IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0160

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANDREW LAIN GIBBS,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana First Judicial District Court, Broadwater County, the Honorable Michael Menahan, Presiding

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II. Gibbs may wish to have the following issue considered on appeal: Did the district court err by determining that the State may involuntarily medicate him to attempt to restore him to competency to participate in his own defense?

III. Gibbs may also wish to have the following issue reviewed on appeal: Did the district court err in denying his motion to dismiss for violation of his right to a speedy trial?

STATEMENT OF THE CASE AND FACTS

On February 22, 2018, the State sought leave to charge the Defendant and Appellant, Andrew Gibbs ("Gibbs"), with two counts of Criminal Endangerment, a felony, in violation of Montana Code Annotated § 45-5-207(1), and one count of Criminal Mischief, a felony, in violation of Montana Code Annotated § 45-6-101(1)(a). (Doc. 1 at 1–2.) The State alleged that in the early morning of October 8, 2017, Gibbs fired several shots into an occupied residence in Broadwater County. Law enforcement recovered several spent .380 casings at the

scene, but they did not have any suspects at the time. (Doc. 1 at 3.) While investigating another matter in December of 2017, law enforcement interviewed Gibbs and he made statements that caused officers to believe he may have knowledge of the October shooting. (Doc. 1 at 3.) On December 12, 2017, Gibbs was arrested in Meagher County for shooting at a commercial building in White Sulphur Springs. (Doc. 1 at 3.) He was held in the Broadwater County jail due to the limited capacity of the Meagher County jail. (Doc. 1 at 4.) Law enforcement collected a .380 automatic pistol from the scene of the White Sulphur Springs shooting and submitted both the firearm and the spent casings from the Broadwater County shooting to the Montana Crime Lab for comparative analysis. (Doc. 1 at 4.) On February 6, 2018, the Crime Lab determined that the bullets from the Broadwater County shooting had been fired from the gun confiscated from Gibbs in Meagher County. Accordingly, the State sought leave to file the Information in this case, charging Gibbs in connection with the Broadwater County shooting.

On September 6, 2018, the State moved the Court for an order committing Gibbs to the Montana State Hospital for a mental evaluation regarding his fitness to proceed to trial. (Doc. 17.) The State

represented in its motion that the issue of Gibbs' fitness had been raised in the Meagher County case that was pending concurrently, and that Judge Spaulding had already ordered an evaluation of Gibbs in that matter. (Doc. 17 at 2; Doc. 10.) That evaluation was performed in August 2018 by Dr. Bowman Smelko, who diagnosed Gibbs with Delusional Disorder, Mixed Type (Persecutory and Grandiose), and found that Gibbs was not fit to proceed. Judge Spaulding ordered Gibbs committed to the Montana State Hospital for treatment. (Doc. 10.) The State sought a similar order from Broadwater County District Court that would entitle it to obtain a copy of the fitness evaluation that had already been performed, and that would allow it to move for Gibbs' commitment and treatment in reliance on that evaluation. (Doc. 17 at 2.) The Court granted the motion for commitment and a fitness evaluation on September 7, 2018. (Doc. 18.) The Court then granted a motion by Gibbs to be evaluated not just for his fitness, but also to determine whether at the time of the offense he had a particular state of mind that is an element of the offense, and whether he had the capacity to appreciate the criminality of his behavior and conform his behavior to the requirements of the law. (Docs. 19, 20.)

On December 27, 2018, Drs. Timothy Casey (Ph.D.) and Virginia Hill (M.D.), submitted a report of their opinions about Gibbs' fitness and mental state, pursuant to § 46-14-206, MCA. (Doc. 23.) They advised the Court that Gibbs remained unfit to proceed "due to his fixed delusional system which interferes with his ability to rationally plan a defense strategy with his attorney." (Doc. 23 at 4.) In reliance on that report, the Court suspended proceedings and committed Gibbs to the Montana State Hospital for so long as his unfitness endured. (Doc. 29.)

