, 2022, at the next omnibus setting, the District Court set the case for trial on March 21, 2023. (D.C. Doc. 33.)

Though "[a] defendant has no duty to bring himself to trial," *Barker*, 407 U.S. at 527, Mr. Norman repeatedly insisted—from the earliest stage of his case—that the court set a trial date. To say that he is responsible for hundreds of days of delay because the omnibus form was not filed at the first hearing is absurd. The time from Mr. Norman's arrest on January 15, 2022, to the date the trial was

continued on the State's motion, March 8, 2023, a total of 417 days, is attributable to the State as institutional delay.

The additional 131 days belong to the State for lack of diligence. The prosecution clearly requested a continuance because Dr. Dale's report indicated that their investigation was deficient. Though Dale's report is not in the record, the motion and hearing transcript establish that the prosecutors learned from the report that they or their predecessors had failed to request certain standard tests from the State Crime Lab. (3/8/23 Tr. 26–28.) It is not Mr. Norman's fault that the disclosure revealed this information several weeks before trial, as the State had many months to interview Dale and declined to do so. And though the prosecution denied being unprepared for trial, the proof is in the pudding. After the court granted the motion to continue, the State retained a new expert and requested additional forensic tests from the crime lab.

The District Court's decision to grant the continuance and then blame Mr. Norman for the delay was gravely wrong. After acknowledging that Mr. Norman satisfied his discovery obligations, the court decided that Dale's report was beyond the scope of his disclosure

and it was only fair to give the State time to respond. (3/8/23 Tr. 51–52.) This decision is perplexing, for several reasons. First, the court had earlier declared that the scope-of-opinion claim was an evidentiary matter that could be settled later. Second, the court never reviewed Dale's report, so he could not have known whether it was beyond the scope of the expert disclosure. Third, Mr. Norman offered not to call Dale, a resolution entirely ignored by the court. And, ultimately, if the report contained information to which the State had to respond, it was information about the State's own failure to diligently investigate. Delay caused by the State's own motion to continue for its own lack of diligence cannot be attributed to Mr. Norman. Factor Two weighs heavily against the State.

Factor Three weighs in favor of Mr. Norman, as he sincerely wanted to go to trial as soon as possible and strenuously objected to the State's cynical continuance. As discussed, Mr. Norman demanded a trial at every hearing until the court set a date. Following the District Court's decision granting the State's continuance, Mr. Norman filed written objections to the court's decision (D.C. Doc. 177), petitioned this Court for a writ of supervisory control (*See* D.C. Doc. 209), and filed a

motion to dismiss for a violation of his speedy trial rights (D.C. Doc. 219). Though those efforts did nothing to preserve his trial date, it cannot be said that Mr. Norman did not have a sincere and persistent desire for a speedy trial.

Factor Four should put to bed any doubt that the State violated Mr. Norman's speedy trial right, as each interest protected by the speedy trial right is implicated. First, Mr. Norman was subjected to oppressive pretrial incarceration. He spent every one of the 548 days detained pretrial, after the District Court denied each of his three motions to reduce his bond. Second, as Mr. Norman attested in his motion, he suffered significant anxiety and stress due to the deliberate homicide charges hanging over his head and lost employment and earning opportunities due to his incarceration. (D.C. Doc. 220.) Third, each day of delay limited Mr. Norman's ability to present an effective defense, because much of the case rested the memory of Nick Thieme. On the night of the shooting, Nick worked a closing shift and had a drink around 3:00am before he went to Dylan Strozzi's. (7/19/23 Tr. 76.) He had the least to drink of anyone at Dylan's was the only person to

witness the fight on the corner. Nick's ability to recall the details of the altercation were therefore critical to establishing Mr. Norman's defense.

The lengthy delay surely undermined Nick's ability to accurately recount what he saw, and he struggled to recall details throughout his testimony. He could not remember exactly what he heard when someone said something like, "you can die tonight, if you want to." (7/19/23 Tr. 61–62.) He could not remember Mr. Norman's demeanor when he was retreating down the driveway. (*Id.* at 80.) He could not remember what Mr. Norman and the Estabrooks were saying to each other after the garage incident. (*Id.*) He thought Mr. Norman's arms were by his side when he walked backward down the driveway, but then conceded "I don't really remember." (*Id.* at 81.) He could not remember if Mr. Norman looked scared. (*Id.* at 81.) He could not remember how much time elapsed between Chase pushing Zac and Zac punching Chase. (*Id.* at 83.) And no wonder. As Nick acknowledged several times, it had "been a little while" since the incident (*id.* at 46, 76, 83)—548 days, to be exact.

