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PREVIEW; State v. Mosby: *The Montana Supreme Court's Opportunity to Assess the Perpetuity of Criminal Charges Over Developmentally Disabled Defendants*

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PREVIEW; State v. Mosby: *The Montana Supreme Court's Opportunity to Assess the Perpetuity of Criminal Charges Over Developmentally Disabled Defendants*

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The Montana Supreme Court will hear oral argument in *State of Montana v. John Thurlow Mosby* on Wednesday, October 13, 2021, at 9:30 a.m. telephonically over Zoom.[1] Chad M. Wright is expected to appear on behalf of the Appellant, John Mosby. Austin Knudsen, C. Mark Fowler, and Kirsten H. Pabst are expected to appear on behalf of Appellee, the State of Montana.

I. INTRODUCTION

The Court is asked to consider a triad of issues: whether the lower court's resurrection of the previously dismissed 11-year-old charges due to Mosby's lack of fitness to stand trial violates the plain language of Montana Code Annotated § 46-14-221;[2] whether the 4,878 days of delay violated Mosby's constitutional right to a speedy trial; and alternatively, whether Mosby deserves credit for every day he was held in the secure forensic unit of the Montana Developmental Center ("MDC") against his will. The Montana Supreme Court's decision will clarify whether prosecutors are statutorily permitted to revive charges against developmentally disabled[3] defendants which have become fit for proceedings upon rehabilitation. This decision has the potential to contribute to shaping the precedent for criminal charging surrounding defendants with developmental disabilities or severe mental illnesses.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 2, 2005, John Thurlow Mosby was charged with a felony sexual assault (count I) and a misdemeanor indecent exposure

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[1] Livestream of the argument is available on the Court's website. http://stream.vision.net/MT-JUD

[2] *See generally* MONT. CODE ANN. §§ 46-14-221 to 222 (2019).

[3] "Developmental disability" means "a disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or any other neurologically disabling condition closely related to intellectual disability; requires treatment similar to that by intellectually disabled individuals; originated before the individual attained age 18; has continued or can be expected to continue indefinitely; and results in the person having a substantial disability." MONT. CODE ANN. § 50-20-102(9)(a)-(e).

(count II) after he allegedly groped the penis of a twelve-year-old boy, and exposed himself to another twelve-year-old boy in the Missoula YMCA's locker room.[4] Mosby was arrested the same day, and bail was set on or about the same day.[5] Arraigned in the Fourth Judicial District Court of Missoula County, Mosby entered not guilty pleas on August 29, 2005.[6] Two months passed between Mosby's plea order, and at the status hearing. At Mosby's status hearing held November 28, 2005, Mosby presented the court with a psychological report by Dr. Michael Scolatti, who had completed an evaluation at Mosby's request.[7]

Dr. Scolatti found that Mosby's intellectual function is "Well Below Average when compared to a population of his peers" and noted that overall, Mosby's results indicated he would have "considerable difficulty understanding the factual and rational components of the judicial process."[8] Additionally, Mosby was also found to have an impaired ability to aid his attorney.[9] Dr. Scolatti concluded that Mosby was suffering from a mental disease or defect that would significantly impair his ability to conform his behavior to the law.[10] On his overall objective intelligence testing, Mosby scored in the sixth percentile, indicating that ninety-four percent of his peers scored higher in intellectual functioning.[11] The tests also reported that Mosby possesses an IQ of 76.[12]

The district court set a later hearing for January 23, 2006, where the State filed a Motion to Suspend Proceedings Due to Lack of Fitness to Proceed.[13] Without objection from the parties, the court found that Mosby lacked fitness, committed him to the custody of the Department of Health and Human Services. The court also ordered the Montana Developmental Center (MDC) to provide a report to the court by April 30, 2006, regarding Mosby's fitness, and ordered a review hearing for May 15, 2006.[14]

Dr. Dean Gregg, a Clinical Psychologist with MDC, filed his psychological report with the court on April 26, 2006.[15] Mosby had attended a structured competency restoration class while at the MDC, and

