IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case Number: DA 22-0054

Shandor S. Badaruddin,
Appellant,

-vs.-

The State of Montana &
The Nineteenth Judicial District,

Appellees.

OPENING BRIEF OF APPELLANT

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2. Even if costs were properly imposed, the district court erred in including costs not authorized by statute in the sanctions order.

II. Statement of the Case

Shandor Badaruddin [Badaruddin] represented Kip Hartman in a 9-day criminal jury trial in Lincoln County in January and February of 2021. The trial ended when the district court declared a mistrial based on perceived time constraints over Badaruddin's objection. *See* Order Re: Mistrial, February 5, 2021 (Appendix B). The court subsequently found that Badaruddin strategically delayed the entire case and caused the mistrial. *See* Order and Opinion Re: Motion for Sanctions, January 25, 2022 (Appendix A). The court sanctioned Badaruddin and ordered him to pay the costs associated with the mistrial. (*Id.*)

Badaruddin filed a Writ challenging the sanctions with this Court on February 18, 2021. *See OP 21-0076.* Badaruddin argued the court erred in imposing sanctions without a hearing, without an opportunity to

be heard, and without specifying the authority for the sanction order. *Id.* This Court denied the Writ as premature on March 30, 2021. *Id.*

On May 21, 2021, the court held a hearing on the sanctions issue. Later, the court issued a written order imposing sanctions in the total amount of $51,923.61. (Appendix A). Badaruddin now appeals.

While this appeal progressed, Badaruddin continued to represent Hartman by seeking to uphold Hartman's constitutional rights. This included writs to both this Court and a writ to the United States District Court for the District of Montana. On August 12, 2022, Badaruddin and Hartman were successful when the federal court granted Hartman habeas relief and precluded the State from trying Hartman again based on the double jeopardy protections of the *Fifth Amendment*. *Hartman v. Knudsen,* 2022 WL 3346375*,* U.S. Dist. Mont., Cause No. CV 22-57-M-DLC, Order, Aug. 12, 2022 (Appendix C)[1]. The State has since appealed the decision of the United States District Court to the Court of Appeals for the Ninth Circuit.

[1]"This Court may take judicial notice of other court proceedings, and we do so here." *Stokes v. First Am. Title Co. of Mont.*, 2017 MT 275, ¶ 8, 389 Mont. 245, 406 P.3d 439 (citing *Mont. R. Evid. 202)*

III. STATEMENT OF FACTS

1. Pre-trial proceedings in *State vs. Kip Hartman.*

The underlying case here is *State vs. Kip Hartman*, Montana Nineteenth Judicial District case number DC-19-75. Hartman was charged with nine felony counts related to securities and insurance fraud and elder abuse. Due to the pandemic and the need for social distancing precautions, the case was tried at the Libby Memorial Events Center.

The trial date was continued multiple times due to the pandemic. The court ultimately set a nine day trial to begin on January 26, 2021. *See* Second Amended Minute Entry (Doc. 243) at 1. The court provided that "counsel [would] be held to the allotted time indicated, with time divided equally between the parties." *See* Order Setting Jury Trial, June 3, 2020, (Doc. 170) at 1, ¶5. At a December 22, 2020, Pretrial Conference, Badaruddin indicated it was unlikely the trial would finish in nine days. Badaruddin cited to the State's extensive witness list and the defense's extensive exhibit list to support his concern. *See* Transcript of Pretrial Conferences, 6/1/20 and 12/22/20 (Doc. 245) at T. 15; *See Also* Second Amended Minute Entry (Doc. 243).

On, January 26, 2021, prior to jury selection, the court held a Final Pretrial Conference at which State again confirmed it would complete its case in four days. *See* Transcript of Final Pretrial Conference and Jury Sworn, 1/26/21 (Doc. 246) at 14. Badaruddin reiterated, based on a four day case-in-chief, that he would need "equal time." *Id.* T. 14:14-14:15.

The court expressed its desire to "let the attorneys [w]ork the case the way you're going to work the case" while staying true to the timeline. Final Pretrial Conf. Tr. (Doc. 246) at T. 27:4 – 27:16. Specifically, the court said, "If it looks like we begin to—you know, if we get to Thursday, Friday, and it begins to look like we're losing time, we may start earlier. We may shorten lunch. We may go a little bit later…" *Id.* at T. 14:24-15:3.

Badaruddin expressed concern with the nine-day time limit at multiple points. His worry stemmed from the fear that he would not have enough time to conduct the case in the manner required of him to adequately represent his client. *See, e.g., Id.* at T. 14-15 and T. 18-19; Trial Tr. 2/1/21, (Doc. 251) at T. 754-755; Trial Tr. 2/3/21 (Doc. 253) at T. 1511-1512.