Two months after Gibbs was committed to the State Hospital in his Broadwater County case, the State moved for an order authorizing the involuntary administration of medication. (Doc. 32.) The State represented that Gibbs had steadfastly refused to take the antipsychotic medications prescribed by Dr. Hill, and that unless and until he was medicated, he would remain unfit to proceed to trial. (Doc. 32 at 1.) Dr. Hill reiterated this information in an updated report to the Court on March 5, 2019. (Doc. 36.) The Court found Gibbs still unfit to proceed to trial, but did not find that "it does not appear that [Gibbs] will become fit to proceed within the reasonably foreseeable future." (Doc. 39 at 2 (citing § 46-14-221(3)(a), MCA.) Accordingly, the Court

extended Gibbs' commitment through May 31, 2019, and set a hearing pursuant to *Sell v. United States*, 539 U.S. 166 (2003) for April 5, 2019. (Doc. 39.)

Dr. Hill testified at the *Sell* hearing that Gibbs

> suffers with a delusional disorder. Persecutory and grandiose type seems to describe it the best from the DSM-5. This is considered a serious mental illness. It is listed under schizophrenia and other psychotic disorders in the DSM-5. And it consists of a prominent finding of what we call delusions, which are fixed false beliefs that cannot be changed by any kind of evidence. I believe Mr. Gibbs has probably been suffering from this illness perhaps since 2000, though the family believes that the symptoms have worsened since 2015.

(Tr. 04/05/2019 *Sell* Hearing at 14.) She elaborated that,

> In this disorder, individuals believe they are being harassed, persecuted, followed, spied on. In Mr. Gibbs' case, he believes that he has been followed and shot at by numerous police authority. He says this has been actually going on since he killed a child rapist at ten years old. But it seems to have increased in frequency in recent years. The grandiose descriptor refers to his statements about having a law degree from the University of Montana, an anthropology degree from the University of Montana, several honorary degrees, having been made a Marine by one of his friends. He certainly speaks to numerous accomplishments that we have no evidence for. [He also] believes that he's married to several famous and non-famous women, including Jewel and Taylor Swift and Emma Watson.

(Tr. *Sell* Hrng. at 16–17.) Dr. Hill's diagnosis was based upon "11 months of 24/7 observation, [Gibbs'] interaction with rehabilitation staff, interaction with psychology staff, nursing staff, psychiatric technician staff, and he has met with a treatment team also on a regular basis." (Tr. *Sell* Hrng. at 20.)

Dr. Hill also testified about her experience treating other patients with delusional disorders. Her "experience with them is that there's really no progress until an antipsychotic medication is used. They remain firmly and incontrovertibly committed to their beliefs, regardless of whatever evidence you might present to them to the contrary." (Tr. *Sell* Hrng. at 28–29.) But thanks to the advent of "second-generation atypical antipsychotic medications, [. . .] delusional disorder is a very treatable condition." (Tr. *Sell* Hrng. at 29.) Dr. Hill explained that cognitive behavioral therapy, which "requires the patient to change their thinking to begin to address the problem," is not successful in patients with delusional disorders until antipsychotic medications are administered and can begin to have a mitigating effect on the delusions. (Tr. *Sell* Hrng. at 30.)

Dr. Hill was then asked to testify about Gibbs' compliance with the treatment program she had developed for him. She explained that,

> [t]hroughout his hospitalization, I have discussed with him the importance of taking an antipsychotic medication for his delusional disorder to help him become fit to proceed. He has angrily denied having any mental illness and has told me repeatedly that he would not accept an antipsychotic medication. So, we haven't made any progress in that area.

(Tr. *Sell* Hrng. at 23.) At the time of the *Sell* hearing, Gibbs was continuing to refuse any psychotropic medication. (Tr. *Sell* Hrng. at 24.)

At the conclusion of the hearing, the Court granted the State's motion to involuntarily medicate Gibbs. The Court stated its intention to issue

> a written order giving the Montana State Hospital and its medical staff the authority to administer, involuntarily, antipsychotic medications in accordance with the treatment plan that Dr. Hill developed; and the antipsychotic drugs -- the regiment as described by Dr. Hill -- according to her medical judgment; and that they'll be administered with appropriate safety measures during the course of involuntarily being administered; and with monitoring for the serious side effects as Dr. Hill testified.

(Tr. *Sell* Hrng. at 66–67.) The Court issued its Findings of Fact, Conclusions of Law, and Order on April 19, 2019. (Doc. 55.)

