IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0378

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN THURLOW MOSBY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Robert L. Deschamps III, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
ChadWright@mt.gov
(406) 444-9505

ATTORNEY FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
TAMMY K PLUBELL
Interim Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

KRISTEN PABST
Missoula County Attorney
Missoula County Attorney's
Office
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Constituition

Montana Code Annotated

Other Authorities

STATEMENT OF THE ISSUES

I. John Mosby's criminal charges were dismissed in 2006 because he was unfit to stand trial. The district court's resurrection of the previously dismissed eleven-year-old charges violates the plain language of Mont. Code Ann. § 46-16-221.

II. The 4878 days of delay violated John Mosby's right to a speedy trial.

III. In the alternative, John Mosby deserved credit for every day he was held in the secure forensic unit of the Montana Developmental Center against his will.

STATEMENT OF THE CASE

August 26, 2005	Mosby charged with felony sexual assault and misdemeanor indecent exposure. Information, District Court Document (D.C. Doc.) No. 3. The Honorable Jim McLean presided over the case.
January 23, 2006	Mosby evaluated by Dr. Michael Scolatti. Mosby moved to suspend the criminal proceedings against him because Dr. Scolatti found Mosby could not understand the criminal proceedings against him. (D.C. Doc. 13.)
April 22, 2006	The court ordered an independent evaluation by Dr. Dean Gregg at the Montana Developmental Center. Dr. Gregg also finds Mosby cannot understand the criminal proceedings. (D.C. Doc. 22.)
May 10, 2006	Upon State's motion, court dismisses the criminal charges against Mosby (Order, D.C. Doc. 25, attached as Appendix A).

August 25, 2017	State files motion to set hearing to restart criminal prosecution under Mont. Code Ann. § 46-14-222. (D.C. Doc. 26.)
September 11, 2017	Mosby objects to the lack of authority to resurrect criminal charges after they were dismissed in 2006. (D.C. Doc. 27.)
October 4, 2017	The Honorable Robert L. Deschamps III assumes jurisdiction.
February 9 and February 15, 2018.	Court holds hearings on Mosby's motion to dismiss for failure to comply with *State v. Tison*, 2003 MT 342, ¶ 11, 318 Mont. 465, 81 P.3d 471. Court denies Mosby's motion to dismiss and orally rules it would "resurrect" the criminal charges. (2/15/2018 Tr. at 26, attached as Appendix B.)
October 23, 2018	Mosby files motion to dismiss criminal charges for lack of speedy trial. (D.C. Doc. 55.)
January 2, 2019	Court denies Mosby's motion to dismiss for lack of speedy trial. (Order and Opinion, D.C. Doc. 64, attached as Appendix C.)
April 22, 2019	Mosby pleads guilty to one count of sexual assault reserving the right to challenge the jurisdiction of the court and speedy trial. Misdemeanor indecent exposure charge is dismissed.
May 13, 2019	Court sentences Mosby to 100 years in the Montana State Prison with 50 years suspended. Court credits Mosby for 388 days spent after the criminal charges were resurrected but denies credit for the entire time Mosby was held in the

Montana Developmental Center. (Judgment, D.C. Doc. 75, attached as Appendix D.)

September 5, 2019 Mosby files a timely notice of appeal.

STATEMENT OF THE FACTS

John Mosby's birth mother was a developmentally disabled woman addicted to drugs and alcohol. He was abandoned at birth and immediately placed in foster care. Foster care was so neglectful of Mosby in his early development, that he was removed and put up for adoption. (D.C. Doc. 22 at 1-2.) He was adopted by the Mosby family at 10 months old. The Mosby's home also turned out to be a chaotic environment. They divorced within two years and Mosby was labeled at three-years-old with having behavioral problems. (D.C. Doc. 22 at 2.)

After being adopted by the Mosby family, things got worse for John. He was subjected to severe physical and sexual abuse at the hands of men his adoptive mother was seeing after the divorce. At nine-years-old, child protective services removed John from his adoptive mother's care. Rather than placing him with another family to provide care and support, Mosby began his arduous journey through various group homes.

First, he was placed in the Rivendell Boys Home in Butte for a short time. Then, between the ages of ten and fourteen-years-old, he was placed in the Majestic Boys Ranch. At the Ranch, another boy smashed Mosby in the head with a baseball bat. At fifteen-years-old, he was moved to the San Marcos Treatment Center in Texas. He arrived with significant behavioral problems. Mosby was self-mutilating, had sex with another resident, and was setting fires. At eighteen-years-old, Mosby aged out of the San Marcos facility and returned to Montana. He ended up at the Montana Developmental Center and later Mosby was under twenty-four-hour supervision with Opportunity Resources. (D.C. Doc. 22 at 2.)

On August 2, 2005, he was in the Missoula YMCA locker room as part of a trip with his group home when he grabbed a 12-year-old boy's penis and exposed himself to the boy's brother. He was charged with felony Sexual Assault and misdemeanor Indecent Exposure. (D.C. Doc. 1.) Mosby's appointed attorneys, Jeff Olson and Margaret Borg, immediately recognized the competency issues and arranged for Dr. Scolatti to evaluate Mosby. (D.C. Doc. 10.)