2. The trial in *State vs. Kip Hartman.*

Hartman's trial was complex and time consuming. The court acknowledged the trial was "complicated[,]", and recognized, during a State Expert witness whose evidence was "…complicated…" that "…it is important that the intricacies and nuances of this case be recognized." Opinion and Order on [Hartman]'s Plea of Former Jeopardy and Motion to Dismiss, (Doc. 285) at 4; Trial Tr. 1/29/21, (Doc. 250) at T. 680:23-680:25.

The record and transcript contain no clear instruction or explanation as to (1) which activities were, or were not, counted (voir dire, openings, breaks, objection arguments, examinations, closings, etc.), (2) when counting began (start of day, start of examination), or (3) what method was employed in the calculations. The court only stated during the final pretrial conference that they would be "keeping a clock. I mean, I understand you want equal time position, [Mr. Badaruddin]. I'm cognizant of that, and I will be paying attention to that." Final Pretrial Conf. Tr. (Doc. 246) at T. 18:23-19:1.

In line with the confusing manner in which the court kept time, it informed Badaruddin for the first time on Day 2 of the trial that "[his] cross-examination [was] counting as [his] equal time." Trial Tr., 1/27/21

(Doc. 248) at T.164:15-164:18. The court failed to advise him at any point prior to trial and until the second day of trial that his time clock would be so affected. *See* Doc. 246.

By the end of day four, (Friday, January 29, 2021) the state had not rested. Trial Tr. (Doc. 250) at T. 748:8-748:10. Badaruddin again expressed timing concerns, "I'm not going to have enough time to put on my case. I don't think the State's going to wrap it up anytime soon, and I need the time." *Id.* at T. 747:11-747:13.

The court indicated it had been dividing the time allotted based on "days."… I will have a detailed calculation of exactly how every minute of this trial has been spent from voir dire forward. As I said, the time talking counts for your nine days for the . at T. 747:15-747:18.

The court did not specify before or up to this point in trial what "time talking" meant, other than telling Badaruddin on Day 2 that his cross-examination counted as his equal time. The court further stated to Badaruddin on day four: "… I know you've been keeping track of the time. You indicated to that earlier when I brought up the issue of cross-examinations and stuff. … I'm paying attention to it too. I'm not in a

position to say what we're going to do with it. … I'll be in a position to discuss it Monday morning. …" *Id.* at T. 747:20-748:3.

The State continued to present its case-in-chief for two additional days—Monday, February 1, and Tuesday, February 2, 2021, ultimately resting at 4:57 p.m. on Day 6, (Tuesday, February 2, 2021).

After the State rested, Badaruddin made a motion for more time because "…my client's being denied his state and federal due process rights to present a defense. I can't do it in two days… I don't have enough time left in the week… I don't see how I can do it, consistent with [Hartman's] right to the effective assistance of counsel and due process and a fair trial." Trial Tr. 2/2/21 (Doc. 252) at T. 1276:11-1276:13; T. 1277:12-1277:16).

Consistent with his earlier assertions, Badaruddin estimated that he needed 3-4 days to put on his case and to ensure "…[Hartman's]'s due process rights to present his defense not suffer for the sake of the constraints we're under." *Id.* at T. 1278:4-1278:5; T. 1278:22-1278:24; T. 1280:12-1280:14.

The court took the Motion for more time under advisement and denied it on the morning of Day 7, (Wednesday, February 3, 2021). Trial Tr. 2/3/21 (Doc. 253) at T. 1286:16-1286:20. While ruling on the motion,

the court informed Badaruddin it had changed its time computation from one based on days to one based on hours on Day 5 of the trial. "… So I'm not going by days, haven't been going by days since Monday …" *Id.* at T.1287:17-1287:23. Consequently, Badaruddin learned at the start of Day 7 that he had even less time to complete the presentation of his defense than originally anticipated both (1) prior to trial and (2) during, up to and including Day 7 of the trial.

Additionally, time spent on motions, arguments, and breaks, while they did not "count" against either party nevertheless resulted in a reduction in time for Badaruddin to present his defense. All the while, the rigid and inflexible nine-day limit crept closer and closer. *See Id.* at T. 1287:3-1287:8, T. 1287:17-1287:23, and Trial Tr. 2/4/21 (Doc. 254) at T. 1718:10-1718:14.

