No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN ANTHONY BRIGGS,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a delay caused by permissive withdrawal of defense counsel, and the subsequent delay in rescheduling trial, is presumed to be caused by a defendant in a Sixth Amendment speedy trial claim.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Anthony Briggs (Briggs), respectfully petitions this Court for a writ of certiorari to the Supreme Court of Montana to review the judgment as decided by the Supreme Court of Montana on October 23, 2018.

OPINION BELOW

The memorandum opinion of the Montana Supreme Court is reported at 2018 MT 261N, ___ P.3d ____. Appendix A1-A12. The memorandum opinion was issued on October 23, 2018. The Montana Supreme Court denied Briggs' petition for rehearing in an unpublished order issued December 5, 2018. Appendix C1-C2. The relevant proceedings and orders are unpublished. Appendix B.

JURISDICTION

The judgment of the Montana Supreme Court was entered on December 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee an accused both the right to a speedy trial and to the assistance of counsel for his defense. Appendix C.

STATEMENT OF THE CASE

This case presents a critical issue regarding the right of an accused to a speedy trial and to the assistance of counsel in his defense. Briggs retained counsel and litigated his case through various motions and discovery battles. One month before trial, Briggs' attorneys filed an *ex parte* motion to withdraw from representation. The reasons for counsels' withdrawal were essentially that Briggs had sent the court a letter complaining that his counsel had not filed a particular motion. Briggs wanted to keep his attorneys and adamantly opposed his attorneys' withdrawal on the grounds that his right to a speedy trial would be prejudiced.

The motion to withdraw was granted. Upon the appointment of new counsel, Briggs' sought the earliest possible trial date. Trial was rescheduled to occur six months later due to conflicts with the schedules of his new attorney, the court, and the prosecution.

When Briggs moved to dismiss on speedy trial grounds, the district court conducted a four-factor analysis pursuant to *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815, Montana's foundational decision on speedy trial. *Ariegwe* is substantially based on this Court's decision in *Barker v. Wingo,* 407 U.S. 514, 92 S. Ct. 2182 (1972). In determining causes for delay, the district court attributed a large portion, 160 days, to rescheduling the trial because Briggs' attorneys had withdrawn: "Briggs's argument offers this Court no valid reasons to accept defense counsel's invitation to blame either Briggs's former counsel or Briggs himself for the delay—the fact is that the defense, and not the State, caused the delay."

In attributing the delay to Briggs, the district court refused to review the sealed hearing where the causes for withdrawal were litigated: "this Court is not aware of the circumstances under which Briggs's former counsel was allowed to withdraw because this Court did not hear the matter and only accepted the recommendation of Judge John Brown to allow former counsel to withdraw." Appendix B38. In essence, the district court found that the withdrawal of counsel was presumed to be held against an accused for speedy trial purposes. These facts are laid out in specificity below.

A. Withdrawal of Briggs' Attorneys

On February 1st, 2014 Kevin Briggs was detained after an investigation of allegations that he had choked and attempted to sexually assault his girlfriend. Briggs retained counsel. Over the course of the next year, Briggs' attorneys would conduct discovery, file motions, and otherwise act as Briggs' attorneys.

On January 15, 2015, one month before trial, Briggs' attorneys filed an *Ex Parte* Motion to Withdraw as Counsel. Briggs himself sent a letter to the Court opposing his counsel's withdrawal on the grounds that changing attorneys at such a late date would impact his right to a speedy trial. Because Briggs and his counsel had differing positions on the motions to withdraw, the district court appointed a separate district court judge to conduct a sealed hearing on the withdrawal motions.

At the withdrawal hearing, Briggs' attorneys were themselves represented by counsel, but Briggs was required to proceed unrepresented. Briggs immediately expressed concern that he was not notified of the hearing, he was not represented by

an attorney and was not prepared to represent himself at the hearing. Appendix E18. Counsel for Briggs assured the Court that "[w]e're still his lawyers. We do have a certain amount of responsibility to him . . . ." Appendix E27. None of the attorneys present gave any advice to Briggs when he expressed uncertainty about legal issues. None of the attorneys were prepared with specific letters Briggs sought to admit in the hearing. Appendix E28. Briggs stated he had not been notified of the hearing in advance. Appendix E18.

Briggs' attorneys asserted that there was "a complete breakdown in the attorney-client relationship . . . ." Appendix E43. The main concern of Briggs' counsel was that their client had complained to the district court about their representation. Counsel for Briggs feared that this would "undermine our credibility with the Court and put us in a position where we feel further behooving to submit to his manipulation or he'll retaliate against us further with further misrepresentations to the Court." Appendix E46. On cross examination from Briggs, counsel asserted for the first time that he "implicitly" feared physical harm from Briggs:

> [Counsel]: I feel physically threatened by you.
> [Briggs]: Why? Have I ever threatened you?
> [Counsel]: Implicitly.
> [Briggs]: How have I threatened you, Chuck?
> [Counsel]: You've done everything but physically threaten me which is where I see this going and I don't feel comfortable sitting next to you at counsel table.
> [Briggs]: You think I'm going to beat you up?
> [Counsel]: I don't know.

Appendix E71.

The judge overseeing the sealed hearings granted the motion to withdraw from

the bench. Briggs inquired whether a determination of culpability would be made concerning the cause of withdraw, and the cause of the resulting delay. Appendix E84. The hearing judge assured Briggs that some other court would inquire into that matter if it was put at issue. Id. On January 26, 2015, on recommendation from the judge overseeing the sealed hearing, the district court granted counsel's Motion to Withdraw. The judge's recommendations did not make clear findings on the reason or cause for withdrawal.

New counsel was appointed for Briggs. On February 4, 2015 the district court conducted a status hearing with Briggs' new counsel, who could not proceed to trial because of a conflicting trial date. The district court vacated the February 17 trial date and ordered a status hearing for March 11, 2015. At the March 11 hearing, Briggs counsel requested the earliest possible trial date. The district court set a new trial date of July 27, 2015, as the State was unavailable before that time.

B. Speedy Trial Proceedings

A motion to dismiss on speedy trial grounds was filed on April 16, 2015. A hearing on the motion was held on June 12, 2015. Appendix E1-E5.

The district court denied Briggs' motion to dismiss on speedy trial grounds. Appendix B1-B50. The district court determined that a total of 542 days had passed between February 1, 2014 and the trial date of July 27, 2015, and of those, 160 days were attributed to Briggs because of his counsel's withdrawal. Appendix B39. This delay included the delay required to appoint new counsel, for new counsel to appear and declare whether they were prepared for trial, and by the scheduling conflicts of

the district court and prosecutor. In attributing the delay to Briggs, the district court did not examine the withdrawal hearing transcripts or any findings concerning the reason for withdrawal: "the Court will not speculate as to what information was presented to [the withdrawal hearing judge]." Appendix B41. Trial occurred on July 27, 2015 and Briggs was convicted on several counts.

Briggs then appealed the district court's speedy trial determination to the Montana Supreme Court. In a memorandum opinion, the Montana Supreme Court concluded that "[t]he 160-day delay related to Brigg's [sic] original counsel withdrawing is appropriately attributable to Briggs." Appendix A7.

REASONS FOR GRANTING THE WRIT

The Montana Supreme Court's memorandum opinion is an extreme example of an issue often considered by state and federal courts: how a delay should be evaluated when a defense attorney withdraws from representation. Some state courts of last resort, including Montana, presume the delay is the fault of the defendant and attribute the delay to him in analyzing a Sixth Amendment speedy trial claim. The Montana courts attributed the entirety of the delay from counsel's withdrawal to Briggs without regard to what had transpired in the hearing. That hearing itself was patently unfair because Briggs was unrepresented while his attorneys retained counsel for themselves and he was not informed of the hearing or prepared for it. At the end of the withdrawal hearing Briggs requested the court to make a determination on whether he was at fault for the withdrawal. The court assured

Briggs that some other court would make that determination. Yet neither the district court nor the Montana Supreme Court gave any consideration to the withdrawal hearing, and instead presumed that the withdrawal should be counted against Briggs.

The Sixth Amendment rights to speedy trial and assistance of counsel are contravened if a defendant is attributed culpability for his attorney's withdrawal even when the reasons for withdrawal are not attributable to the defendant or are unknown to the court considering a speedy trial claim. The presumption that a defendant is responsible for the delay runs afoul of the Sixth Amendment guarantee of speedy trial as described in *Barker.*

A. A variety of courts have attributed the delay resulting from attorney withdrawal to a defendant, even where the defendant had no responsibility for the withdrawal.

A survey of state and federal courts demonstrates that the issue of attorney withdrawal is consistently held against a defendant in speedy trial analysis.

Various states attribute delay to a defendant during the time when an attorney's motion to withdraw is pending or when the accused is waiting for new counsel to be appointed. *State v. Miller*, 299 N.J. Super. 387, 691 A.2d 377, 381 (N.J. Super. Ct. App. Div. 1997); *State v. Brown*, 157 N.H. 555, 560, 953 A.2d 1174, 1178 (N. H. 2008) (Considering delay under the Interstate Agreement on Detainers, but likening it to speedy trial jurisprudence); *Linden v. State*, 598 P.2d 960 (Alaska 1979); *State v. Younker*, 2008 Ohio 6889, 2008 Ohio App. LEXIS 5736 (Ohio App. Dec. 16,

2008);.*State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005); *State v. Bradsher*, 49 N.C. App. 507, 271 S.E. 2d 915 (N.C., 1980).

A few states have attributed delay to a defendant without regard to whether the defendant caused the withdrawal of his attorney. In *State v Schaaf*, 169 Ariz. 323, 819 P.2d 909, 913-915 (Ariz, 1991), counsel for the defendant withdrew after he was appointed to be a judge and could no longer represent the defendant. The Arizona Supreme Court concluded that the delay caused by the defense counsel's withdrawal constituted "extraordinary circumstances" which justified delay and did not violate the defendant's right to speedy trial. *Id.*, 169 Ariz. at 327, 819 P.2d at 913.

Florida has also attributed delay to a defendant even where the facts demonstrated no fault on the defendant's part. In *Hill v. State*, 467 So. 2d 695, 695 (Fla. 1985), a defense attorney represented six co-defendants and withdrew at the precipice of trial because some of the co-defendants desired to go to trial. The Florida Supreme Court found the delay properly attributed to the defendant, and also that the defendant had effectively "waived" his constitutional right to speedy trial when his attorney withdrew. *Id.*, 467 So. 2d at 696. The dissent criticized the Court's reliance on the withdrawal as a waiver of speedy trial:

> The withdrawal of counsel, without more, does not necessarily cause a delay, nor does it constitute a waiver of speedy trial. There has been no showing below that the motion for withdrawal was frivolous, filed for delay, or that it was caused by the conduct of the accused. Indeed, the record reflects that petitioner's initial attorney diligently represented him but was forced to withdraw once the conflict of interest became unavoidable.

Id., 467 So. 2d 695, 696 (Fla. 1985) (Ehrlich, J., dissenting) (citations omitted).

The United States Courts of Appeals, in construing delays under the Speedy Trial Act, have excluded time between the filing of a motion to withdraw and the appointment of new counsel without regard to the cause of withdrawal. In particular, the First, Second, Fourth, Fifth, Sixth, and Eighth circuits have ruled specifically that the period of delay while a motion to withdraw is pending is automatically excluded without regard to the causation or reasonableness of the delay. *United States v. Rodriguez*, 63 F.3d 1159, 1163 (1st Cir. 1995);*United States v. Hammad*, 902 F.2d 1062, 1064 (2d Cir. 1990); *United States v. Parker*, 30 F.3d 542, 550 (4th Cir. 1994); *United States v. Gonzales*, 897 F.2d 1312, 1314-16 (5th Cir. 1990), *cert. denied*, 498 U.S. 1029, 112 L. Ed. 2d 675, 111 S. Ct. 683 (1991); *United States v. Richmond*, 735 F.2d 208, 213 (6th Cir. 1984); *United States v. Driver*, 945 F.2d 1410, 1412-14 (8th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 448, 112 S. Ct. 1209 (1992).

The Tenth Circuit Court of Appeals has excluded the time from the motion to withdraw, the appointment of new counsel, and any time required for adequate preparation of new counsel. *United States v. Spring*, 80 F.3d 1450, 1457 (10th Cir. 1996). In *Spring*, the Tenth Circuit permitted an open-ended continuance until the new attorney could appear and agree on an appropriate trial date. Even with such an open-ended continuance, however, the excluded delay was only for two months. *Id.*, 80 F.3d at 1458. Of course, the Circuit Courts of Appeals are usually interpreting the provisions of the Speedy Trial Act, not the constitutional guarantees of the Sixth Amendment. The analysis of whether the delays are permissible is a matter of due process and fairness, and applies equally to the Speedy Trial Act as it does to speedy

trial analysis under the Sixth Amendment.

The tendency for courts to attribute delay to a defendant, even where evidence demonstrates the defendant is not at fault for the delay, runs roughshod over this Court's decision in *Barker*. In *Barker*, this Court outlined a four-factor test in determining whether the right to speedy trial had been infringed. Factor two considered the justification for different lengths of delay. Deliberate attempts to delay trial were weighted heavily against the delaying party, while more neutral reasons like overcrowded courts are "weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances *must rest with the government rather than with the defendant*." *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192 (emphasis added). The *Barker* court specifically cautioned against faulting a defendant for "a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed." *Id.*, 407 U.S. at 529, 92 S. Ct. at 2191. *Barker* mandates that an evaluation of why, what, or who caused a particular delay, and that the delay is presumed to be the fault of the government unless explained otherwise. *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686 (1992) further reaffirmed *Barker*'s holding that different levels of culpability are to be assigned to different reasons for delay. 505 U.S. at 657, 112 S. Ct. at 2693.

The tendency of courts to ignore delay resulting directly or indirectly from the withdrawal of counsel is a direct contravention of the standard in *Barker*. Although institutional delays in resetting trial are weighed less heavily against the

government, they are nonetheless attributed to the government rather than the defendant. But the standards articulated by Florida, Arizona, and Montana attribute institutional delay *to the defendant* even when the defendant has no hand in his attorney's withdrawal. Arizona attributes delay to defendant when his attorney is appointed as a judge, Florida attributes delay to a defendant when his attorney represents six co-defendants and surprisingly discovers a conflict, and Montana presumptively attributes delay to a defendant without even examining the reasons for withdrawal. This legal standard cannot co-exist with *Barker*'s holding that delays be attributed and weighted based on the reasons for their cause.

B. The permissive withdrawal of Briggs' attorneys should not have been granted, as it deprived him of both his right to counsel and his right to speedy trial.

The supreme courts of Florida and Arizona have considered the interaction between a defendant's right to speedy trial when the withdrawal of counsel was mandatory, such as when an unwaivable conflict arose or an attorney ascended to the bench. This case, however, concerned the conflict between the defendant's right to speedy trial and a permissive withdrawal based on a minor disagreement with their client on motions strategy. The district court should not have permitted withdrawal of Briggs counsel one month before trial for the minor transgression of sending a letter to the court. When the withdrawal was granted, delay from counsel's permissive withdrawal was construed against Briggs without any evidence indicating Briggs was actually at fault for counsel's withdrawal.

Some causes for withdrawal are mandatory, such as a conflict of interest with past or current clients. Model R. Prof. Conduct 1.16(a) (ABA 2016). Other causes are merely permissive, such as when the client insists on taking action which the lawyer disagrees with, or when the client insists on presenting a claim or defense unwarranted by existing law. Model R. Prof. Conduct, 1.16(b)(2)-(4). Such a permissive withdrawal must only occur "if it can be accomplished without material adverse effect on the client's interests." Model R. Prof. Conduct 1.16 cmt. 7. Accordingly, courts have discretionary authority to grant or deny permissive withdrawal, but are required to balance the interests of the attorney with the rights of the accused. The Ninth Circuit Court of Appeals has held that permissive withdrawal is properly denied when it is sought on the precipice of trial and for unclear reasons. *Glavin v. United States*, 396 F.2d 725, 726 (9th, 1968). A court is under no obligation to relieve an attorney simply because he and his client disagree on strategy, especially where an attorney's withdrawal will prejudice the constitutional rights of his client. *People v. Jacobs*, 27 Cal. App. 3d 246, 261, 103 Cal. Rptr. 536, 546 (1972).

The withdrawal hearing judge permitted the removal of Briggs' counsel for unclear reasons and without concern for Briggs' constitutional rights. The hearing was patently unfair on its face, as Briggs was uninformed, unprepared, and unrepresented while his attorneys retained their own counsel. Briggs' attorneys sought withdrawal on the grounds that Briggs had sent a letter to the district court complaining that they had refused to file a particular motion. With less than one

month before trial, Briggs adamantly opposed his attorneys' withdrawal on the grounds that it would further delay his trial and upend the preparation his attorneys had already undertaken. On these facts, the judge overseeing the withdrawal should have denied the motion. Instead, it granted the motion in a recommendation to the trial judge without making any findings on the cause for withdrawal, and with no examination on how it would impact Briggs' constitutional rights.

The district court could have protected Briggs' interests by directing the withdrawal hearing judge to make determinations of the cause and culpability for the withdrawal. In fact, Briggs specifically requested the judge in that hearing to make a determination about his culpability for the withdrawal, and the judge assured him, "[t]he record and the testimony speak for itself . . . . I'm not assigning fault to anyone and somebody, if down the road, somebody does, some Court does a speedy trial analysis of what I've done today they will have to look at the record and make their own decision." Appendix E84. But the trial court never looked at that record or made its own decision when evaluating Briggs' speedy trial motion, and instead assigned blame to Briggs based on its blindness of the proceedings. The Montana Supreme Court summarily affirmed that blind attribution of fault. This presumption that a defendant caused delay because of his counsel's withdrawal is a direct violation of the accused's guarantee to speedy trial and assistance of counsel.

After granting permissive withdrawal of Briggs' counsel without an apparent reason, the district court further compounded this error by assigning the entire delay from the first trial date until the second trial date, a total 160 days, to Briggs.

Attorneys for Briggs withdrew on January 26th, and the Office of Public Defender was appointed shortly thereafter. New counsel indicated they were prepared to proceed by the omnibus hearing on March 11, 2015. Despite the quick turnaround in preparing for trial, the schedules of the court and prosecutor were unable to accommodate a trial until July 27, 2015. The delay from withdrawal of Briggs' first counsel resulted in only a minor delay while new counsel prepared for the earliest possible trial date. Attribution of that delay to Briggs would be understandable and in line with the Federal Courts of Appeals. Here, the Montana courts attributed the entire 160-day delay, from withdrawal, the preparation of new counsel, and the scheduling preferences of the court and prosecutor, to Briggs. Issues with scheduling due to the court's crowded calendar are not to be held against a defendant, but rather, qualify as institutional delays held against the State. Briggs feared that the permissive withdrawal of his attorneys would delay his trial for another substantial chunk of time, and he was correct. An ever-growing list of delays resulted from a withdrawal that Briggs opposed, but was granted based on his attorneys' vague concerns about Briggs' conduct.

C. This case was not decided on independent state statutory or constitutional grounds, making it an ideal vehicle for addressing Sixth Amendment speedy trial jurisprudence.

The Montana Supreme Court's foundational speedy trial decision is *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. That decision adopted this Court's four-part test outlined in *Barker*. In adopting this Court's speedy trial

jurisprudence, the Montana Supreme Court noted that the Montana Constitution "provides a speedy trial guarantee that is independent of the Sixth and Fourteenth Amendments to the United States Constitution." *Id.,* ¶ 35. Montana may "give its own meaning" to *Barker*'s four factors, but such meaning may not lower the standards for speedy trial outlined under the Sixth Amendment.

Because the *Ariegwe* standard is based substantially on *Barker,* and because Montana has declared the federal standard to be the "floor" of its constitutional rights, this case provides an ideal vehicle to address state handling of the Sixth Amendment speedy trial clause. The federal judiciary is governed by the Speedy Trial Act, which imposes time limits and attribution standards far more strict than the Sixth Amendment demands. Similarly, a wide swath of states have adopted speedy trial legislation which renders constitutional claims unnecessary or nonexistent. Montana, however, lacks any speedy trial statute and has based its speedy trial jurisprudence on *Barker.* Accordingly, this case provides desirable precedent to address the Sixth Amendment right to speedy trial without regard to the various statutory provisions or independent state grounds that may cloud other cases.

CONCLUSION

The petitioner respectfully requests the Court to grant his petition for certiorari to the Montana Supreme Court.

RESPECTFULLY SUBMITTED this 4th day of March, 2019.

/s/ Nick K. Brooke
Nick K. Brooke

SMITH & STEPHENS, P.C.
Attorney for Defendant & Petitioner

APPENDIX A

MEMORANDUM OPINION OF THE
MONTANA SUPREME COURT

State of Montana v. Kevin Anthony Briggs,
2018 MT 261N (Mont., October 23, 2018)

DA 16-0157

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 261N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN ANTHONY BRIGGS,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DC 14-71ax
Honorable Mike Salvagni, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nick K. Brooke, Smith & Stephens, P.C., Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Martin D. Lambert, Gallatin County Attorney, Bozeman, Montana

Submitted on Briefs: October 3, 2018

Decided: October 23, 2018

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Following jury trial Kevin Briggs (Briggs) was found guilty of Aggravated Assault; Sexual Assault;[1] Assault on a Peace Officer; Escape; and Criminal Possession of Dangerous Drugs. Briggs appeals asserting: 1) the District Court erred in denying his motion to dismiss for violation of his right to speedy trial; 2) his counsel was ineffective for failing to object or otherwise correct mischaracterization of the meaning of text messages and the result of DNA analysis; 3) the District Court erred when it failed to impose sanctions or suppression for the State's failure to preserve the victim's cell phone; and 4) the District Court erred when it failed to turn over Officer Bachich's personnel file. We affirm.

¶3 On February 1, 2014, Briggs was detained as a suspect in an aggravated assault and a sexual offense involving knives. Briggs walked away from the detention facility in belly chains and shackles. He was arrested in Oregon on February 21, 2014, and returned to Montana on March 10, 2014. On March 24, 2014, Briggs was charged with and arraigned on the charges of Aggravated Assault, Attempted Sexual Intercourse without Consent,

[1] The jury could not reach a verdict on the charged offense of Sexual Intercourse Without Consent, but found Briggs guilty of the lesser included offense of Sexual Assault.

Assault on a Peace Officer, Escape, and Failure to Register as a Sex Offender. On April 14, 2014, Defense counsel appeared at the omnibus hearing and requested continuance which was granted to May 12, 2014, at which time Briggs requested another continuance which was granted and the District Court reset the omnibus hearing to June 9, 2014. Following receipt of substantial discovery, Briggs sought another continuance and the court rescheduled the omnibus hearing to July 14, 2014.

¶4 On July 7, 2014, the State filed an Amended Information adding the offense of Criminal Possession of Dangerous Drugs (felony). Briggs sought another continuance of the omnibus hearing and it was reset to August 11, 2014. Following receipt of additional discovery, Briggs sought yet another continuance and the omnibus hearing was rescheduled for September 8, 2014. At the omnibus hearing on September 8, 2014, the court scheduled jury trial for February 17, 2015. Briggs received additional discovery October 20, 2014; November 20, 2014; December 5, 2014; and January 6, 2015. On January 21, 2015, the parties filed a notice agreeing the State had furnished Briggs all discovery.

¶5 On December 5, 2014, Briggs filed a motion to produce the arresting officer's personnel file asserting his history of use of force was material to his defense. Thereafter, the court conducted an in-camera inspection of the officer's personnel records and based thereon concluded due process did not require disclosure of these confidential records.

¶6 Also on December 5, 2014, Briggs filed a motion for dismissal or, alternatively, evidence suppression for the State's failure to preserve the victim's cell phone. Following hearing on this motion, the District Court denied the motion.