Dr. Scolatti reviewed Mosby's tortuous social history and met with Mosby for three hours over three separate interviews in the Missoula County jail. (D.C. Doc. 13.) Dr. Scolatti noted Mosby's judgment was significantly impaired most likely from organic impairment and mental retardation. Dr. Scolatti reported Mosby's "Insight [meaning objective reality] is impoverished." (D.C. Doc. 13 at 2.) On the overall objective intelligence testing, Mosby scored in the sixth percentile, meaning 94% of his peers scored higher in intellectual functioning. (D.C. Doc. 13 at 3.) Dr. Scolatti diagnosed organic brain problems causing Borderline Intellectual Functioning, Attention Deficit Disorder, and Hyperactivity that may have been exasperated by the assault in the Texas boy's ranch. (D.C. Doc. 13 at 6.) Mosby's IQ was 76. His ability to understand was at the lowest percentage. (D.C. Doc. 3.) Dr. Scolatti concluded Mosby was not able to understand the criminal proceedings against him because Mosby would find it nearly impossible to synthesize and sequence what was going on in the courtroom. He could not read or write at a sufficient level for court, nor could he communicate with or take advice from counsel. (D.C. Doc. 13 at 8-10.) Dr. Scolatti concluded Mosby would not be able to protect himself or use

legal safeguards. (D.C. Doc. 13 at 6). Based on Dr. Scolatti's findings, Mosby's attorney moved to suspend the criminal proceedings and have Mosby declared unfit to proceed. (D.C. Doc. 17.)

Since Mosby demonstrated cognitive deficiencies similar to a developmental disability, and upon agreement of the parties, Mosby was committed for ninety days to the Montana Developmental Center with the specific intent to see if he could regain fitness. (1/5/06 Tr. at 15-16.) Dr. Dean Gregg conducted the independent evaluation as requested by the State. Dr. Gregg noted IQ scores between 58 and 62 over Mosby's lifetime, but found his IQ had stabilized around 76. (D.C. Doc. 22 at 5.) Dr. Gregg concluded Mosby would have little ability to work with counsel or sustain the concentration necessary for following trial proceedings. (D.C. Doc. 22 at 6.)

Based on the two evaluations, the State agreed to dismiss the criminal charges against Mosby and commit him to the Montana Developmental Center under the procedure set forth in Mont. Code Ann. § 46-14-221(3). (*See*, 5/1/06 Tr. at 19 *and* D.C. Doc. 24.) The State conceded the report it commissioned showed Mosby had not regained fitness. Thus, on May 10, 2006, Judge McLean granted the State's

motion to dismiss the criminal charges. (D.C. Doc. 25.) Pursuant to statute, Mosby was civilly committed to the Montana Developmental Center.

For the next eleven years, Mosby would continue to be held in the Montana Developmental Center. On May 16, 2017, Mosby moved to be released from the Center because he believed his disability had progressed to the point where he could function in the community. In response, 4384 days after he was first arrested in 2005, the State resurrected the sexual assault and indecent exposure charges. (D.C. Doc. 26.) The State reasoned it could do so based on a reading of Mont. Code Ann. § 46-14-222, which, it claimed, put no time limits on when the criminal charges could be restarted if the defendant regained fitness. (D.C. Doc. 26 at 1.) In other words, the State took the position that criminal proceedings against Mosby were suspended during the period of unfitness rather than dismissed. (2/9/18 Tr. at 9.) Taking over for retired Judge McLean, Judge Deschamp immediately recognized there was no authority for the State's position and labeled the restarting of Mosby's criminal proceedings as an issue of first impression. (2/15/18 Tr. at 25.) However, the court did not conduct any

analysis of the plain language of Mont. Code Ann. § 46-14-221. Instead, the court found it had inherent authority to preside over the restarted criminal proceedings: "I'm going to deny [the motion to dismiss], and I am going to resurrect it." (2/15/18 Tr. at 26.) Later, the court found, the thirteen-and-a-half year delay was not long enough to warrant dismissal on speedy trial grounds. (D.C. Doc. 64 at 25-26.) Due to the Court's adverse rulings, Mosby pled guilty, reserving his right to appeal. (D.C. Doc. 71.)

At sentencing, Mosby was given the maximum term of 100 years in the Montana State Prison. The court suspended fifty years of the sentence. The court only granted 388 days of credit for time Mosby served in the county jail. However, the court did not credit Mosby any of the eleven years he was held in the Montana Developmental Center. (4/22/19 Tr. at 113.)

SUMMARY OF THE ARGUMENT

> In Montana, our statute is clearly designed to prevent the abhorrent situation where a defendant languishes indefinitely in a mental hospital with criminal charges hanging over his head like the sword of Damocles. *State v. Tison*, 2003 MT 342, ¶ 11, 318 Mont. 465, 81 P.3d 471.