On Day 7 (Wednesday, February 3, 2021), the State requested to *Mirandize* a critical defense witness and Hartman's wife, Ginny Hartman, as she walked to the witness stand. The State had known well before trial that Mrs. Hartman would be called as a defense witness. This request resulted in an overnight delay and need for Mrs. Hartman to consult with counsel. Badaruddin complained outside the presence of the jury at

approximately 4:30 p.m. that the State's request was a ploy to cause delay and consume his limited time a request. He told the court "[the prosecution] could have told [him] about this two weeks ago or two hours ago and we could have sorted through it. And I'm the one that's suffering, or [Hartman's] the one that's suffering." Trial Tr. 2/3/21 (Doc. 253) at T. 1511:4-1511:7. The court indicated "… what we're doing here right now isn't taking off of your time. You understand that?" Badaruddin responded "I don't, but I am pleased to hear it. Thank you, Your Honor." *Id.* at T. 1512:9-1512:13.

The court also stated, at the end of Day 7, "I haven't counted hearings and, I mean objections while people are--- it just is what it is. But when we've had to come back here, [chambers] that's not part of the count," (*Id.* at T. 1512:16-1512:19), in direct contradiction to what the court said on Day 4, (*See* Trial Tr. 1/29/21 (Doc. 250) at T. 747:14-747:18 ("… the time talking counts for your nine days for the split …")). The court also stated, "We've lost time on motions and we've lost time on a number of things ..." Trial Tr. 2/1/21 (Doc. 251) at T. 755:8-755:10.

Even the court was unable to discern how much time the parties had used or had remaining. On Day 8, (Thursday, February 4, 2021), in the

middle of Mrs. Hartman's direct examination, the court took a break and advised counsel the Badaruddin had 37 minutes and the State had 92 minutes. *See* Trial Tr. 2/4/21 (Doc. 254) at T. 1716:13-1716:14. Following the State's approximately 36 minute cross examination, and Badaruddin's 5 minute redirect, the court advised counsel of the time remaining, stating, "… the [Badaruddin] has 15 minutes, the State has 152." *See Id.* at T. 1774:6-1774:7).

Presuming the court's original calculation of 92 minutes for the State was accurate, after 36 minutes of cross, it should have had 56 minutes remaining. Instead, it had 152 minutes remaining. Gaining almost over 90 minutes. The court had to continue clarifying what time did and did not "count" even after the mistrial was declared. *See* Trial Tr. 2/5/21 (Doc. 255) at T. 1798:1-1798:8.

3. The district court declared a mistrial over Hartman's objection.

At the end of Day 8, (Thursday, February 4, 2021) the trial court informed Badaruddin that 15 minutes remained for the defense. *See* Trial Tr. 2/4/21 (Doc. 254) at T. 1773:10-1773:11; T. 1774:6-1774:7). Hartman wished to exercise his constitutional right to testify. However, his testimony was anticipated to last in excess of 15 minutes. Badaruddin

moved for approximately three (3) extra hours. *See Id.* at T. 1774:22-1780:16. The court considered Badaruddin's motion for more time overnight. *See Id.* at T. 1782:5-1782:13. No discussion or argument regarding a possible mistrial occurred.

On the morning of Day 9, (Friday, February 5, 2021), sometime prior to 8:31 a.m., without warning and without seeking Badaruddin's input, the court declared a mistrial with an entire trial day remaining on the clock. *See* Trial Tr. 2/5/21 (Doc. 255) at T. 1792:24-1792:25; T. 1787:25-1792:23. Even the court recognized the mistrial was unexpected. *See* Trial Tr. 2/5/21 (Doc. 255) at T. 1797:4-1797:6); T. 1800:21-1800:22.

The court's mistrial declaration was first based on scheduling issues: "I don't have any place to put it [the trial]…" "…we don't have time to get this done within the allotted period of time… I can't put it any place else." Trial Tr. 2/5/21 (Doc. 255) at T. 1790:5-1790:6; T. 1791:4-1791:7. *See Also* Doc. 285 at 4 ("…the Court did not have an additional two days within several weeks to work a continuation of this case into its schedule.").

The court also suggested that it believed Badaruddin had intentionally stalled the trial in order to gain a strategic advantage

(despite the fact that, in eight days of trial, the court never expressed concern that Badaruddin was wasting time, nor did it explain the objective counsel hoped to achieve by stalling.) "Now, for the record, and I said it yesterday, I don't think this was an accident. I think it was an intentional move, deliberate, strategic, and tactical, based on the conduct of Mr. Badaruddin." Trial Tr. 2/5/21 (Doc. 255) at T. 1790:13-1790:16.