A witness's loss of memory "often carries more weight than the other bases for concluding a defendant has been prejudiced by a pretrial

delay." *Ariegwe*, ¶ 98 (quotation omitted). Loss of memory "is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532. In this case, the memory loss of the only eyewitness is plainly evident in the record. And given the excessive delay, there is separately a presumption that the reliability of the trial was compromised in ways that cannot be identified or proven. *Ariegwe*, ¶ 113.

Balancing the four factors, it is clear that Mr. Norman was deprived of his right to a speedy trial. Each factor weighs heavily in his favor. The entire delay is attributable to the State, including a lengthy portion due to the State's lack of diligence. Mr. Norman fought for a speedy trial throughout the pretrial proceedings. And he was significantly prejudiced by the ultimate 548-day delay. The District Court erred in denying the motion to dismiss for a speedy trial violation.

IV. Mr. Norman's Unequivocally Invoked the Right to Counsel During the Post-Arrest Interrogation.

Because the State violated Mr. Norman's right against self-incrimination, the District Court erred in denying the motion to

suppress all statements after Mr. Norman's first request for counsel, in violation of Mr. Norman's constitutional rights.

The privilege against self-incrimination is guaranteed by both the federal and Montana constitutions. U.S. Const, amend. V, XIV; Mont. Const, art. II, § 25. The State may not use statements elicited in a custodial interrogation unless the subject was "warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *State v. Olson*, 2003 MT 61, ¶ 13, 314 Mont. 402, 66 P.3d 297 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). "Once a person has invoked the right to have counsel present during custodial interrogation, the interrogation must end." *State v. Main*, 2011 MT 123, ¶ 15, 360 Mont. 470, 255 P.3d 1240.

Whether a suspect invokes the right to counsel is an objective inquiry. *State v. Scheffer*, 2010 MT 73, ¶ 26, 355 Mont. 523, 230 P.3d 462. Under federal precedent, questioning must immediately cease only where the request for counsel is unambiguous. *Davis v. United States*, 512 U.S. 452, 459 (1994). If "reference to an attorney . . . is ambiguous or equivocal in that a reasonable officer in light of the circumstances

would have understood only that the suspect *might* be invoking the right to counsel, [federal] precedents do not require the cessation of questioning." *Id.*

Though this Court has interpreted the right to counsel "consistent with the principles articulated in *Davis*," *State v. Nixon*, 2013 MT 81, ¶ 28, 369 Mont. 359, 298 P.3d 408, this Court construes requests for counsel more broadly than the federal courts. In *State v. Spang*, 2002 MT 120, 310 Mont. 52, 48 P.3d 727, for example, this Court declined to accept the State's *Davis* analysis and instead relied on Article II, § 25, to conclude that the defendant invoked his right to counsel when he said, "Shit, I need a lawyer, man." *Spang*, ¶¶ 18, 25, *overruled in part on other grounds*, *State v. Buck*, 2006 MT 81, ¶ 48, 331 Mont. 517, 134 P.3d 53. The decision in *Spang* built on the pre-*Davis* decision *State v. Johnson*, 221 Mont. 503, 514, 719 P.2d 1248 (1986), where the Court held that the defendant invoked his right to counsel when he stated, "I would like to talk to somebody." *Spang*, ¶ 23 (quoting *Johnson*, 221 Mont. at 514).

In *State v. Buck*, this Court overruled *Spang* and *Johnson* in part, without rejecting "the principal guidance" of *Johnson*. *Buck*, ¶ 48. The

Buck decision clarified that *Johnson* and *Spang* had incorrectly located the right to counsel during a custodial interrogation in Section 24 of Article II, rather than Section 25. *Id.* Having overruled *Johnson* and *Spang* on that narrow ground, the Court affirmed *Johnson*'s holding that "form shall not prevail over substance where invocation of the right to counsel in custodial interrogation is concerned," and declared:

> [W]e still adhere to the rule that invocation of that right does not depend on the use of any particular words; rather, it depends on the evident purpose of the suspect's statement, as viewed in light of the circumstances and in light of the rule that requests for counsel must be construed broadly.

Buck, ¶ 48 (citing *Johnson*, 221 Mont. at 514). Under *Johnson*, *Spang*, and *Buck*, the rule remains that "a suspect's statement evincing a *general desire for assistance in dealings with law enforcement*, even though vague and not containing a reference to legal counsel, is sufficient to invoke the right to counsel in custodial interrogation." *Buck*, ¶ 49 (emphasis added).