¶7 On January 15, 2015, defense counsel filed an ex parte motion to withdraw. The next day Briggs sought testing of the knives for DNA and fingerprints. The State responded it did not believe either DNA or fingerprint analysis could be conducted without delaying trial (which was then set for February 17, 2015). Also on January 16, 2015, Briggs filed a motion to dismiss asserting violation of his right to a speedy trial. Counsel's motion to withdraw was referred to Judge Brown (a non-presiding judge) who, following a January 26, 2015, hearing on the matter, recommended granting the motion.

¶8 On January 26, 2015, the court accepted Judge Brown's recommendation and appointed Briggs new counsel who, at the status hearing February 4, 2015, requested continuance of the trial because she had a homicide trial scheduled on the trial date. The court vacated the trial date, scheduled an omnibus hearing for March 11, 2015, and reset trial for July 27, 2015. On April 16, 2015, Briggs filed another motion to dismiss based on violation of his right to speedy trial. Following full briefing and a hearing, on July 1, 2015, the court denied both the original and second speedy trial motions. On June 17, 2015, Briggs's counsel provided the State an email indicating they wanted the knives tested for fingerprints and DNA. Jury trial started July 27, 2015.

¶9 A speedy trial violation presents a question of constitutional law that this Court reviews de novo to determine whether the court correctly interpreted and applied the law. *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. This Court reviews a district court's findings of fact underlying a speedy trial claim for clear error. *State v. Reynolds*, 2017 MT 25, ¶ 13, 386 Mont. 267, 389 P.3d 243. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court has misapprehended

the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Ariegwe*, ¶ 119.

¶10 We review ineffective assistance of counsel (IAC) claims on direct appeal if the claims are record based. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 45. IAC claims are mixed questions of law and fact which we review de novo. *State v. Ailer*, 2018 MT 18, ¶ 9, 390 Mont. 200, 410 P.3d 964.

¶11 A motion to dismiss based on alleged suppression of exculpatory evidence is a question of law reviewed for correctness. *State v. Williams*, 2018 MT 194, ¶ 16, 392 Mont. 285, 423 P.3d 596. We review a lower court's grant or denial of discovery for abuse of discretion. *State v. Stutzman*, 2017 MT 169, ¶ 13, 388 Mont. 133, 398 P.3d 265.

¶12 **Speedy trial**. A defendant is guaranteed the right to a speedy trial by the Sixth and Fourteenth Amendments of the United States Constitution and by Article II, Section 24 of the Montana Constitution. Asserted speedy trial violations are analyzed by balancing four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) the prejudice to the accused as a result of the delay. *Ariegwe*, ¶ 20.

¶13 Here, in its 50-page Findings of Fact, Conclusions of Law, and Order, the District Court thoroughly and conscientiously considered and balanced the four *Ariegwe* factors and appropriately concluded Brigg's right to speedy trial was not violated.

¶14 For the first *Ariegwe* factor the District Court concluded the length of delay—542 days between February 1, 2014 when Briggs was initially detained and trial on July 27, 2015—well exceeded the 200-day threshold, requiring balancing of the *Ariegwe* factors.

¶15 Next the court considered the second *Ariegwe* factor, the reasons for delay. The District Court correctly found the 52 days from February 1, 2014 through March 24, 2014 attributable to Briggs. Any delay to March 24, 2014 (the date Briggs was arraigned and the matter could be put on a court calendar) would not have occurred but for Briggs's escape to Oregon and his extradition back to Montana. The District Court then attributed 21 days of delay (from March 24, 2014,[2] when Briggs was arraigned, to April 14, 2014, the date of the original omnibus hearing) to institutional delay. The court attributed 309 days of delay (April 14, 2014 to February 17, 2015) to the complexity of discovery and the court and counsels' calendars. The District Court thoroughly discussed the complex nature of the case and the extensive discovery and found no intentional delay on the part of the State. Indeed, the State actively worked to avoid delay. For example, when the State learned Briggs sought testing of the sexual assault kit, the State worked diligently to obtain expedited testing despite Briggs waiting almost four months after learning of the kit to request testing. Discovery was substantially complete by November 20, 2014, and the parties jointly acknowledged Briggs had all of the State's discovery on January 20, 2015, sufficiently in advance of the initial trial date. The record supports the District Court's findings attributing delay related to the production of discovery evidence as unintentional and due to the complex nature of the case and the extensive discovery required.

¶16 The District Court attributed 160 days of delay (February 17, 2015 to July 27, 2015) to Briggs resulting from his original counsels' withdrawal and trial. The District Court

[2] The Court referenced March 10, 2014 to April 14, 2014 as institutional delay but had already attributed the delay between March 10 and March 24, 2014 to Briggs.

painstakingly reviewed the out-of-state cases asserted by Briggs in support of attributing this delay to the State and rightfully concluded it would not "rely on cases interpreting significantly different laws regarding speedy trial here." The 160-day delay related to Brigg's original counsel withdrawing is appropriately attributable to Briggs. Thus, the District Court concluded, of the 542 days from initial detention to trial, Briggs was responsible for 212 days and the State was responsible for 330 days in institutional delay. Throughout the case the State did not seek delay or engage in tactics which might create delay. Pursuant to *Ariegwe*, the District Court appropriately weighed this institutional delay less heavily against the State.

¶17 For the third *Ariegwe* factor, the District Court concluded Briggs asserted his right to speedy trial and declined to speculate whether his original counsel's withdrawal was part of a delay tactic employed by Briggs.

¶18 For the fourth *Ariegwe* factor, the District Court considered whether any delay prejudiced Briggs in terms of oppressive pretrial incarceration, his anxiety and concern, and possible impairment of his defense by loss of witness recall or loss of exculpatory evidence. The District Court thoroughly discussed the complex nature of the charges; the extensive discovery; and the need for expert testimony regarding the sexual assault examination, the serology analysis, the DNA analysis, and the toxicology analysis. The District Court appropriately concluded the time it took to bring the matter to trial was not unreasonable and was consistent with that of other discovery intensive major felony offenses. Briggs's pre-trial incarceration was not oppressive. The court reasonably concluded the violent nature of the underlying charged offenses and Briggs's initial escape

merited setting a high bail and the high bail weighed less heavily in considering oppressiveness of pretrial incarceration.

¶19 Additionally, the District Court rightfully concluded most of the difficulties Briggs encountered during his pre-trial incarceration resulted from his own behaviors. The District Court thoroughly considered Briggs's mental health history, his history of suicide attempts, his lengthy criminal history, and prior significant periods of incarceration, ultimately concluding his "professed claims of anxiety and stress due to incarceration are exaggerated."

¶20 Finally, the District Court found Briggs presented no evidence of loss of witnesses or evidence and concluded there "has been no possible impairment of the defense in this case due to any delay." Although the 542-day delay weighed in Briggs's favor, the complex nature of the case and the lack of intentional delay on the part of the State outweighed the overall length of delay. The record on a whole supports the District Court's findings of fact, conclusions of law, and order denying Briggs's motion to dismiss for violation of his right to speedy trial.

¶21 **Ineffective Assistance of Counsel**. Briggs asserts during closing the prosecutor mischaracterized the DNA evidence indicating Briggs's DNA was on the handle and blade of both knives which was consistent with the victim's version of events. Briggs asserts this remark was not accurate and it was IAC for his trial counsel to not object to this statement. The State asserts there was no reason for defense counsel to object as it was consistent with the testimony and report of Joseph Pasternak, the biology DNA supervisor

and technical leader at the State of Montana Forensic Science Division. We agree with the State.

¶22 Pasternak testified the DNA profile collected from the handle of the green-handled knife was a mixture of at least three individuals, Briggs and the victim could not be excluded as contributors, and "the estimated number of individuals that could be included in this DNA profile are approximately 1 in 1134 Caucasians." Pasternak testified the DNA profile collected from the blade of the green-handled knife indicated a mixture of two individuals with the major profile from this mixture matching the DNA profile of Briggs. The DNA profile collected from the handle of the pink and purple knife was a mixture of at least two individuals with the major profile from this mixture matching the DNA profile of Briggs. The DNA profile collected from the blade of the pink and purple knife was a mixture of at least two individuals, Briggs could not be excluded as a contributor, and "the estimated number of unrelated individuals in a random population expected to have a DNA profile that could be included in this mixed DNA profile is 1 in 121,600 Caucasians."

¶23 Given Briggs could not be excluded from the DNA found on the blades and handles of both knives, the remote incidence of unrelated individuals expected to have a DNA profile that could be included, and Briggs's presence at the scene of the offense, it was not inappropriate or objectionable for the prosecutor to argue in closing the DNA evidence was consistent with the victim's version of events. Had objection to the prosecutor's remarks been made, it would have been appropriately overruled. Defense counsel was also free to argue at closing that the DNA evidence was more consistent with Briggs's version of events.

¶24 Briggs also asserts during cross-examination the "State repeatedly took advantage of a text message that it knew was redacted to eliminate information about drug use." The State argues since Briggs has not argued on appeal that the District Court improperly admitted the text message, it was not improper for the State to question him as to what he meant by certain statements in the text. Briggs could confirm or disagree with the prosecutor's interpretation of the text. Again, we agree with the State.

¶25 Briggs has not contested the admission of State's trial Exhibit 19 on appeal and it was not inappropriate for the prosecutor to question him on the text's interpretation. Further, Defense counsel had opportunity to rehabilitate Briggs's testimony on re-direct to assure his interpretation of the texts was before the jury. Moreover, based on review of the record, we conclude Briggs has failed to demonstrate that even if improper, the prosecution's remarks prejudiced him. Thus, it was not IAC not to object to this cross-examination.

¶26 **Denial of Sanctions**. Briggs asserts the District Court erred when it failed to impose sanctions or suppression for the State's failure to preserve the victim's cell phone. In criminal cases, the State has a duty to provide the defense with exculpatory evidence in its possession. *State v. Ellison*, 2012 MT 50, ¶ 15, 364 Mont. 276, 272 P.3d 646 (discussing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963)). Briggs asserts the State had possession and control of the victim's phone and thus had a duty to gather and preserve evidence on the phone.

¶27 With the victim's permission, Detective McNeil photographed texts between Briggs and the victim around the time of the offenses and secured a call log. The photographs and

call log were provided to Briggs in discovery. Detective McNeil did not possess and control the victim's phone and Briggs provides no controlling authority to the contrary. Briggs claims any exchange between himself and the victim to be exculpatory but fails to explain how. Further, any exchanges between Briggs and the victim were arguably also on Briggs's phone which was seized, searched, and preserved.

¶28 Although a defendant has a constitutional right to obtain exculpatory evidence which the State cannot interfere with, "police officers are not required to take initiative or even assist the defendant with procuring exculpatory evidence." *State v. Wagner*, 2013 MT 47, ¶ 26, 369 Mont. 139, 296 P.3d 1142. The State had no legal obligation to take possession and control over the victim's phone to assist Briggs in potentially obtaining exculpatory evidence.

¶29 **Denial of Personnel Records**. Briggs requested Officer Bachich's personnel records. Personnel records may be discoverable given the right set of circumstances (i.e., they contain exculpatory evidence) and after balancing the Defendant's need for exculpatory evidence with the privacy interest of the employee. This may include in camera review of the records. *State v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992); *Stutzman*, ¶ 29.

¶30 Here, the District Court properly used the in-camera review procedure to weigh the effects of allowing discovery of the information contained in Bachich's personnel file and accurately determined it contained no relevant impeachment evidence or other exculpatory evidence requiring disclosure to Briggs. Given the record before us, we find no error on the part of the District Court.

¶31 In sum, Briggs has failed to demonstrate error on the part of the District Court in any of his claims on appeal.

¶32 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶33 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE

APPENDIX B

RELEVANT DISTRICT COURT ORDERS

Findings of Fact, Conclusions of Law, and Order Denying Motion to Dismiss on Speedy Trial Grounds

Order Granting Counsel's Motion to Withdraw

MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

* * * * * * * * * * * *

STATE OF MONTANA, Plaintiff, vs. KEVIN ANTHONY BRIGGS, Defendant.	Cause No. DC 14-71AX **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On June 12, 2015, this Court heard Defendant Kevin Anthony Briggs's ("Briggs") Motion to Dismiss for Denial of Right to a Speedy Trial. County Attorney Marty Lambert and Deputy County Attorney Bjorn Boyer represented the State. Briggs was present with his counsel, Randi Hood, Nick Miller, and Annie DeWolf. From the testimony and evidence presented and the arguments of the parties in their briefs, the Court is fully advised and makes the following Findings of Fact:

FINDINGS OF FACT

1. On February 21, 2014, law enforcement officials in Oregon arrested Briggs. He arrived at the Gallatin County Detention Center on March 10, 2014. On March 24, 2014, the State filed an Affidavit of Probable Cause and Motion for Leave to File Information. That same day Briggs appeared before Judge Holly Brown in Department 1 for an initial appearance. Briggs appeared with counsel from the Office of the State Public Defender. The Court questioned counsel about the Omnibus Hearing:

THE COURT:	Omnibus, Mr. Brewer, we have April 15, May 20th or June 17th?
MR. BREWER:	April 15, I don't know that we'll have discovery by then, or at least complete discovery.
THE COURT:	Any idea?
MS. MURPHY:	Everything we have, your Honor, I believe is ready to be copied and sent over.
MR. BREWER:	Then you can set it and we'll continue if we need to but.
THE COURT:	Your choice?
MR. BRIGGS:	Can you do April?
MR. BREWER:	Might as well set it for April, Your Honor.

State v. Briggs, Initial Appearance Hrg. Transcr. (Mar. 24, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. A).

2. On March 25, 2014, the State filed Motion for Substitution of Judge of Judge Holly Brown. On March 26, 2014, the undersigned assumed jurisdiction of this case and set the Omnibus Hearing for April 14, 2014. On April 4, 2014, Attorney Chuck Watson filed a notice of substitution of counsel to replace Eric. Brewer. On April 4, 2014, Attorneys Ashley J. Whipple and Todd S. Whipple filed a Notice of Co-counsel. On April 14, 2014, counsel for Briggs requested to continue the Omnibus Hearing because they had not yet received discovery. On April 21, 2014, the State provided Briggs with the first set of discovery documents. *State v. Briggs,* DC 2014-071AX Discovery Receipt (Apr. 21, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. B). On April 23, 2014, the State filed is first Notice of Additional Discovery Receipt. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Apr. 23, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. C).

3. On May 9, 2014, Briggs's counsel filed Defendant's Unopposed Motion to Continue the Omnibus Hearing set for May 12, 2014. Ct. Doc. No. 19. The Court continued the Omnibus Hearing to June 9, 2014. On June 5, 2014, counsel received a letter that additional discovery was available for pick up. Ct. Doc. 21. On June 6, 2014, Briggs filed a Motion to Continue Omnibus Hearing because Briggs's counsel was informed that there was a large amount of additional discovery for their review. The State did not object. The Court continued the Omnibus Hearing until July 14, 2014.

4. On July 1, 2014, the State filed an Affidavit of Probable Cause and Motion for Leave to File Amended Information. The Amended Information alleges that Briggs committed the following crimes: Count 1: Aggravated Assault, a Felony, in violation of §45-5-202, MCA; Count 2: Attempted Sexual Intercourse Without Consent, a Felony, in violation of §§45-4-103 and 45-5-503, MCA; Count 3: Assault on a Peace Officer, a Felony, in violation of §45-5-210, MCA; Count 4: Escape, a Felony, in violation of §45-7-306, MCA; Count 5, Failure to Register as a Sexual Offender, a Felony, in violation of §46-23-507, MCA; and Count 6: Criminal Possession of Dangerous Drugs, a Felony, in violation of §45-9-102, MCA. The offenses were allegedly committed on or about February 1, 2014. On July 14, 2014, Briggs appeared for an initial appearance on the Amended Information. Upon request of Briggs's counsel, the Court continued the Omnibus Hearing to August 11, 2014. Ct. Doc. No.32. Also on July 14, 2014, the State provided Briggs its second Notice of Additional Discovery. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt, (Jul. 14, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. D).

5. On July 30, 2014, and August 1, 2014, the State provided its third and fourth notices of additional discovery to Mr. Briggs. *State v. Briggs,* DC 2014-71AX, Additional

Discovery Receipt, (Jul. 30, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. E; *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Aug. 1, 2014) (Attached to Def.' Mot. to Dismiss as Ex. F). On August 11, 2014, at the request of Brigg's counsel the Court continued the Omnibus Hearing to September 8, 2014. Defense counsel cited incomplete discovery as the basis for the continuance. The Court ordered Briggs's counsel to have a completed Omnibus Hearing Order at the Omnibus Hearing on September 8, 2014. Ct. Doc. No. 39. On August 19, 2014, the State filed with the Court its fifth and sixth Additional Discovery Receipts for material received by Briggs in June and July, 2014. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Aug. 19, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. G); *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Aug. 19, 2014) (Attached to Def.'s Mot. to Dismiss as Ex. H).

6. On August 29, 2014, counsel for Briggs filed a letter with the Court addressed to the State regarding discovery production. Def.'s Ex. I. The letter outlines seven categorizes of discovery not received from the State.

7. On September 8, 2014, the Court held an Omnibus Hearing. The Court set a trial date of February 17, 2015. On September 12, 2014, the State provided Briggs with Additional Discovery. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Sep. 12, 2014). Def.'s Ex. J. On November 10, 2014, Briggs's counsel filed an Unopposed Motion to Continue Motions Deadline. From November 14, 2014 for four weeks. Ct. Doc. No. 68. The State did not object. Briggs claimed he was missing evidence essential to the motion on the illegal detention and for the trial itself; an issue that could not have been properly raised or ruled upon without that evidence. On November 12, 2014, the Court held a status hearing and counsel for Briggs indicated Briggs would not waive his right to a speedy trial to accommodate the delayed filing of

the motions. The Court did not grant Briggs's request but extended the motions' deadline to December 5, 2014. Also on November 12, 2014, counsel for Briggs sent a letter, filed with the Court, requesting additional discovery not yet provided. Def.'s Ex.. K.

8. On November 20, 2014, the State provided Briggs with its eighth set of Additional Discovery. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Nov. 20, 2014). Def.'s Ex. L. Evidence included the 9-1-1 audio from February 1, 2014, and MSU Police reports from February 2014 and March 2014. On December 5, 2014, the State provided Mr. Briggs with its ninth set of additional discovery. Def.'s Ex. M; *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Dec. 5, 2014). On January 6, 2015, the State provided Briggs with the tenth set of additional discovery. *State v. Briggs,* DC 2014-71AX, Additional Discovery Receipt (Jan. 6, 2015). Def.'s Ex. N.

9. Sgt. Dana McNeil ("McNeil") testified regarding the testing of drugs during the investigation of this case. During his February 1, 2014, interview with L.W., the alleged victim told McNeil that she thought Briggs may have drugged her. The initial testing of L.W.'s bodily fluids was done by a private laboratory, and was negative for any type of date rape drug. The specimens were sent to the Montana State Crime lab. The report that L.W. had Etizolam in her system was dated May 2, 2014.

10. McNeil testified that all physical and documentary evidence collected during the investigation of this case was available for Brigg's trial.

11. Maureen Exley, the County Attorney's administrative assistant responsible for issuing and tracking service of subpoenas, testified that all witnesses available for Briggs's February 17, 2015, trial are still available for Briggs's scheduled July 27, 2015, trial. The only exception was one of the two U.S. Marshals who helped arrest Briggs in Portland, Oregon.

12. In his letter to the Court, Briggs complained that two knives seized as evidence from L.W.'s apartment had either been lost, or had not been tested. Def.'s Ex. R. On January 16, 2015, Briggs's former counsel sought testing of the knives for "DNA and Fingerprints as to specific locations on the knives". St's.Ex.2. On January 19, 2015, the State replied by letter from the County Attorney to Brigg's former counsel. St's.Ex.3. The County Attorney took the position that "I don't believe that either DNA analysis or fingerprint analysis could be conducted at this late date without delaying the trial. *The State does not agree to a continuance of the trial based on your request.*" St's. Ex. 3 (emphasis added). On June 17, 2015, the County Attorney received an email from Briggs's counsel stating "[W]e do want the knives tested for fingerprints and DNA, if possible." St.'s Ex. 6 (admitted after the hearing by an unopposed motion filed by the State).

13. The knives have not yet been analyzed, as evidenced by State's Exhibit.6, the June 17, 2015, e-mail from Briggs's present defense counsel to the County Attorney.

14. On January 16, 2015, Briggs filed his first Motion to Dismiss for Violation of Defendant's Right to a Speedy Trial. On January 15, 2015, Defendant's Co-Counsel filed an Ex Parte Motion to Withdraw as Counsel. Around January 14, 2015, Briggs wrote a letter to the Court. The letter was admitted as Defendant's Exhibit R and filed under seal. However, despite the letter being filed under seal, in his Proposed Finding of Fact No. 9 Briggs discussed his interpretation of the letter and exposed its contents by asserting in his letter he requested the Court not allow counsel to withdraw because he did not want to delay the proceedings. Briggs also asserts that in his letter Briggs expressed that he has been waiting a very long time for justice and was concerned about his ability to maintain his right to a speedy trial if he switched counsel. Concerning these two representations, Briggs's exact words were: "I don't want to fire them. I definitely don't want them disbarred. I'm trying to complaining about what I hope you

can remedy." Def.'s Ex. R. Briggs also wrote: "What can be done to put the money my family spent to good use? How can I avoid having to waive my right to a speedy trial, which I have asserted from day one, by changing horses in the middle of the fact?" Def.'s Ex. R.

15. Upon the recommendation of Briggs's co-counsel, this Court assigned the Ex Parte Motion to Withdraw as Counsel to Judge John Brown. Judge John Brown heard the motion and recommended this Court grant the Ex Parte Motion to Withdraw as Counsel. In his Proposed Finding of Fact No. 10, Briggs makes reference to the conduct of the hearing. This Court sealed all records concerning the Ex Parte Motion to Withdraw and the proceedings before Judge John Brown. This Court has not examined any of those records. Briggs has not offered those records to be considered by this Court with respect to this present Motion. This Court was merely informed about Judge John Brown's recommendation. On January 26, 2015, this Court issued an Order Granting Motion to Withdraw allowing Briggs's counsel to withdraw and appointed the Office of the State Public Defender to represent Briggs.

16. On February 4, 2015, the Court held a status hearing based on new counsels' recent appearance. At that hearing, Briggs's new counsel made clear that Briggs maintained his right to a speedy trial and that his right to his speedy trial was violated prior to a change in counsel. Briggs sent a letter to "To Whom it May Concern." Def.'s Ex. O. In the letter Briggs expresses concerns about claimed omissions in the Motion to Dismiss for Violation of Right to Speedy Trial filed by his former counsel. In the letter he stated "I did my best to assert my desire for a speedy trial at my initial appearance in the court of the Hon. Judge Holly Brown and Eric Brewer." In his Proposed Finding of Fact No. 11, Briggs claims that he asserted his right to a speedy trial prior to counsel being assigned. Def.'s Ex. O. However, that representation is inconsistent with the contents of the letter. On February 4, 2015, the Court vacated the February

17, 2015, trial date, as new lead counsel was unavailable because of a previously scheduled trial. The Court ordered an omnibus hearing for March 11, 2015.

17. On February 6, 2015, the State filed its response to Briggs's Motion to Dismiss for Violation of Right to Speedy Trial filed by his former counsel.

18. On March 11, 2015, the Court held a second Omnibus Hearing and issued a second Omnibus Hearing Order. The Court scheduled a new trial date for July 27, 2015 because the State was unavailable before then. The Court also set a briefing deadline for the filing of second motion to dismiss for speedy trial reasons.