"Due Process prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Curtis v. Dist. Court of Twenty-First Judicial Dist.*, 266 Mont. 231, 236, 879 P.2d 1164, 1167 (1994). Montana's unique fitness to proceed system required the charges filed against John Mosby in 2005 to be dismissed so he could be civilly committed. Mont. Code Ann. § 46-14-221 (2005).[1] Mosby's attorney, the county attorney, and the original trial judge followed this statutory procedure to a tee. Mosby was declared unfit by two independent mental health professionals because he could not understand the criminal proceedings against him or assist his attorney with his defense. The experts agreed it was unlikely he would regain fitness anytime soon. Upon State's motion, the original trial judge dismissed the criminal charges against Mosby. The State initiated civil commitment proceedings and Mosby was held in the Montana Developmental Center for eleven years.

[1] Mosby relies the 2005 version of the Montana Code Annotated as it was the law in effect when he allegedly committed the charged offense. *State v. Thomas*, 2019 MT 155, ¶ 10, 396 Mont. 284, 445 P.3d 777, *reh'g denied* (Aug. 13, 2019).

In 2019, a new trial judge determined the prior dismissal order was not really a dismissal, treating it merely as a suspension of the criminal proceedings. The judge's ruling belies the plain language of Mont. Code Ann. § 46-14-221, which clearly differentiates between: (1) a suspension of the criminal proceedings for a defendant who is likely to regain fitness and (2) the dismissal of criminal charges when the defendant is unlikely to regain fitness. Legislative history shows the change from the suspension to outright dismissal of the criminal charges. This Court's precedent confirms this plain reading requiring dismissal without the ability to bring the charges again.[2] And finally, the transfer of jurisdiction from the criminal to civil commitment realm forecloses the ability to restart the criminal process.

Failing to comply with Montana's unique fitness to proceed structure necessarily implicated speedy trial concerns. The Montana Legislature built in a review procedure incorporating a quasi-speedy trial analysis allowing judges to dismiss when delay is unjust. Mont.

[2]*See, e.g. State v. Meeks,* 2002 MT 246, ¶ 26, 312 Mont. 126, 58 P.3d 167*, overruled in part by State v. Herman,* 2008 MT 187, ¶ 26, 343 Mont. 494, 188 P.3d 978

Code Ann. § 46-14-222. Holding Mosby in the Montana Developmental Center for eleven years and then resurrecting the dismissed criminal charges was unjust. Mosby was held over double the amount of time the United States Supreme Court has characterized as "extraordinary." *Barker v. Wingo*, 407 U.S. 514, 533, 92 S. Ct. 2182, 2194, 33 L. Ed. 2d 101 (1972). Given the thirteen-and-a-half-year delay the district court should have dismissed based on the extraordinary length of time since his arrest and continued incarceration in a state facility.

The dichotomy of the district court's ruling claiming Mosby suffered no prejudice during the thirteen-and-a-half-years he was held in jail or the secure wing of the Montana Developmental Center is laid bare by its refusal to credit Mosby for any of this time against the 100-year maximum sentence to the Montana State Prison. If this Court does not dismiss, then Mosby deserves credit for 4987 in custody.

STANDARDS OF REVIEW

This Court demands strict compliance with the provisions of Mont. Code Ann. § 46-14-221(2). *Curtis*, 266 Mont. at 236. This strict compliance demands fitness to proceed questions and statutory interpretation be reviewed for correctness. *Tison*, ¶ 5. Similarly, a

district court's grant or denial of a motion to dismiss in a criminal case presents a question of law that this Court reviews *de novo*. *State v. Giddings* (*Giddings II*), 2009 MT 61, ¶ 42, 349 Mont. 347, 208 P.3d 363.

A speedy trial violation presents a question of constitutional law, which this Court reviews *de novo* to determine whether the court correctly interpreted and applied the law. *State v. Stewart*, 2017 MT 32, ¶ 6, 386 Mont. 315, 389 P.3d 1009; *State v. Butterfly*, 2016 MT 195, ¶ 6, 384 Mont. 287, 377 P.3d 1191. Factual findings underlying a speedy trial analysis are reviewed for clear error. *State v. Morsette*, 2013 MT 270, ¶ 12, 372 Mont. 38, 309 P.3d 978 (citing *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815).

This Court reviews a criminal sentence of at least one year of actual incarceration for legality only. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 11, 369 Mont. 81, 296 P.3d 461; *State v. Claassen*, 2012 MT 313, ¶ 14, 367 Mont. 478, 291 P.3d 1176. Credit for time served is a non-discretionary legal requirement that this Court reviews *de novo*. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889.

ARGUMENT

I. John Mosby's criminal charges were dismissed in 2006 because he was unfit to stand trial. The district court's resurrection of the previously dismissed eleven-year-old charges violates the plain language of Mont. Code Ann. § 46-16-221.