Mr. Norman's invocation was sufficient under either constitutional standard. To start, the invocation of "I'd like a lawyer" was unambiguous and unequivocal. In *Davis*, the suspect said, "Maybe I should talk to a lawyer," a conditional or hypothetical request. *Davis*,

512 U.S. at 455. By contrast, in *Smith v. Illinois*, 469 U.S. 91 (1984), the suspect was given his *Miranda* warning and responded, "Uh, yeah. I'd like to do that," a statement the Supreme Court held was clear and unambiguous. *Smith*, 469 U.S. at 93, 96–97 (quotation omitted). Likewise, in *Johnson*, this Court found the request, "I would like to talk to somebody," to be clear and unambiguous. *Johnson*, 221 Mont. at 514. Here, Mr. Norman's request was a direct, affirmative request, like in *Smith* and *Johnson*. He said, "I'd like to be reminded. *I'd like a lawyer too*." (Interrogation Video 00:04:28–50.) The phrase "I'd like a lawyer too" could hardly be more unambiguous and unequivocal.

The invocation is not rendered equivocal or ambiguous by the next utterance, when Mr. Norman said, "but I'll answer any questions you guys have. Absolutely." Read as part of Mr. Norman's request for counsel, the statement clearly still evinces "a general desire for assistance in dealings with law enforcement." *Buck*, ¶ 49. One could strain to read the conjunction "but" as negating the lawyer statement, as in, *I'd like a lawyer, but I'll answer any questions without a lawyer*. However, it is more logical, especially given the context, to interpret Mr. Norman as not immediately contradicting himself, but rather offering

reassurance, as in, *I want a lawyer, but I'll answer any questions once I have a lawyer*. Mr. Norman did not want to immediately cease the questioning, but he undoubtedly wanted, and requested, assistance in dealing with the detectives.

A reasonable officer in the circumstances would understand that Mr. Norman was a scared and confused young man who wanted to answer questions and be helpful, but wanted to do so in the presence of an attorney. This explains why, later in the interview, Mr. Norman reiterated his interest in helping with the aid of counsel, saying, "I'd like to ask a lawyer, but sounds like a good plan." (Interrogation Video 02:56:58–57:03.) Of course, the officers knew something that Mr. Norman did not—a request for counsel, if properly honored, causes an interrogation to immediately cease. The detectives did not want to cease the interrogation, which is why they not only ignored Mr. Norman's initial request for counsel, but also the subsequent requests. But there was nothing ambiguous or unequivocal about Mr. Norman's request to answer questions with an attorney, and the officers violated his right to counsel by continuing the interrogation.

Not only does the subsequent statement not render the request ambiguous, but also it cannot retroactively undermine the clarity of his initial request for counsel. In *Smith*, the Supreme Court rejected the contention that subsequent statements rendered Smith's invocation ambiguous. *Smith*, 469 U.S. at 98. Rather, invocation and any subsequent waiver "are entirely different inquiries, and the two must not be blurred by merging them together." *Id.*

This Court need not consider waiver because Mr. Norman's request, taken as a whole, was unambiguous and unequivocal. But if the Court does, further responses may be admitted "only on finding that [the accused] (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Id.* at 95. First of all, Mr. Norman did not initiate further discussions with the police because, following his invocation, Detective Emens asked, "So you want to talk to us?" (Interrogation Video 00:04:28–50.)

If the Court disagrees and separates Mr. Norman's statement into an invocation followed by an immediate initiation, the validity of any subsequent waiver depends on "the particular facts and circumstances surrounding the case, including the background,

experience, and conduct of the accused." *Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983) (quoting *North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979)) (alteration omitted). The government bears "a heavy burden" to demonstrate that the right to counsel was knowingly and intelligently waived. *Miranda,* 384 U.S. at 475.

That heavy burden cannot be met here. While Mr. Norman arguably initiated further discussion by saying that he would answer their questions, there is no evidence that he subsequently knowingly and intelligently waived the right to counsel. Mr. Norman was a 24-year-old of normal intelligence caught in a particularly vulnerable state. He had slept only 2 to 3 hours before his arrest and had sustained physical injuries during the fight with the Estabrook brothers, including a potential head injury. And though he signed a *Miranda* waiver form after his invocation, there is no sign that he actually read the form before signing it. Rather, Detective Emens gave him the form, told him to sign and date it, and Mr. Norman did so almost immediately after being handed a pen. (Interrogation Video 00:04:50–05:05.) The officers never re-advised Mr. Norman of his right to counsel nor stopped

to confirm whether he was specifically waiving the right to counsel he had invoked.