Dr. Hill submitted an updated evaluation of Gibbs on May 17, 2019. (Doc. 62.) She reported that pursuant to the Court's order authorizing involuntary medication, Gibbs had begun receiving a low dose of the antipsychotic Zyprexa on April 25, 2019. (Doc. 62 at 1.) Since then, Gibbs "continued to exhibit delusional beliefs, [but] they were less extensive and his thoughts were more organized than during our previous summary interview. His level of agitation and degree of argumentativeness had also decreased somewhat since the last interview." (Doc. 62 at 2.) Dr. Hill opined that Gibbs "continues to be unfit to proceed in his criminal case," but that he recently started on another antipsychotic medication, Abilify, which she hoped would "facilitate his adjudicatory competence in the near future." (Doc. 62 at 5.) She recommended continued treatment and a re-evaluation in 90 days. The Court accepted her recommendation and continued Gibbs' commitment through August 2, 2019. (Doc. 66.)

In another report filed with the Court on July 24, 2019, Dr. Hill advised that Gibbs' "symptoms are significantly improved with the administration of antipsychotic medication; his thinking is more rational and flexible than during previous evaluations and his

demeanor is more pleasant. As a result of his diminished delusional belief system, it is [her] opinion that Mr. Gibbs is presently fit to proceed with his criminal case." (Doc. 69 at 6.) However, Dr. Hill recommended an additional 90-day commitment to "adjust [Gibbs'] medication and further improve his psychotic symptoms." (Doc. 69 at 1.) Based upon these opinions, the Court ordered Gibbs' continued commitment and set a fitness hearing for November 1, 2019. (Doc. 79 at 2–3; Doc. 80 at 3.)

The parties and the Court agreed at the fitness hearing that Gibbs was fit to proceed to trial and the matter should be put back on the Court's trial calendar. (Tr. 11/01/2019 Fitness Hearing at 3.) The Court offered a trial date in January 2020, but Gibbs, through his counsel, requested a later trial date so that newly appointed counsel could have adequate time to prepare. (Tr. Fitness Hrng. at 8.) The Court set the trial for May 4, 2020. (Tr. Fitness Hrng. at 9.) At the pretrial conference on March 27, 2020, the Court reset the trial for August 31, 2020, due to the COVID-19 pandemic. (Doc. 84.) At the next pretrial conference on August 7, 2020, the Court reset the trial at defense

counsel's request because a new public defender had just been appointed. The new trial date was December 4, 2020. (Doc. 86.)

On October 28, 2020, Gibbs' counsel filed a motion to dismiss his case for violation of his speedy trial rights, citing a 1,047-day delay in the commencement of his trial. (Doc. 89.) The Court held a hearing on the motion and issued a written order denying the motion on December 11, 2020. (Doc. 99.) The Court analyzed the factors set forth in *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815, because it found that the amount of delay satisfied the 200-day threshold that raises a presumption of prejudice to the defendant. (Doc. 99 at 11.) The Court found that all the delay stemming from Gibbs' unfitness to proceed was attributable to him, that the delay stemming from the COVID-19 pandemic was institutional and attributable to the State, and that the continuances stemming from the multiple substitutions of defense counsel were also attributable to Gibbs. (Doc. 99 at 7–8.) The Court balanced the length and attribution of the various delays against Gibbs' response to the delay and the prejudice incurred, and concluded that Gibbs had not been denied his constitutional right to a speedy trial. (Doc. 99 at 11–12.)

Three days later, Gibbs entered a no contest plea to Counts I and II, and the State dismissed Count III. (Doc. 96.) The plea agreement obligated both parties to recommend a sentence on Count I of a custodial commitment to the Department of Public Health and Human Services ("DPHHS") for a period of 5 years with no time suspended, but with credit for time served. On Count II, the parties were to jointly recommend a custodial commitment to DPHHS for a period of 10 years with all time suspended, consecutive to the sentence on Count I. (Doc. 104.1 at 5.) Gibbs retained the right to appeal the Court's order authorizing the involuntary administration of medication and the denial of his motion to dismiss for violation of his speedy trial right. (Doc. 104.1 at 6.) The Court accepted the plea agreement and sentenced Gibbs according to its terms. (Doc. 106.) Gibbs timely appealed. (Doc. 109.)