On January 23, 2006, the district court suspended the criminal proceedings against John Mosby so he could be further evaluated and treated to regain fitness at the Montana Developmental Center. (1/5/06 Tr. at 15-16 and D.C. Doc. 18). Mosby had already been found to not competent to stand trial by Dr. Scolatti. After three months of observation, Dr. Gregg would independently find Mosby unable to understand or assist in his defense. Based on these two undisputed findings, the court dismissed the criminal charges, and civilly committed Mosby to the Montana Developmental Center. The district court took these steps in strict compliance with Montana's statutory scheme for prosecuting criminal defendants who are not competent to stand trial. *Tison*, ¶ 8 and ¶ 11.

A. The plain language of Mont. Code Ann. § 46-14-221 controls.

Due process prohibits the criminal prosecution of a defendant who is not competent to stand trial. *In re G.T.M.*, ¶ 18, *State v. Garner*, 2001

MT 222, ¶ 20, 306 Mont. 462, 36 P.3d 346 (citing Mont. Code Ann. § 46-14-103.) To comply with this constitutional directive, Montana's first statutory requirement after a finding of unfitness focuses on the ongoing evaluation. The district court ordered Mosby to be evaluated for fitness under Mont. Code Ann. § 46-14-221(2)(a):

> (2)(a) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant must be suspended, except as provided in subsection (4), 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, as defined in 53-21-102, or residential facility, as defined in 53-20-102, of the department of public health and human services for so long as the unfitness endures or until disposition of the defendant is made pursuant to this section, whichever occurs first.

The key provision of subsection 2(a) centers on *suspending* the criminal proceedings while the evaluation takes place. The criminal trial proceedings continue while the defendant is being evaluated. For example, the defendant is charged with this evaluation time for speedy trial purposes. *State v. MacGregor*, 2013 MT 297, ¶ 35, 372 Mont. 142, 311 P.3d 428 (defendant assigned time for 90–day mental health evaluation at Montana State Hospital). A defendant may also continue to file legal objections prior to trial, even without the defendant's personal participation because of the ongoing evaluation. Mont. Code

Ann. §46-14-221(4). This pre-trial evaluation step essentially puts the prosecution on hold before any disposition of the defendant is contemplated.

The next step is to develop some sort of treatment plan to help restore fitness. Mont. Code Ann. § 46-14-221(3)(b). After placement for evaluation and treatment, the court must review the defendant's status in ninety days. Mont. Code Ann. § 46-15-221(3)(a). This Court has found the ninety-day review and treatment period "contemplates that defendants may have attained fitness to proceed during those ninety days." *Tison*, ¶ 14. In 2006, the State told the Court that the Montana Developmental Center would use special therapeutic tools to help Mosby regain fitness during the ninety-day evaluation period. However, based on the reports of both experts, the parties agreed at the conclusion of the ninety-day evaluation period that, even with the proposed treatment, it was unlikely he would regain fitness in the foreseeable future. (5/1/06 Tr. at 19.)

If unfitness endures, then the final statutory step is to dismiss the criminal case and initiate civil commitment proceedings:

> (3) (a) The committing court shall, within 90 days of commitment, review the defendant's fitness to proceed. 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, except as provided in subsection (4).
>
> * * *
>
> (c) If the court determines that the defendant lacks fitness to proceed because the defendant has a developmental disability as defined in 53-20-102, the proceeding against the defendant must be dismissed and the prosecutor shall petition the court in the manner provided in Title 53, chapter 20, to determine the disposition of the defendant pursuant to those provisions.

Mont. Code Ann. § 46-14-221(3)(a) and (c). *See also, In re G.T.M.*, ¶ 14.

Almost immediately after he was charged, the parties implemented the plain and unambiguous terms of Mont. Code Ann. § 46-14-221. Dr. Scolatti found Mosby was not competent and the district court committed Mosby to the Montana Developmental Center for evaluation and treatment. While being evaluated and attempting to treat Mosby to regain fitness the criminal proceedings were suspended. After ninety days the court reviewed Dr. Gregg's report also finding Mosby not competent to assist in his defense and stand trial. Rather than holding the criminal proceeding in suspension while further efforts were made to restore competence, the court found Mosby would not become fit within the reasonably foreseeable future and dismissed the criminal charges. Jurisdiction was transferred to the civil commitment

process and Mosby was placed in the secure portion of the Montana Developmental Center. In 2006, the parties strictly complied with the clear statutory procedures. Mont. Code Ann. § 46-14-221(2) – (3).

No statutory authority exists to resurrect the criminal prosecution eleven years after the criminal charges were dismissed. Unlike 2006, the district court in 2018 conflated the pre-trial suspension procedure while the defendant was being evaluated with the requirement to dismiss if fitness could not be regained. 2/9/18 Tr. at 7. Labeling the resurrection of the criminal charges as a case of first impression, the court would apparently agree with the State that the statutes "implied" the dismissal was without prejudice. 2/15/18 Tr. at 26. The court's implied reading injecting a third option for unfitness proceedings creating a dismissal "without prejudice." Mont. Code Ann. § 46-14-221 contains no such third option. The court's "dismissal without prejudice" violates the fundamental principle of statutory interpretation "not to insert what has been omitted" Mont. Code Ann. § 46-14-221. As will be discussed next, the district court's variance from the plain language to create a "without prejudice" concept also completely undercuts the legislative intent for pre-trial fitness determinations.