19. At the hearing on June 12, 2015, Katie Beckman ("Beckman"), a paralegal in the Office of the Public Defender, testified. Beckman researched print media, consisting of the Bozeman Daily Chronicle, a "few" Belgrade News and Associated Press news stories regarding this case. Beckman prepared a spreadsheet listing the print publications. Def's .Ex P. Beckman also had a photocopy of the most recent Bozeman Daily Chronicle news story on this case. Def.'s Ex. Q.

20. Beckman admitted she did not investigate the number of subscribers, either for the on-line edition or the print edition of the Bozeman Daily Chronicle. Beckman admitted that she did not investigate how many readers may have viewed any of the news stories listed in Defendant's Exhibit P.

21. Beckman admitted that she was not able to testify about broadcast media regarding this case. Beckman admitted that Briggs had not secured any opinion pollster to learn the extent to which Gallatin County's potential jurors may have learned about the case through the media.

22. Briggs's father, Charles Briggs ("Charles"), testified. Charles testified he contacted the Gallatin County Detention Center ("GCDC") to confirm that mental health services were available to Briggs. According to Charles, Briggs attempted suicide while he was incarcerated in the GCDC. Charles testified to concerns over provision of medication for anxiety and allergies, and concerns over where Briggs was being housed in the GCDC. Charles admitted on cross-examination that he contacted Eduardo Duran , a private mental health professional who had seen Briggs before the arrest in this case. Charles asked Duran to help with Briggs's anxiety, and was told that the GCDC mental health staff "might be the best resources for Kevin".

23. Charles also testified that he knew of two prior suicide attempts by Briggs. The first apparently occurred sometime in the fall of 2013:

> And the – in the fall preceding, so it would've been the fall of 2013, and when he was certainly at that time enrolled as a student . . . in that fall I was out of state. But upon returning to the state I learned that he had – there had been a suicide attempt. And his partner had – came upon him and had been unable to revive him and called EMTs and he was taken to the emergency room at the hospital.

Tr., pg. 20, lns. 20-25, pg. 21. Lns. 1-5. Charles admitted that he did not know what medications Briggs ingested during this particular suicide attempt.

24. According to Charles, Briggs's second suicide attempt occurred when Briggs was either 12 or 13 years old:

> Well, there was one incident I remember. This was going back to when he was I believe either 12 or 13. He had been going through a lot of stress just coping, some of that related to, you know, his own growth and development, in which he cut himself and he was taken in – what appeared to be an attempt at slicing his wrist to commit suicide. But I don't think it wasn't – it wasn't a serious cut, but he was taken into – put in care for a period of time in Billings. I believe it was Billings Deaconess Psychiatric clinic for a period.

Tr., pg. 21, lns. 20-25, pg. 22, lns. 1-6.

25. Charles also testified that his son had anxiety about once again finding himself in the criminal justice system:

> I mean with this whole incident that led to his arrest he has had considerable anxiety about going back into the correctional system. Certainly he has a lot of fear about being in the correctional system and whether – what he – what the basis of this is, just that the whole system gives him tremendous anxiety based on his prior experience. And he's had, I know from him, some very difficult experiences which he's come through, I mean remarkably.

Tr., pg.22, lns 16-25, pg. 23, ln.1.

26. Charles admitted that Briggs had taken illegal drugs in the past:

> LAMBERT: You know that he's frequently used illegal drugs throughout his life, you know that, correct?
>
> CHARLES: I'm aware that he has ingested or taken substances, yes.

Tr., pg. 29, lns. 4-8.

27. Briggs testified that he suffered panic attacks in the GCDC, where he had "multiple episodes of vomiting and fainted several times." Defendant also claimed that he felt short of breath and sick to his stomach, and tense.

28. Briggs testified that he informed GCDC staff "on the day that I arrived" of his anxiety and depression, and that he suffered from post-traumatic stress disorder from the beating the arresting officers gave him. Briggs testified that he tried three different medications for his afflictions and that none had helped with his anxiety or his panic attacks. Brigs testified that one mental health professional had told him he suffered from an adjustment disorder "which she explained as basically that I hadn't settled down and gotten used to being in jail and the nurse practitioner referred to my symptoms as being caused by situation related anxiety." Tr., pg. 48, lns. 11-15. Briggs also claimed that he had tried meditation, prayer, exercise, and deep relaxation exercises to deal with his problems.

29. When asked by his counsel about what was causing all his problems, Briggs responded as follows:

HOOD: Can you tell the Court what you believe causes these physical manifestations, the panic attacks, the anxiety, the shortness of breath?

BRIGGS: It's sitting around not knowing what's going to happen. And also it's been worse when I spend a large amount of time confined to a cell by myself.

Tr., pg. 49, lns. 2-8.

30. Briggs admitted that he did not put in any "kites" or written requests for assistance, for mental health care from June 27, 2014, through December 11, 2014. Tr., pg. 49. Briggs claimed that other kites he had sent in had been ignored. *Id.* Briggs claimed that his medical problems such as shortness of breath had become overwhelming and had caused Briggs to seek medical care, as opposed to mental health care. Tr., pg. 49, lns. 20-25, pg. 50, lns. 1-8.

31. On cross-examination Briggs summarized his suicide attempts or gestures:

LAMBERT: [David Powell] saw you after your suicide gesture or attempt in May, correct?

BRIGGS: That is correct.

LAMBERT: May of last year, 2014, correct?

BRIGGS: That is correct.

LAMBERT: Did you recall telling him that you had three to four prior suicide attempts before you were arrested?

BRIGGS: I believe I said three to four total to the best of my recollection.

LAMBERT So that would be at least one more than what you just testified to the Court. So what were the other attempts or gestures, how old were you, and what did you do?

BRIGGS: When I was 13 I attempted to cut my wrist. When I was 27 I

attempted to overdose on pills. When I was 28 I attempted to hang myself in the jail. And when I was 28 I attempted to bleed to death in jail. That's four.

Tr., pg. 72, lns.9-25, pg. 73, lns 1-2. Briggs then went on to describe his April, 2014, hanging attempt or gesture:

LAMBERT: And the hanging in April of 18 [sic] you in fact did not attempt to suspend yourself at all, did you?

BRIGGS: Suspend myself?

LAMBERT: Yes. The mark across your neck was a result of your pulling a T-shirt tight across your neck. That's what you admitted to Western Montana Health Worker's correct?

BRIGGS: That is what I told them, correct.

LAMBERT: And so you didn't try and hang yourself; it was an attention-getting action by you so that the jail staff could observe you with the marks across your neck, correct?

BRIGGS: That is not correct. I hanged myself and I lost consciousness momentarily and woke up with the noose tighter around me, but no longer cutting off the carotid arteries. And I got scared and pulled it off and I attempted to cover it up from jail staff by wearing a towel around my neck and saying that I was cold.

Tr., pg. 73, lns. 3-22.

32. Despite the problematic behavior he displayed in his first three months in the GCDC, Briggs did not think it appropriate to be placed in solitary confinement:

LAMBERT: And you stole a razor and hid the razor in your underpants. That was on May 7 – or excuse me, June 7 of 2014, correct?

BRIGGS: I believe so.

LAMBERT: So just based on your behavior within the first three months that you were in the jail, tell the Court why the sheriff shouldn't keep you in solitary confinement for your own protection?

BRIGGS: Because it is harmful toward my mental health. And solitary confinement doesn't resolve the underlying problems that are involved with that.

LAMBERT: Do you think the sheriff has the responsibility to resolve your underlying mental health problems?

BRIGGS: I believe that the sheriff has a responsibility to – yes.

Tr., pg. 74, lns. 4-20.

33. Eilissa Crowe ("Crowe") is a clinical therapist with 12 years' experience in the mental health field. In 2014 she was employed by Western Montana Mental Health and part of her duties was to work with inmates in the GCDC. Briggs requested mental health assistance. Crowe met with Briggs, who told Crowe the following:

LAMBERT: Why was it that he wanted to see you? Were you able to learn that from him?

CROWE: It wasn't clear from the onset of the appointment. It was – he provided very limited history to me. . . . It wasn't clear on initially what the appointment was about.

LAMBERT: What things did he talk with you about?

CROWE: As the session progressed he began to talk about this relationship that he had been in and provided a pretty expensive [sic] answer about this relationship And it was toward the end of this discussion that he had advised me that he was talking about the alleged victim in his crime.

LAMBERT: What did you say to him when you learned that he was describing the complaining witness in this case?

CROWE: Well, he had said to me, he said "This is confidential, right?" And I again advised him, just like "I told you at the onset of the appointment that my records could be subpoenaed at any time," and he said "That's okay. I want my story to get out there."

Tr., pg.106, lns. 4-25, pg. 107, lns. 1-6. Crowe testified that she eventually completed a termination

of services report as Briggs "wasn't interested in pursuing mental health care while he was in the jail." Tr., pg. 109, lns. 22-23. Crowe's termination report was dated July 23, 2014.

34. David Powell ("Powell") has worked for the past 32 years in psychiatric institutions, outpatient mental health clinics, and family service clinics. Tr., pg. 135. Powell currently serves as Western Montana Mental Health Center's crisis response team leader, and responds to mental health emergencies in the jail, the hospital, doctor's offices, and the Hope House. Tr., pg. 136.

35. Powell described the inmate practice of "cheeking" prescribed drugs:

LAMBERT: And what is cheeking?

POWELL: Cheeking is taking a pill that is prescribed to you and hiding it somewhere in your mouth, usually a cheek or under a tongue, until the healthcare professional has walked away and then spitting it up and hiding it in a place to be used later.

LAMBERT: In your experience why would an inmate do that?

POWELL: Well, they would do it for a variety of reasons. One would be a possible suicide attempt, another would be to have an altered emotional experience such as getting high from the drug. It would depend on what chemical they were cheeking I guess.

Tr., pg. 139, lns. 3-17. Powell then testified that Briggs admitted to him that he had "cheeked" prescribed drugs in the GCDC:

LAMBERT: Was cheeking a concern with Kevin Briggs?

POWELL: He actually talked to me about cheeking his medications.

LAMBERT: And what did he tell you?

POWELL: He told me that he was prescribed Buspar and that he had been hiding them for two weeks, yeah. And he, you know, had been cheeking them I guess for about two weeks.

Tr., pg. 139, lns. 18-25, pg. 140, ln 1.

36. Briggs denied that he hid medications:

> LAMBERT: Well, I'll withdraw that question then. You did cheek medication to take a lot of it at once so that you would get a high, correct?
>
> BRIGGS: No, I did not. . .
>
> LAMBERT: Why are they saying that?
>
> BRIGGS: – because David Powell told them that I cheeked medications.
>
> LAMBERT: And why would Mr. Powell think you cheeked medications.
>
> BRIGGS: I don't know. I've been wondering that myself. If we had more advanced notice, we perhaps could have obtained more information about his record. I don't know if it was a mistake. But I have never cheeked any medications and I've never told him that I cheeked any medications.

Tr., pg. 76, lns. 6-10, 16-25, pg. 77, lns. 1-2.

37. Briggs testified the anxiety from the delay has manifested in physical symptoms of panic attacks, multiple episodes of vomiting, and fainting. In addition, Briggs testified he feels short of breath, sick to his stomach, and at times trouble sleeping.

> They have come and gone. They have been worse at some times than others, particularly when I don't know when things are going to happen or what is going to happen. Also, sometimes when I have been under pressure from other inmates. I would say if I were to average it maybe three times a month that it's --- I mean I feel anxious more often than that, but would be full-on panic attacks that lead to vomiting or loss of consciousness or at the very least severe shortness of breath.

Tr. pg.45, lns. 17-25, pg. 46, lns. 1-3.

38. Briggs testified that the physical manifestations of his anxiety are caused by "sitting around not knowing what's going to happen." This is exacerbated when Briggs spends a large amount of time confined to a cell by himself. Tr. Pg. 49, lns. 2-8.

39. On April 22, 2014, a mental health worker at the jail, Ryan Schwartzmeyer ("Schwartzmeyer"), observed ligature marks around Briggs's neck and he discussed that with Briggs. Briggs told Schwartzmeyer those marks were from pulling on his shirt because he was having a panic attack. Schwartzmeyer testified in his notes about that discussion he wrote that Briggs seemed embarrassed about the marks, he was avoiding eye contact, his laughter was inappropriate, and his story was changing.

40. Briggs also described his May 2014, suicide attempt, where he had hoped to bleed to death.

> I cut my wrist. I cut beneath my arm. I reached for the place where I could feel a pulse and tried to cut into the artery there. I tried to cut open the vein the crook of my elbow and I sliced my tongue in half.

Tr., pg. 50, lns 17- 21.

41. When Briggs returned from the hospital, he was placed in a cell by himself for two and half weeks with a large portion of that time without books and was not allowed visits. Tr., pg. 51, lns 9-13.

42. After his suicide attempt, Briggs was evaluated by Powell. Jail staff called Powell because of Briggs's recent suicide attempt. Powell assessed Briggs and determined he should be kept on suicide watch. Powell testified Briggs's suicide attempt was a genuine attempt to end his life. Powell diagnosed Briggs as having an adjustment disorder, a condition related to acute stress.

43. During a period of time when Briggs claims his requests for medications were ignored by medical staff, the medical staff did see Briggs on emergency bases. One occurred when he felt he could not breathe and another after he had woken up on the floor and hit his head, which was swollen and bruised. Briggs also did not feel comfortable with the mental

health staff working at the facility from June 27, through December 14, 2014, and did not utilize mental health services at that time.

44. In addition to medication, Briggs also sought the advice of several counselors to varying degrees of success and "attempted numerous techniques to deal with anxiety." Briggs testified he spoke with a counselor, Miya, who explained his symptoms were descriptive of adjustment disorder because he had not settled down and gotten used to be being in jail." Tr., pg. 48, lns. 8-12. Briggs also testified he has "tried meditation and prayer and exercise and deep relaxation exercises" and "visualization exercises" suggested by one of his counselors" to calm his anxiety with minimal success. Tr. Pg. 48, lns. 20-25; pg. 49, ln, 1.

45. Briggs testified about his claim of oppressive pretrial incarceration he has experienced due to his lack of safety among certain inmates and the detention staff's response of placing Briggs in solitary confinement for long periods of time.

46. Briggs has an extensive criminal record. He was incarcerated in Pine Hills from March 27, 2003 through January 16, 2004. On October 11, 2005, Briggs was arrested in Humboldt, California, for escape and placed in the Montana State Prison on January 6, 2006, where he was not released until January 26, 2008, to Helena. Briggs was arrested again on February 15, 2008, and remained in custody until March 8, 2008. On June 18, 2008, Briggs was arrested in Yellowstone County, and remained in custody until November 6, 2008. On November 12, 2008 Briggs was returned to the Montana State Prison. Briggs remained there until February 19, 2009. On July 31, 2013, Briggs was arrested for a probation violation, and was released on August 3, 2013.

47. Briggs testified about being assaulted while he has been incarcerated at the GCDC. Sergeant Nicholas Walisor ("Walisor") and Corporal David Lauchnor ("Lauchnor") are officers at the GCDC. By a separate Order after the hearing Defendant's Exhibits S and T were

admitted as evidence without objection from the State. Defendant's Exhibits S and T are video recordings of incidents in the GCDC. The Court has viewed Defendant's Exhibits S and T.

48. Defendant's Exhibit S is a DVD containing four video files from February 2015. Each of the actual videos has a visible date and time displayed on the screen. None of the videos have any audio. The file names consist of the starting date and time of each video and the ending date and time of each video. For example the file titled "[ch23]020815_065000__020815_065546" is a video from February 8, 2015 between 6:50 and 6:55 and 46 seconds.

49. Briggs testified he was assaulted by other inmates in August of 2014, twice in February 2015, and once in April of 2015.

50. Briggs testified that in August, 2014, he was assaulted by an inmate whom he did not know. The other inmate apparently did not like what he saw about Briggs on the television and surprised Briggs by punching him as he was going up the stairs. Brigs received a black eye and testified that it made him feel "helpless, afraid, [and] humiliated." Tr. pg. 53, lns. 2-8. Briggs testified he did not disclose what happened to the jail staff because it would have put in him in greater danger. Tr. pg. 53, lns. 24-25.

51. The first February incident between Briggs and another inmate was established through the testimony of Briggs and Walisor. The other inmate was Tommy Steele "(Steele"). The video on Defendant's Exhibit S of February 8, 2015 shows at 06:50 and 30 seconds (all video times are military time), which is 30 seconds into the video, Briggs approach Steele who is sweeping out a cell. Steele then waves a fist or pointed finger at Briggs and within 5-10 seconds approaches and punches Briggs in the head.

52. For the remaining five minutes of the February 8, 2015 video Briggs and Steele appear to be speaking or arguing with each other. At one point Briggs grabs a broom from the entry of a cell Steele is in and then tries to hide behind the door as Steele exits the cell toward him. Although the body language of both could be construed as angry or aggressive following the assault there does not appear to have been any provocation on the part of Briggs prior to being punched. After the punch Briggs repeatedly continues to approach Steele.

53. Briggs testified Steele was sweeping things from Steele's room into the dayroom and Briggs asked him not to do that. Briggs testified Steele then called him other names and struck him in the eye. Steele then continued to try to get him to fight him in his cell. Briggs refused and tried to talk him down. He then moved the door between them.

54. Briggs testified that the strike hurt and it made him feel afraid, humiliated and helpless. Tr. pg. 56, lns. 8-13. Briggs ultimately informed jail staff what happened. Briggs told the officer that he bit his lip. Briggs was afraid to tell on the inmate because he was afraid of retaliation. Briggs received 35 days in solitary for both of the February assaults.

55. The next incident, on February 11, 2015, has two videos on Defendant's Exhibit S. File "[ch22]021115_200345__021115_200459" is a video from February 11, 2015 which starts at 20:03 and 45 seconds and ends at 20:04 and 59 seconds. This video file does not show anything relevant. However, file "[ch23]021115_200230__021115_200457" shows the same room at generally the same time from a different angle. From this angle Briggs is visible in the video at one time apparently using the phone. Briggs then lets the phone hang and approaches another inmate, again Steele. Briggs speaks for a moment with Steele, then walks back toward the phone with Steele following. Briggs briefly picks the phone back up and then is punched.

Prior to the punch, Briggs was leaning casually against the wall speaking to Steele and there did not appear to be any animosity between the two men.

56. Briggs testified Steele was spraying a substance in the air where Briggs was speaking on the phone. According to Briggs, he asked Steele to stop. The inmate then charged Briggs and struck him three times. One of the strikes split Kevin's lip which ultimately became infected. *Id.* at 57: 1-19.

57. A third February incident occurred on February 20, 2015. Defendant's Exhibit S shows Briggs seated at a table, then throwing a piece of food at another inmate sitting at the next table. Briggs immediately picks up the piece of food and throws it away and nothing further happens. Walisor described the incident as an assault and testified that watching this food-throwing video "was what made the decision really" for him that Briggs had instigated the three incidents in February. Considering that this incident occurred ten days after the two assaults, and that no assault was committed, this conclusion is not supported by facts. Walisor acknowledged that Steele claimed "that fucking rapo has been taunting me . . . and I hit him whop, whop, whop." He also testified that Steele had been heard making threats on telephone calls.

58. For these February incidents, two of which appear to be unprovoked assaults against him from which Briggs sustained injuries, he was given 30 or 35 days of solitary confinement. Steele was given 30 days.

59. Defendant's Exhibit T is another DVD. Testimony was also heard about an incident on April 13, 2015, in which Briggs received a black eye. Defendant's Exhibit T contains two video files, both from April 13, 2015. One file is titled "[ch27]041315_151630__041315_154317" and is a video of the recreation yard at the GCDC. It

shows Briggs on that date, alone, shooting a basketball and working out. It shows that he did not fact receive a black eye during this time in recreation.

60. Lauchnor testified that Briggs claimed this is where the injury occurred. Lauchnor acknowledged that inmates can be afraid of retribution for accusing other inmates of wrongdoing. Lauchnor said when he questioned Mr. Briggs about the black eye it was in the presence of another inmate and it was not a private setting. Lauchnor testified Briggs could have had this concern when he claimed he got the black eye playing basketball.

61. The other video file on Defendant's Exhibit T, "[ch23]041315_170824__041315_172951," shows Briggs and other inmates in a cell block on that same date. At 17:13 and 37 seconds, 5:12 into the video, Briggs sets down his tray at a table and about two minutes later comes back and sits down, eating with another inmate. At 17:16 and 30 seconds, an inmate comes out of a cell and appears to speak to Briggs, and points his finger at Briggs. This other inmate involved in the April incident was identified by Lauchnor as James Smith ("Smith"). Smith returns to his cell, and Briggs does not get up or make any gestures during this time. About 30 seconds later, Smith comes out of his cell again with his attention directed at Briggs. Briggs again does not respond or get up, but it appears Briggs may have been speaking with Smith.

62. At 17:17 and 33 seconds, Smith charges out of the cell at Briggs. Briggs stands up from the table and backs away. Smith punches Briggs one time in the head. Briggs has his hands raised in a defensive manner but does not strike or attempt to strike Smith. Briggs backs away from Smith and circles the table he had been sitting at, keeping it between himself and Smith. After Smith walks away Briggs takes his food and items and shuts himself in his cell.

About two minutes later, at 17:19 and 35 seconds, Smith walks to the door of Briggs's cell and looks in or speaks to Briggs. Nothing further occurred.

63. Contrary to the testimony of Lauchnor, prior to the assault no inmates were puffing out their chests, acting aggressive, or otherwise showing signs of fighting other than Smith. Briggs turns toward Smith but maintains a general posture of hunching over his food and does not gesture or square his shoulders. The attack appears unprovoked. Lauchnor testified that "[t]hey started and stopped several times while they were interacting" but Smith appears to be the only person instigating any interactions, and continuing to engage Briggs.

64. Also contrary to the testimony of Lauchnor, Smith did not lock down in his cell after the attack. Smith returned to his cell but left the door open, continuing to walk around the common area, and even going to the door of Briggs cell for a few moments after the attack.

65. Lauchnor testified that Smith did receive some time in lockdown as discipline for the attack, but could not remember how long he remained there. Briggs testified that he was placed in solitary confinement and 23-hour lockdown for the incident and remained there at the time of the June 12, 2015 hearing on this motion for a running total of 46 days.

66. Briggs also testified about this assault in April, 2015. His testimony is consistent with the video evidence. Briggs was eating his meal in the dayroom. According to Briggs an inmate started taunting him after seeing Briggs on the news and told Briggs he needed to leave the pod. The inmate used several profane remarks and said his kind was not welcome around his pod. Briggs tried to ignore him, but the inmate eventually charged him and struck him once as he was running away. Briggs then stood with the table between them and eventually grabbed his things and went and locked down.

67. Briggs testified he lied about what happened because jail staff questioned him in front of other inmates, outside the door of the assailant. Briggs was afraid that if he told the truth while everyone could hear, it would lead to further assaults. Briggs testified he has been in solitary confinement for 46 days and will remain there indefinitely because of this incident. Briggs was told by Staff Sergeant Young that "based on his recent behavior, administrative segregation is the best placement option for [him] right now."

68. Briggs testified while in administrative segregation (solitary confinement), he is in his cell 23 hours a day. He is allowed out of his cell, by himself, for 1 hour per day. On Wednesday, Thursday, and Friday, his hour out of his cell is outside of business hours and he is not able to call his attorney and unable to always reach his family. Briggs testified he feels trapped, alone, and anxious while in solitary confinement.