STANDARDS OF REVIEW

"While the first *Sell* factor is primarily a legal question, this and the remaining factors involve questions that are factual in nature and require the trial court to resolve disputed issues by weighing expert testimony and evaluating other medical evidence." *Barrus v. Mont. First*

Judicial Dist. Court, 2020 MT 14, ¶ 28, 398 Mont. 353, 456 P.3d 577 (citing *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 (9th Cir. 2010)). "The credibility of witnesses and the weight to be given to their testimony are to be determined by the trier of fact, and disputed questions of fact and credibility will not be disturbed on appeal. If the evidence conflicts, it is within the province of the trier of fact to determine which will prevail. This Court will not reweigh the evidence or the credibility of witnesses." *Barrus*, ¶ 13 (internal citations omitted). This Court "determine[s] whether the [trial] court's underlying findings of fact are clearly erroneous, which occurs if they are not supported by substantial credible evidence, the [trial] court has misapprehended the effect of the evidence, or if [this Court's] review of the record leaves [it] with a definite and firm conviction that a mistake has been committed." *Barrus*, ¶ 14. However, "[a] court's application of controlling legal principles to its factual findings is a mixed question of law and fact which this court reviews de novo." *Barrus*, ¶ 15.

"In order to address a speedy trial claim, a trial court must first make findings of fact. [This] court reviews those factual findings to determine whether they are clearly erroneous. A trial court's factual

findings are clearly erroneous if they are not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves the appellate court with the definite and firm conviction that a mistake has been made. While the factual findings are reviewed under the clearly erroneous standard, whether those facts amount to a violation of the defendant's right to a speedy trial is a question of constitutional law. [This] court reviews a trial court's conclusions of law de novo to determine whether the trial court's interpretation and application of the law are correct." *State v. Houghton*, 2010 MT 145, ¶ 13, 357 Mont. 9, 234 P.3d 904.

SUMMARY OF THE ARGUMENT

This Court should grant counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and § 46-8-103, MCA, because a thorough review of the factual record and the relevant law has revealed no meritorious issues to raise in this appeal.

Gibbs may argue that the district court erred by allowing the State to involuntarily medicate him to attempt to restore him to competency to participate in his own defense, and again by denying his motion to dismiss for violation of his right to a speedy trial.

ARGUMENT

I. Counsel for Appellant should be permitted to withdraw from this appeal pursuant to *Anders v. California* and § 46-8-103, MCA.

Both the US Constitution and the Montana Constitution guarantee defendants the rights to due process and the effective assistance of counsel. *Anders v. California*, 386 U.S. 738, 744 (1967); *State v. Adams*, 2002 MT 202, ¶ 15, 311 Mont. 202, 54 P.3d 50; *see also* U.S. Const. amend. VI; Mont. Const. art. II, §§ 17, 24. In addition to providing effective assistance to his client, an appellant's counsel also has a duty of candor towards the court, and an obligation not to raise claims without having "a bona fide basis in law and fact for the position to be advocated." Mont. Rules of Prof. Conduct 3.1, 3.3. When these rights and duties conflict, and appellate counsel "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744.

The State of Montana has codified the *Anders* requirements. Section 46-8-103(2), MCA. If, after thoroughly reviewing the record and researching the applicable law, counsel "determines that an appeal

would be frivolous or wholly without merit, counsel shall file a motion with the court requesting permission to withdraw." Section 46-8-103(2), MCA . Counsel's motion to withdraw "must be accompanied by a memorandum discussing any issues that arguably support an appeal." Section 46-8-103(2), MCA . The memorandum must include the factual, procedural, and jurisdictional history of the case, as well as citations to pertinent statutes, case law, or procedural rules. Section 46-8-103(2), MCA . An *Anders* brief is not meant to "force appointed counsel to brief his case against his client," but rather to "afford the [client] that advocacy which a nonindigent defendant is able to obtain," and to "induce the court to pursue all the more vigorously its own review [of the case] because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." *Anders*, 386 U.S. at 745. Indeed, this Court has explained that "§ 46-8-103(2), MCA, serves a vital function. It notifies prospective pro se litigants of potentially viable issues for appellate review. It also provides assistance to a court deliberating over the merit of a motion to withdraw from appellate representation." *Adams*, ¶ 16.

After a thorough review of the entire factual record and the relevant law, counsel has not found any meritorious issues to raise in this appeal. Counsel provides this memorandum to the Court not to argue against his client, but to provide the Court with citations to the record and the applicable law sufficient to help the Court conduct its own review of the case and determine whether to grant counsel's motion to withdraw. Pursuant to § 46-8-103(2), MCA, the appellant has been advised of counsel's decision and of the appellant's right to file a response.

II. Gibbs may wish to have the following issue reviewed on appeal: Did the district court err by determining that the State may involuntarily medicate him to attempt to restore him to competency to participate in his own defense?