B. Legislative changes to Mont. Code Ann. § 46-14-221 eliminated the "suspension" of criminal proceedings when a defendant is unfit in favor of dismissing the charges.

Mosby maintains the structure and plain meaning of the words used in Mont. Code Ann. § 46-14-221 controls and this Court need not go further or apply other means of interpretation. *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806 *citing Gulbrandson v. Carey*, 272 Mont. 494, 500, 901 P.2d 573, 577 (1995) *and State v. Ankeny*, 2010 MT 224, ¶ 21, 358 Mont. 32, 243 P.3d 391. However, legislative changes completely belie the district court's finding that it could resurrect Mosby's charges eleven years after they were dismissed.

In 1979, the Montana Legislature abolished the traditional insanity offense and substituted alternative procedures for considering a criminal defendant's mental condition. *State v. Korell*, 213 Mont. 316, 322, 690 P.2d 992, 996 (1984). As part of the pre-trial level of protection, the Legislature adopted the ALI Model Penal Code's provision with how to deal with defendants who are unfit to proceed. Under Model Penal Code § 4.06, fitness to proceed is defined as:

> The test [is] whether the 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 a factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402, 403, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960) *quoting State v. Austad*, 197 Mont. 70, 78, 641 P.2d 1373, 1378 (1982), *citing Dusky v. United States*, 362 U.S. 402, 403, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960). Falling in line with these standards, the first district court judge committed Mosby because he had no present ability to work with his attorney or assist in his defense. Under the Model Penal Code and the 1979 Montana statutes, when a criminal defendant was committed because he was unfit to proceed and unlikely to regain fitness in the foreseeable future, then the judge could either dismiss ***or*** defer the criminal charges. Model Penal Code § 4.06(2) and Mont. Code Ann. §§46-14-221 and 222 (1979)(*emphasis added*).

In 1983, the Montana Legislature set out to clarify the disposition of a defendant who was declared unfit to proceed before trial.[3] The Legislature enacted a new procedure requiring mandatory review of fitness to proceed within ninety days and dismissal (instead of

[3]1983 Laws of Montana, Sec. 1, Chapter 352.

suspension) of the criminal charges if the judge determines the defendant unfit to proceed and unlikely to regain fitness. In its amended form, the applicable version of Mont. Code Ann. § 46-14-221(2), (2005) no longer allows a court to defer the criminal charges. Dismissal now means exactly that: dismissal without the ability to resurrect the charges at some later date.

Senator Tom Towe, the author of the bill, explained how this new provision and the mandatory dismissal would work in practice:

> [Y]ou have to pull him [the defendant] back in ninety days, have him examined by a psychiatrist and then decide if he is really fit to proceed; if he is not fit to proceed and he is not likely to change, then [Towe] felt that it was only fair that they dismiss the criminal case; but you immediately start commitment proceedings, which will send him right back Warm Springs, only then under the mental commitment proceedings and not under this nebulous unfit-to-proceed thing.

Hearing on Senate Bill 248, House Judiciary Committee, March 21, 1983. The amendments addressed the concern that someone who suffers from a mental illness could be incarcerated indefinitely merely because criminal charges had been filed and that person was declared unfit to proceed.

The elimination of the deferral option brought Montana's unique statutes more in line with *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct.

1845, 32 L. Ed. 2d 435 (1972). In *Jackson*, the United States Supreme Court held that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial violated due process. *Jackson*, 406 U.S. at 724. The Court refused to impose specific time limits on the states, but held the mere filing of criminal charges cannot justify less procedural and substantive protections than afforded to those facing civil commitments. *Jackson*, 406 U.S. at 724. Removing the deferral option from Section 46-14-221(3)(c) avoided these constitutional pitfalls by setting defined review and disposition procedures.

The updated procedures in the unfitness statutes speak in mandatory terms of shall and must. A defendant shall be evaluated within ninety days. If it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, then the proceeding against the defendant must be dismissed. *Tison* ¶ 11. Dismissal does not mandate freedom for potentially violent mentally ill individuals because the next mandatory step is for the prosecutor to pursue civil commitment proceedings. *Tison,* ¶ 11. Mandatory civil commitment speaks to the permanency of the dismissal, rather than the

deferral, of the criminal proceedings. This plain reading of Mont. Code Ann. § 46-14-221(3) promotes justice by "simultaneously effectuating the legislature's will and requiring the State to pursue involuntary treatment of mentally ill persons under the civil statutes specifically authorizing such treatment." *Curtis*, 266 Mont. at 237, 879 P.2d at 1167.