69. Briggs has committed numerous violations of the GCDC's policies and rules during his incarceration:

a. February 21, 2014, Briggs refused to stand for a medication pass, resulting in his not receiving his medication that day. Tr., pg. 79;

b. March 12, 2014, Briggs refused his medication. Tr., pg. 80;

c. April 14, 2014, Briggs made a second phone call during visitation, in violation of GCDC rules. Tr., pg. 82;

d. April 25, 2014, Briggs was purportedly strangling himself, and was found face-down in his cell, but then stood up on his own. Tr., pg. 82;

e. May 5, 2014, Briggs was found on the top tier pod against GCDC orders. Tr., pg. 82;

f. May 7, 2014, Briggs refused two meals in a row. Tr., pg. 83;

g. May 8, 2014, Briggs cut himself, resulting in his hospitalization. Tr., pg. 83;

h. June 7, 2014, Briggs stole a razor from inmate Royster. Tr., pg. 83;

i. June 11, 2014, Briggs passed a book under a door, in violation of GCDC rules. Tr., pg. 83;

j. July 27, 2014, Briggs was speaking with other inmates in violation of lock-down rules. Tr., pg. 83;

k. August 15, 2014, Defendant was not wearing his name badge, in violation of GCDC rules, Tr., pg. 83;

l. September 3, 2014, Briggs had blood on his bedsheets, Tr., pg. 83;

m. September 7, 2014, Briggs was wearing his uniform pants with the pants legs rolled up, Tr., pg. 85;

n. September 23, 2014, Briggs did not go to lockdown when told to do so, Tr., pg. 85;

o. November 8, 2014, Briggs again did not go to lockdown when told to do so, Tr., pg. 85;

p. November 13, 2014, Briggs was lingering outside the cell of another inmate, Tr., pg. 86;

q. December 4, 2014, Briggs had excess books, excess food, and excess uniform in his cell, Tr., pg. 86;

r. December 31, 2014, Briggs threw wads of wet toilet paper on the pod floor, Tr., pg. 86;

s. January 12, 2015, Briggs argued with a jailer, Tr., pg. 87;

t. January 17, 2015, Briggs violated GCDC policy by typing a 10 chapter book, Tr., pg. 87;

u. January 19, 2015, Briggs used a book cart as a stand to play chess, Tr., pg. 87;

v. February 1, 2015, Briggs was sleeping when he should have been cleaning, Tr., pg. 88;

w. February 8, 2015, Briggs fought with inmate Steele, Tr., pg. 88;

x. February 21, 2015, Briggs fought with inmate Steele, Tr., pg. 89;

y. April 12, 2015, Briggs was performing jumping jacks on his bed, Tr., pg. 89;

z. April 13, 2015, Briggs fought with inmate Smith, Tr., pg. 89;

aa. April 19, Briggs leaned against another inmate's cell door, Tr., pg. 90;

bb. April 22, 2015, Briggs covered the intercom in his cell so that he could not hear GCDC staff, Tr., pg. 90.

70. Briggs testified that throughout the period of time during which he has been at the GCDC, his primary interest has been to have a trial, to have a "chance to get the facts sorted out." Tr. pg. 65, lns. 6-10.

71. On May 9, 2014, Briggs attempted three separate phone calls to the phone number of L.W., the alleged victim. St's. Ex. 5, Tr., pg. 199. One of the calls went through, and Briggs had a three minute phone conversation during that call. McNeil testified that one of this Court's conditions of bail was that Briggs was not to contact L.W. Tr., pg. 159. McNeil testified that jail staff had entered L.W.'s number into the form needed to block Briggs's calls, but had neglected to check the appropriate drop down box to complete that task. Tr., pg. 159-60.

72. Briggs admitted that the disciplinary treatment handed out by the GCDC staff for the infractions and violations described in ¶ 69 above was, for the most part, fair:

> LAMBERT: And by the way, you had warnings for most of these didn't you? They didn't result in reclassification or confinement in solitary conditions, correct?

BRIGGS: That is correct.

LAMBERT: Andy by doing so – by doing that you would have to agree that the jail and the sheriff was being reasonable and fair to you by giving you those warnings as opposed to doing something more drastic, would you agree with that?

BRIGGS: Yes.

Tr., pg. 85, lns. 12-22.

73. Any factual findings contained in the following Conclusions of Law are hereby incorporated in these Findings of Fact.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Any conclusions of law contained in the Foregoing Findings of Fact are incorporated into these Conclusions of Law.

2. The Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution, guarantee a criminal defendant's right to a speedy trial.

3. The Montana Supreme Court established a balancing test for addressing speedy trial issues in the case of *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. In *Ariegwe*, the Supreme Court determined that a court presented with a speedy trial claim must analyze and then balance the following four factors: 1) the length of delay; 2) the reasons for the delay; 3) the defendant's response to the delay; and 4) whether any prejudice arises from the delay.

4. A district court considering a speedy trial claim must determine the relevant facts and then assess whether those facts demonstrate a denial of the right to speedy trial. *State v. Morsette*, 2013 MT 270, ¶ 12, 372 Mont. 38, 309 P.3d 978.

5. The four factors are "inherently case-specific" and are weighed based upon the facts and circumstances of each case. *State v. Sartain,* 2010 MT 213, ¶13, 357 Mont. 483, 241 P.3d 1042.

6. A court must begin its analysis of a speedy trial claim by determining whether the speedy trial time frame is sufficient to trigger the four factor balancing test. The interval is measured without fault for delay. If the interval is less than 200 days, then further analysis is not triggered and the speedy trial claim should be denied as a matter of law. If the delay is at least 200 days, then the four part balancing test is triggered and the court must proceed with a full analysis. *Ariegwe*, ¶ 62.

7. In order to determine the appropriate speedy trial time frame, courts generally consider the interval between accusation and the scheduled trial date or the date on which an accused pleads guilty. *State v. Ellenburg*, 2000 MT 232, ¶ 16, 301 Mont. 289, 8 P.3d 801; *Ariegwe*, ¶ 43.

8. The first step in the speedy trial analysis is to determine whether the interval between accusation and trial is sufficient to even trigger the four-factor balancing test. *Ariegwe,* ¶ 39. A speedy trial claim lacks merit as a matter of law if the interval between accusation and the trial is less than 200 days. *Ariegwe*, ¶ 41.

9. 505 days will have passed between March 10, 2014, and Briggs's scheduled trial date of July 27, 2015. This is sufficient to trigger speedy trial analysis.

10. The significance of the inquiry of the extent to which the delay stretches beyond the 200-day trigger date is two-fold: "first, the presumption that pretrial delay has prejudiced the accused intensifies over time, and second, the State's burden under Factor Two to justify the delay likewise increases with the length of the delay." *Ariegwe,* ¶ 62.

11. 305 days will have passed beyond the 200 day threshold before Briggs's trial on July 27, 2015.

12. The State disagrees with Briggs's calculation of 505 days, based on a starting date of March 10, 2014. The State quotes the following holding of the Montana Supreme Court in *Ariegwe,* ¶ 42 regarding the starting date of the calculation:

> As for when the speedy trial clock begins to run, we stated in *State v. Longhorn,* 2002 MT 135, 310 Mont. 172, 49 P.3d 48, that "[t]he right of a defendant to a speedy trial comments when he becomes an accused." *Longhorn,* ¶22 . . . *see also Dillingham v. United States,* 423 U.S. 64, 65, 96 S.Ct. 303, 303-04 (1975)(per curiam)("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.'" (quoting *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct.455, 463 (1971)). We affirm the rule set forth in *Larson* and add that the speedy trial clock begins to run at the earliest of the enumerated occurrences. (emphasis added by State).

13. According to Ariegwe, the *earliest* trigger occurrence in this case was the State's filing of a complaint against Briggs in the Gallatin County Justice Court and the issuance of an arrest warrant by the Gallatin County Justice of the Peace. The complaint was filed, and the warrant was issued, on February 1, 2014, the same day Briggs allegedly assaulted L.W., and allegedly escaped and fled from Bozeman.

14. Briggs's flight, capture, extradition from Oregon to Montana, and arraignment in District Court, encompassed a total of 52 days' delay (February 1, 2014, through March 24, 2014). All that delay is attributed to Briggs.

15. According to the State's calculation, the length of delay in this case is from February 1, 2014, through July 27, 2015, or a total of 542 days. Whether one applies Briggs's analytical calculation or the State's analytical calculation, the 200-day threshold is met. *Ariegwe,* ¶ 41.

16. Using the State's calculation 342 days will have passed beyond the 200 day threshold to the date of Briggs's trial on July 27, 2015.

17. Concerning the second factor "[T]he State bears the burden of explaining the pretrial delays." *Ariegwe*, ¶ 64. This Court must identify and attribute each period of delay in bringing an accused to trial and then must assign weight to each period "based on the specific cause and motive for the delay." *Ariegwe*, ¶ 67. There are several gradations of culpability. At one end of the spectrum is bad faith or deliberate delay that exposes the accused to oppressive prosecution tactics. *Ariegwe*, ¶¶ 68, 71. The next level of culpability applies to delays caused by negligence or lack of diligence on the part of the prosecution. *Ariegwe*, ¶ 69. A third level of culpability applies to institutional delays caused by circumstances largely beyond the control of the prosecution, such as overcrowded court dockets and scheduling conflicts. *Ariegwe*, ¶¶ 67-68. Finally, there may be "valid reasons" for delay attributable to the State. *Ariegwe*, ¶ 70. "When the State requests a postponement of the trial because a material witness with 'valid reason' is not available, the resulting delay is charged to the State unless that delay was brought about by the accused's unlawful acts." *Ariegwe*, ¶ 70 n. 5.

18. The period from March 10, 2014, through April 14, 2014, should be categorized as institutional delay. This initial period of delay should be attributed to the State as the State held Briggs until it filed an Affidavit of Probable Cause and Motion for Leave to File an Information. The Court first appointed counsel to represent Briggs. Briggs had an initial appearance in this Court on March 24, 2014. Briggs then hired private counsel. Briggs's counsel prepared for the Omnibus Hearing. This delay amounts to 35 days.

19. Briggs disputes the State's staring date of February 1, 2014 and the State's attribution of the delay from February 1, 2014 until March 24, 2014, the date of the initial appearance Briggs. This is 52 days. The State argues Briggs is responsible for that delay by reason of his alleged escape from the Bozeman Police Department and subsequent flight from law enforcement. It was not until March 24, 2014, when Briggs was arraigned, that this Court could place this case on its calendar. It was not until March 24, 2014 that this case could move forward toward its disposition.

20. Briggs cites *State v. Crane,* 240 Mont. 235, 238-239, 784 P.2d 901, 903 (1989) (citing *State v. Wirtala*, 231 Mont. 264, 268, 752 P.2d 177, 180, (1988)) for the proposition that "in determining whether the appellant was denied his right to a speedy trial, that period of time from the date of arrest and the length of the delay before trial are not interchangeable terms. 'Length of delay refers only to the time period chargeable to the State.'"

21. Briggs asserts he is not arguing that the time between February 1, 2014, until March 10, 2014, the date he was returned to Montana, should be attributed to the State. Briggs has pled not guilty to the offense of escape, but nevertheless stipulates that the 38 day delay in locating and extraditing Briggs back to Gallatin County should not be attributed to the State. Briggs waived extradition. *See State v. Grant*, 227 Mont. 181, 185-186, 738 P.2d 106, 109 (1987) (The Montana Supreme Court "noted that any delay in bringing a defendant to trial which is attributable to defendant's own actions must be deducted from the total delay for purposes of determining whether speedy trial rights were violated."); *State v. Robbins,* 218 Mont. 107, 116-117, 708 P.2d 227, 233 (1985) ("Days in which the court does not or cannot, through the State's efforts, acquire jurisdiction over an accused will be counted against the accused and will not be included in computing the length of delay.").

22. Briggs argued that when he arrived in the GCDC on March 10, 2014, he became within the jurisdiction of the Court. Briggs was seen on March 11, 2014, before the Gallatin County Justice Court and the Justice of the Peace set bail in the amount of $1,000,000.00. According to Briggs, the 14 day delay by the State to file an Affidavit of Probable Cause – when the alleged acts took place over one month prior – is certainly not within the control of Briggs and this time should count against the State as institutional delay.

23. On March 24, 2014 Judge Holly Brown conducted an arraignment with Briggs and set the matter for an Omnibus Hearing at her next available date. The State moved to substitute Judge Brown and this Court accepted jurisdiction of the case and set the matter for an Omnibus Hearing for April 14, 2014. Counsel for the defense received the first set of discovery on April 14, 2014. As that was the same day as the Omnibus Hearing and the discovery was voluminous, Briggs could not move forward.

24. The pace of discovery in this case, as evidenced by the discovery documents on file with this Court (Defendant's Exhibits B-N, and State's Exhibit 4) is consistent with discovery in other felony cases. The State's first discovery receipt lists 285 separate items of discovery, as well as three CDs containing information about this case. The amount of items listed in the subsequent discovery receipts then abates. This is consistent with the fact that, as time the time for trial approaches, most all of the discoverable information in existence in the State's case already has been provided to the defendant.

25. There is nothing unusual in the exchange of letters between Briggs's former counsel and the County Attorney regarding discovery. Def.'s Ex. I; St's .Ex. 4. In the letter defense counsel makes routine inquiries, and the County Attorney makes routine replies, regarding the status of discovery in a serious and complex case such as this case.

26. Given the complexity of the case, there was nothing unusual about conducting an Omnibus Hearing on September 9, 2014, approximately six months after Briggs's arraignment. This Court set the hearing date for December 29, 2014, and the trial date for February 17, 2015. It was not the State's fault that the trial was set into 2015, and the status of discovery played no part in this Court's setting of the date for trial.

27. There is no evidence that Briggs's ability to present his case for dismissal and suppression at the December 29, 2014, hearing was prejudiced in any way by the timing of the provision of discovery to Briggs's former counsel.

28. Briggs's complaints about the discovery received in December 2014, and January 2015, lack merit. The discovery involved items that only came into existence in November and December 2014, and the State could not have provided the discovery any earlier.

29. The defense motion notes that the sex assault kit was not tested for the presence of Briggs's DNA until requested by Briggs's counsel. Briggs is not charged with crimes that assert Briggs sexually penetrated or contacted the alleged victim. Rather, Briggs is charged with attempt to commit sexual intercourse without consent of the alleged victim.

30. Briggs knew about the sexual assault kit from the onset of provision of discovery in this case (discovery items #100 and #114, Discovery Receipt, April 21, 2014). Briggs's former counsel could have sought testing of the kit at any time. On August 29, 2014, over four months after learning about the rape kit, Briggs sought testing of the kit. The State immediately obliged and requested expedited testing by the state crime lab. It should be noted that the State could have insisted that Briggs's private counsel arrange for and pay for testing of the kit by a private laboratory.

31. In this case, with an expedited test, the serology results were issued in

approximately two weeks (October 1, 2014), and the final DNA results were issued in approximately two months (November 20, 2014), from the state lab's receipt of the kit. The results of the testing were immediately provided to Briggs, months prior to the scheduled trial date.

32. Any discovery issues between the State and Briggs were completely resolved when on January 20, 2015, all three of Briggs's former counsel signed a "Joint Notice to Court Re: Discovery." Briggs's attorneys agreed to the following:

> [A]ll discovery in possession of the State of Montana has been furnished to the Defendant's attorneys.

Joint. Not. To Ct. Re: Discovery (Jan. 20, 2015), Ct. Doc. No. 159.. This Court notes that January 20, 2015, was 28 days before February 17, 2015, the Defendant's first scheduled trial date.

33. The goal of Montana's discovery statutes in criminal cases is "to enhance the search for the truth." *State v. Waters,* 228 Mont. 490, 495, 743 P.2d 617 (1087). In *Waters,* defendant knew before trial of the existence of the stolen property at issue in the case. Before the trial the State did not list the property as a proposed exhibit. The court upheld the district court's determination that defendant Waters was not prejudiced or unduly surprised by introduction of the evidence. The district court did not err when it allowed the evidence as an exhibit during trial. *Id.*

34. Montana's discovery statutes were enacted, in part, to prevent surprise. *State v. Stewart,* 2000 MT 379, ¶22, 303 Mont. 507, 16 P.3d 391 ("The policy behind §4 6-15-322, MCA is to provide notice and prevent surprise"); *State v. Golder,* 2000 MT 239, ¶13, 301 Mont. 368, 9 P.3d 617 ("Established precedent and statutory language both support the discretion of Montana courts to refuse to impose sanctions for discovery violations where there is no prejudice or undue surprise"). If trial had started on February 17, 2015, as originally scheduled, Briggs and his

former counsel legitimately could not argue that Briggs was surprised by any evidence introduced or by any witness questioned during the trial. Defendant's discovery claims have no merit.

35. Briggs argues that discovery was not complete, despite many requests and protestations to that fact. As the State noted, discovery was not substantially complete until November 20, 2014. However, the Court accepts the State's explanation for the delivery of discovery to Briggs under the circumstances of this case. Briggs now argues that it is fundamentally unfair to Briggs and his ability to prepare for trial that the discovery was not substantially completed until November 20, 2014. However, Briggs's former counsel acknowledged that on January 20, 2015, Briggs had the State's discovery. Briggs maintains that this time should be attributed to the State on a more culpable level, as the State did not turn over critical information in its possession. Under the circumstances of the extensive discovery in this case, the Court disagrees with Briggs's position.

36. On July 1, 2014, the State moved for leave to file an Amended Information charging Briggs with an additional count of Criminal Possession of Dangerous Drugs, a felony. This count was based upon the alleged presence of a syringe within Briggs's backpack. The State knew the location, existence, and nature of this syringe at the time it filed the original charges against Briggs on March 24, 2014. Briggs claims there is no justification for the three month delay in filing the amended charge. Briggs claims that this new charge only brought more media coverage to Briggs's case. Briggs asserts this delay associated with the amendment of the charges, should be considered intentional in nature and should be attributed to the State.

37. Briggs argues the State has provided *no* explanation whatsoever for its 10 month long failure to provide evidence that it had from the day of the alleged assaults on February 1,

2014. Whether this was the result of deliberate tactics or simply of negligence is indeterminable. Either way, Briggs maintains the State could have prevented this delay, but for whatever reason, elected not to. Briggs claims this delay counts against the State on a more culpable level. However, the Court accepts the State's explanation for the delivery of discovery to Briggs as it became available and sought by Briggs from the Omnibus Hearing on April 14, 2014, until January 2015. The delays were not intentional.

38. On January 26, 2015, the Court granted Briggs's former counsel's Motion to Withdraw from the case. Briggs obviously has a right to counsel. Briggs argues he should not be forced to choose between a right to a speedy trial and a right to counsel. Briggs argues the time after Briggs's former counsel withdrew and the continuation of the jury trial should be attributable to the State as institutional delay. Briggs states he did not cause counsel to withdraw and as a result, he did not control this delay.

39. The State argues that Briggs offered no legal authority to a finding that the State be held responsible for delay resulting from the withdrawal of Briggs's former counsel. The State cites the following cases to support its argument that the 160 days' delay caused by withdrawal of Brigg's counsel should be attributed to Briggs: *U.S. v. Oberoi,* 295 F.Supp.2d 286, 296-97 (W.D.N.Y.2003); *Linden v. State,* 598 P.2d 960, 966 (Alaska1979); *State v. Curry,* 790 N.W.2d 441, 451 (Neb.App.2010); *Hill v. State,* 438 So.2d 971, 973-74 (Fla.2ndDist.App.1983). The State argues that Briggs should be held responsible for 52 + 160 days, or a total of 212 days' delay. Under the State's theory the State concedes it is responsible for 542 – 212 days, or 330 days' delay.

40. Briggs distinguishes each of the cases cited by the State to dispel the State's assertion that Briggs is responsible for the delay caused by the withdrawal of his former counsel. The first, *U.S. v. Oberoi,* 295 F.Supp.2d 286 (W.D.N.Y. 2003), involves a very detailed, complex analysis of the defendant's speedy trial claim under the Federal Speedy Trial Act.

> The Act commands the government to bring criminal defendants to trial within 70 days of their first appearance before a judicial officer of the court or the filing of an indictment, whichever is later. The 70-day deadline, however, is not absolute; 18 U.S.C. § 3161(h) excludes certain periods of delay from the 70-day calculation. The periods of delay defined in §§ 3161(h)(1)-(6), which include delays resulting from interlocutory appeals, pretrial motions and "other proceedings concerning the defendant," are automatically excluded from the Speedy Trial clock. Put differently, these sections of the Act are self-executing, *i.e.,* no specific finding or order by the court is required for the exclusions to apply, and the exclusions are not limited to delays that are reasonably necessary.

Id. at 288. The court examined in excruciating detail the multitude of delays requested by the defendant, a few of which related to counsel, and almost all of which were excluded from the 70 day clock based on statutory provisions. *Oberoi* is so factually distinguishable from the case, and based on a federal statutory scheme so different than *Arigewe* that it cannot be controlling precedent here.

41. Briggs maintains that *Linden v. State,* 598 P.2d 906, 966 (Alaska 1979) actually supports his position. In *Linden*, two youths were charged with felony burglary. Alaska statute mandates all defendants charged with a felony or misdemeanor to be brought to trial within 120 days of a certain date. *Id.* at 965 n. 6 (citing Alaska Crim. R. 45). At some point counsel for one of the defendants withdrew for some unknown reason. The defendant consented to the withdrawal and also consented to allow the co-defendant's attorney to represent him. *Id.* Not surprisingly, the co-defendant's attorney had to withdraw because of a conflict. The Court held that statutory exceptions to the 120 day mandate were sufficiently broad enough to account for the delay and upheld the trial court's denial of the motion to dismiss. *Id.* at 965-966.

42. Montana, unlike Alaska, does not have a statutory scheme determining time limits for trial and any exceptions to that timeframe. As with *Oberoi,* this Court will not rely on cases interpreting significantly different laws regarding speedy trial here. However, the delay in *Linden,* was only 154 days between the arrest and trial; Mr. Briggs's delay is notably more. In *Linden,* the defendant consented to the change in counsel, which is not the case here. Briggs did not want to fire his counsel and expressed concerns about his right to a speedy trial.

43. The third case cited in the State's response is *State v. Curry,* 790 N.W.2d 441 (Neb. App. 2010). *Curry,* like *Linden,* is based upon a state speedy trial act, guaranteeing a trial within six months. The Nebraska statute also has statutory exceptions as to what time periods are excluded in the speedy trial calculation. *Id.* at 447. Counsel withdrew because of a conflict of interest prohibited by the Rules of Professional Conduct. *Id.* at 448.

44. The Nebraska appellate court determined that withdrawal of counsel does fit in the statutory exception which tolls the speedy trial calculation. *Id.* at 450. The court specifically held that the speedy trial clock is tolled from the day after the motion to withdraw is filed and the court's subsequent order allowing counsel to withdraw and appointment of (new) counsel. *Id.*

45. If the Court were to somehow apply the same rational here, the only delay attributable to Briggs – even if he did consent - would be the time period between prior counsels' motion to withdraw on January 16, 2015, and the reappointment of the Office of the State Public Defender on January 26, 2015, a period of 10 days. However, as with *Linden,* the Court cannot logically follow *Curry* because the Nebraska statute does not rely on attributing periods of delay as set forth in *Ariegwe;* instead the Nebraska statute discusses "tolling" the speedy trial clock.

46. The State cites *Hill v. Florida,* 438 So.2d 971 (Fla. Dist. App. 1983). In this case, a public defender represented six co-defendants. A week before trial he moved to withdraw because, unsurprisingly, a conflict arose when a few of the co-defendants wanted to go to trial. *Id.* at 971. The trial had to be continued and pushed out past the 175 day speedy trial deadline. The defendant ultimately plead nolo-contendere reserving the right to appeal based on the trial court's denial of his motion to dismiss based on a violation of a right to a speedy trial. *Id.*

47. Like the other cases, Florida has a statutorily defined right to a speedy trial guaranteeing a defendant a right to a speedy trial within 175 days. Like in Nebraska and Alaska, Florida's statute has numerous statutory exceptions to the speedy trial right. Again, this Court cannot logically follow *Hill* as the statutory exceptions do not translate to the *Ariegwe* factors. This is exceptionally true in this case where the defendant did not actually want to go to trial, but instead changed his plea, defeating his sincere desire to have a speedy trial.

