

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

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KYLE FOUTS, Montana State Hospital  
Administrator, and ADAM MEIER, Director,

No. OP 21-0450

Department of Health and Human Services,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT  
COURT, HONORABLE JOHN A. KUTZMAN,  
Presiding,

Respondent.

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**RESPONSE TO ORDER  
ON WRIT OF REVIEW**

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Pursuant to Order of the Montana Supreme Court issued November 12, 2021, Joshua A. Racki, Cascade County Attorney, on behalf of the Cascade County Attorney's Office (CCAO) responds to the Court's order to provide a summary response to Petitioner's Writ of Review. Petitioner filed the Writ in order to withdraw the District Court's finding of contempt and imposition of a \$500 per day civil contempt fine.

**STATEMENT OF FACTS**

In the Eighth Judicial District Court case of *State v. Shylah Hanway* (CDC-21-052) the District Court issued an Order on August 19, 2021 finding Defendant Hanway unfit to proceed. See Appendix 1, Unfit Order. The Court ordered

Defendant committed to the custody of the Director of the Department of Public Health and Human Services (DPHHS) to be placed in an appropriate mental health facility, including the Montana State Hospital (MSH). Appx. 1. The Court ordered that a hearing to review Defendant's fitness be set for November 12, 2021. Appx. 1. Finally, the Court ordered that Cascade County shall transport Defendant immediately and without delay by communicating with the Montana State Hospital. Appx. 1.

On October 5, 2021, the State, through the Cascade County Attorney's Office (CCAO), filed a Motion to Transport or Show Cause. See Appendix 2, Motion to Transport or Show Cause. The CCAO noted in the motion that Hanway still remained incarcerated at the Cascade County Detention Center. Appx. 2. The CCAO requested that the Court order MSH to allow Hanway to be admitted and to arrange for her transport within seven days of the order. Appx. 2. The CCAO also requested that should the transport and admission not occur within the seven days that the Court require MSH to show cause as to why they have not complied with the Court's orders. Appx. 2.

On October 14, 2021, the Court held a Show Cause Hearing to allow MSH to advise why they had yet to comply with admitting and transporting Hanway. Nicole Klein appeared for DPHHS/MSH and advised the Court of the Hospital's then capacity concerns and the ability to admit individuals. MSH advised they had not

explored any other placement options and that it would not be until after the new year before Hanway could be admitted. On October 17, 2021, the Court found MSH in contempt and ordered that they be sanctioned by a contempt fine of \$500 for each day it has not transported Hanway after October 12, 2021. See Appendix 3, Contempt Order. MSH admitted Hanway on October 27, 2021, which accounted for a total fine of \$7,500. MSH provided treatment and care for Hanway in the CDC-21-052 case and opined that she could be made fit within a total amount of time of approximately three to six months. See Appendix 4, Affidavit of Dr. Virginia Hill. The District Court however dismissed the case on November 17, 2021, over the objections of CCAO. See Appendix 5, Dismissal Order.

### **RESPONSE**

MSH contends that they cannot be held in contempt because the order to immediately transport and admit was an order of impossibility. MSH claims that District Courts, County Attorneys, and Defense Counsel contribute to the problem in cases such as Hanway's due to failing to timely try the case after fitness is restored or allowing the defendant to decompensate and fail to take medications. MSH further lays blame on County Attorneys for failing to pursue involuntary civil commitments. These claims of blame made by MSH are not only irrelevant but inappropriately lodged. What does or does not occur in a case or with a defendant following fitness being restored has no relevance to MSH's duty to or ability to admit

individuals who are unfit to proceed in criminal cases. Additionally, fitness to proceed in a criminal case is a vastly different standard than the standard under which a person can be involuntarily committed under the civil statutes and commitment under a civil statute does not solve or remedy a fitness to proceed issue in a criminal case.

The CCAO understands it is impossible to immediately and simultaneously admit all unfit defendants from across the state. The CCAO was placed in an untenable position of having to prosecute an individual for crimes committed while waiting for the defendant's unfitness to be treated so that fitness could be restored. The statutes specify how parties, and the Court, shall proceed when fitness is an issue in a criminal case. The statutes provide pursuant to M.C.A. § 46-14-221 (2) (a) that when a defendant lacks fitness 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. DPHHS is then responsible for placement and unfortunately M.C.A. § 46-14-221 (3) (a) puts a timeline on the initial commitment to be only 90 days. If a defendant isn't placed within a reasonable time, then no treatment is provided, and no justice is seen within the criminal proceedings.

M.C.A. § 46-14-221 (2) (a) provides that the placement is to the custody of the director of the department of public health and human services. The statute further states the placement is to be at an appropriate mental health facility or

residential facility. The statute does not limit that placement to be at MSH; the placement may be at either a mental health facility or a residential facility so long as that facility meets the statutory definition. MSH was already in violation of the Court's initial order to transport from October 19, 2021. MSH continued to be in violation of that order and then in violation of the October 5, 2021, order which provided seven days to comply. MSH was ultimately given nine days to comply before the Court held the Show Cause hearing on October 14, 2021. No testimony or information was provided during the Show Cause Hearing that MSH had even attempted to arrange for Hanway's admission. Following the Order of Contempt MSH worked with their facilities and were able to admit Hanway on October 27, 2021. Pursuant to the statute and case law it appears that the Court did not have the authority to issue a per diem contempt fine. However, that does not mean the contempt fine itself was improper, it simply means that the fine amount is limited to \$500 for any individual act of contempt.


### **CONCLUSION**

Hanway is a mental ill individual who committed multiple serious crimes. As a result of her mental illnesses her fitness to proceed in the criminal cases were called into question and she was ultimately found unfit to proceed. The law requires that a defendant who is unfit to proceed shall be committed to the custody of the director of the department of public health and human services. Defendant Hanway

unfortunately due to a multitude of reasons was not timely transported as required. In an attempt to ensure the law is complied with the CCAO filed a motion with the Court which ultimately resulted in DPHHS being held in contempt and fined. The contempt was not improper; however, the amount of the fine was. The Court is limited to issuing a fine of only up to \$500 for each individual violation and a per diem fine is not allowed.

DATED this 1st day of December, 2021.

JOSHUA A. RACKI  
Cascade County Attorney

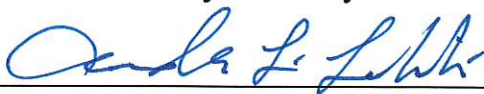
  
Amanda L. Lofink  
Deputy County Attorney

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman 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 1309 words, excluding certificate of service and certificate of compliance.

DATED this 1st day of December, 2021.

JOSHUA A. RACKI  
Cascade County Attorney

  
Amanda L. Lofink  
Deputy County Attorney

## **CERTIFICATE OF SERVICE**

I, Joshua A. Racki, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 12-01-2021:

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Daylon Nathaniel Martin (Attorney)  
615 2nd Ave. N.  
FL 3  
Great Falls MT 59401  
Representing: Shylah Cassie Hanway  
Service Method: eService

John A. Kutzman (Respondent)  
Eighth Judicial District Court  
415 2nd Ave. N.  
Great Falls MT 59401  
Service Method: E-mail Delivery

Chad Garrett Parker (Attorney)  
P.O. Box 201401  
Helena MT 59620-1401  
Representing: Kyle Fouts, Adam Meier  
Service Method: E-mail Delivery

Electronically Signed By: Joshua A. Racki  
Dated: 12-01-2021