Mosby never escaped responsibility for his actions. Just the opposite, he was incarcerated in the Montana Developmental Center for over eleven years because the original district court followed the dictates of Mont. Code Ann. § 46-14-221(3), just as the Legislature intended. Creating the third option of "dismissal without prejudice" is simply a return to the pre-1983 deferral process. The district court's "resurrection" of the criminal charges undercut both the plain language and legislative intent of the pre-trial fitness statutes.

C. This Court has consistently recognized the necessity for strict compliance with the jurisdictional requirements of the unfitness statutes.

Mosby's case shows a sharp contrast from the first district court's adherence to the statutes and the second district court's disregard of the statutory plain language and intent. District courts must strictly

comply with the statutory procedures for dealing with the mentally ill. In *Curtis*, the district court approved forced medication of two criminal defendants during their ninety-day commitment period. *Curtis*, 266 Mont. at 233, 879 P.2d at 1164. No statutory authority existed permitting forced medication of a criminal defendant during the ninety-day commitment period. Since the statute did not authorize this procedure, this Court held that there was no authority to medicate the two defendants. Failure to strictly comply with Mont. Code Ann. § 46-14-221(2) required reversal. *Curtis*, 266 Mont. at 238, 879 P.2d at 1168. In Mont. Code Ann. § 46-14-221, the defendant's guilty plea and sentence had to be set aside charges had to be set aside because, despite a submitted report from the state hospital showing the defendant had regained fitness, the district court never held a hearing or made findings that the defendant had regained fitness. In *Meeks*, the defendant was declared unfit to proceed and the evaluation gave no indication whether he would be able to regain fitness in the foreseeable future. *Meeks*, ¶ 22. The defendant was held for further evaluation past the ninety-day review period. This court held it was mandatory for the charges to be dismissed and civil proceedings commenced. *Meeks* ¶

26. The same requirement for dismissal was true in *Tison* even though the evaluation that found him unfit to proceed was sandwiched between two evaluations concluding he was fit to proceed. *Tison*, ¶¶3-4. Failure to comply with the ninety-day review meant that the district court was required to dismiss the charges. *Tison,* ¶ 15.

All these cases show failure to strictly comply results in dismissal of the chares with no opportunity to reinstitute charges sometime in the future. *Meeks* and *Tison* are especially instructive because they both regained fitness within relatively short periods of time. Meeks regained fitness six months after the review period. *Meeks*, ¶¶ 8-11. *Tison* was found fit to proceed after the second court ordered evaluation process. *Tison*, ¶ 4. Under the district court's "dismissal without prejudice" creation, the State could have prosecuted Meeks and Tison again because they had regained fitness. Essentially, there would be no end to the criminal prosecution if the defendant's status ever changed in the future. Holding someone indefinitely without following the statutes designed to prosecute someone who is not fit to face trial violates Due Process. *Tison*, ¶11 *citing Jackson*, 406 U.S. at 738. The district court went well beyond the plain language of Mont. Code Ann. § 46-14-221 to

create an unlimited ability to prosecute defendants who regain fitness in the future.

D. When Mosby's criminal charges were dismissed jurisdiction transferred to the civil commitment realm.

"Jurisdiction" means the authority or power of the court to take action against Mosby eleven years after his criminal charges were dismissed because he was unfit to be tried. *See, Hagan v. State*, 265 Mont. 31, 873 P.2d 1385 (1994) *and* Wayne R. Lafave, *Criminal Procedure*, Vol. 4, §16.4(a), fn. 1. The most common questions regarding this type of jurisdiction relate to territorial limits of the charging government. *See*, Lafave at §16.4(a). However, Montana law provides numerous examples where district courts lose jurisdiction if criminal statutory procedures are not strictly followed.

An information properly dismissed pursuant to statutory procedure is no longer effective against the defendant. *State v. Onstad*, 234 Mont. 487, 490, 764 P.2d 473, 475 (1988). When the trial court dismisses an information pursuant to statute, Mont. Code Ann. § 46-13-402, does not provide for reconsideration of the decision, and the trial court is without jurisdiction to reinstate the charges. *State ex rel. Torres v. Montana Eighth Judicial Dist. Court*, 265 Mont. 445, 453, 877 P.2d

1008, 1012 (1994). Contrary to the court's ruling, Mont. Code Ann. § 46-14-221 does not provide for reinstatement of the dismissed information.

District courts lose jurisdiction when the State fails to meet the statutory procedures for revoking probation. *State v. Goebel (II),* 2001 MT 155, 306 Mont. 83, 31 P.3d 340. Failure to strictly comply with technical requirements of the probationary statute removed jurisdiction, even when the statutory procedures did not make sense. *State v. Goebel (I)*, 2001 MT 73, 305 Mont. 53, 31 P.3d 335, *decision clarified on denial of reh'g,* 2001 MT 155, 306 Mont. 83, 31 P.3d 340. An adult district court cannot properly acquire jurisdiction over a juvenile without compliance with the youth court transfer procedures. *State v. Bedwell*, 1999 MT 206, 295 Mont. 476, 985 P.2d 150 (youth/adult court transfer statutes are jurisdictional in nature.) In *State v. Butler*, 1999 MT 70, 294 Mont. 17, 977 P.2d 1000[4], the district court transferred a youth to adult court based solely on the prosecution's affidavit, as was the statutory criteria at the time. *Butler*,

[4] *Butler* was overruled by *State v. McKee*, 2006 MT 5, ¶ 20, 330 Mont. 249, 127 P.3d 445 after the Montana legislature amended the Youth Court Act to allow direct filing without a hearing.