48. Briggs asserts the delay from February 17, 2015, until July 27, 2015, is not the fault of Briggs: his prior counsel's withdrawal less than one month before trial left him with no choice but to allow his new counsel to continue the trial. Briggs claims he did not 'fire' counsel. However, this Court is not aware of the circumstances under which Briggs's former counsel was allowed to withdraw because this Court did not hear the matter and only accepted the recommendation of Judge John Brown to allow former counsel to withdraw. At the status hearing on February 4, 2015, Briggs's new counsel requested a continuance of the trial set for February 17, 2015. At the Omnibus Hearing on March 11, 2015, Briggs stated his intention to file a second Motion to Dismiss for the denial of a speedy trial. With the concurrence of counsel, the Court set a briefing schedule which resulted in the Court having to set an evidentiary hearing for June 12, 2015. Because of the State's calendaring conflicts the earliest the trial could be set

was in July. Briggs's new counsel asserts that they were prepared to move forward at the earliest setting available by the Court. Briggs's newly appointed counsel asserts they made clear at the status hearing on February 4, 2015, that they would be prepared to go to trial in "a couple months" of that hearing.

49. At that Omnibus Hearing on March 11, 2015, the Court set the trial – based upon the State's calendar and the Court's calendar for July 27, 2015.

50. The first 52 days' delay in this case, from February 1, 2014, through March 24, 2014, is attributable to Briggs. Briggs is responsible for that delay by reason of his alleged escape from the Bozeman Police Department and subsequent flight from law enforcement. It was not until March 24, 2014, when Briggs was arraigned, that this Court could place this case on its calendar. It was not until March 24, 2014 that this case could move forward toward its disposition.

51. The 160 days' delay from the February 17, 2015, trial date, until the trial date of July 27, 2015, is attributable to Briggs. Briggs contrived an argument that this delay ought to be attributed to the State. ("The subsequent delay cannot be attributable to Mr. Briggs as this would be an unfair choice: the right to a speedy trial or the right to effective assistance of counsel" Def.'s Proposed COL 26) This argument lacks merit. Briggs's argument offers this Court no valid reason to accept defense counsel's invitation to blame either Briggs's former counsel or Briggs himself for the delay – the fact is that the defense, and not the State, caused the delay.

52. The Court finds that Briggs should be held responsible for 52 + 160 days, or a total of 212 days' delay. The State is therefore responsible for 542 – 212 days, or 330 days' delay. This Court concludes that all of the State's delay is institutional. Institutional delay weighs less heavily against the State:

> [W]e characterized delay inherent in the criminal justice system and caused by circumstances largely beyond the control of the prosecutor as "institutional delay" and we attributed such delay to the State. (citations omitted) . . . however, we explained that institutional delay weighs less heavily against the State than does intentional delay, because institutional delay "is not one the State actively pursued," whereas intentional delay 'exposes the defendant to "oppressive tactics of the prosecution.'" (citation omitted)

Ariegwe, ¶68. The evidence and testimony presented during the hearing demonstrate that the State has not sought delay, nor has the State engaged in any tactics which might create delay, in this case.

53. Under Factor Three, the Court must consider the accused's responses to pretrial delays, including whether the accused acquiesced in or objected to the delays. *Ariegwe*, ¶ 79. The accused's responses to the delays must be evaluated "based on the surrounding circumstances--such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth." *Ariegwe*, ¶ 80 (*citing United States v. Loud Hawk*, 474 U.S. 302, 314 (1986)).

54. Like the defendant in *Ariegwe*, Briggs and his attorneys were apparently "operating under the mandates" of Briggs. *Ariegwe*, ¶ 138. This Court will not negatively infer any delay arising from the fact that Briggs's counsel decided to wait to assert his speedy trial rights until 312 days after the trigger date. *Ariegwe*, ¶ 138.

55. At Briggs's initial appearance, he requested the earliest omnibus date. Briggs refused to waive his right to a speedy trial at a status hearing on November 12, 2014. On January 16, 2015, counsel for Briggs filed a motion to dismiss for a violation of his right to a speedy trial. On February 4, 2015, Briggs again asserted his right to have a speedy trial when discussing how to proceed with new counsel. At no time during any of the proceedings did Briggs acquiesce to any of the continuances.

56. However, the State points out that it has never been privy to the reasons Briggs's former attorneys filed their motion to withdraw from representing Briggs. The State represents that it does know, however, that former defense counsel's motion had merit. District Judge John Brown, who heard testimony and evidence *in camera* regarding the motion, recommended that defense counsel's motion be granted.

57. The withdrawal of Briggs's former counsel created an additional 160 days' delay in this case. The State sought disclosure of the proceedings before Judge John Brown. Briggs's counsel objected. The State withdrew its request. This Court will not speculate as to what information was presented to Judge John Brown. It is sufficient to emphasize that withdrawal of Briggs's former counsel created a delay that is not attributable to the State.

58. The State suggests that Briggs's conduct may have played a part in deciding whether Briggs really wanted a speedy trial, or whether Briggs actively sought what amounts to 160 days' delay, in the hopes that he could profit from that delay. Briggs may have engaged in a tactic designed to create delay through his seeking, at a time very close to his February 2015, trial date, the forensic testing of the knives seized by the Bozeman Police. Def. Ex. R; Sts.Exs. 1, 2 and 3. This Court has no other evidence in the record to hold against Briggs on this particular issue. Therefore, the Court concludes that Briggs asserted his right to a speedy trial.

59. Under the fourth factor of *Ariegwe*, the Court considers whether any prejudice arises from the delay. When an accused shows a delay of more than 200 days, a presumption of prejudice arises. *Ariegwe,* ¶ 45. This presumption, however, does not relieve either party of the burden of coming forward with evidence regarding the existence or non-existence of prejudice. *Ariegwe*, ¶ 56. "[T]he length of the delay (Factor One) and the necessary showing of prejudice (Factor Four) are inversely related: as the delay gets longer, the quantum of proof that may be

expected of the accused decreases, while the quantum of proof that may be expected of the State increases." *Ariegwe*, ¶ 49. On the other hand, the accused's responses to the delay (Factor Three) are directly and strongly related to the amount of personal prejudice suffered by the accused (Factor Four), which itself is "not always readily identifiable" or subject to proof. *Ariegwe*, ¶¶ 78-79. That the accused is suffering prejudice from a violation of his right to speedy trial can be inferred from an accused's timely, persistent, and sincere complaints about the delays, and the stronger those complaints are, the more serious the prejudice is likely to be. *See Ariegwe*, ¶ 78 (*citing Barker,* 407 U.S. at 531-32).

60. The prejudices that the speedy trial right was designed to prevent focuses around three interests of the accused: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. *Ariegwe*, ¶ 88 (*citing Barker*, 407 U.S. at 532; *Doggett v. United States*, 505 U.S. 647, 654 (1992)). "[P]rejudice may be established based on 'any or all' of these considerations." *Ariegwe*, ¶ 88 (*quoting State v. Johnson*, 2000 MT 180, ¶ 23, 300 Mont. 367, 4 P.3d 654).

61. In judging the fourth *Ariegwe* factor, the delay in a case involving a complex charge weighs less heavily against the State than delay where the charges are relatively simple, such as felony DUI. *Ariegwe,* ¶59. The State emphasizes that this case is complex. The State represents that the trial of this case will involve expert testimony: a medical doctor regarding the alleged strangulation suffered by L.W.; a Sexual Assault Nurse Examiner regarding the sex assault examination; a serologist regarding bodily fluids obtained during L.W.'s sex assault exam; a DNA analyst as to the DNA analysis undertaken by the crime lab, and the statistics that are derived from the lab's DNA analysis; chemists regarding the determination that the date-rape

drug Etizolam was present in the syringe and in L.W.'s system; and a toxicologist regarding the effect of Etizolam on the human body. Further, given Briggs's last-minute request for fingerprint and DNA analysis of the knives, there exists the possibility that fingerprint expert testimony will be heard during the trial as well. Thus, given this case's complexity, the 330 days' delay in this case weighs less heavily against the State.

A. Prevent Oppressive Pretrial Incarceration

61. When assessing whether pretrial incarceration is oppressive, the Court must consider all of the circumstances surrounding the incarceration, including factors such as the duration of the incarceration; the complexity of the charged offense; any misconduct by the accused leading to the pretrial incarceration; and the conditions of incarceration. *Ariegwe*, ¶¶ 90-93.

62. In *State v. Couture,* 2010 MT 201, ¶ 55, 357 Mont. 398, 240 P.3d 987, the defendant was incarcerated while awaiting his trial for deliberate homicide. Because the case involved a homicide charge, the Montana Supreme Court held that "[Couture's] resulting incarceration, due to the serious nature of the offense with which he had been charged, weighs against a finding of oppressiveness." *Id.,* ¶ 60.

63. In this case, the allegations are that Briggs strangled the alleged victim. It is also alleged that Briggs allegedly employed a date rape drug to facilitate the alleged assault. Briggs has an extensive criminal record and has spent much time in jails and prison, for crimes such as sexual intercourse without consent and escape. Like the circumstances of the *Couture* case, the circumstances of this case merit the setting of a high amount of bail for Briggs, weighing against a finding of oppressiveness.

64. The *Couture* case cited *State v. Keyes,* 2000 MT 337, ¶18, 303 Mont. 147, 15

P.3d 443, for the proposition that, when a defendant presents a flight risk, high bail weighs less heavily in considering oppressiveness. *Id.* It is undeniable that Briggs is a flight risk, as he amply demonstrated by his alleged escape and subsequent evasion of law enforcement authorities in this case. In addition, Briggs has a prior conviction for escape in Lewis and Clark County.

65. In *State v. Rose,* 2009 MT 4, ¶ 70, 348 Mont. 291, 202 P.3d 749, the Montana Supreme Court set forth the following factors for this Court to consider in deciding whether Defendant's incarceration was oppressive:

> In assessing whether the pretrial incarceration in a given case is "oppressive", we consider all of the circumstances surrounding the incarceration. In *Ariegwe,* we identified a number of pertinent circumstances, including the duration of the incarceration, the complexity of the charged offense(s), any misconduct on the part of the accused directly related to the pretrial incarceration (e.g., a demonstrated likelihood to flee the jurisdiction of the court), whether the accused was incarcerated on a separate charge while awaiting trial on the instant charge, and the conditions of the incarceration, such as overcrowding and lack of recreational opportunities, adequate food, climate control, proper medical care, cleanliness, or legal research capabilities.

66. As set forth in the Findings of Fact, Briggs has been an extreme disciplinary problem during his stay in the GCDC. Briggs's pretrial incarceration was not oppressive – to the contrary, the testimony proved that the GCDC staff has been patient with Defendant and have not been biased or unfair towards him.

67. To show oppressiveness, Briggs relies on the fact that he was assaulted four times in the GCDC. Briggs claims that the most credible evidence is from the videos in Defendant's Exhibits S and T. Three of the videos show that Briggs was assaulted by other inmates, and according to Briggs, without provocation. However, the videos do not contain any audio.

68. Briggs claims that the staff at the GCDC characterized the assaults as "fights" and refused to move Briggs into a protected population of inmates accused of sexual related crimes. The response of the GCDC has been to move him to administrative segregation. The Court heard testimony from Briggs that he was told he would remain in segregation because of his continued behavior.

69. Briggs testified that administrative segregation he is in his cell 23 hours a day. He is allowed out of his cell, by himself, for one hour per day. On Wednesday, Thursday, and Friday, his hour out of his cell is outside of business hours and he is not able to call his attorney and unable to always reach his family. Briggs feels trapped, alone, and anxious while in solitary confinement.

68. Under all of the circumstances considered by the Court as set forth above, the Court concludes that Briggs's pretrial incarceration is not oppressive.

B. Minimize the Accused's Anxiety and Concern

69. "[T]he crucial question here is whether the delay in bringing the accused to trial has unduly prolonged the disruption of his or her life or aggravated the anxiety and concern that are inherent in being accused of a crime." *Ariegwe*, ¶ 97. The Supreme Court has noted that this is a more subjective interest. *Ariegwe*, ¶ 95.

70. Briggs consistently complained for over a year of fainting and vomiting symptoms. Approximately once per month Briggs has suffered from these symptoms. The physical manifestations of his anxiety are caused by "sitting around not knowing what's going to happen." According to Briggs, this is exacerbated when Briggs spends a large amount of time confined to a cell by himself

71. Briggs attempted to control his feelings of anxiousness by both medication and counseling. Briggs has now tried three medications. He stopped taking one of the medications because it was not working; he met with a counselor and complained about the side effects. The medical staff at the detention center did not respond to his requests for a new medication, so Briggs stopped taking the medications. Not until six months later did a medical provider put him on a different medication.

72. Briggs sought help from a mental health counselor at the jail, who told Briggs the anxiety was situational. Briggs met with a number of counselors in the jail. Briggs testified, and that testimony was corroborated by other mental health providers that Briggs was uncomfortable meeting with the staff and concerned about the lack of confidentiality of those discussions. Briggs has tried numerous techniques to suppress his anxiety from meditation to prayer to exercise. Nothing has been successful.

73. In late April 2014, Briggs attempted to kill himself by hanging. However, one week later, around May 8, 2014, Mr. Briggs again attempted to commit suicide by bleeding to

death. Briggs began by attempting to cut an artery in his arm pit, followed by an attempt to cut his left wrist, then a vein on the inside of his elbow, then finally, he sliced his tongue in half. Briggs was anxious and depressed. Powell characterized Briggs attempt to end his life as genuine.

74. The Court notes that these suicidal attempts were early in Briggs's incarceration.

75. Briggs has a lengthy criminal record, and has been incarcerated for significant periods of time in the past. Based on his extensive past criminal conduct, and his repeated demonstrations of improper behavior in the GCDC, this Court concludes that Defendant's professed claims of anxiety and stress due to incarceration are exaggerated. The crimes alleged in the Amended Information are serious and Briggs has not been able to post bail. Given that he cannot post bail, Briggs must be held somewhere in custody pending his trial. Briggs's complaints about his treatment in the jail lack merit, particularly his complaints about his being held in isolation. Given his suicidal and problem behavior, including the stealing and concealment of a razor, and his contacting the alleged victim's phone number, the Sheriff was and is entitled to hold Briggs in isolation. This Court concludes that this factor weighs in the State's, and not Briggs's favor.

C. Impairment of Defense.

76. Briggs's lack of specificity as to how his defense might be impaired is significant. "Impairment of the defense" is the most significant factor of all those considered in conducting a speedy trial analysis. *Rose,* ¶ 83; *Ariegwe,* ¶ 98; *State v. Price,* 2001 MT 212, ¶ 28, 306 Mont. 381, 34 P.3d 112; *Barker v. Wingo,* 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

77. Briggs complained that "Critically, law enforcement and witnesses were unable to remember points critical to Mr. Brigg's defense concerning cell phone records". Def.'s Mot. to Dismiss for Denial of Right to Speedy Trial, pg. 15. This Court does not recall McNeil (he was

the only witness who testified as to the cell phone motion) claiming lack of recollection of any matter of any importance to Briggs's cell phone motion. There has been no transcript prepared of the December 29, 2014, hearing.

78. Likewise, defense counsel made vague complaints about the lack of recollection of the officers who testified regarding the backpack suppression motion, to the effect that "officers and witness memories [had] faded." *Id.* Again, there is no evidence to support this claim. Further, Briggs's former attorneys made no mention of memory loss in Briggs's January, 2015, proposed findings to this Court on the suppression and dismissal issues.

79. This Court relies on the State's testimony and evidence that no evidence has been lost, and that no witness has disappeared, since Briggs's arrest. Briggs presented no evidence or testimony to the contrary. There has been no possible impairment of the defense in this case due to any delay.

80. Briggs maintains that he cannot make any showing of whether or not the witnesses' memories are impaired because he claims in his Proposed Conclusions of Law that as of the time of the filing of the motion, the State has prevented Briggs from access to three critical witnesses. Whether this continues to be true at the time of this Order is unknown to the Court. Apparently, the remaining witnesses have taken notes or memorialized their statements in reports.

81. Finally, Briggs's claims his defense is also compromised by the continued and constant reference to him in the media. Briggs asserts that as this reference was state-wide, at this time, Briggs is not requesting a change in venue, but Briggs claims that the constant repetitive mention of Briggs in the media will have a prejudicial effect, especially concerning the escape charge.

82. Concerning Briggs's reference to the media, Briggs offered evidence about pretrial publicity. However, Briggs has not filed a motion for change of venue. In *State v. Kingman,* 2011 MT 269, ¶ 33,362 Mont. 330, 264 P.3d 1104, the Montana Supreme Court stated:

> [B]ecause media coverage may occur throughout the pretrial period and the trial itself, and because new publicity may generate new concerns about the defendant's ability to receive a fair and impartial trial, a motion for change of venue may be made or renewed at any point during the pretrial period, *voir dire*, or the trial, as circumstances dictate.

83. Briggs did not introduce the content of the newspaper articles set forth in Defendant's Exhibit P. Briggs Defendant has not conducted any opinion polling of the potential jurors in Gallatin County. Based on the record made by Briggs during the hearing, the Court cannot presume that "pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community." *Kingman*, ¶ 21.

84. Insofar as Briggs's speedy trial motion is concerned, any suggestion by Briggs about unfair publicity as may be related to the speedy trial issue lacks merit.

85. The Court concludes that Briggs's defense has not been seriously impacted. There has been no possible impairment of the defense in this case due to any delay.

D. Balancing the Factor.

86. Determining whether an accused's right to a speedy trial was violated involves "[a] difficult and sensitive balancing process." *Ariegwe*, ¶ 102 (*quoting State v. Highpine*, 2000 MT 368, ¶ 14, 303 Mont. 422, 15 P.3d 938 (internal quotations marks omitted)). "[B]ecause the right to a speedy trial is a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Ariegwe*, ¶ 153. As explained above, none of the four factors enunciated by this

Court is either "a necessary or a sufficient condition" for a deprivation of the right to a speedy trial. *Ariegwe*, ¶ 102.

87. This Court has balanced the *Ariegwe* factors. Even given the 542 days' delay in this case, a factor that weighs in Briggs's favor, this Court concludes that Briggs's speedy trial claim is without merit. *State v. Burns,* 2011 MT 167, ¶¶27-28, 361 Mont. 191, 256 P.3d 944 (although factor one, 465 days' delay, favored defendant, factors two, three and four outweighed the length of the delay and the district court properly denied defendant's speedy trial motion).

From the foregoing Findings of Fact and Conclusions of Law, the Court issues the following Order:

ORDER

IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss for Denial of Right to a Speedy Trial is **DENIED.**

2. The Clerk of the District Court shall immediately notify counsel by telephone and email that this Order has been issued by the Court.

Dated this 1st day of July, 2015.

Hon. Mike Salvagni
District Judge

c: Marty Lambert
Bjorn Boyer
Randi Hood
Annie DeWolf
Nick Miller
emailed 7-1-15

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * * *

STATE OF MONTANA, Plaintiff, vs. KEVIN BRIGGS, Defendant.	Cause No. DC 14-71AX **ORDER GRANTING MOTION TO WITHDRAW**

On January 15, 2015, Defendant's Co-Counsel filed an Ex Parte Motion to Withdraw as Counsel. They recommended that if the Court desired further inquiry into this matter that the Court should assign a different judge to hear the matter to preserve this Court's neutrality. Because the Court required further inquiry, the Court assigned Judge John Brown to inquire further with Defendant and his counsel. Because of the confidentiality of the attorney-client privilege existing between Defendant and his counsel and Counsel's request that this matter be sealed, the documents concerning this Motion have been sealed and removed from the ROA on Full Court. On January 26, 2015, Judge Brown met with Defendant and his counsel. Judge Brown recommends that Co-Counsel's Motion to Withdraw be granted.

IT IS HEREBY ORDERED that Defendant's Co-Counsel's Motion to Withdraw is **GRANTED.** All records concerning the Ex Parte Motion to Withdraw and the proceedings before Judge John Brown shall be sealed and not reflected in the ROA.

Dated this 26th day of January, 2015.

Hon. Mike Salvagni
District Court Judge

c: ✓Marty Lambert
✓Ashley Whipple
✓Todd Whipple
✓Herman A. "Chuck" Watson, III
✓Kevin Briggs – personally served through interoffice mail –
✓Public Defender – e-mailed
1/27/15

e-mailed

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

State of Montana v. Kevin Anthony Briggs,
DA 16-0157 (Mont., December 5, 2018)

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 16-0157

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN ANTHONY BRIGGS,

Defendant and Appellant.

ORDER

Kevin Anthony Briggs petitions this Court for rehearing of an October 23, 2018 Order which affirmed the Eighteenth Judicial District's conviction. Briggs asserts the Court's decision "contravenes existing precedent in a number of ways and makes factually inaccurate assertions" supporting rehearing pursuant to M. R. App. P. 20(1)(a).

Briggs primarily asserts this Court determined the 14-day delay while Briggs waited to be arraigned was attributable to him contrary to *State v. Reynolds*, 2017 MT 25, ¶ 22, 386 Mont. 267, 389 P.2d 243. Briggs then also asserts various delays associated with filing the Information, providing discovery, time spent in pretrial incarceration, and replacement of counsel were not specifically considered by this Court.

Briggs misapprehends this Court's memorandum opinion. When the record on a whole supports the ultimate findings and conclusions of the District Court and the matters involve well-settled law, this Court in its discretion may issue a memorandum opinion pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules. A memorandum opinion by its nature does not set forth a detailed analysis of every fact found by the District Court noting each harmless error. The memorandum opinion issued herein recited a general overview of the District Court's findings and conclusions and then concluded overall the District Court had properly applied and weighed speedy trial factors.

This Court did not conclude the District Court properly attributed 14 days of delay to Briggs while awaiting arraignment, which the State concedes was institutional delay.

This Court also did not conclude all of Briggs's solitary pretrial confinement was resultant directly from his conduct. Rather, this Court concluded that on balance the District Court thoroughly considered the issues and arguments asserted by Briggs, including conduct attributable to Briggs as well as unprovoked conduct against Briggs, weighed them appropriately and reached conclusions which are not inconsistent with the record on a whole. While the District Court attributed 14 days of delay to Briggs and counted a short period of time twice in its speedy trial analysis, these errors were harmless and do not warrant reversal or rehearing. Briggs has failed to establish the overall record does not support the findings and conclusions made by the District Court.

Regarding the personnel record and cell phone issues, Briggs re-argues the result found by the District Court and upheld by this Court should be different. A petition for rehearing is not a forum to rehash arguments in the briefs that this Court has already considered. M. R. App. P. 20(1)(a). These are not legitimate grounds for rehearing.

IT IS ORDERED that Briggs's petition for rehearing is DENIED.

The Clerk of this Court shall provide a copy of this Order to Kevin Anthony Briggs and to counsel of record.

DATED this 4th day of December, 2018.

Chief Justice

Justices

APPENDIX D

CONSTITUTIONAL PROVISIONS AT ISSUE

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FORTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

PORTIONS OF RELEVANT
DISTRICT COURT
TRANSCRIPTS

Hearing on Speedy Trial Motions,
June 12, 2015

Hearing on Withdrawal Motion,
January 26, 2015

Q. And throughout the period of time in which you have been involved in the court proceedings has it been your desire to have a speedy trial?

A. Yes.

Q. Have you done anything to vocalize that?

A. I have.

Q. When was your first time that you did that?

A. That was in the court of Judge Holly Brown. And I asked for the soonest possible date for an omnibus in hopes of speeding things along.

Q. And earlier this year when -- you were represented by other defense attorneys, correct?

A. Correct.

Q. And there came a time in which they moved to withdraw.

A. That is correct.

Q. Did you take any opportunity to evidence your desire for a speedy trial?

A. I did.

Q. How did you do that?

A. Initially I wrote His Honor requesting that my counsel not be permitted to withdraw because they had -- well, primarily because I

didn't want my trial date to be delayed any further and I specified that in the letter.