Badaruddin, in the midst of the court's decision, offered several alternatives that negate the idea he had been deliberately extending the trial. *See Id.* at T. 1792:4-1792:7; T. 1793:7-1794:5; T. 1804:5-1804:14. He requested an opportunity to present his testimony in less than three hours and perhaps in as little as 90 minutes and, additionally, requested an opportunity to proceed with Day 9 to try to complete the trial with the day remaining. *See Id.* at T. 1792:4-1792:7; T. 1793:12-1793:14; T. 1804:5-1804:8.

Finishing out the last day of trial may have included Hartman choosing not to testify, testifying for 15 minutes, or testifying for more than 15 minutes. Badaruddin stated, "[w]hat if Mr. Hartman were to testify and it takes less time than anticipated? ... I can, not rush things along, but work with greater dispatch, as can [the prosecution]. I believe

that we might be able to get it done." *Id.* at T. 1804:9-1804:14. In any event, Badaruddin's suggested alternatives showed he was prepared to do whatever was needed to complete the trial in lieu of the mistrial. *See Id.* at T. 1793:7-1794:5.

4. The sanctions Writ and subsequent district court litigation.

On February 5, 2021, the district court issued a written order declaring the mistrial and ordering Badaruddin to pay costs and fees, finding that Badaruddin had tactically slow played the case, resulting in the mistrial. The written order largely tracked the court's findings at the hearing. (Appendix B).

Badaruddin filed a Writ with this Court asking that the sanctions order be vacated as the order was issued without a hearing and cited no authority for the imposition of costs. *See generally OP 21-0076.* This Court ordered the State and the district court to respond, but ultimately denied the Writ as premature. *Id.* The case then returned to the court.

The parties submitted further briefing to the district court on the question of sanctions. The district court held a sanctions hearing on May 21, 2021. On January 25, 2022, the district court issued a written order imposing sanctions in the total amount of $51,923.61. This amount

includes $27,000.00 in attorney fees for the State's special prosecutor, $4,300.00 for the facility rental, $3853.28 for the court reporter, and $16,770.33 for witness fees, per diem, and lodging. (Appendix A).

IV. ARGUMENT SUMMARY

Imposing sanctions on criminal defense counsel should be a decision of last resort and done only in the face of egregious and objectively unreasonable and vexatious conduct. Such conduct is not present here. In fact, the opposite is true. Two different judges have examined the same record and the same conduct and come to opposite conclusions. Thus, while the court below found Badaruddin's conduct unreasonable and vexatious, the United States District Court found the same conduct to be the hallmark of effective advocacy and consistent with the *Sixth Amendment*. Sanctions on criminal counsel are not warranted under circumstances where the conduct is susceptible to two different subjective interpretations.

Additionally, imposing monetary sanctions on criminal defense counsel will have a chilling effect of advocacy and the performance of criminal counsel's effective representation of their clients.

Finally, even if sanctions are appropriate, many of those imposed by the court below are not those expressly allowed by statute.

V. STANDARDS OF REVIEW

This Court reviews a trial court's order granting or denying attorney fees and costs for an abuse of discretion. *Somont Oil Co. v. A & G Drilling, Inc.*, 2006 MT 90, ¶25, 332 Mont. 56, 137 P.3d 536.

A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Guffin v. Plaisted-Harman*, 2010 MT 100, ¶20, 356 Mont. 218, 232 P.3d 888 (*Guffin II*). However, "a court's failure to exercise its discretion is, in itself, an abuse of discretion." *State v. Weaver* (1996), 276 Mont. 505, 509, 917 P.2d 437, 440.

A court's authority to impose costs is dictated by statute. *See e.g., Cross Guns v. Eight Jud. Dist. Ct.*, 2017 MT 144, ¶14, 387 Mont. 525, 396 P.3d 133 (affirming the plain language of *Mont. Code Ann. § 37-61-421* provides for the assessment of costs upon a finding of contempt made pursuant to *Mont. Code Ann. § 3-1-511*); *State v. Duong*, 2015 MT 70, ¶¶19, 23, 378 Mont. 345, 343 P.3d 1218 (holding that the imposition of

costs for an interpreter and of a court administrative fee lacked statutory authority and were illegal).

The existence of that authority, especially within the context of an award for attorneys' fees, is reviewed for correctness. *City of Helena v. Svee*, 2014 MT 311, ¶7, 377 Mont. 158, 339 P.3d 32.

VI. ARGUMENT

A. The district court erred in imposing sanctions against Badaruddin because his conduct defending Hartman was not vexatious and was reasonable.

1. Badaruddin's trial conduct, including advocating for his client's right to testify, was not vexatious or unreasonable.