In sum, the District Court clearly erred in finding that Mr. Norman did not adequately invoke his right to counsel. Because the interrogation video formed such a critical part of the State's case at trial, the State cannot meet the high bar of proving there was "no reasonable possibility that the tainted evidence *might* have contributed to the conviction." *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423 (emphasis in original). As a result, this Court should reverse on all counts and remand for further proceedings.

V. The Warrantless Search of Mr. Norman's Home Was Patently Unconstitutional.

The District Court similarly erred in denying Mr. Norman's motions to suppress evidence seized from his home. The Fourth Amendment of the United States Constitution and Article II, Section 11, of the Montana Constitution both guarantee the right to be free from unreasonable searches and seizures of persons, houses, papers, and effects. U.S. Const. amends. IV, XIV; Mont. Const. art. II, § 11.

In addition, the Montana Constitution provides an express right to individual privacy. Article II, Section 10, states that "[t]he right of

individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. "Together, Article II, Sections 10–11 provide a heightened state right to privacy, broader where applicable than the privacy protection provided under the Fourth and Fourteenth Amendments to the United States Constitution." *State v. Staker*, 2021 MT 151, ¶ 9, 404 Mont. 307, 489 P.3d 489. Under Montana's heightened individual right to privacy, "the government must generally utilize the least intrusive means available to effect a warrantless search under a recognized exception to the warrant requirement of Article II, Section 11." *Id.* ¶ 12.

Warrantless searches are "*per se* unreasonable except under certain recognized and narrowly delineated exceptions to the warrant requirement." *State v. Peoples*, 2022 MT 4, ¶ 15, 407 Mont. 84, 502 P.3d 129. This Court recognizes "only a few specifically established and well-delineated" exceptions to the Article II, Section 11 search warrant requirement. *Nichols v. DOJ*, 2011 MT 33, ¶ 20, 359 Mont. 251, 248 P.3d 813 (quotation omitted).

One such exception is the "protective sweep." The United States and Montana Supreme Courts have recognized that an arresting officer may make a precautionary protective sweep by looking in "spaces *immediately adjoining the place of arrest* from which an attack could be immediately launched" to determine that there are no other persons who pose a threat to the officers at the arrest scene. *Maryland v. Buie*, 494 U.S. 325, 334–36 (1990) (emphasis added); *State v. Olson*, 2002 MT 211, ¶ 15, 311 Mont. 270, 55 P.3d 935. However, in order for such a protective sweep to be constitutionally reasonable, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Olson*, ¶ 15 (quoting *Buie*, 494 U.S. at 333–34). Even when a protective sweep is justified, it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found" and may last "no longer than it takes to complete the arrest and depart the premises." *Buie*, 494 U.S. at 335.

In *State v. Olson*, officers responded to the defendant's home to arrest her for an outstanding bench warrant. *Olson*, ¶ 3. After arresting

Olson in her kitchen and being told that there was no one else in the house, one of the officers leaned into the living room and observed drug paraphernalia. *Id.* ¶¶ 4, 12. The officer proceeded to search the living room, bathroom, and bedroom, locating drugs and paraphernalia. *Id.* ¶¶ 4–5.

On appeal, the State attempted to justify the search as a protective sweep. Writing for the Court, Chief Justice Gray found that the officers were informed no one was in the home, they did not hear or observe anything indicating that anyone else was present, and they did not believe that the arrestee posed a danger, and held that the officer therefore "did not testify to a single articulable fact creating a reasonable belief on his part that there was anyone else in the residence who might pose a danger." *Id.* ¶ 16. Finding that the search could not be justified as a protective sweep, the Court reversed the denial of Olson's motion to suppress. *Id.* ¶¶ 24–25.

The case for a protective sweep is even weaker in the present case. First, unlike in *Olson*, the officers did not even arrest Mr. Norman inside his home. He was arrested, without incident, outside. A protective sweep can support a search only of "spaces immediately

adjoining the place of arrest," *Buie*, 494 U.S. at 334–36, and the nooks and crannies of Mr. Norman's home were not "immediately adjoining" the front yard where he was arrested. Second, the officers lacked a single articulable fact creating a reasonable belief that there was anyone in the residence who might pose a danger. At the suppression hearing, Officer Garfield explicitly admitted that he "did not have any concrete facts that somebody else was in the residence." (1/27/23 Tr. 57.) Third, the search went well beyond a protective sweep. It was a full search of the premises occurring after the arrest had been completed, in clear contravention of the doctrine's limited parameters. *See Buie*, 494 U.S. at 335–36.