MS. HOOD: May I approach, Your Honor?

THE COURT: Yes.

BY MS. HOOD:

Q. I'm handing you --

Your Honor, this letter that I'm going to hand Mr. Briggs is a part of the court file under seal, and I think the Court can take judicial notice of it before I introduce it. But I think it should still go under seal.

THE COURT: Let me see the letter.

MS. HOOD: And, Your Honor, there's a letter that you wrote.

THE COURT: You can -- are you having this marked as an exhibit?

MS. HOOD: I think it can be done either way. I'll have it marked as an exhibit because --

THE COURT: Or --

MS. HOOD: -- as I say it was previously ordered under seal.

THE COURT: It's not been provided -- have you provided it to the County Attorney now?

MS. HOOD: Yes. And it originally I think --

THE COURT: It was not provided to the County

Attorney originally.

MS. HOOD: That's right. They have a copy of it.

MR. LAMBERT: This is the first that I have seen either Mr. Briggs's letter or your Response and Order, Your Honor.

THE COURT: Cuz I did not allow this letter to be disclosed to anyone.

MS. HOOD: Right.

THE COURT: And it's under seal. But now the County Attorney has it. But the Court's Order keeps it under seal.

MS. HOOD: Right. We only wanted to refer to a brief section of it, Your Honor.

THE COURT: That's fine. But do you have any objections to the Court taking judicial notice of this letter, Mr. Lambert?

MR. LAMBERT: Well, I think it -- how can we do that without it being admitted? I don't have an objection to either Mr. Briggs's letter or your Order and as they would remain under seal. But I'm going to be -- if they're in, they're in. And I'm going to want to take a look at this when Findings and Conclusions come due and maybe discuss with counsel and the Court how to bring

up portions of the letter even given that it's under seal. Understanding that, though, I think the State should have the right to do that, I have no objection.

THE COURT: So we'll have it marked as an exhibit.

MS. HOOD: Yes.

THE COURT: So it would be exhibit...

CLERK: It'd be R.

THE COURT: ...R.

MS. HOOD: R.

THE COURT: What was Q?

BY MS. HOOD:

Q. Mr. Briggs --

A. Yes.

MR. LAMBERT: He was the newspaper article.

THE COURT: Okay. So this is R.

COURT REPORTER: Excuse me, Judge. I can't hear Ms. Hood.

MS. HOOD: I'll speak up. May I --

THE COURT: If you get closer --

MS. HOOD: -- approach him?

THE COURT: -- to him you can speak louder. Yes.

THE WITNESS: Thank you.

BY MS. HOOD:

Q. Mr. Briggs, I'm handing you what has been marked as Defense Exhibit R. Do you remember that? Do you recognize it?

A. I do. Thank you.

Q. Mr. Briggs, you wrote this letter to the Judge, correct?

A. Yes.

Q. And in the letter you state that you want to continue with your attorneys and continue with your trial date, correct?

MR. LAMBERT: Objection. The letter is in evidence and will speak for itself, Your Honor.

THE COURT: Sustained.

MS. HOOD: That's fine.

BY MS. HOOD:

Q. What was your purpose in writing the letter?

A. My purpose was to -- I had two purposes. One was that I wanted to let the Judge know that if certain actions were not taken by my lawyers, it was not because I was requesting that. And the -- my second purpose and well, my probably primary purpose was to keep the February 17th trial date going.

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT

GALLATIN COUNTY

* * * * *

STATE OF MONTANA,	)	No. DC-14-71AX
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KEVIN ANTHONY BRIGGS,	)	
	)	
Defendant.	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

January 26, 2015

HONORABLE JOHN C. BROWN, JUDGE PRESIDING
LAW AND JUSTICE CENTER
615 SOUTH 16TH, ROOM 202
BOZEMAN, MT 59715

Sandra K. Murphy
Electronic Court Reporter/Transcriptionist

ORIGINAL

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Whipple

TABLE OF CONTENTS

January 26, 2015

TRANSCRIPT

MOTION HEARING

THE COURT: All right, this is Cause No. DC-14-71AX, *State of Montana v. Kevin Anthony Briggs.* This is a special hearing set today and I'm going to read the Order issued by Judge Salvagni setting this hearing and I think that's the way that I will start.

This is the Order that was issued in this matter by Judge Mike Salvagni, the presiding Judge, on Friday, January 23rd, 2015. This is the text of the Order. This Order was issued by the Court and filed under seal. The caption of this Order reads: Order Assigning Judge John Brown to Hear Counsel's Motion to Withdraw and Setting Hearing.

On January 15th, 2015, Defendant's counsel filed an *ex parte* Motion to Withdraw as counsel. Defendant's counsel asserted as the basis for the motion that "there has been a complete breakdown in the attorney-client relationship and counsel no longer believes that an effective defense can be conducted

given this breakdown." Because this Motion appeared to involve the attorney-client privilege the Motion was filed under seal. All subsequent documents have been filed under seal including the sealing of the register of action. In their motion, Defendant's counsel suggested that if the Court desired further inquiry into this matter that the Court "assign a different judge to preserve this tribunal's neutrality with respect to the Defendant". Because counsel's motion did not indicate whether the requisite notice required by Section 37-61-403(2), MCA, was provided to the Defendant, the Court issued an Order on January 15th, 2015, requiring counsel to notify Defendant and to provide notice to the Court about Defendant's position regarding the Motion to Withdraw by no later than 5:00 p.m. on January 23rd, 2015. In an Order issued on January 22nd, 2015, the Court advanced the notice to noon on January 23rd, 2015. On January 23rd, 2015, the Court received Defendant's *ex parte* notice, notice of position of Defendant regarding Motion to Withdraw in which the Defendant stated his objection to the

counsel's Motion to Withdraw. The Court does require further inquiry into the basis for counsel's request to withdraw and Defendant's objection because Defendant's counsel suggests that it would be in their client's best interest for this tribunal to maintain its neutrality and isolated from the reasons, the Court finds that there is good cause for this tribunal to assign consideration and determination of counsel's Motion to Withdraw to another District Court Judge. By making this assignment this Court does not relinquish any of its authority or jurisdiction over this case. The assignment will be made for the limited purpose of allowing the other District Court Judge to hear this matter and make a recommendation to this Court for disposition of the Motion. The Court considers this unprecedented procedure to be similar to referring to an issue to a Special Master; however, this matter involves the attorney-client privilege between counsel and the Defendant, the confidentiality of that relationship must be maintained. Further, this confidential hearing cannot be held without

appropriate security as determined by the Sheriff.

IT IS HEREBY ORDERED:

1. Counsel's Motion to Withdraw is assigned to Judge John Brown. Judge Brown shall hear the Motion and make a recommendation to the undersigned as to the disposition of the Motion.

2. The hearing shall be held on Monday, January 26th, 2015 at 9:00 a.m. in Courtroom 3.

3. The hearing is confidential and shall be closed to the public. The only persons who are allowed to be present for the hearing at Defendant, Defendant's counsel, the Clerk of Court, the Court Reporter and deputies of the Sheriff's Department to provide security. The Defendant is not required to appear in street clothes.

4. (This is the paragraph that is emphasized.) ALL PERSONS WHO ARE PRESENT SHALL MAINTAIN CONFIDENTIALITY OF WHAT IS SAID DURING THE HEARING AND THE FACT THAT THE HEARING WAS HELD. ANY DOCUMENT GENERATED FROM THE HEARING INCLUDING MINUTES OF THE COURT SHALL BE FILED UNDER SEAL AND EXCLUDED FROM THE ROA FUNCTION

ON FULL COURT.

5. Because this matter involves the attorney-client relationship the County Attorney may not be present and no notice of this hearing shall be provided to the County Attorney.

6. Judge Brown shall state his reasons for his determination on the record and shall provide this Court with a written report of his conclusion about whether the Motion to Withdraw should be granted or denied. The conclusion shall not be subject to review by this Court.

7. The procedure is being conducted to protect the privacy rights of the Defendant in his relationship with his attorneys.

8. The Clerk of the District Court shall file this Order under seal and exclude it from the ROA function of Full Court.

9. The Clerk of the District Court shall immediately notify Ashley Whipple, Todd Whipple and Herman A. "Chuck" Watson that the Court has issued this Order. Defendant's counsel shall notify the Defendant about the Order.

Signed on December -- or, excuse me, January -- 23rd, 2015. Mike Salvagni.

So, that is the Order under which we are conducting this hearing. Let the record show that Mr. and Mrs. Whipple are present along with Mr. Watson. They are defense counsel for Mr. Briggs. Mr. Briggs appears here as well.

Mr. Briggs, so I'm Judge John Brown, you understand, I've been assigned to hear this issue regarding your counsel's Motion to Withdraw; do you understand that?

MR. BRIGGS: Yes, Your Honor.

THE COURT: All right. Now, Sandy, is the door locked?

COURT REPORTER: Yes, it is.

THE COURT: Thank you. All right, so the door is locked. This hearing is a closed hearing. We've done -- Judge Salvagni has taken really extraordinary steps to make sure that this matter remains private between Mr. Briggs and his counsel and the Court. I'm going to hear the evidence regarding the motion. Deputy Monforton has brought Mr. Briggs over. Deputy Monforton, you understand everything you hear today, this is all confidential and you can't repeat anything that you hear, correct?

DEPUTY MONFORTON: Yes, Your Honor.
THE COURT: All right. And Sandy, you understand that as well?
COURT REPORTER: Yes.
THE COURT: And Jes, you understand?
THE CLERK: Yes, Your Honor.
THE COURT: All right.
MR. WATSON: Your Honor, that Order doesn't address Mr. Roth's role. I would also ask that he be reminded (indecipherable).
THE COURT: All right, and so and in what capacity is Mr. Roth here today?
MR. WHIPPLE: Your Honor, because Mr. Briggs still maintains an attorney-client relationship with counsel --
THE COURT: Yes.
MR. WHIPPLE: -- we, and he's made references in his letters that he's basically indicating there's some ineffective representation.
THE COURT: Yes.
MR. WHIPPLE: Should it be required that any one of his legal team be required to testify Mr. Roth is here as our attorney to make sure that his attorney communications are

maintained and that privilege is maintained to protect Mr. Briggs' communications as well as our own.

THE COURT: Thank you, Mr. Whipple, I understand that. You know, counsel, and frankly, what I thought what I would do with this here, I guess who are the other people in the Courtroom, just for the record?

MR. WATSON: Your Honor, this is Mark Fullerton who has been the investigator on the case.

THE COURT: Very well.

MR. WATSON: Haley Ford who is my intern.

THE COURT: Yes.

MR. WATSON: And, Mari Lindsey who is a paralegal who's been dealing with Mr. Briggs, so, in their capacity as my staff.

THE COURT: Very well, all right, and so you folks understand as well that you can't repeat anything you hear at this hearing today. Do you understand that?

VOICE: Yes.

THE COURT: All right. Counsel, when I thought about this over the weekend, to talk about, I mean we have to preserve a record and

the record, obviously, of this hearing will be sealed as well. I thought about the most effective way to do this. I kind of thought that I would just put everybody under oath and then we would have a discussion but counsel, if you think, or if you want to go ahead and prepare, I mean, obviously Mr. Briggs needs to, he's going to have a right to hear what you say and I didn't know if I was going to have this position where Mr. Briggs would be questioning counsel but I guess, Mr. Whipple, so I understand then, you're prepared to go ahead and present testimony?

MR. WHIPPLE: Your Honor, I believe it would be our position that Mr. Roth, if he wants to come up here now, that would be fine.

THE COURT: Yeah, you can come on up, Mr. Roth. That's fine.

MR. WHIPPLE: Um --

MR. WATSON: As a housekeeping matter I'm presenting Mr. Briggs with a copy of any, of the documents that we think are relevant.

THE COURT: Oh, thank you. Okay.

MR. WATSON: And would just like the record to reflect that --

THE COURT: Mr. Briggs, those are the documents that the lawyers, apparently, they're going to talk about in this hearing.

MR. WATSON: I'm sorry, I -- you can look at that, but I think I (indecipherable).

THE COURT: There you go. All right.

MR. BRIGGS: Your Honor?

THE COURT: Yep.

MR. BRIGGS: I just have, I have two concerns.

THE COURT: Yes.

MR. BRIGGS: Nobody told me that this hearing was going to happen today until this morning.

THE COURT: Yes.

MR. BRIGGS: And the other one is that I'm not really sure what to do and I don't really have counsel that I can ask.

THE COURT: So --

MR. BRIGGS: And I don't really have any counsel to represent me here and I don't really know how to --

THE COURT: -- well, I guess, Mr. Briggs, let me tell you, this is where you stand, all right.

MR. BRIGGS: Yes.

THE COURT: First of all, there is a motion and I have no, they filed the two-page motion. Counsel, did you provide Mr. Briggs -- did he receive a copy of your Motion to Withdraw?

MR. WHIPPLE: He did.

THE COURT: All right. So, Mr. Briggs, when your counsel filed the Motion to Withdraw, that they left out, they were basically very vague about the reasons to withdraw. They gave no specific facts. That has never been placed in the record. So, I'm not sure exactly what they're going to say today but their point, what's going to happen today, is they're going to present their case and tell me why they think they should be able to withdraw. I have no idea what they're going to say. I'm going to hear it for the first time just like you are going to hear it for the first time. After they present their reasons then I'm going to go ahead and give you a chance to respond but, Mr. Briggs, as I understand from the record right now, you oppose the Motion to Withdraw; is that correct?

MR. BRIGGS: Yes, Your Honor.
THE COURT: All right. All right, so --
MR. BRIGGS: I opposed it signing saying that I don't know what to do and that I opposed it on the grounds that I believe that I should at least have a hearing and try to figure out what would happen although I --
THE COURT: All right. So, Mr. Briggs, what I, here's what I'm going to do today. I'm going to let your counsel present their case and their reasons to me why they wish to withdraw as your counsel in this matter and then after they present that then you and I, then we will have a conversation about what you think about what they're saying and what you wish to do, okay?
MR. BRIGGS: Okay.
THE COURT: But as of right now, you have not waived your right. I mean you haven't done anything. Right now you're opposing their request to withdraw so just by appearing at this hearing today you're not consenting to anything. Do you understand that, Mr. Briggs?
MR. BRIGGS: Yes, Your Honor.
THE COURT: All right. Now, just so we

put this, let's put this matter in context. The Information was filed in this matter on March 24th, 2014, charging Mr. -- the State of Montana filed that Information, received leave of Court from Judge Salvagni, or I guess maybe it originally started in Department 1 in front of Judge Holly Brown. At any event, on March 24th, 2014, that Mr. Briggs was charged with five counts: Count One, aggravated assault, a felony; Count Two, attempted sexual intercourse without consent, a felony; Count Three, assault on a peace officer, a felony; Count Four, escape, a felony; Count Five, failure to register as a sex offender, a felony. Later, on July 1st, 2014, that Information was amended to add a sixth charge of criminal possession of dangerous drugs, a felony. Right now this matter is set for, the trial is set to begin on February 17th, 2015 and counsel, how many days is it set for?

MR. WATSON: Five.

THE COURT: Five days, all right. So, trial is set. Judge Salvagni told me that he's, after the questionnaires went out, everything, given his excuses, that he's

expecting probably 200 jurors to show up on February 17th for trial, so we have that less than a month away. That's where we stand. So, I guess, counsel, Mr. Roth, however you wish to proceed, you may go ahead and present your case for your Motion to Withdraw.

MR. WHIPPLE: Your Honor, if I may, briefly?

THE COURT: You may.

MR. WHIPPLE: One of the dilemmas that obviously we have here is that Mr. Briggs does maintain the attorney-client relationship.

THE COURT: Yes.

MR. WHIPPLE: His communications to us are he enjoys an absolute privilege to all those communications.

THE COURT: Yes.

MR. WHIPPLE: So, it puts us in the tenuous position is that we cannot disclose any of those communications absent a waiver of that right to confidentiality and privilege. I don't think we can compel him to waive that and we're in a situation where our position is that we believe that there's a breakdown, a complete breakdown, of the attorney-client relationship.

However, to discuss why that has broken down would necessarily require us to disclose privileged communications made by us.

THE COURT: Separate from any actions that Mr. Briggs may have taken if there are such actions. You're just talking about what Mr. Briggs has told you, correct?

MR. WHIPPLE: Exactly.

THE COURT: All right. Mr. Briggs, this is what they're saying. Do you have -- I'm, my job today is to sort out this Motion to Withdraw, Mr. Briggs, to try to sort it out and come to some kind of resolution for Judge Salvagni.

MR. BRIGGS: Um hum (yes).

THE COURT: By the way they phrased the motion, Judge Salvagni isn't going to hear anything that you have to say to me today.

MR. BRIGGS: Um hum (yes).

THE COURT: This is all in front of me and I will keep it confidential. I'm just going to say, basically what I'm going to give Judge Salvagni my decision if I decide that today, that's the plan, is that yes, counsel should be allowed to withdraw or no, they should not.

But not only all the people in this room but even myself, I'm not going to say anything to Judge Salvagni about anything you say in this hearing today. I mean I don't even, I mean I understand the charges against you, but I don't even know you, all right, so you have, I'm impartial. What the attorneys, the question the attorneys are raising now is that they are concerned, I mean obviously you have had conversations with them. There's a dispute. They want to give their side of the story but to do that they want to be able to explain on the record things that you've said to them and then likewise you can explain what you've said to them as well.

MR. BRIGGS: Um hum (yes).

THE COURT: So, I guess, Mr. Briggs, that's my question to you. Solely in the context of this hearing on this Motion to Withdraw, are you going to -- and I might be able to override what your position is anyway, but I'm going to ask you -- is it all right if counsel tell me what they think you've said to them that has contributed to this breakdown of communication?

MR. BRIGGS: Um, in the absence of an attorney telling me that -- an attorney who is representing me, and on my side, telling me that -- I should do this, I think I'm going to err on the side of caution and say no.

THE COURT: All right. So, Mr. Briggs, now, are what you're saying today is that you, do you have another attorney in mind? Do you have counsel, because it becomes problematic. Do you have -- have you had conversations with other counsel?

MR. BRIGGS: Yes.

THE COURT: All right. So, do you have -- do you, are you, what are you telling -- do you have replacement counsel lined up or you have second, you getting second, opinions from other counsel or what are you doing?

MR. BRIGGS: Um, I have spoken somewhat with Sandy Selvey who works out of Billings.

THE COURT: Yes.

MR. BRIGGS: And he, because this hearing was filed so soon with so little notice --

THE COURT: Yes.

MR. BRIGGS: -- he can't make it today.

THE COURT: Yes.

MR. BRIGGS: It's very difficult for me to know exactly what I should do and how I should, I mean I'm going up against three lawyers and their lawyer and I'm just a guy.

THE COURT: Yep, I understand that.

MR. BRIGGS: I'm really scared and I don't know what to say or what to do when I don't have an attorney here to represent my interest.

THE COURT: All right, so --

MR. WATSON: We're still his lawyers. We do have a certain amount of responsibility to him and I think the Court knows that we understand how to discharge that.

THE COURT: Yeah.

MR. WATSON: The only thing that Mr. Whipple is alluding to is that, you know, under the rules once our credibility is challenged, we've got a right to correct the record and you've got the right to impose a *Gillam* Order.

THE COURT: So --

MR. WATSON: Secondly, there's a *Jones* case that we're concerned about where lawyers got in trouble for disclosing attorney-client communications in a Motion to Withdraw hearing which is why we went to the, you know, went to

the extreme here and got a second judge to come in so that Judge Salvagni will be insulated from this. I have no objection at all, nor does anybody else on the legal team to Mr. Briggs being represented. I don't know that the Court -- I don't know if we're at the point where the Court -- needs to make a determination about whether he needs counsel.

THE COURT: So, then counsel, I will tell you right now is that that I do not know this *Jones* case. What's the cite?

MR. WATSON: I don't have the cite but I can get it for you before the end of the hearing.

THE COURT: All right. Well, here's what I want to do. I'm going to decide this threshold issue right now to resolve this issue at the very beginning because I want to be very careful about this. If somebody can give me the cite I'll go into recess and I'm going to go read the case.

MR. WATSON: All right. It's also in the Code of Professional Responsibility, Your Honor.

THE COURT: All right.

MR. WHIPPLE: We'll step out and get the Internet.

THE COURT: Okay.

MR. WATSON: It shouldn't take but just a minute.

THE COURT: All right. So then while Ms. Whipple steps out so then we're in recess.

(Whereupon, the Court took a brief recess.)

MR. BRIGGS: Do you guys have a copy of all the letterd that you've sent me or just the letters that I sent you?

MR. WHIPPLE: I don't know what Chuck handed you.

MR. BIGGS: I don't have any of the letters that you guys sent me. Do you guys have them?

MR. WHIPPLE: With us? No, I don't think so.

THE COURT: So then, Mr. Briggs, as we go along with this hearing what, I mean I will tell you this is that after they tell me and I'm going to repeat this when we go -- actually, Sandy, let's, we're back on the record.

Mr. Briggs, we're back on the record. While we're waiting for Ms. Whipple, if you'll respond to your question that was off the record, after they present everything, all right, then I'm going to give you a chance to respond.

MR. BRIGGS: Okay.

THE COURT: And if you think that there is something in one of the letters that counsel sent to you that we don't have a copy of --

MR. BRIGGS: Uh huh.

THE COURT: -- then you'll be able to tell me that, all right?

MR. BRIGGS: Okay.

THE COURT: All right. Mr. Briggs, I understand that you're at a disadvantage today because you don't have counsel, but I'm going to try and work through this as best I can to try to protect your rights and I'm going to give you a chance to say what you need to say, all right, and that you get a -- that it's a full and fair hearing, okay?

MR. BRIGGS: Thank you, Your Honor.

THE COURT: All right, we're back in recess.

MR. BRIGGS: Also, are we able to get copies? The jail should have logs of when I received mail as well as when my lawyers came to visit me.

THE COURT: You know what, Mr. Briggs, why don't we, when we go back, when we get, here's what I suggest. I'm going to resolve this issue about what you actually said to them after I read this case; that whatever happens with that they'll present what they are able to present and then I'm going to give you a chance to respond but you should keep that in mind and then we'll talk about it, okay? If you think you're short anything to respond that's what we'll talk about, all right?

MR. BRIGGS: Okay.

THE COURT: Okay.

MR. WHIPPLE: And Kevin, those letters are in that book, notebook.

MR. BRIGGS: All the letters that you sent me?

MR. WHIPPLE: Apparently.

MR. BRIGGS: I am missing the letter that you sent me in October and it's not logged in here as being in here.

MR. WHIPPLE: Which letter?
MR. BRIGGS: Excuse me, not the letter that you sent me. There's a letter that Chuck sent me, that he sent me in October, and it should be in the mail logs as having been sent or being received.
MR. WHIPPLE: If you'll look at number eight. Is that the one you're talking about?
MR. BRIGGS: Number eight?
MR. WHIPPLE: Are there no tabs there?
MR. BRIGGS: There are no tabs.
MR. ROTH: Let me help you there, Mr. Briggs. I know where it is.
MR. BRIGGS: Thank you.
MR. ROTH: Is that the one?
MR. BRIGGS: Yes.
THE COURT: Marsha, while we're waiting, do you have a problem if Mr. Briggs has a pad, a notepad?
OFFICER: (inaudible).
MR. BRIGGS: Thank you, Your Honor.
THE COURT: You're welcome.
MR. BRIGGS: Your Honor, is it possible for me to get the testimony of other people into the consideration that goes into this

decision?

THE COURT: So, I think, Mr. Briggs, is that you may make that request, all right. So, as soon as they get done presenting their side --

MR. BRIGGS: Um hum (yes).

THE COURT: -- then I'm going to see what you want to do, okay?