¶ 4. This Court explained that the youth court had "exclusive original jurisdiction" and the adult court could not acquire jurisdiction without the appropriate statutory and due process safeguards. *Butler*, ¶14, ¶¶19-20.

Here, the statutory time limits and review procedures for transfer to civil commitment proceedings make absolute sense. This Court should demand the same strict compliance. The mental fitness statutes are "jurisdictional in nature." *Meeks*, ¶ 18. So, when the charges against Mosby were dismissed in 2006 the State could have appealed the dismissal. Instead, as dictated by Mont. Code Ann. § 46-14-221(3), civil commitment proceedings were initiated. "Just as in *Meeks,* once the ninety-day statutory period expired, the State lacked the power to proceed further with criminal charges." *Tison*, ¶ 15. In Mosby's case, the original district court affirmatively dismissed criminal jurisdiction over Mosby so it could civilly commit him. Nothing about Mosby regaining fitness eleven years later allowed the district court to once again reclaim criminal jurisdiction. His current conviction must be dismissed.

II. The 4878 days of delay violated John Mosby's right to a speedy trial.

Every person accused of a crime is guaranteed the fundamental right to a speedy trial by the Sixth Amendment to the United States Constitution, which is made applicable to the States by virtue of the Fourteenth Amendment. *State v. Chavez*, 213 Mont. 434, 691 P.2d 1365 (1984). Article II, Section 24 of the Montana Constitution likewise guarantees a speedy trial. *Ariegwe*, ¶ 20.

A. The thirteen and a half years of delay was unjust.

Ariegwe created a four-factor speedy trial test requiring courts to analyze: (1) the length of the delay, (2) the reason for the delay, (3) assertion of the right, and (4) prejudice to the defendant. *Ariegwe*, ¶ 34. Before applying the *Ariegwe* factors this Court should also consider the built-in statutory process for analyzing delays in the fitness to proceed realm. As raised by Mosby in district court, Mont. Code Ann. § 46-14-222 contains a unique provision permitting dismissal if the time while waiting for the defendant to regain fitness takes so long to be unjust:

> When the court, on its own motion or upon the application of the director of the department of public health and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. *If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust*

> *to resume the criminal proceedings, 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 an appropriate facility of the department of public health and human services.*Mont. Code Ann. § 46-14-222, (emphasis added). This provision essentially creates a speedy trial analysis focused on the overall length of delay. *Ariegwe*, ¶ 49.

The Commission Comments to Mont. Code Ann. § 46-14-221 recognized this unique power to dismiss a criminal charge against the defendant even after he or she regained fitness to proceed:

> The provision permitting the court to dismiss the prosecution, if because of the lapse of time it would be unjust to continue it, is novel in codified American law but not in actual practice . ...There would seem to be some value in vesting such a power in the court, to be exercised where either, due to lapse of time the defendant is unable to produce witnesses or evidence once available which is essential to his defense, or where because of the length of the intervening period, which he has spent in a mental institution, subsequent to the alleged wrongful conduct, it seems "unjust" to subject him to trial and punishment.

Commission Comments to Mont. Code Ann. § 46-14-221. The power to dismiss under Mont. Code Ann. § 46-14-22, is not exactly a speedy trial ruling, but instead gives district courts broad discretion to consider not only the delays before his fitness was regained, but any unjust impact caused by the resumption of the criminal proceedings.

Mosby was imprisoned by the State for 13.5 years - equivalent to a 54-year sentence in the Montana State Prison with quarter time-eligibility. Mont. Code Ann. § 46-23-201(3). The delays in Mosby's case far exceed the time periods the United States Supreme Court has found to be "extraordinary." *See, Barker*, 407 U.S. at 533 *and Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520 (1992)(Eight-and-one-half year lag between indictment and arrest was clearly extraordinary.) Even if it had jurisdiction over Mosby's resurrected prosecution, the district court should have dismissed the charges against him because 13.5 years of total time was unjust. Also, the district court's speedy trial analysis is inherently flawed because it only counted 336 days of delay while the criminal case was "actively pending." (D.C. Doc. 64 at 11.)

B. The Ariegwe factors all weigh in favor of dismissal.

1. The length of delay

The speedy trial clock begins when a person has been formally accused or charged. *Ariegwe*, ¶ 42. Mosby was arrested on August 2, 2005. (D.C. Doc. 64 at 1.) The district court recognized the 4,878 days, easily satisfying the 200-day speedy trial trigger. (D.C. Doc. 64 at 11.)