The court sanctioned Badaruddin under *Mont. Code Ann. § 37-61-421*, which allows costs against an attorney if counsel multiplies the proceedings unreasonably and vexatiously. (Appendix A). This court has interpreted and applied this statute many times in civil cases. However, *Mont. Code Ann. § 37-61-421* has never been applied to sanction a criminal defense lawyer for defending their client at trial. Badaruddin's defense of Hartman through trial and his insistence on Hartman's right to testify at trial cannot be reasonably characterized as vexatious or unreasonable on the record.

The court found that Badaruddin "knowingly" delayed the proceedings and intentionally did not leave enough time for Hartman to testify. *Id.* at 8. The court determined Badaruddin was "gaming the system for a tactical advantage" and his "intentional conduct that caused the mistrial is precisely the type of" conduct that justifies sanctions under § 37-61-421.

The trial record here does not show any intentional conduct to slow-play the trial for a tactical advantage. Badaruddin explained this to the court:

> I feel as if—I was not stalling. I was trying to move as quickly as possible. Yes, there were occasions when I could have moved faster, but I was always mindful of the time, and I wasn't trying to stall. [Mr. Hartman is] trying to get a verdict. . . [T]here's no manifest necessity for a mistrial. Especially since we still have six hours to work with. I don't see why we couldn't try and make the best use of them, or make a use of them.

Trial Tr. 2/5/21 (Doc. 255) at T. 1803:9–24, 1804:5–8.

The crux of the court's complaint with Badaruddin, which resulted in the imposition of sanctions, was Badaruddin's time management and the court's perception that Badaruddin was playing "games" with the court's trial schedule and Badaruddin's client's right to testify. *See Id.* at T. 1796:11-24. However, the court never voiced any concerns about

Badaruddin's pacing during the trial. The first time the court indicated it was concerned at all with Badaruddin's trial performance was when it was grappling with the key question—whether to give Hartman more time to testify. For conduct to be sanctionable as vexatious and unreasonable the conduct had to have been apparent and repeated. Yet at no point during the trial did the district court voice any concerns about Badaruddin's defense.

Additionally, at no point until after it had done so did the court hint that a mistrial and sanctions were possible punishments against either Hartman or Badaruddin. *See Santiago v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 58 (1st Cir. 2000) (cautioning against sanctioning counsel for defying the court's unstated expectations); *In re Richardson*, 793 F.2d 37, 41 (1st Cir. 1986) (reversing sanctions "for violating an unwritten rule. . . of which the court thought appellants should be aware."); *Boettcher v. Hartford Ins. Group*, 927 F.2d 23, 26 (1st Cir. 1991) ("We do not doubt the inherent power of a district court to act promptly and forcefully in the face of egregious or outrageous conduct . . ., but this conduct, violating no previously declared rule and not on its face outrageous, does not reach any such level.").

Throughout the trial, none of Badaruddin's witnesses, evidence or cross examination were found to be repetitive, irrelevant, or immaterial contemporaneously with their presentation. Badaruddin was never told to move along or hurry up. *See* Docs. 246 – 255 (Entire Trial Transcript). Conversely, State's counsel was told twice to "move on," Trial Tr. 1/28/21 (Doc. 249) at T. 418:12-20 and Trial Tr. 2/4/21 (Doc. 254) at T. 1743:6-8), and a third time to "hurry." Trial Tr. 1/29/21 (Doc. 250) at T. 700:20-25.

During the course of the trial the court never intervened or terminated a line of questioning by Badaruddin. *See* Docs. 246 – 255 (Entire Trial Transcript). The State never objected to Badaruddin's questions on the grounds of Rule 403 (waste of time/cumulative evidence), and only objected three (3) times in eight days to Badaruddin's questions on the grounds of Rule 401/402, but each time it did so, the objection was overruled by the trial court. *See* Trial Tr. 1/26/21 (Doc. 247) at T. 52:12-62:7), Trial Tr. 1/29/21 (Doc. 250) at T. 552:11-552:17, and Trial Tr. 2/4/21 (Doc. 254) at T. 1731:22-1732:8.[2]

[2] There was a fourth occasion on which the State objected on the grounds of character evidence and relevance. The court sustained the objection. The court did not indicate, but the evidence suggests it was sustained on the grounds of character, not relevance. *See Id.* at T. 1646:18-22).

The record shows Badaruddin was properly defending Hartman and trying to do so efficiently. (Trial Tr. 1/26/21 (Doc. 247) at T. 61:16-17)(Badaruddin apologized for being in "too big a hurry."). Badaruddin worked with the State "… to keep it moving… I don't want to waste time with exhibits. I've got all these witnesses. And the same for them." Trial Tr. 1/27/21 (Doc. 248) at T. 97:5-8 (stipulating to the admission of exhibits so as to avoid time conducted on foundation questions). Mindful of the passage of time, Badaruddin would sometimes move onto another topic rather than continue to search for or wait for an exhibit to be displayed. *See* Trial Tr. 2/1/21 (Doc. 251) at T. 889:25-890:7.