MR. BRIGGS: Thank you, Your Honor.

THE COURT: All right.

MS. WHIPPLE: Sorry, Your Honor, I got locked out.

THE COURT: No, oh, that's right, we forgot the door. Sorry about that.

MS. WHIPPLE: The site is 278 Mont. 121.

THE COURT: 278 Mont. 121?

MS. WHIPPLE: Correct.

THE COURT: Very well.

All right, so we'll go back on the record. We're back on the record now. Counsel are present. Mr. Briggs is present. I've been advised that this case, the *Jones* case that is a Montana case that is causing counsel some concern on how we would proceed with this hearing, that the cite to that case is 278

Mont. 121. Mr. Briggs, I'm going to go back into recess and I'm going to go over to my office and I'm going to get the case. I'm going to read the case and I'm going to bring it over and I'll bring you a copy of that case as well, all right?

MR. BRIGGS: Thank you, Your Honor.

THE COURT: So, that's where we're at. So, Court is back in recess.

MR. WATSON: Your Honor, I'd like to give you one more thing to look at.

THE COURT: Yes.

MR. WATSON: Under the rules --

THE COURT: Yes.

MR. WATSON: -- if you look at confidentiality of information under 1.6.

THE COURT: One-point-six of the Professional Rules of Conduct, yep.

MR. WATSON: Yes, Your Honor, under b(3).

THE COURT: [B](3).

MR. WATSON: It says that the client, privilege may be waived in order to establish a defense on behalf of the lawyer in a controversy between the lawyer and client.

THE COURT: Okay.

MR. WATSON: And also to respond to allegations in any proceeding concerning the lawyer's representation of the client.

THE COURT: Very well. Thank you, Mr. Watson. Counsel, I'll be back very shortly.

(Whereupon, the Court took a brief recess.)

THE COURT: Court is back in session. You may be seated, Mr. Briggs.

MR. BRIGGS: Thank you.

THE COURT: Sandy, if you'd have the lawyers come back in. Sandy, would you give that to Mr. Briggs?

MR. BRIGGS: Thank you.

THE COURT: All right, we're back on the record. Mr. Watson, Mr. Whipple and Ms. Whipple are present along with their counsel, Mr. Roth. Mr. Briggs is present as well. During the break the Court had went and got a copy of the case cited by Mr. Whipple. That case being *State of Montana v. Troy Michael Jones*, 278 Mont. 121, 923 P.2d 560. The Court has considered, has reviewed *Jones, State v. Jones,* and also in light of Rule 1.6 of the

Montana Rules of Professional Conduct, the Court notes that Justice Gray, when she wrote the opinion, the majority opinion, in *Jones*, does talk about 1.6 and found basically that the attorney's actions in *Jones* in disclosing things told to him by his client, did not fall, were not protected, were not allowed to be disclosed under Rule 1.6 and therefore, that his disclosure of those was improper in the context on a hearing on motion to withdraw as counsel. But after thinking about it and looking at Rule 1.6 and understanding how we have a -- I think this is a different situation here. Counsel have moved to withdraw. I'm not exactly sure what counsel are going to tell me but the fact that 1.6 does allow, specifically allows, counsel to may reveal information relating to the representation of a client -- may not reveal information relating to the representation of a client -- unless the client gives informed consent. The disclosure is impliedly authorized in order to carry out the representation or the disclosure as permitted by paragraph (b). [Rule] 1.6(b) states: A lawyer may reveal information relating to the

representation of a client to the extent the lawyer reasonably believes necessary and there are several sub-sections but sub-section (3) applies in this case to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and client. I think Rule .6 [sic] with the added protection for Mr. Briggs in that I'm conducting this hearing in lieu of Judge Salvagni conducting the hearing, that I'm going to grant counsel's request that, and I understand Mr. Briggs objects to this, but over Mr. Briggs' objection, that I'm granting counsel's request. You may disclose as part of this hearing your communications back and forth with Mr. Briggs so that I can hear the full story and decide this issue given the important nature of this case, the pending trial, the six felony charges against Mr. Briggs, it's a very serious matter and I need to sort this out. So, I'm granting your request, Mr. Whipple, over Mr. Briggs' objection, you may share with me information that Mr. Briggs has told you. That's the Court's ruling.

MR. WHIPPLE: Your Honor, may we have a

moment to discuss this with Mr. Roth?

THE COURT: You may.

MR. WHIPPLE: Okay. Thank you, Your Honor.

MR. WATSON: I would like to clarify the record, Your Honor. Also, Mr. Briggs' substitute counsel was notified of this hearing personally by me and my investigator on Friday.

THE COURT: Yes.

MR. WATSON: And it was discussed with him and he made a decision to not come for whatever reason.

THE COURT: I understand. That's Mr. Selvey, correct?

MR. WATSON: Yes, Your Honor.

THE COURT: All right.

MR. WATSON: I just wanted the Court to be aware that we were not trying to sandbag Mr. Briggs.

THE COURT: I understand, Mr. Watson.

MR. BRIGGS: Your Honor?

THE COURT: Yes, Mr. Briggs.

MR. BRIGGS: My only question is that if that sub-section (b) --

THE COURT: Yep.

MR. BRIGGS: -- does that mean that the attorney-client privilege is waived only if necessary for the attorney to defend themselves?

THE COURT: As to defend themselves in the nature of this controversy, yes.

MR. BRIGGS: So, if I'm not making allegations against them do they need to defend themselves?

THE COURT: Yes, because they have moved to withdraw. They have a legal grounds to withdraw. You have a position why they shouldn't withdraw. They have a -- Mr. Briggs, they have a right to respond to that, all right, with the point being that nothing in this hearing will ever be repeated to Judge Salvagni nor is it a matter of public record. So, it's, your, I have to sort out this issue because Mr. Briggs, you have this trial looming. You have very serious charges against you and I have to decide what's going to happen with your counsel.

MR. BRIGGS: Okay.

THE COURT: And it's very crucial, I mean I understand you object to that and your

objection is noted, but I have to sort this out given the serious nature of what's going on around you and to do that I need all of the information, all right. That's the basis for my ruling.

MR. BRIGGS: Thank you for clarifying that for me.

THE COURT: All right, you may go ahead, counsel.

MR. ROTH: Chuck.

MR. WATSON: I didn't think they were even going to let me participate.

(Whereupon, the Court recessed while counsel confer in the foyer.)

THE COURT: All right, we're back on the record. Counsel have returned. Mr. Whipple then, counsel are ready to proceed?

MR. WHIPPLE: Your Honor, Mr. Roth will now be proceeding.

THE COURT: Very well, Mr. Roth, you may proceed.

MR. ROTH: Thank you, Your Honor. With the Court's permission, I will call Mr. Watson.

THE COURT: You may.

MR. ROTH: And perform the questioning on behalf of their interests.

THE COURT: Very well, you may, and Jes, would you go ahead and swear Mr. Watson in?

HERMAN A. "CHUCK" WATSON,

called as a witness herein, after having been duly sworn, was examined and testified as follows:

THE WITNESS: Thank you, Your Honor. Your Honor, may I take some materials?

THE COURT: You may. Those are the same documents that you're going to be referring to those in your testimony. For the record those are the same documents you've provided to Mr. Briggs?

THE WITNESS: Yes, Your Honor.

THE COURT: All right, and Mr. Briggs, so you understand how this will work, after, because we're going to do this as a formal hearing --

MR. BRIGGS: Um hum (yes).

THE COURT: -- after Mr. Roth asks Mr. Watson his questions you have the right to ask Mr. Watson questions as well.

MR. BRIGGS: Okay.

THE COURT: And Sandy, so what happened to the tall microphones?

COURT REPORTER: I took them out. They were worthless.

THE COURT: They were worthless.

COURT REPORTER: I put these back.

THE COURT: So these work just as well?

COURT REPORTER: Really good.

THE COURT: All right, very good. So, Marsha, just when, after, actually, Marsha, just now would you slide that microphone closer to Mr. Briggs, please? Thank you.

All right, Mr. Watson, would you please state and spell your name for the record, please?

THE WITNESS: Chuck Watson, C-H-U-C-K, W-A-T-S-O-N.

THE COURT: You may go ahead, Mr. Roth.

DIRECT EXAMINATION

BY ROTH:

Q. Mr. Watson, you are the lead attorney on, lead defense attorney, on behalf of Kevin Briggs, is that correct?

A. Yes.

Q. You're associated with Todd and Ashley

Whipple?

A. Yes.

Q. And you've fled a motion with the Court seeking to be removed as counsel for Mr. Briggs, correct?

A. Yes.

Q. And Judge Brown has just indicated that you would be allowed to go into matters that may touch upon the attorney-client or that involve the attorney-client privileged communications; you're aware of that?

A. Yes.

Q. Yet, it's our intent here today, is it not, to be very circumspect as far as disclosures regarding attorney-client privilege, correct?

A. Yeah, just to be clear, Mr. Briggs asked a question of the Court prior to the last recess, to the effect that he was wondering whether our waiver that we're being permitted by the Court that the attorney-client privilege would only extend to attorney-client matters that we need to breach in order to defend ourselves against what we perceive to be false allegations.

Q. Well, really the issue here today is your request for withdrawal based upon a breakdown of the attorney-client relationship, correct?

A. Correct.

Q. And that is the basis of the motion?

A. That is the basis of the motion.

Q. All right.

A. It's been called irreconcilable differences in other States --

Q. Sure.

A. -- but we don't think that we can go forward without a conflictual possible relationship with Mr. Briggs.

Q. So, we would like to confine any disclosure of communications between counsel and Mr. Briggs to that narrow issue, that is, the breakdown in the attorney-client relationship?

A. Correct.

Q. Okay. The, can you just state generally for the Court and we'll go into specifics, why it is you believe that there has been a complete breakdown in the attorney-client relationship.

A. Well, I've tracked a pattern of deceit and manipulation in the form of misrepresentations by Mr. Briggs regarding what members of the defense team have said, misrepresentations for one thing to me of things he claims that I've said to him of a material nature that directly affect strategy in this case which could have very meaningful effects for Mr. Briggs. Furthermore, in addition to misrepresenting me to myself, he's misrepresented me to other people on the defense team. He's misrepresented them to themselves and misrepresented them to other members of the defense team. Furthermore, he's misrepresented all of us, particularly me, to Judge Salvagni in two different letters, all of which, or the vast majority of which, were misrepresentations, deceitful and manipulative and aimed directly at the effectiveness of his trial counsel and I can also address our effectiveness if that's a relevant issue. Does that answer your question?

Q. Yes. Has Mr. Briggs made any threats towards you?

A. He has made threats toward me.

Q. What were the nature of those threats?

A. Well, he's made a lot of different threats, one of 'em, well, the first one that was of concern to me was to start acting out on his own behalf by filing motions in Court, by insisting on arguing motions in Court, and by threatening me with retaliation if I didn't do certain things which ultimately took the form, and I think this will go on, but right now they've just taken the form of misrepresentation to other members of the trial team but more seriously misrepresented -- misrepresentations -- of my conduct to the tribunal in this case being Judge Salvagni which in my opinion places me in a direct conflict with him because he has challenged my veracity with the tribunal before whom I'm going to be defending him.

Q. Has Mr. Briggs made misrepresentations in his correspondence and motions to the Court and misrepresented your position or the defense team's position on certain issues?

A. Not only that but he's indicated to Judge Salvagni that he's doing this for the purpose of manipulating me.

Q. Okay. And those --

A. If you look at his second letter he indicates that he's told us that he's going to file letters, or send letters, to the Judge in order to force us to do certain things and all that's fine except for the fact that we had either already done 'em or were in the process of doing 'em and I can't understand any basis for him taking that position with the Court except to put us off balance and undermine our credibility with the Court and put us in a position where we feel further behooving to submit to his manipulation or he'll retaliate against us further with further misrepresentations to the Court.

Q. Has Mr. Briggs threatened to make allegations or claims that for ineffective assistance of counsel?

A. Repeatedly. He has threatened me. I don't know who else he's threatened but he's threatened me with Bar complaints, ineffective assistance of counsel claims, malpractice law suits. He's threatening to fire me and "get all of his money back" but most seriously in my last conversation with him after which I

terminated contact with him because we had open conflict at that point and I felt threatened and didn't feel comfortable having any more conversations with him but he threatened to embarrass me in Court or with the Court and I can give you the context to that if it would be helpful.

Q. Well, let me, let me move on to something else. Again, we want to just in general terms describe where the breakdown has come.

A. Well, I think there's a reason that the Court needs to be aware of my concern about his acting out and that's because he's openly defied counsel in previous Court hearings by misbehaving and he's directly defied orders of counsel to comply with the orders of the Court personnel and it's, he's exhibited an unwillingness to comply with direction by counsel in the Courtroom and a willingness to act out in the Courtroom which is also another form that his embarrassment of me could take.

Q. Has Mr. Briggs insisted that the defense team assert motions that are contra-indicated in the best judgment of the defense

team?

A. Well, it's kind of complicated. For one thing, early on in the case he adopted the position that he did not want any delay because he felt and he's got, this is in writing, and I can allude to it in my documents, but he indicated that his only chance of coming out of this was a speedy trial motion and so he prohibited us from doing anything that would result in any delay which I don't think, for example, let me just use venue change. I don't think a venue change would have been in his best interest and that was discussed and decided but that in and of itself would have constituted delay which would have affected the speedy trial analysis and we were denied the right to engage in any delay. Secondly, there were other motions that he wanted us to file I think. It's not hard -- it's not easy for me to understand exactly what he was getting at -- but one of which was to do something about a prior conviction that he had that he was concerned about affecting him pre-trial which was not in my opinion reasonable and secondly at sentencing which would have also caused

delay and which could have been satisfied after trial. Also, a matter of some evidentiary testing came up and we had already made a determination with regard to testing based on the fact that we weren't getting good advice from our counsel about what to test and what not to test because it was resulting in evidence that wasn't helpful to us but recently he brought up the testing of some knives that were allegedly involved in this incident. I'm, you know, familiar with forensic evidence. I'm a member of the American Academy of Forensic Sciences and addressed the international meeting in San Francisco. I've also edited book chapters on expert witnesses and I engaged three crime scene experts out of Jacksonville Florida. His name was given to me by Rich Lubin, one of the top three criminal lawyers in Florida and these knives that Mr. Briggs insisted on testing we were informed by that source at least as well as a pathologist that there wasn't a reasonable -- there wasn't a reason to believe that those knives would have demonstrated anything forensically significant if admissible. So this notion that we declined

to test the knives took the form of threats to file motions but it also took the form of attacking one of our counsel and our investigator because Mr. Briggs is now making representations all consistent with what I think is a pattern throughout this case of attempting to create an ineffective assistance of counsel claim to the effect that he insisted to, I believe, my investigator and Ms. Whipple, that these knives be tested months ago and I can testify that this is the first that I've heard of it. The matter has been discussed. We have a statement from an expert witness to the effect that there's no cognizable reason from a forensic standpoint to test those knives and it's within our discretion to not insist on testing that we don't believe is necessary and secondly which might actually be counterproductive.

Q. Mr. Watson, you've been handling major criminal defense cases for how many years?

A. Over 30.

Q. Okay. Do you feel that Mr. Briggs and you have a relationship sufficient for you to effectively move forward and discharge your

professional obligation to provide him with a defense to these charges?

A. No.

Q. Do you feel it would be in Mr. Briggs' best interest for the Court to allow you to withdraw as his counsel?

A. He has consulted two other lawyers about representing him on this case, one of whom was Eric Brewer. The other of whom was Sandy Selvey. It's my impression that he's been discussing legal matters with his ex-stepfather who is also a lawyer, Neil Halperin, and we have a record with a request that we provide Neil Halperin with all the legal documents. He has exhibited a complete lack of confidence in my ability. He has criticized my ability to me. He's criticized my ability to everybody on this defense team including my paralegal and Judge Salvagni. He's declared me ineffective and he insists on keeping me on the case and so my answer would not be based on what I would want if I were he. My answer would be based on what I would assume given what he's done to the effect that I can't imagine any reason why he would want a lawyer

who he feels he needs to threaten, who he's misrepresented, and who he claims to be ineffective to represent him at trial unless he wanted me to be found ineffective for some benefit.

MR. ROTH: Thank you. I have nothing else.

THE COURT: Mr. Briggs, now, do you have any questions for Mr. Watson, and Mr. Briggs, I need to tell you that, and I tell this to all *pro se* people who are in hearings without counsel, that you may go ahead and ask Mr. Watson questions but I don't want you to argue with him, all right.

MR. BRIGGS: Okay.

THE COURT: So, do you have any questions for Mr. Watson?

MR. BRIGGS: Yes, sir.

THE COURT: All right. You may go ahead and ask them and you can ask them from there. It will show up all right on the record. So, you may go ahead and ask your questions.

MR. BRIGGS: Okay. I have a question for you first.

THE COURT: Yes.

MR. BRIGGS: And should I stand?
THE COURT: You don't have to stand.
MR. BRIGGS: Okay. Thank you. If I want to contest some of the claims that Mr. Watson has made what is the appropriate manner for me?
THE COURT: The appropriate is that after the attorneys get done presenting their witnesses and testimony and evidence then Mr. Briggs you will have a right to testify, all right? And at that time you may say anything you wish to say in response to what any witness says, all right? So, you will have a right to testify.
MR. BRIGGS: Okay. And I'm sorry, what was your name?
MR. ROTH: Dan Roth.
MR. BRIGGS: Dan Roth. So, you're kind of representing both of us here?
MR. ROTH: No.
MR. BRIGGS: You're representing them?
THE COURT: He -- he has to -- he's representing counsel to make, because this is a formal hearing, and it's so it's they don't have to ask themselves questions, all right. They're doing it -- he is acting as their

counsel to preserve the record, Mr. Briggs.

MR. BRIGGS: Okay. And who should ask me questions?

THE COURT: Then Mr. Briggs, what we're going to do is when it's your turn that counsel, I will ask them to waive that narrative objection. If they make a narrative objection I'm going to overrule it and you'll just be able, no one is going to ask you questions. You may say what you want to say.

MR. BRIGGS: Okay.

THE COURT: I will, I'm going, I'll give you the right to do that.

MR. BRIGGS: Thank you, Your Honor.

THE COURT: All right. So, Mr. Briggs, do you have questions for Mr. Watson?

MR. BRIGGS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BRIGGS:

Q. Mr. Watson, what, can I, could I ask you to please list for me specifically what your major complaints are? There are a couple of things here in this four-page thing at the beginning that look like you didn't mention. I'm just, I just want to make sure that I have

the full list of your complaints about my behavior down here on record for the Court and for me, please. When you say misrepresenting you mean lying, right?

A. Yeah.

Q. Okay.

A. Okay. I am going to qualify this answer by indicating that I'm not going to go into misrepresentations about what happened in this case, the substantive case, but only about what happened in the relationship and I'll just start by giving you a laundry list. One, I don't think you -- well, I know you didn't tell the truth about the whole Pete Highland, I don't even know what it was, sideshow.

THE COURT: So, Mr. Watson, just so we clarify for the record, that regards Officer Bachich, is that correct?

MR. WATSON: Yes, Your Honor. He was an individual and I'm not sure what story is here but back in September we started hearing about an individual who alleged to have been charged with felony assaulting Bachich. Mr. Briggs alleged that this individual told him that the matter was investigated and it was determined

that Bachich turned his audio off and assaulted this boy and that he was told on by the other officer who was there; that the felony assault charges were dropped and that Bachich was disciplined. And, so, back in September we told Mr. Briggs that we were not going to contact Mr. Highland because, in my opinion, the set up on this was to file a motion for production of Bachich's personnel file which we did, asked for anything that might pertain to his veracity, particularly in the area of crimes of this nature. On the day that we got back the Order from the Judge indicating that there was nothing in the personnel file to support what we were alleging, it's my recollection that that triggered a letter to I'm not sure, I think that triggered a letter to Judge Salvagni to the effect that we were ignoring -- well, it certainly triggered a reaction from Kevin to the effect that we had screwed the whole investigation up and ruined any chance of him getting acquitted of the felony assault charge. On the same day I called the lawyers who were involved in this case. I checked the record in open court in

Municipal Court. I determined from his defense lawyer that there was never any felony assault charge, that there was never any question about any audio being turned off, there was never any indication that the other officer stated that Bacich assaulted this boy. In fact, the other officer did claim that he didn't see anything and the charge was not dismissed and there was I was not left, after my conversation with the Public Defender, with the impression that Mr. Highland was a reliable historian. I had the same conversation with Kyla Murray who prosecuted this case. She had the same opinion regarding Mr. Highland's veracity and told me identically the same thing that the defense lawyer told me to the effect that nothing, that Pete Highland told, or allegedly told Mr. Briggs was true. I do recall that I was told in front of a witness that Mr. Briggs had discussed this with Mr. Highland and seen the documentation of the investigation none of which turned out to be true. Now, there was a question about I had indicated in one of my responses that Mr. Briggs misrepresented the question of whether he had ever given us Mr.

Highland's telephone number. We discovered that he had had, in fact, given it to us back in September but we had no trouble retrieving it immediately upon needing it which was when we got the Order back from Judge Salvagni which was exactly when I told Mr. Briggs that we would close the loop on this Highland thing and secondly, the individual was interviewed by Mr. Fullerton and gave him a convoluted story vaguely resembling what he allegedly told Briggs but not one that I would feel comfortable presenting to a jury. So, in other words, that whole thing collapsed like a wet chip bag on slight investigation. In further response to Mr. Briggs' question he -- another thing is despite his representations to the contrary, I never heard Pete Highland's last name and I don't think anybody else on the defense team did either until Friday before last, or maybe it was last Monday, which is the last time, I think -- well, now, I think I might have head it from Ashley or Mark, but he alleged that we were given this name months ago and that's simply not true. Secondly, with regard to these knives, there was now Mr.

Briggs is claiming that he told us to test the knives which is absolutely not true. There was discussion about the knives. I mean the set up on the knives and the reason that none of the experts think they have any forensic evidentiary value and which we all agree with is that the apartment where this happened the residence where this happened, was being used by both Mr. Briggs and Ms. Wolf and they both had access to and undoubtedly handled or could have handled any or all of the knives in the residence. I did read where Mr. Briggs insinuated that if they tested one of those and it had an absence of Mr. Briggs' fingerprints on it that that would be indicative of something but if you contextualize it the Court can see that it has scarce materiality and not a whole lot of argumentative value. And, we've requested that the knives be tested and another reason that we didn't want the knives tested is because we have, upon Mr. Briggs' advise had some testing done which was counterproductive to the defense and now there's an insinuation that we created that problem by having the testing done and I'm not going to go into that

unless I have to but the reality is is that it damaged Mr. Briggs' case and it was of his own doing. He misrepresented to me what Ashley told him the Friday before last regarding the knives to the effect that the knives -- he indicated that she told him Friday before last that the knives -- were out of evidence and I didn't need to talk to her to know that (1) she didn't tell him that; (2) it wasn't true. He called me and I guess it was Monday and that's when we -- that's when I finally realized that I couldn't go forward with Mr. Briggs is because he started trying to tell me that Ashley -- and he's been pitting me and Ashley against each other and me against the Whipples in general ever since we kind of quit acquiescing to unreasonable demands and continued to indicate to him where we thought he had a chance to come out on this and he declined to follow any of our advice and in fact I got to thinking about it this weekend and kind of patterned it and whether he's intending to or not when you have good lawyers who are telling you what you need to do and you tell them to do the opposite you've got a

pretty good roadmap for ineffective assistance of counsel because if somebody doesn't take my advice at some point they're going to render me ineffective. In fact, that's why the Rules of Professional Conduct give me the right to withdraw from a case where I'm getting driven down a road that it's not a matter of sensibilities. I think the Court knows that the threat of embarrassment is hardly a threat to me and but I do think that I have a duty to the Court not to come into Court and offer things that aren't -- that don't hold up, period, particularly if they wouldn't be helpful even if they did hold up but for him to tell me that Ashley had told him something Friday that was material to my relationship with her, set me at odds with her.