In *Sell v. United States*, 539 U.S. 166 (2003), the United States Supreme Court was asked whether "the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." *Sell*, 539 U.S. at 169. The Court determined that the Constitution does allow "the Government to administer those drugs, even against the defendant's

will, in limited circumstances," upon satisfaction of a number of conditions. *Id*. This Court has summarized the *Sell* factors as follows:

> (1) the court must find that important government interests are at stake; (2) the court must conclude that involuntary medication will significantly further those state interests and further must find that administration of the drugs is (A) substantially likely to render the defendant competent to stand trial, and (B) substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist his counsel in conducting his defense; (3) the court must conclude that involuntary medication is necessary to further the state's interests, and that any alternative, less intrusive treatments are unlikely to achieve the same results; and (4) the court must conclude that administration of the drugs is medically appropriate, *i.e.* in the patient's best medical interest in light of his medical condition.

Barrus, ¶ 24 (citing *Sell*, 539 U.S. at 180–81).

"The *Sell* factors do not represent a balancing test, but a set of independent requirements, each of which must be found to be true before the forcible administration of psychotropic drugs may be considered constitutionally permissible." *Barrus*, ¶ 24 (citing *Ruiz-Gaxiola*, 623 F.3d at 691). This Court agrees with the Ninth Circuit's assessment that "the government must prove the relevant facts by clear and convincing evidence" because of "the importance of the liberty interests implicated by a *Sell* order and the high risk of error." *Barrus*,

¶ 24 (citing *Ruiz-Gaxiola*, 623 F.3d at 692). In keeping with *Sell*, Montana law requires a court to "enter into the record a detailed statement of the facts upon which an order [for involuntary medication] is made, and if compliance with the individualized treatment plan is ordered, the court shall also enter into the record specific findings that the state has proved an overriding justification for the order and that the treatment being ordered is medically appropriate." Section 46-14-221(2)(b), MCA.

In this case, the Court received testimony from Dr. Hill on each *Sell* factor. She opined that important government interests were at stake because Gibbs was accused of shooting at a house that was occupied by people, and separately accused of shooting 12 or 13 bullets into a commercial building in White Sulphur Springs, and she was concerned about his "acting under [a] delusion [and] committing future crimes that would be a danger to the community." (Tr. *Sell* Hrng. at 32.) She added that, "[u]ntreated mental illness is the critical issue here. And I also believe the best predictor of future behavior is past behavior." (Tr. *Sell* Hrng. at 32.)

As to the second factor, Dr. Hill opined that involuntary medication "is substantially likely" to render Gibbs competent to stand trial, and that she expected to see some improvement in his condition within 90 days, and actual fitness after 6 months. (Tr. *Sell* Hrng. at 34–35.) She testified that she held such an expectation because she had previously treated "five delusional disorder patients for whom [she] had to testify on a *Sell* hearing. And all of them became fit to proceed." (Tr. *Sell* Hrng. at 35.) Regarding side effects that may interfere significantly with Gibbs' ability to assist his counsel in conducting his defense, Dr. Hill explained that,

> all medications have side effects including aspirin that has 17 pages of possible side effects. But the side effects I'd be concerned about in cases of fitness to proceed are of course drowsiness, dizziness, inability to concentrate. If you are disturbed by a lot of muscle stiffness or tremulousness, that would certainly derail your concentration. [But] I believe that these medications can be properly prescribed, and particularly when persons are in an inpatient setting where knowledgeable psychiatric technicians and nurses are watching their response to medication throughout the day. I get a report on the patient's response every morning. And we can quickly adjust doses, offer antidotes, if they're getting into any kind of a side effect that would interfere with their ability to concentrate in a courtroom.

(Tr. *Sell* Hrng. at 37.)

Dr. Hill also testified extensively about why less intrusive treatments are unlikely to achieve the same results. She explained that in her experience treating patients with delusional disorder, "there's really no progress until an antipsychotic medication is used. They remain firmly and incontrovertibly committed to their beliefs, regardless of whatever evidence you might present to them to the contrary." (Tr. *Sell* Hrng. at 28–29.) Other treatments like cognitive behavioral therapy are not successful in patients with delusional disorders until antipsychotic medications are administered and can begin to have a mitigating effect on the delusions. (Tr. *Sell* Hrng. at 30.) She concluded that less intrusive treatments are unlikely to achieve the same results in Gibbs' case because he had been under her treatment but refusing antipsychotic medication for ten months "and his thinking patterns are unchanged." (Tr. *Sell* Hrng. at 45.)