The record shows Badaruddin attempted to conserve, not waste time. Badaruddin stipulated to the admission of 153 out of 160 of the State's exhibits. (*See* Doc. 228, Record of Exhibits). Two of Badaruddin's seven objections were sustained. Badaruddin stipulated early on to publishing any admitted exhibit (*See* Trial Tr. 1/27/21 (Doc. 248) at T. 122:18-19), in order to save time. At the end of Day 6, February 2, 2021, the State rested its case. The jury was in the courtroom and Badaruddin asked to reserve an opportunity to argue a Motion for directed verdict of acquittal until after the jury was excused for the day and instead

commence the presentation of his defense case-in-chief and make use of the precious time with the jury to present witness testimony rather than dismiss them early. *See* Trial Tr. 2/2/21 (Doc. 252) at T. 1261:19-1264:16. The request was denied. *Id.*

The court never voiced any concerns about Badaruddin delaying trial by approaching witnesses on the stand. After eight (8) days of trial, there were sixteen, (16), occasions on which Badaruddin approached the witness. In other words, it happened approximately twice a day. Badaruddin asked for permission on each of the 16 occasions and the trial court granted permission each time. *See* Trial Tr. (Doc. 248) at T. 144:11-13), T. 173:15-174:9; (Doc. 249) at T. 352:6-7, (Doc. 250) at T. 549:19-550:1, T. 631:18-631:20; (Doc. 252) at T. 1055:8-10, T. 1172:25-1173:2), T. 1179:4-5, T. 1247:24-1248:5; (Doc. 253) at T. 1413:3-4, T. 1418:23-24, T. 1423:23-24, T. 1490:18-19; and (Doc. 254) at T. 1528:18-20, and T. 1731:16-17.

The court never refused permission or suggested Badaruddin was moving too slow or taking up too much time and acknowledged at the end of Day 6 that Badaruddin counsel had not wasted any time. *See* Trial Tr. 2/2/21 (Doc. 252) at T. 1280:7-8.

Throughout the trial, both the State and Badaruddin struggled with the technology and "portrayed a less than sophisticated delivery at times". The court properly instructed the jury during an occasion that Badaruddin wanted to approach the witness his laptop that "this isn't designed to be an efficient process. We aren't here to do it fast; we're here to do it right." Trial Tr. 1/26/21 (Doc. 247) at T. 54:6-8).

In all, the record does not show any vexatious and unreasonable intentional delay from Badaruddin. Badaruddin's only "failing" was that after completing relevant cross examinations, and offering relevant admissible evidence in Hartman's defense, there was insufficient time left to present Hartman's testimony. The court imposed a rigid nine day limit as a deadline rather than a guidepost. Badaruddin and Hartman never agreed to compromise Hartman's right to confrontation and due process right to present a defense to meet the court's rigid and inflexible time limit.

Other courts have now evaluated Badaruddin's actions at trial as well as the court's inflexible limit. Most recently, a United States District Court repeatedly referred to the court's time limitations as "arbitrary." (Appendix C) at 2 n.1, 19, & 21. While the court considered Badaruddin's

insistence on Hartman's right to testify to be gamesmanship and deliberate stalling, the United States Court concluded the precise opposite:

> "Far from indicating incompetence, alternative facts, or a deliberate strategy of delay, [Badaruddin's] overnight consultation with his client to reduce the time needed for his testimony was the *hallmark of competence*. [Badaruddin] did not violate his client's right to testify. He provided the means to realize it. By reaching a point were trial might be completed by Friday with his client's testimony, defense counsel did precisely what the trial court, his client's constitutional rights, and the standards of legal professionalism required of him."
>
> (Appendix C) at 27 (emphasis added).

Furthermore, there was no practical advantage to slow playing the case and not allowing enough time for Hartman to testify. Nowhere, in any of its orders or its briefing on the Writ on this issue did the court explain the benefit that Badaruddin hoped to realize by his purported intentional stalling.

The United States District Court's Order on Hartman's case fundamentally affects the factual analysis here and whether the court here abused its discretion in concluding that Badaruddin's trial performance "unreasonably and vexatiously" multiplied the proceedings. *Mont. Code Ann. § 37-16-421.*

"A court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in a substantial injustice." *In re M.C.,* 2015 MT 57, ¶ 10, 378 Mont. 305, 343 P.3d 569 (citing *Guffin II,* ¶20). The focus of both *Mont. Code Ann. § 37-61-421* and this Court's abuse of discretion standards is reasonableness. Analysis of the actions giving rise to attorney's fees or sanctions must be one of objective reasonableness. Similarly, the court's conclusion that Badaruddin acted unreasonably and vexatiously must be reviewed for objective reasonableness. That is the point of appellate review.