And then, secondly, there came up the question of what to do with a thumb drive full of social media data that was gathered from dark Internet sites that Mr. Briggs gave me the names of and gave me Ms. Wolf's password and instructed me to gather all the screen shots from the social media sites in order to use them to impeach Ms. Wolf which I didn't think

was an effective strategy and I have a disclosure deadline coming up and I'm trying to get Mr. Briggs on Monday to tell me what to do with this what I think is impeachment on a collateral issue, not material, and extremely prejudicial to his case, completely lacks probity and it's going to do nothing but inflame the Court. The other problem with it is we're in kind of a standoff with Mr. Lambert about how we're going to get access to Ms. Wolf and if we produce those photographs of her in what I would consider embarrassing circumstances it's not going to do anything to (1) get us access to her; and (2) have her in any position to have anything helpful to say about Mr. Briggs at sentencing and I was told -- first of all I was told -- that well, I was cursed and told that he didn't care about her sensibilities because she tried to kill him. Secondly, I was told that he didn't tell me to collect that information to begin with until I confronted him with the questions of how I would have gotten it without the passwords that he gave me. Furthermore, I have it in writing from him in two different places in this file

that he told me to get it and what to do with it. So, here I am in a conversation where he's already misled me with regard to what my trial counsel, co-counsel has said to him in order to manipulate me into doing something that I consider frivolous which is to jump into this whole knife thing which was also inconsistent with his demand that we not further delay the trial. I mean I've already been through two suicide attempts with him and been told that he's going to hang himself if he doesn't get -- if he gets -- any jail time and now I'm under threat of embarrassment if I don't file these motions that I don't want to file but the main problem came in where I wind up with a complete logical inconsistency because I've got a client who told me to gather this and cursed me the day, the same day, when I told him I was concerned about using it and then in the same breath he told me to use it. So, I've got him telling me two different things and I just didn't disclose it, but it left me in a position of being open to an allegation of ineffective assistance of counsel regardless of what I did because he had told me to do two

things which were mutually exclusive and neither one of 'em were pivotal to the case but one of 'em was extremely prejudicial.

Furthermore, he has openly defied counsel in open Court. At the last bail hearing he was told repeatedly by Todd to quit looking at the gallery because the guards were telling him to quit looking at the gallery and as soon as Todd told him that, I was watching this, he looked Todd right in the eye and almost jumped into the gallery in complete defiance of Todd and I told Todd later if the guards had been looking at Kevin the way Todd was I would have had to object but it's gotten to the point where he, when he's defying us to the effect we feel challenged and threatened personally then the amount of trust that exists has got to be at least circumscribed and I believe well beyond the point where we can effectively represent him.

He's threatened to start filing what we believe, and this is all in writing, frivolous motions, if we don't obey his orders. He's misrepresented in a letter to Judge Salvagni about this Court clothes issue. He's

misrepresented to me what the, what I'm supposed to do with this social media stuff that we've been telling him for nine months is going to kill him if we try to play with it in this case. He's threatened me with IAC claims, Bar complaints, being fired, malpractice. He's threatened to embarrass me by creating a conflict by taking a hostile position for purposes of manipulation. He's informed me of -- he's been informed by us over several months of our intent to withdraw for fraud, threats, false allegations, false accusations, attempts to force us to suborn perjury and attempting to create a false record about ineffective assistance of counsel. He started sending letters to me addressed to Team Whipple and with the direct purpose of undermining my authority with the defense team and we don't have that kind of team to begin with. Everybody knows who's running the show and taking all of the responsibility, but I've got a duty to, you know, protect my co-counsel as well.

Now, we've asked -- as I've said, for these knives to be processed -- we filed a

motion to dismiss for speedy trial. Neither of those motions do we have any confidence in. It's troubling to me -- well, for one thing, a lot of this event strategy that he is asking me to engage in is unethical because he's asking me to defend this whole case by arguing inferences from evidence that doesn't exist and I know it doesn't exist, and I mean it's unethical for one thing.

Secondly, Judge Salvagni is not going to let me get away with it and thirdly, I'm going to be in front of the Court with a -- which a lawyer should never allow himself to get in this position and far too many do -- but I'm going to be in Court trying to carry a client-mandated agenda that is inimical to the Rules of Professional Conduct and also inimical to the Constitution because it's *ab initio* I think an ineffective assistance on my part under the Sixth Amendment and it's all client mediated and I can't accede to it which leaves me in a position where I'm in a standoff with my client with regard to how we're going to proceed at trial and I can just assure the Court that it's not going to inure to Mr. Briggs' benefit or to

my benefit to be in front of a jury with different agendas.

Now, in, on the 16th of January, he sent a letter to Judge Salvagni admitting to using letters to Judge Salvagni to manipulate us to do things, misrepresenting to Judge Salvagni what Ashley Whipple told him about the knives, misrepresenting to Judge Salvagni the situation about the Court clothes. I think Ms. Whipple may have already bought those Court clothes before he even filed his motion with Judge Salvagni and I was making proactive attempts to determine whether he'd be allowed to wear Court clothes to a motion hearing and once I determined that was reasonable I don't take, I mean, don't take this wrong, Your Honor, I mean I try to accede to my client's wishes, but I'm not going to jump over myself to do something the client tells me to do if I think it's inconsistent with my duty as an officer of the Court and with regard to this thing about wearing Court clothes at hearings, I'm frustrated about it but I can tell you that things have developed during my lifetime to the point where I understand why there are people

in the Courtroom who need to be in orange where they can be isolated in the event of a situation for the protection of (1) the accused; secondly, his counsel, which is sort of the order in which I've placed importance, and everybody else in the Courtroom, so I don't want to jump in the middle of and neither does the Court of the Sheriff's right to control the, you know, certain aspects of the security decorum of the Courtroom unless it's necessary and when I found out that there were situations where you all allowed clients under certain circumstances to come to Court in Court clothes -- I mean in street clothes -- and Mr. Lambert was sympathetic with my request then we got the motion filed and got it granted and everything went fine. But to imply that we weren't going to do anything is just an attempt to get us in a position to be able to embarrass us and further manipulate us. He admits in his letter to Judge Salvagni that he had to threaten me because "we are not doing our job". Now, we've had this case reviewed by a medical examiner, chief forensic pathologist, strangulation expert in Eugene, Oregon, for the State of

Oregon. We've had him polygraphed and psychologically evaluated. We've had him -- we've had all the evidence processed by crime scene experts. We've interviewed every witness he wanted interviewed who would talk to us and we've discharged and then we've filed a host and won some, we filed a host of sophisticated motions, one of which is, you know, I think probably about the only thing that he's really got going for him right now out of this whole motion practice. We are circumscribed not to the point of being ineffective but I'm not sure that wasn't the plan in our ability to file motions because we couldn't file any motions that would delay the trial.

And then after accusing us of all of this, he declines to consent to our withdrawal even though he says we're ineffective. And I'm sure the Court realizes that I'm well aware of Rule 1.16 and Mr. Briggs signed a contract indicating that he would be truthful with us, cooperate with us, communicate meaningfully with us and in exchange we agreed to do certain things but we also indicated to him that there were limits to our representation and that we

couldn't endorse his moral views, his agendas, we could not assist him in conduct that is criminal or fraudulent, and that if he's expecting assistance not permitted by law or by the Rules of Professional Conduct, it's been explained to him the relevant limitations on our conduct the first of which is a duty to withdraw and at a certain point a duty to not take any further action because of what we perceive to be a direct conflict between our obligation to the client which I place first, my obligation to the tribunal which I place second, my obligation to co-counsel which I place third, and my obligation to myself, and I think that you might have noticed that the first person I put on that list was my client.

THE COURT: Thank you, Mr. Watson. Mr. Briggs, did, your question --

MR. WATSON: Does that answer your question, Mr. Briggs?

THE COURT: Mr. Briggs, did that question come from, is there a letter in those documents? Is there a letter? Did you receive a letter; is that a letter from Mr. Watson that had a list of their issues? Is that where that

comes from?

MR. BRIGGS: I did receive a letter and there's also a hearing preparation motion to withdraw. It kind of describes a few things. The things that -- I just want to make sure that -- I'm not going to be surprised by anything else is the reason that I'm asking this.

THE COURT: I understand, Mr. Briggs.

BY MR. BRIGGS:

Q. I want to make sure that you have covered all of your problems that you have with me as well as anything that you think might get in the way of your ability to defend me properly.

A. I feel physically threatened by you.

Q. Why? Have I ever threatened you?

A. Implicitly.

Q. How have I threatened you, Chuck?

A. You've done everything but physically threaten me which is where I see this going and I don't feel comfortable sitting next to you at counsel table.

Q. You think I'm going to beat you up?

A. I don't know.

THE COURT: You're welcome.

(Whereupon, the Court took a short recess.)

THE COURT: Let the record show Mr. and Ms. Whipple are present. Mr. Watson is present with counsel, Mr. Roth. Mr. Briggs is present in the Courtroom as well. Counsel, because of the time issues in this case, what I'm going to do is I'm going to do my best to dictate my Findings and Conclusions into the record and then as per Judge Salvagni's Order, I'm going to dictate those into the record and then what I will do is I will have -- Sandy will do a transcript of those and then I will file those, the Findings and Conclusions that support the Order will be filed under seal. The actual Order itself which is just a short order, will be filed and I believe that will be a public record unless -- no, the Order itself will be filed under seal. What Judge Salvagni orders to be disclosed will be up to Judge Salvagni. at this point, at some point, well, that's what I'm going to do. All right.

So, to start with then, these are the

Court's Findings of Fact. The Court has considered all of the evidence that had been presented at this hearing, the testimony of Mr. Watson, the testimony of Mr. Briggs, the three exhibits that were introduced into the record, Exhibits 1, 21 and the third one, I believe, was 24. The Court first considered the testimony of Mr. Watson. Mr. Watson testified in detail regarding his, the issues that counsel have with Mr. Briggs. Mr. Briggs does not agree with all of those allegations, but just to summarize those for the record, Mr. Watson first of all testified that Mr. Briggs had engaged in deceit; that he had told different things to counsel and misrepresented to counsel the positions of co-counsel; that Mr. Briggs had threatened Mr. Watson with ineffective assistance of counsel claim. He threatened to embarrass him in Court. He threatened to turn him in to the Commission on Practice. He threatened to advise Judge Salvagni of certain things. Threats were made including to the point where that Mr. Watson feels physically threatened by Mr. Briggs. That Mr. Watson also testified that there was a

dispute between Mr. Briggs and counsel regarding strategy in this case; that Mr. Briggs insisted on pursuing certain defenses or tactics in this trial that counsel disagreed with that was over counsel's objection; that Mr. Briggs defied counsel's instructions regarding in Court their instructions to Mr. Briggs that he should follow the instructions of security officers when Mr. Briggs appeared in the Courtroom; that Mr. Briggs refused to follow those instructions; that Mr. Briggs was unhappy on -- did not believe that Mr. Watson and counsel had made good on their commitments to him regarding whether it's to come to see him or provide him with counsel -- or, excuse me, provide him copies of evidence; that he also on one hand directed that counsel do everything possible to get this matter to trial as soon as possible, yet on the other hand then complained that counsel did not file certain motions that would have contradicted his request to have a speedy trial. So, in effect, Mr. Watson had testified that Mr. Briggs had placed counsel in an impossible position of getting the case to trial as soon as possible

yet to file motions that would have delayed the trial. That Mr., though this is not totally binding, that Mr. Watson also testified that he believed that Mr. Briggs had not complied with paragraph 3 of the, of his fee agreement with counsel that required, and to quote paragraph 3: "That client shall be truthful with attorney, cooperate with attorney, keep attorney informed of developments, abide by this contract, to pay attorney's bills on time and keep attorney advised of client's address, telephone number and whereabouts. By signing this contract client understands the failure of client to advise attorney of change of address, telephone number and/or whereabouts or lack of communication shall be grounds for attorney to withdraw as counsel of record for the client."

That basically with that, that under this agreement, that Mr. Briggs had a duty to cooperate with counsel and that he had not been cooperating with counsel. Also that Mr. Briggs had engaged in this conduct where Mr. Watson felt that Mr. Briggs was basically setting up counsel for an ineffective assistance of counsel claim by taking these adverse

positions. Mr. Briggs, I note, has written separate letters to the Court. Those are filed under seal. Mr. Briggs also filed two separate motions that were unsigned and they are in the Court file. I do not believe they are going to be adjudicated by Judge Salvagni. I believe one of those motions has to do with the whole issue with Mr. Highland. So, Mr. Briggs has, within the last 30 days, in the last 20 days, has started to engage in representing himself, filing documents with the Court without his counsel's permission.

MR. BRIGGS: Your Honor?

THE COURT: So, Mr. Briggs, when I'm done I'll give you a chance to respond --

MR. BRIGGS: Thank you.

THE COURT: -- because I'm just setting out, I understand that you dispute a lot of this, Mr. Briggs, but I'm going to and I will state that on the record.

That Mr. Briggs has threatened to file frivolous motions; that Mr. Briggs did file a motion on his own regarding the right to wear street clothes at all hearings, not just at trial; that counsel, Mr. Watson testified, they

were going to file that motion and I'm not sure exactly whose motion the Court granted, but Judge Salvagni did grant that motion. That Mr. Briggs had threatened Mr. Watson with bar complaints, with law suits, and that you would -- that Mr. Briggs -- had threatened to embarrass counsel in open Court at trial.

Mr. Briggs himself disputes many of those allegations but as I listened to Mr. Briggs' testimony it became clear that there are serious differences between counsel and particularly relating to strategy and that Mr. Briggs further testified that ultimately that he had no confidence in these counsel to represent him at trial. Those are the Court's Findings of Fact.

Based upon those Findings of Fact the Court draws the following Conclusions of Law. The Court looks first to this Montana case, *State v. Jones* that had been cited earlier during the hearing to set forth just the general law of withdrawal and there is not a lot of law about this. That under Montana law that the Sixth Amendment to the United States Constitution and Article II, Section 24 of the

Montana Constitution guarantee a criminal defendant the right to the assistance of counsel. Mere representation by counsel is not sufficient, however, and the assistance must be effective to give true meaning to that right and to the right to a fair trial. A criminal defendant's constitutional right to effective assistance of counsel is comprised of two correlative -- I can't pronounce it -- correlative rights, the right to counsel of reasonable competence and the right to counsel's undivided loyalty. When the Court looks at a motion to withdraw and in this case this is a contested motion to withdraw the Court must look then to Rule 1.6 of the Montana Rules of Professional Conduct. Under Rule .16[sic] -- excuse me, not 16 --

MR. WATSON: I think it's 110, I'm not positive. No, that's the Court rule of withdrawal. I don't now what the Code rule is. I think 1.16 is withdrawal and discharge.

THE COURT: Thank you, Mr. Watson. 1.6 -- Rule 1.16 of the Montana Rules of Professional Conduct, sub (a): Except as stated in paragraph (c), a lawyer shall not represent a

client or where representation has commenced, shall withdraw from the representation of a client if -- and then it goes down and then it says -- (1), the representation will result in violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs a lawyer's ability to represent the client; or (3) the lawyer is discharged. Then sub-section (b) states: Except as stated in paragraph (c) a lawyer may withdraw from representing a client if (1) withdrawal can be accomplished without material adverse affect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the lawyer -- the client -- has used the lawyer's services to perpetuate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer

will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.

The Court concludes as a matter of law based upon the facts that there has been as stated by counsel, that there has been a complete breakdown in the attorney-client relationship between Mr. Watson and Mr. and Mrs. Whipple and the Court agrees with counsel that they are no longer able to provide, or conduct an effective defense on the part of Mr. Briggs given this breakdown.

The Court finds that looking specifically at Rule 1.16 that all under subsection (b) that there is conflict between counsel as for strategy in this case; that there are serious disagreements between counsel; that Mr. Briggs, at least to some part has engaged in activities that are hostile toward counsel. Mr. Watson has testified that he feels physically threatened by Mr. Briggs. I believe that there is, whether he, I believe that there is some

basis for that, that Mr. Briggs has further made these allegations and frankly I understand if Mr. Briggs is unhappy with actions of counsel that why he made those threats, but those threats exist on the record and ultimately Mr. Briggs has threatened that he lacks confidence in counsel to take this matter to trial given the serious consequences he faces should he be found guilty of any one of the six felony charges pending against him.

Therefore, the Court finds that there is a basis to terminate this representation. That specifically the Court concludes as a matter of law that the grounds supporting this withdrawal are Rule 1.16, that given the disagreement between the parties that Mr. Briggs is insisting upon taking action that counsel believes to be repugnant or with which counsel has a fundamental disagreement. That it's further under sub (5) because Mr. Briggs has a duty to cooperate with counsel under the fee agreement and he has substantially failed to fulfill that obligation that the Court further concludes as a matter of law that in this case under Rule 1.16(b)(6) that counsel's

representation of Mr. Briggs has been rendered unreasonably difficult by Mr. Briggs given the disputes between counsel and Mr. Briggs and that under (7), the catchall, that other good cause for withdrawal exists, that applies as well given the difficulties in communication, this irreconcilable communication breakdown between counsel and Mr. Briggs, that that applies as well.

So, the Court concludes then as a matter of law that based upon all this that the Court should grant the *ex parte* Motion to Withdraw as counsel that was filed by counsel on January 15th, 2015, and the Court signs -- therefore, the Court is issuing this Order as follows:

Pending before the undersigned judge is *ex parte* Motion to Withdraw as Counsel dated January 15th, 2015 filed by Herman A. "Chuck" Watson, Ashley Whipple and Todd Whipple as counsel for Defendant Kevin Briggs. The Court held a hearing on the motion on January 26, 2015. After considering the evidence presented the Court grants the *ex parte* Motion to Withdraw as Counsel. The Court dictated into the Court record the reasons for this ruling.

Those Findings and Conclusions are incorporated herein by reference in this Order and shall be filed under seal and shall not be reflected in the ROA function of Full Court nor will this Order. It is so ordered. The Court signs this Order on today's date, January 26th, 2015.

All right, the Order is signed and I have included, in the cc of this Order it is being cc'd to Ms. Whipple, Mr. Whipple, Mr. Watson, Mr. Roth, Judge Salvagni and Mr. Briggs. I have not cc'd this Order to Mr. Lambert of the County Attorney's Office and I will leave that up to Judge Salvagni. That is the Court's Order. So, Mr. Briggs, do you have any questions regarding this matter?

MR. BRIGGS: Yes, Your Honor.

THE COURT: Yes.

MR. BRIGGS: So, one, this is basically saying that this is because of, that I'm at fault here?

THE COURT: The Order is saying, for the reasons, that there has been a breakdown and I've noted for the record, Mr. Briggs, that the counsel believe it is your fault and I know that you dispute that, but the end result of

this conflict between the parties is that they can no longer effectively represent you and you have testified that you no longer have confidence in them. So --

MR. BRIGGS: Okay, so --

THE COURT: -- that's the basis for the Court's decision.

MR. BRIGGS: So, you're not findings fault, you're not saying who's at fault, you're just saying there are irreconcilable differences?

THE COURT: As for finding fault, the record will show, and Mr. Briggs, I understand what you're thinking about because you're probably thinking about speedy trial analysis. The record and the testimony speak for itself and whether, I'm saying there is a basis to withdraw. I'm not assigning fault to anyone and somebody, if down the road, somebody does, some Court does a speedy trial analysis of what I've done today they will have to look at the record and make their own decision. I'm just saying there are, because of this breakdown between counsel and you, Mr. Briggs, that they have a right to withdraw. That's what I'm

saying.

MR. BRIGGS: Okay. And what happens to my family's money if they do this?

THE COURT: Then this has -- that has to be sorted out under the terms of the fee agreement. I don't know how that works, Mr. Briggs. This has nothing to do with that. That's a separate legal issue but here's what will happen. Right now you're still set for a Final Pre-Trial Conference at 1:30. You will go to that conference. Counsel will go to that conference and Judge Salvagni will look at my Order and then Judge Salvagni will decide what happens next in this. That's where we stand, all right?

MR. WATSON: I would just like to point out to Mr. Briggs that nothing is going to leave this Courtroom today.

THE COURT: Oh, that's right. Mr. Briggs, that's the other thing that happens. This is, the record in this and my decision, this is all sealed. The only thing Judge Salvagni is going to see is this Order that says I'm allowing them to withdraw, all right?

MR. BRIGGS: Okay.

THE COURT: Now, down the road if you have new counsel and they want to bring some of this out and talk about speedy trial and all this stuff then Judge Salvagni decides what becomes, then it would become public. Judge Salvagni decides that and you would have a chance to respond to that.

MR. BRIGGS: Okay, I --

MR. WATSON: I would ask if the Court's Findings be placed under seal as well.

THE COURT: They are. It is, Mr. Watson.

MR. WATSON: All right. Thank you.

THE COURT: It will all file, everything's under seal.

MR. BRIGGS: I guess a lot of what I'm asking is I'm wondering if how I'm going to be represented from here.

THE COURT: And you know what --

MR. WATSON: Your Honor, Mr. Selvey told me that he and Mr. Briggs' grandmother have arranged for his representation of Mr. Briggs and I'm surprised that Mr. Briggs is not aware of that.

THE COURT: Oh, well, I guess, Mr. Briggs, I don't know anything. It sounds like Mr.

Selvey is going to come represent you, but I don't --

MR. BRIGGS: She told me that she only had enough money to pay for one representation and I'm just afraid that these guys are going to take the money and run.

THE COURT: So, and so, and Mr. Briggs, I understand your concern, but I don't have anything to do with that. This was just the legal basis for the Motion to Withdraw and the fallout from that Motion to Withdraw, I don't know happens with that, all right?

MR. BRIGGS: Okay.

THE COURT: The Order has been signed. So, Mr. Briggs, I'm going to go ahead and excuse you now. Court is adjourned and you will be back over in Judge Salvagni's Court at 1:30.

MR. BRIGGS: Thank you.

MR. ROTH: Your Honor, as just a housekeeping matter, given the Court's Order, whether or not counsel needs to appear at 1:30.

THE COURT: I believe that counsel, technically, probably you don't need to appear, but I think that you should.

MR. WATSON: I'll bet what John [sic] Brown is thinking is I would.

THE COURT: Yeah. I think that you need to go and explain and then because I'm not sure exactly what Judge Salvagni is going to do but he'll have to rule based on that.

MR. ROTH: Very well. Thank you.

THE COURT: All right. Thank you. All right, Mr. Briggs, good luck to you.

MR. BRIGGS: Thank you. And thanks for your patience with my incoherent testimony.

THE COURT: You're welcome. It's a difficult situation, Mr. Briggs. You're welcome.

(Whereupon, the proceedings was concluded.)

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CERTIFICATE OF ELECTRONIC COURT REPORTER

I, **SANDRA K. MURPHY,** Official Electronic Court Reporter of the District Court of the Eighteenth Judicial District, Department 3, State of Montana, after having been duly sworn, **DO HEREBY CERTIFY:**

That I was duly authorized and did report the proceedings in the above-entitled cause;

That the foregoing proceedings were electronically recorded using an FTR Reporter™ 5.2.6 Digital Recording System. That the electronic recording has been in the custody of the Court; that the recording has not been changed or altered in any way; that the recording is a full, true and accurate record of these proceedings.

That the undersigned transcribed the recording to writing. That the undersigned has compared the electronic recording with the written transcription and the foregoing 129 pages, including this certificate, constitutes a full, true and accurate transcription of the above entitled proceedings had and taken in the above-entitled matter at the time and place hereinbefore mentioned.

I further certify that I am not a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action herein.

DATED this 15th day of September, 2015.

SANDRA K. MURPHY

Electronic Court Reporter