Given these facts, the District Court could endorse the warrantless search only by twisting the protective sweep doctrine beyond recognition and muddling it with the exigent circumstances doctrine, which applies only when the State satisfies the heavy burden of showing that aa reasonable person would believe that entry was necessary to prevent harm to the officers or destruction of evidence. *State v. Smith*, 2021 MT 324, ¶ 24, 407 Mont. 18, 501 P.3d 398. Judge Brown concluded that because Mr. Norman was suspected of double-

homicide and the firearm had not been found these doctrines authorized the search to protect officers from "hidden danger." (D.C. Doc. 412, at 12.)

The court erred in holding that these facts justified a warrantless search under either doctrine. If law enforcement's interest in finding evidence related to any reported serious crime could justify the warrantless search of a home, the Fourth Amendment and Article II, Sections 10 and 11, would be dead letters. In any event, the officers knew of no concrete facts suggesting a hidden danger lurked in the home that had been fully and voluntarily vacated. *See United States v. Reid*, 226 F.3d 1020, 1027–28 (9th Cir. 2000) (holding that officers were not entitled to conduct protective sweep absent reasonable belief of hidden individual posing danger to them). Nor were there any facts supporting a reasonable belief of exigent circumstances. *See State v. Anyan*, 2004 MT 395, ¶¶ 42, 57, 325 Mont. 245, 104 P.3d 511 (holding that exigent circumstances "cannot be predicated upon general fears" about firearms or mere suspicion of evidence disposal), *overruled in part on other grounds*, *State v. Neiss*, 2019 MT 125, ¶ 37, 396 Mont. 1, 443 P.3d 435.

Evidence found in the unlawful sweep was ultimately seized in a subsequent search pursuant to a warrant. It should nevertheless be suppressed, for at least two reasons. First, the record does not establish that the evidence would have been inevitably discovered. The unlawful sweep observations were central to the probable cause to search the home. When the unlawful observations and statements are excised from the warrant application, there is no probable cause to believe that any specific evidence of the offense would be located at Mr. Norman's home. Moreover, where, as here, unlawful observations are incorporated into a search warrant, application of the inevitable discovery doctrine would "amount to the unacceptable assertion that police would have done it right had they not done it wrong" and undermine the deterrent effect of the exclusionary rule. *State v. Ellis*, 2009 MT 192, ¶ 57, 351 Mont. 95, 210 P.3d 144 (quoting *State v. Davolt*, 84 P.3d 456, 469 (Ariz. 2004)).

Second, the search that led to the seizure of evidence was fundamentally unreasonable, notwithstanding the eventual search warrant. The Fourth Amendment and Article II, Section 11, both have a reasonableness clause and a warrant clause. "Accordingly, a valid warrant is only one consideration of a reasonable search: Article II,

Section 11, protects citizens against 'unreasonable searches and seizures'—even where officers otherwise possess a valid warrant." *Neiss*, ¶ 23. Given the conduct of the officers, the search and seizure of evidence from Mr. Norman's home was unreasonable, especially in light of the heightened right to privacy under Montana law. Authorizing the State's search in this case would significantly endanger the right to privacy and the sanctity of the home. The law cannot allow officers to retroactively justify unlawful searches with subsequently obtained warrants built on the fruits of the original trespass. Allowing the warrantless search here would authorize—indeed, encourage—a policy of warrantless, unreasonable, and unlawful protective sweeps in every private home connected to an arrest.

"[I]f this Court refuses to scrupulously uphold and enforce the guarantees of the Fourth Amendment and Article II, Sections 10 and 11, then, we can be assured that no other branch of government will." *Ellis*, ¶ 75. Because the District Court erred in failing to uphold these guarantees, this Court should reverse on all counts and remand for further proceedings.

CONCLUSION

Zachary Norman saved his life through the lawful use of self-defense on that frigid street corner. Since then, he has spent over four years in custody due to numerous errors across two trials. For all the foregoing reasons, Mr. Norman respectfully requests that this Court reverse the deliberate homicide conviction as unsupported by the evidence and reverse all the convictions due to the violation of his right to a speedy trial. If his convictions are not reversed entirely, Mr. Norman respectfully requests that this Court vacate and remand for a new trial due to the court's errors in requiring Mr. Norman to testify and denying his motions to suppress.

Respectfully submitted this 16th day of April, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 17,750, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

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