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[4] Opinion and Order at 1, *State v. Mosby*, (Mont. Jan. 2, 2019) (No. DC-05-403).
[5] *Id.*
[6] *Id.*
[7] *Id.* at 2.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Brief of Appellant, *State v. Mosby*, (Mont. Nov. 10, 2020) (No. DA 19-0378).
[13] *Id.* at 3.
[14] Opinion and Order, *supra* note 4, at 3.
[15] *Id.*

with concern to this, Dr. Gregg noted that Mosby's ability to "assist his attorney and make informed decision about legal strategy [was] probably compromised."[16] Based on the reports made by both Drs. Scolatti and Gregg, the State filed a Motion to Dismiss, indicating a pursuit of civil commitment.[17] At this point, the State filed a Petition for Emergency Commitment and/or Commitment of a Person Due to a Serious Developmental Disability.[18] It was only after Mosby did not request a hearing on the Petition that the Court concluded he was seriously developmentally delayed and issued and Order committing Mosby to MDC.[19]

After being detained for 11 years in the MDC, Mosby was released on the belief that his condition had progressed to the point of functioning in the community.[20] The State then resurrected Mosby's sexual assault and indecent exposure charges, alleging the criminal proceedings against Mosby were suspended during the period of unfitness rather than dismissed.[21] Taking over for retired Judge McLean, Judge Deschamps labeled the restart of the criminal proceedings as an issue of first impression.[22] At sentencing, Mosby was given the maximum term of one hundred years, with fifty years suspended in the Montana State Prison.[23] The Court only granted 388 days of credit for the time Mosby served in the county jail, but did not credit for the 11 years he was held in the MDC.[24]

III. ARGUMENTS

A. Appellant's Argument

Mosby asserts three main arguments: (1) because the court dismissed Mosby's criminal charges for his inability to stand trial, its resurrection of the dismissed charges violates the plain language of Mont.

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[16] *Id.*
[17] Brief of Appellee at 4, *State v. Mosby*, (Mont. June 15, 2021) (No. DA19-0378).
[18] *Id.*
[19] Opinion and Order, *supra* note 4, at 4.
[20] *Id.* at 5.
[21] *Id.* The State filed a motion in this cause on August 25, 2017 to set a hearing on Appellant's fitness as it had come to light that he possibly did not meet the criteria found at note 3 for a developmental disability and as such, could be fit to proceed.
[22] Brief of Appellant, *supra* note 12, at 7.
[23] *Id.* at 8.
[24] *Id.*

Code Ann. § 46-14-221;[25] (2) the 4,878 days of delay violated Mosby's right to a speedy trial; and (3) in the alternative, Mosby deserved credit for every day he was held in the secure forensic unit of the MDC against his will.[26] Mosby also asserts that the Court demands strict compliance with the provisions of Mont. Code Ann. § 46-14-221(2), and that a speedy trial violation presents a question of constitutional law, which the Court will review *de novo*. Further, Mosby notes that credit for time served is a non-discretionary legal requirement that the Court would review *de novo* as well.

First, Mosby asserts that the resurrection of his dismissed charges violates the plain meaning of Mont. Code Ann. § 46-14-221. According to Mosby, the district court suspended criminal proceedings against him so that he could gain fitness to stand trial at the MDC. At this point, Mosby was already found not competent to stand trial, but after three months of observation, Dr. Gregg independently found Mosby unable to understand or assist in his defense.[27] Based on these two findings, Mosby reasserts that the court dismissed the criminal charges, instead of civilly committing Mosby to the MDC. Mosby cites the plain language of the Mont. Code Ann. § 46-14-221 as controlling, arguing that under *In re G.T.M.*[28] and *State v. Garner*,[29] due process prohibits the criminal prosecution of a defendant not competent to stand trial.[30] In order to comply with this constitutional directive, Mosby notes, the finding of unfitness focuses on the ongoing evaluation. Here, the district court ordered Mosby be evaluated under Mont. Code Ann. § 46-14-221(2)(a), with the key provision of the subsection centering on suspending the criminal proceedings while the evaluation takes place.[31]

As the treatment provided did not reflect Mosby's cognitive improvement, Mosby asserts the next statutory step is to dismiss the criminal case and initiate civil commitment proceedings. Mosby argues that the mandatory civil commitment speaks to the permanency of the