Finally, Dr. Hill was asked for her opinion with respect to the fourth factor, whether the administration of drugs is in the patient's best interest. She replied, "I think either short term for fitness, long term for his general health. I think he would have the best chances of success having his psychotic symptoms, specifically his delusions,

ameliorated by psychotropic medications." (Tr. *Sell* Hrng. at 45–46.) She also opined that it would be beneficial to Gibbs' long term mental and physical health if he were able to get some relief from the delusions that cause him constant fear and anxiety. (Tr. *Sell* Hrng. at 47.)

The Court heard Dr. Hill's testimony, weighed her experience and credibility, (Tr. *Sell* Hrng. at 66); *Barrus*, ¶ 13, and determined that "the State has proven each of the four *Sell* factors by clear and convincing evidence," (Doc. 55 at 18). Nonetheless, Gibbs may wish to argue that the State did not meet its burden to prove each of the *Sell* factors by clear and convincing evidence.

III. Gibbs may also wish to have the following issue reviewed on appeal: Did the district court err in denying his motion to dismiss for violation of his right to a speedy trial?

An accused's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. An accused's claim that his right to a speedy trial has been violated is analyzed under the four-factor test originally set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), and subsequently interpreted by this Court in *State v. Ariegwe*, 2007 MT 204, ¶¶ 34–35, 338 Mont. 442, 167 P.3d 815. The four factors

to be analyzed are (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right to a speedy trial by the defendant; and (4) the prejudice to the defense. *Barker*, 407 U.S. at 530; *Ariegwe*, ¶ 34.

The first factor—length of delay—actually contains two inquires. The first inquiry is a threshold matter: "whether the interval between accusation and trial is sufficient to trigger the four-factor balancing test." *Ariegwe*, ¶ 39. Two hundred days is the necessary length of time to trigger a speedy trial analysis, and this interval is measured without regard to fault for the delay. *Ariegwe*, ¶¶ 39, 41. The speedy trial right "extends to those persons who have been formally accused or charged in the course of [a] prosecution whether that accusation be by arrest, the filing of a complaint, or by indictment or information," and runs until the scheduled trial date. *Ariegwe*, ¶¶ 42–43. As of the 200-day trigger date for a speedy trial analysis, there is a rebuttable presumption that the defense has been prejudiced by the delay that escalates with the passage of time. *Ariegwe*, ¶ 56. "With respect to the second inquiry under Factor One, the court must consider the extent to which the delay (again, irrespective of fault for the delay) stretches beyond the 200-day

trigger date. The significance of this latter inquiry is twofold: 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. The Court found that the length of delay in Gibbs' case exceeded the 200-day threshold, so it proceeded to conduct the balancing analysis. (Doc. 99 at 6.)

"Under Factor Two, the court first identifies each period of delay in bringing the accused to trial. The court then attributes each period of delay to the appropriate party, with any delay not demonstrated to have been caused by the accused or affirmatively waived by the accused being attributed to the State by default. Finally, the court assigns weight to each period of delay based on the specific cause and motive for the delay." *Ariegwe*, ¶ 108. A deliberate attempt to delay the trial in order to prejudice the defense is weighted heavily against the government. *Ariegwe*, ¶ 66. A reason such as lack of diligence, negligence, or overcrowded courts weighs less heavily against the government, and constitutes a "middle ground on the culpability scale." *Ariegwe*, ¶¶ 66, 108. A "valid reason, such as a missing witness," may

justify the government's delay. *Ariegwe*, ¶ 66. The Court similarly weighs acceptable and unacceptable reasons for delay caused or requested by the accused. *Ariegwe*, ¶ 108. As this Court has explained,

> the more delay in bringing the accused to trial that is due to lack of diligence or other 'unacceptable' reasons, the more likely the accused's speedy trial right has been violated. Likewise, the more delay caused by the accused for 'unacceptable' reasons, the less likely the right has been violated. Lastly, because 'the primary burden' to assure that cases are brought to trial is 'on the courts and the prosecutors,' *Barker*, 407 U.S. at 529, the further the delay stretches beyond the 200-day trigger date, the more compelling the State's justifications for the delay must be.