2. Reasons for the delay

The second factor the Court shall consider is the reason for the delay. The longer the delay, the more compelling the State's justification for that delay must be. It is the State's burden to explain pretrial delays, as it is not the Defendant's obligation to bring himself to trial. *Ariegwe*, ¶ 64. Once the delays have been identified and attributed, the weight of each delay must be assigned "based on the specific cause and motive for the delay." *Ariegwe*, ¶ 68. Mosby accepts ninety days of delay caused by his motion to suspend the criminal proceedings so he could be evaluated by Dr. Gregg after being declared unfit. The remaining time should be attributed to the State as institutional delay. "Institutional delays weigh less heavily against the State because institutional delay is not one the State actively pursued." Mosby easily satisfies this factor.

3. Mosby's response to the delay

Mosby asserted his right to a speedy trial on October 9, 2018 and filed a speedy trial motion to dismiss on October 23, 2019. (D.C. Doc. 55.) Mosby did not raise speedy trial concerns while being held in the Montana Developmental Center because he had no indication the State

would seek to resurrect the criminal charges against after they were dismissed in 2006. However, his frequent objections to continued placement in the Montana Developmental Center demonstrates that he would not have chosen to both be civilly committed and held for extended periods while awaiting a criminal trial. This factor also weighs in Mosby's favor.

4. Prejudice

The presumption that pretrial delay has prejudiced the accused intensifies over time. Therefore the 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. The massive delay in Mosby's case reflects thirteen and a half years of incarceration. No doubt the level of anxiety caused by this extended incarceration was aggravated by Mosby's personal history of mistreatment when being placed in various facilities. His limited cognitive abilities no doubt led to newfound concerns when the criminal charges were resurrected eleven years after he was told the charges were dismissed. And while

the alleged victims were still available to testify, thirteen years of maturity could potentially create confidence and credibility difficult to compare to what their demeanor would have been in 2006. *See*, Ariegwe, ¶ 99 (quoting *Doggett*, 505 U.S. at 655, internal quotations omitted.) Mosby suffered considerable prejudice and this factor also weighs in his favor.

5. Balancing

When balancing the factors, it is clear Mosby's constitutional right to a speedy trial has been violated. The length of the delay is extraordinary at 4,806 days. The entirety of that time Mosby's liberty has been impaired either by incarceration or institutionalization in the Montana Developmental Center. Although the delay may technically be "institutional", there is no justification for the State resurrecting the criminal charges other than to thwart Mosby's desire to be released after an equivalent time any criminal defendant would have been entitled to parole consideration. The delay and restart of the prosecution was unjust. The district court erred when it rejected Mosby's statutory claim under Mont. Code Ann. § 46-14-222 and denied his right to a speedy trial. His convictions must be dismissed.

III. In the alternative, John Mosby deserved credit for every day he was held in the secure forensic unit of the Montana Developmental Center against his will.

Credit for time incarcerated is also specifically mandated by Mont. Code Ann. § 46-18-403(1)**:**

> **Credit for incarceration prior to conviction.** (1) Any person incarcerated on a bailable offense and against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed may not exceed the term of the prison sentence rendered.

Calculating credit for time served "is not a discretionary act, but a legal mandate." *State v. Hornstein*, 2010 MT 75, ¶ 12, 356 Mont. 14, 229 P.3d 1206 (citing *State v. Hoots*, 2005 MT 346, ¶ 31, 330 Mont. 144, 127 P.3d 369). 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. *See State v. McDowell*, 2011 MT 75, ¶ 27, 360 Mont. 83, 253 P.3d 812; Hornstein, ¶¶ 12-13; Mont. Code Ann. § 46-18-403(1).

Incarceration is incarceration. It does not matter whether Mosby spent the time in a jail or institutionalized in the secure forensic unit of the Montana Developmental Center. Black's Law Dictionary defines incarceration as imprisonment. In Montana, imprisonment is defined

as the restraint of an individual against his will. *Hughes v. Pullman*, 2001 MT 216, ¶ 21, 306 Mont. 420, 36 P.3d 339. Mosby was restrained against his will from the entire time after he was arrested on August 2, 2005. He deserves credit for all 4878 days he was held until he was sentenced on April 22, 2019.

CONCLUSION

Allowing the state to resurrect the criminal charges against Mosby undercuts the procedural safeguards necessary to uphold Montana's unique system for prosecuting people like Mosby who have clear mental disabilities. Resurrecting the criminal charges against Mosby ignores this Court's authority holding the dismissal transfers jurisdiction from the criminal to civil commitment criminal. More importantly, resurrecting Mosby's criminal charges ignore the United States Supreme Courts command to not hold those unfit to stand trial indefinitely. His conviction must be dismissed.

Respectfully submitted this 10th day of November, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Chad Wright
CHAD WRIGHT
Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7192, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
CHAD WRIGHT
Appellate Defender

APPENDIX

CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-10-2020:

Kirsten H. Pabst (Prosecutor)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Gerri Lamphier on behalf of Chad M. Wright
Dated: 11-10-2020