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[25] MONT. CODE ANN. § 46-14-221 determines a defendant's inability to proceed on the basis of fitness, and the procedural rules for dismissing if a defendant is determined to be developmentally disabled, and therefore unfit.
[26] Brief of Appellant, *supra* note 12, at 1.
[27] *Id.* at 6.
[28] 222 P.3d 626 (Mont. 2009).
[29] 36 P.3d 346 (Mont. 2001).
[30] Brief of Appellant, *supra* note 12, at 13.
[31] "If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant must be suspended . . . and the court shall commit the defendant to the custody of the director of the department of public health and human services to be placed in an appropriate mental health facility…" MONT. CODE ANN. § 46-14-221(2)(a).

dismissal, rather than the deferral, of the criminal proceedings. As such, Mosby asserts Mosby did not "[escape] responsibility for his actions," but the opposite: Mosby was incarcerated in the MDC for 11 years, because the original district court followed the dictates of Mont. Code Ann. § 46-14-221(3).[32]

Mosby further argues that the 4,878 days of delay violated Mosby's right to a speedy trial—a right guaranteed by the Sixth Amendment and made applicable to the States via the Fourteenth Amendment. Mosby reiterates this right under *State v. Chavez*[33] and Article II, Section 24 of the Montana Constitution. Mosby contends he meets the four-factor speedy trail test (the length of the delay; the reason for the delay; the assertion of the right; and the prejudice to the defendant).[34] Mosby's statutory claim under Mont. Code Ann. § 46-14-222[35] and denial of his right to a speedy trial were erroneously dismissed by the district court, and counsel argues that as such, his convictions must be dismissed.

Should Mosby's convictions not be dismissed, Mosby's third argument rests squarely on Mont. Code Ann. § 46-18-403(1), which governs the credit for time served prior to conviction.[36] Mosby reiterates that calculating credit for time served is not a discretionary act, but a legal mandate, and that once a judgment of imprisonment has been entered for a bailable offense, a person is entitled to credit for each day of incarceration prior to and after the conviction.[37] Mosby asserts that restraint against his will after his August 5, 2005 arrest should be credited as 4,878 days – the entire time he was held until his sentencing on April 22, 2019.[38]

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[32] "If the court finds that the defendant is still unfit to proceed and that it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed . . ." MONT. CODE ANN. § 46-14-221(3).

[33] 619 P.2d 1365 (Mont. 1984).

[34] Brief of Appellant, *supra* note 12, at 33.

[35] The plain language of MONT. CODE ANN. § 46-14-222 relied on by the Appellant is "the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant committed to appropriate facility of the department of public health and human services."

[36] "Any person incarcerated on a bailable offense and against whom a judgment of imprisonment prior to or after conviction, except that the time allowed may not exceed the term of the prison sentence rendered." MONT. CODE ANN. § 46-18-403(1).

[37] State v. Hornstein, 229 P.3d 1206 (Mont. 2010).

[38] Brief of Appellant, *supra* note 12, at 42.

B. Appellee's Argument

The State contends that Mosby misconstrues the civil commitment statute and "concocts" a permanent prohibition on any future prosecution of a person once committed for "unfitness who has then regained fitness."[39] Accordingly, the district court properly denied Mosby's motion to dismiss on speedy trial grounds, and, therefore, Mosby would not be entitled to credit for time served during commitment at the Montana Developmental Center.[40]

The State asserts neither Mont. Code Ann. § 46-14-222 nor "any other provision of the commitment statute" expressly require the district court to declare that once a case against an unfit person has been dismissed, all prosecutions are barred forever if or once the person regains fitness.[41] Arguing the plain language Mosby asserts is not present in the statute, the State asserts that the plain reading of Mont. Code Ann. § 46-14-222 does not bar a district court from permitting resumption of a criminal case that was not dismissed without prejudice.[42] Here, the State argues that the Court should not "read into a statute what is not there."[43]

The State further asserts that the district court properly denied Mosby's motion to dismiss on speedy trial grounds by employing the language of *State v. Ariegwe*[44] as well. The State concedes the total length of delay (4,878 days) triggered a speedy trial analysis, but it contends the period of delay was due to the "inherent nature of the criminal justice system," or "institutional[45] delay" weighs less heavily than if the State intentionally attempted to delay a trial.[46] The State only concedes 42 days would be attributable to Mosby.[47] Rather, the State maintains the holding of the trial court was correct and the additional 4,125 days do not attribute to anyone.[48] The State compels the Court to view the *Ariegwe* balancing test as one that allows detailed analysis of cause and culpability for each period of pretrial delay.[49]

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[39] Brief of Appellee, *supra* note 17, at 10.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 11.
[43] *Id.* at 16 (citing Bates v. Neva, 339 P.3d 1265 (Mont. 2014)).
[44] State v. Ariegwe, 167 P.3d 815 (Mont. 2007).
[45] *Id*. at 25 (citing State v. Stops, 301 P.3d 881 (Mont. 2013)).
[46] Brief of Appellee, *supra* note 17, at 24.
[47] *Id*. at 26.
[48] *Id.* at 27.
[49] *Id*. at 36.