Ariegwe, ¶ 72. This Court has held that delay resulting from mental health evaluations are attributable to the defense, and "the fact that the defendant must be competent to proceed does not make the delay for obtaining a mental health evaluation institutional delay." *State v. Couture*, 2010 MT 201, ¶ 81, 357 Mont. 398, 240 P.3d 987. Similarly, delay caused by defense counsel is counted against a defendant, as long as there is no evidence that the delay was "due to a systemic breakdown in the public defender system." *State v. Redlich*, 2014 MT 55, ¶ 48, 374 Mont. 135, 321 P.3d 82.

The chart below illustrates the periods of delay and two whom they were attributed by the Court, (Doc. 99 at 8):

Dates	Number of days	Party to whom interval is attributable
Filing of Information (Feb. 22, 2018) to first trial setting (Sept. 7, 2018)	197	State (institutional delay)
Fitness to proceed raised (Sept. 7, 2018) to declaration of fitness (Nov. 1, 2019)	420	Gibbs (unfit to proceed and unwilling to accept medication to restore fitness)
Declared fit (Nov. 1, 2019) to second trial setting (Mar. 27, 2020)	147	State (institutional delay)
Second trial setting (Mar. 27, 2020) to third trial setting (Aug. 31, 2020)	157	State (institutional delay due to COVID-19)
Third trial setting (Aug. 31, 2020) to fourth trial setting (Jan. 4, 2021)	124	Gibbs (delays due to substitution of defense counsel)

The Court held that nearly all the delay in the case was attributable to Gibbs, either because he was unfit or because he was refusing medication offered to render him fit, and that the remaining delay that was attributable to the State weighs less heavily because it was institutional and for valid reasons, including the COVID-19 pandemic. (Doc. 99 at 9.) However, Gibbs may wish to argue that the district court erred in attributing to him periods of delay caused by his unfitness, his refusal to accept medication to restore fitness, or the substitution of defense counsel.

The third factor asks the court to analyze the defendant's responses to the delay in bringing him to trial. "[W]hether the accused

actually wanted to be brought to trial promptly is an 'important' consideration in ascertaining whether his or her right to a speedy trial has been violated." *Ariegwe*, ¶ 76 (citing *Barker*, 407 U.S. at 534). In determining whether or not the accused genuinely desires to be brought to trial, the court considers factors such as "whether and how the accused asserted the right to speedy trial, the frequency of the accused's objections to pretrial delays, and the reasons for any acquiescence by the accused in pretrial delays." *Ariegwe*, ¶ 76 (internal citations omitted). A sincere desire to be brought to trial, evidenced by conduct of the defendant is weighed in favor of the defendant. Conversely, evidence indicating a desire to avoid trial weighs in favor of the State. *Ariegwe*, ¶ 85.

The Court summarized Gibbs' desire to see the matter brought to trial as follows: "Apart from the present motion to dismiss, Gibbs has not previously indicated a desire to see this matter brought to trial. He repeatedly filed *pro se* motions with the Court pursuing legal strategies divorced from his appointed counsel. He also raised numerous complaints regarding his counsel." (Doc. 99 at 9.) However, Gibbs may wish to argue that his documented displeasure with his confinement at

the Montana State Hospital should be interpreted as a fervent desire to be brought to trial.

The fourth factor is chiefly concerned with the consequences of delay to the defendant. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Ariegwe*, ¶ 87. The speedy trial guarantee also serves to "limit the possibilities that long delay will impair the ability of an accused to defend himself." *Ariegwe*, ¶ 87. Prejudice to the defendant may be established because of any or all of these considerations. *Ariegwe*, ¶ 88.

The Court held that although Gibbs did remain confined for the duration of the pretrial proceedings (in a hospital, not a jail), the "period of pretrial incarceration was not excessive given the Defendant's mental state and his unwillingness to accept medication prescribed to treat his mental illness and regain fitness." (Doc. 99 at 10.) The Court also held, based on testimony taken at the hearing on this motion to dismiss, that "[t]here is no evidence the delay hampered the defense." (Doc. 99 at 11.)

However, Gibbs may wish to argue that his pretrial confinement in the Montana State Hospital was so lengthy (1,047 days) that prejudice to his defense is presumed, and this factor should weigh in his favor.

CONCLUSION

After a thorough review of the entire factual record and the relevant law, counsel has not found any meritorious issues to raise in this appeal. The Court should therefore grant counsel's motion to withdraw.

Respectfully submitted this 18th day of March, 2022.

By: /s/ *Samir F. Aarab*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 5,901 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

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APPENDIX

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