Both the record before the Court and the conclusions by U.S. District Court Judge Christensen in the underlying criminal case, reveal that Badaruddin's actions were not objectively unreasonable, nor were they vexatious. In light of what is clearly two opposite conclusions of the same record, it is the court's imposition of sanctions that is objectively unreasonable not that court's subjective assessment of Badaruddin's performance.

If two fair-minded jurists, reviewing the same set of facts and applying the same law, arrive at opposite conclusions it exceeds the

bounds of reason to impose sanctions based solely on one jurist's subjective opinion. While it could be superficially argued that the court and Judge Christensen were applying two different legal standards (*Mont. Code Ann. § 37-61-421* versus *Double Jeopardy* law), the factual predicates were the same.

Additionally, the lion's share of the court's sanctions presume the cost of a retrial. The decision by the United States District Court precludes the State of Montana from retrying Badaruddin's client ever again. Therefore, no additional costs or fees will result from Badaruddin's actions. In fact, in light of the United States Court's conclusions, it can be reasonably argued that it was the court's actions that resulted in the costs and fees to the State. It was the court by "stubbornly adhering to an arbitrary limitation on the time allotted for trial" and failing to consider Badaruddin's proposed compromise that he could pare down his client's testimony because the court had already "decided [Badaruddin] deliberately stalled the proceeding," ((Appendix C) at 20-21), that stopped the original trial from coming to fruition. Therefore, the fees and costs contemplated in *Mont. Code Ann. § 37-61-421* were not "reasonably

incurred" as a result of Badaruddin's actions; rather, they are the result of the court's actions.

2. Sanctions against criminal defense lawyers must be carefully considered or the Sixth Amendment function will be chilled.

In reviewing Badaruddin's actions and the court's sanctions, it is critical that this court not undertake its review "in a vacuum." *United States v. Agosto-Vega*, 731 F.3d 62, 64 (1st Cir. 2013). Appellant urges the Court to "bear in mind [criminal defense] counsel's important constitutional function." *Id.* (*citing and quoting United States v. Cooper (In re Zalkind)*, 872 F.2d 1, 3 (1st Cir. 1989); *see also United States v. Figueroa-Arenas (In re De Jesús Morales)*, 292 F.3d 276, 279 (1st Cir. 2002) (noting that courts should use their inherent sanction power "with due circumspection" and should not "chill vigorous but legitimate advocacy").

Contrary to the court's evaluation, Badaruddin's performance in the face of "slavish adherence to an arbitrary time limitation, set before a single bit of evidence has been introduced, particularly in a criminal trial where the last witness to testify is frequently the defendant", was "a hallmark of competence." (Appendix C) at 2 n.1, & 27. Adding to the mix of the totality of the circumstances in which this case was tried is the

fact that trial occurred in the midst of the COVID-19 pandemic where nothing about the justice system was functioning normally.

"It is common ground that if a trial judge is to manage a crowded calendar fairly and efficiently, members of the bar must comport themselves in a professional matter. When a lawyer goes too far – that is, when a lawyer's conduct is vexatious, oppressive, or undertaken in bad faith – the judge must be accorded considerable latitude in dealing with such excesses." *Figueroa-Arenas*, 292 F.3d at 279 (citing *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 13 (1st Cir. 1973). "Despite this imperative, however, a judge's power to sanction an attorney is not unbridled – and that power cannot be used to chill vigorous but legitimate advocacy." *Id. (citing Kale v. Combined Ins. Co.*, 861 F.2d 746, 760 (1st Cir. 1988); *In re Bithoney*, 486 F.2d 319, 322 (1st Cir. 1973). "In short, sanctions are an integral part of the judicial armamentarium, but a judge should resort to them only when reasonably necessary – and then with due circumspection." *Id.* (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991). "We think it follows that, on appeal from the imposition of sanctions, substantial respect is owed to the trial court's first-hand appraisal, but that respect 'is not to be

confused with automatic acquiescence.'" *Id.* (*quoting United States v. One 1987 BMW 325*, 985 F.2d 655, 657 (1st Cir. 1993).

In *Figueroa-Arenas*, the Court of Appeals for the First Circuit reversed a trial court, stating that counsel had not engaged in sanctionable misconduct because past decisions "gave appellant's position a patina of plausibility." The First Circuit concluded counsel did not act in bad faith given the totality of the circumstances including "the absence of any factual misrepresentations and the colorable legal argument advanced." Ultimately, the First Circuit found the "sanctions [were] unsustainable" because "appellant's conduct was within the permissible bounds of vigorous advocacy." *Figueroa-Arenas*, 292 F.3d at 282.