The State requests the Court does not grant Mosby credit for the time he served during civil commitment at the MDC.[50] Here, the State attempts to differentiate between involuntary commitment and bailable criminal offenses—strongly stating that the former is "nowhere near equitable" with the latter, because the state power is not exercised in a punitive sense in a civil commitment.[51] Since Mosby was not incarcerated under Mont. Code Ann. § 46-18-403(1), the State argues his civil commitment is not required to be credited to his sentence for that time by the trial court.[52]

Due to the imbalance in the *Ariegwe* factors and the difference in civil commitment and incarceration as alleged by the State, it argues that this Court should affirm Mosby's conviction and sentence.

IV. ANALYSIS

While it is more likely the court will find in favor of the State in *Mosby*, there are stronger public policy arguments to be made for the court to hold for Appellant. A defendant's competence to stand trial is arguably one of the "most significant mental health [inquiries] pursued in the system of criminal law."[53] In *Mosby*, the court has an opportunity to solidify due process rights for defendants that are developmentally disordered or disabled and clarify Montana's statutes pertaining to competency to stand trial and restorability of such defendants.

The issue of competency to stand trial goes to the root of our constitutional safeguard of due process protections, a requirement that is essential to the fairness upon which our nation's judiciary was designed. [54] A mentally impaired defendant who cannot comprehend the nature of the proceedings or assist their counsel in presenting their defense to the criminal charge or charges cannot be tried as a matter of due process of law.[55]

The Supreme Court first offered its definition of competency in *Dusky v. United States*.[56] There, the Court held that competency would

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[50] *Id.* at 42.
[51] *Id.* at 38.
[52] *Id.* at 41.
[53] Nicholas Rosinia, *How 'Reasonable' Has Become Unreasonable: A Proposal for Rewriting the Lasting Legacy of Jackson v. Indiana*, 89 WASH. U. L. REV. 673, 674 (2012).
[54] *Id.*
[55] J. Thomas Sullivan, *Not Fit to Be Tried: Due Process and Mentally-Incompetent Criminal Defendants*, 39 U. ARK. LITTLE ROCK L. REV. 155 (2017).
[56] Dusky v. United States, 362 U.S. 402 (1960).

hinge on "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[57] This standard has since been the recognized baseline inquiry that due process requires.[58]

Although *Dusky* was initially only applicable at the federal level, its standard has become widely regarded as the standard state courts should implement[59], and was clarified under *Jackson v. Indiana*[60] in 1972. The *Jackson* Court stated that "Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process."[61] Consequently, the *Jackson* Court asserted that a person who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that [they] will attain that capacity in the foreseeable future.[62]

If it is determined that a defendant will not attain capacity, then the State must either institute the customary civil commitment proceeding (like what would be required to commit indefinitely any other citizen), or release the defendant.[63] Here, it would have been appropriate to pursue either avenue once Mosby's criminal charges were dismissed by the District Court. Further, the *Jackson* holding noted that even if a defendant is likely to soon be able to stand trial, their continued commitment must be justified by progress toward that goal.[64] These sentiments are reflected in Mont. Code Ann. § 46-14-221 to 222, and Montana falls into a majority of states that have attempted to define a "reasonable" time for commitment to predict restorability.[65] Currently, Montana's timeframe for attempting

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[57] *Id*.
[58] Sullivan, *supra* note 55.
[59] *Id*.
[60] Jackson v. Indiana, 406 U.S. 715 (1972).
[61] *Id*. at 731.
[62] *Id*.
[63] *Id*.
[64] *Jackson*, 406 U.S. at 738–39.
[65] Rosinia, *supra* note 53, at 681. These states are: Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

to predict restorability in a defendant is 90 days.[66] Generally, the court could construe that Mosby's continued commitment could be justified toward the continued goal of restoring capacity, but it is unlikely that the 11 years he was held against his will by the State would be considered a "reasonable" period of time.

The relevant Montana statutes in *Mosby* (Mont. Code Ann. §§ 46-14-221 to 222) do not comply with *Jackson*, as they fail to offer a durational limit on commitment of an incompetent defendant.[67] This is a legislative shortcoming in this area of Montana criminal law that contributed to Mosby being held for 11 years in the MDC, which could be addressed by the court should the Montana Legislature not revise this section of law to clarify these guidelines.

Although the Montana Supreme Court may not be compelled to create a bright line test for the durational limit on commitment for an incompetent defendant, ruling for Appellant would begin to clarify due process rights for developmentally disabled defendants in Montana in line with *Jackson* and *Dusky*. It is true that the State and public as a whole deserve protection and justice, and a defendant equally deserves a fair trial and due process.[68] But if the court in *Mosby* reinforces allowing a defendant that *may* become competent in the unforeseeable future to be held indefinitely, then they will be doing so in contrast to the United States Supreme Court's holding in *Jackson* (that due process requires durational limits be placed on both commitments for predicting competency and commitment for restoration of competency).[69]

Additionally, available social science research confirms this inadequacy in the law generally, illustrating that due process should reflect shorter durational periods of commitment than many states allow for.[70] Despite the limited scope of research on duration commitment for prediction of restorability, available literature suggests that a brief period of time would be more than adequate to determine the foreseeability of a defendant's fitness.[71] This is reflected in the work of Ronald Roesch and Stephen Golding,[72] who surveyed 12 proposals for durational limitations and found that most invoked a six-month treatment limitation as an

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[66] MONT. CODE ANN. § 46-14-221(3)(a).
[67] Rosinia, *supra* note 53, at 691.
[68] *Id.* at 673.
[69] *Id.* at 702.
[70] *Id.* at 703.
[71] *Id.* at 693.
[72] *Id.* (citing Ronald Roesch & Stephen L. Golding, *Competency to Stand Trial* 120–31, 209–16 (1980)).

"adequate amount of time."[73] This is the longest treatment limitation in contrast to studies done by Michael Finkle (who found that the process for interviewing and reporting opinions on a defendant's competency can range from a day to several weeks)[74] and Bruce Winick (who reiterated that initial competency assessments can occur over a period "of several days or weeks").[75]

Many states have codified short durational limits for commitment predicated on predicting restorability in their statutory provisions, confirming that this inquiry can be completed within brief periods of time.[76] Montana allows 90 days to confirm this inquiry—three times the trend exhibited by this research—which indicates a likely failure in Montana's statutes to protect a defendant's right to due process as laid out by *Jackson*, even before considering the 4,878 days Mosby spent in the MDC before having his criminal charges re-prosecuted. Montana can follow the lead of other states that mandate shorter durational limits for commitment in the pursuit of upholding due process.

V. CONCLUSION

This Montana Supreme Court decision will determine the ability of Montana courts and prosecutors to re-prosecute developmentally disabled and mentally ill defendants after they've regained fitness. If the court affirms the district court's findings that it is appropriate to retry a previously dismissed case on the basis of a developmentally disabled individual becoming fit to stand for the proceedings, the court creates a legal catch-22. If a defendant is civilly committed, with a chance their criminal charges will be revived, then there is little motivation for a defendant to attempt to become restored lest those charges be brought, but if they do not attempt to become restored due to Montana's lack of durational limit to determine competency, they will remain in the care of the state without their freedom. By enforcing a precedent that allows defendants to view their freedom as conditioned by the overhanging potential for re-prosecution in the case they are found competent again, the system encourages defendants to remain in situations akin to the 11 year limbo experienced by Mosby in the Montana Developmental Center.

Instead, the court has an opportunity to expand how the criminal legal system handles defendants with mental illnesses and developmental

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[73] *Id.* at 693.
[74] Michael J. Finkle et al., *Competency Courts: A Creative Solution for Restoring Competency to the Competency Process*, 27 BEHAV. SCI. & L. 767, 774 (2009).
[75] Rosinia, *supra* note 53, at 673 (citing Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985)).
[76] *Id.* at 693.

disabilities or defects with practices focused on rehabilitation, rather than pushing these individuals further into the system lest the punishment be brought against them once again.