Courts reviewing sanctions look for extreme conduct, e.g., "egregious or outrageous conduct." *Boettcher* 927 F.2d at 26 ("We do not doubt the inherent power of a district court to act promptly and forcefully in the face of egregious or outrageous conduct . . ., but this conduct, violating no previously declared rule and not *on its face outrageous*, does not reach any such level.") (emphasis added).

In *Martin County Conservation Alliance v. Martin County*, 73 So.3d 856 (FL 2011), a civil case, a dissenting option warned of the possible consequences of the imposition of sanctions on civil counsel.

> "I am deeply concerned that, by imposing sanctions in a case such as this, we will necessarily have a "chilling effect" on innovative legal argument and appropriate zealous representation, especially in complex and evolving areas of law. If excessive use of sanctions chills vigorous advocacy, attorneys will not accept close cases, access to the courts will be restricted, and wrongs will go unaddressed."

Id. at 872 (Van Nortwick, J., dissenting).

These concerns are of greater magnitude in a criminal case where, even in the instance of the most-obviously guilty defendant, counsel is constitutionally compelled to advocate for their client, contest the power of the State, and uphold the presumption of innocence. Imposition of a sanctions against criminal defense counsel performing these functions will without question have a chilling effect. Not only will innovative legal arguments potentially be stalled, so, too, will standard arguments.

Take, for example, recent decisions in which various courts have – based on persistence of skilled advocates – revisited their prior decisions even in instances of decades of contrary precedent. *See e.g., Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191 (2019) ("The Court casually

overturns the long-established interpretation of important criminal statute, *18 U.S.C. § 922(g)*, an interpretation that has been adopted by every single Court of Appeals to address the question. That interpretation has been used in thousands of cases for more than 30 years.") (Alito, J., dissenting)); *State v. Goetz*, 2008 MT 296, ¶ 72, 345 Mont. 421, 191 P.3d 489 ("The Court's discarding of [*State v.*] *Brown* [(1988), 232 Mont. 1)] represents an unnecessary departure from the principle of *stare decisis*. We have held that precedent should be overruled only if it is manifestly wrong.") (Morris, J., dissenting)).

Perhaps the best example of persistently pursuing a legal argument that has been previously denied comes from the very case that gives rise to the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963). Prior to Gideon's insistence that "The United States Supreme Court says I'm entitled to be represented by Counsel," *Id.* at 337, the United States Supreme Court had held the opposite. In *Betts v. Brady*, 316 U.S. 455 (1942), the Court had held the right to counsel embodied in the *Sixth Amendment* was not incorporated to the States through the *Fourteenth Amendment*. *Id.* at 461-62. Twenty-one years after Betts lost, Gideon was granted certiorari on the question of "Should this Court's holding in *Betts*

v. Brady, 316 U.S. 455, be reconsidered?" *Gideon* at 338. The answer was a unanimous "yes" from the United States Supreme Court.

3. The United States District Court reviewed Hartman's trial record and found that Badaruddin's trial conduct was proper.

Badaruddin's own dogged dedication to his client in this case has paid off for Hartman. After multiple writs to this Court and to the United States District Court for Montana, the latter Court concluded the state court abused its discretion in declaring a mistrial in Hartman's case. Based on that conclusion, the United States District Court has ordered that a retrial of Badaruddin's client would violate the Double Jeopardy Clause of the *Fifth Amendment*. (Appendix C) at 21.

For centuries criminal defense counsel have served as loyal opposition to court precedent that adversely affects the clients they serve. While a district court may believe counsel's argument may be a frivolous tilt at a windmill, that argument may later prove to be a "a very palpable hit."[3] The Constitutions of both the United States and the State of Montana envision the role of criminal counsel to be the "drip, drip, drip,

[3]*Hamlet*, Act 5, scene 2. William Shakespeare.

that'll never stop . . . [and] pressure like a grip, grip, grip, and it won't let go."[4] Or, in the words of the United States Supreme Court:

> [T]he adversarial process protected by the *Sixth Amendment* requires that the accused have 'counsel acting in the role of advocate.' The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted… the kind of testing envisioned by the *Sixth Amendment* has occurred. But if the process loses its character as confrontation between adversaries, the constitutional guarantee has been violated.

United States v. Cronic, 466 U.S. 648, 656-657 (1984) (citations omitted); *see also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("[The assistance of counsel] is one of the safeguards of the *Sixth Amendment* deemed necessary to insure fundamental human rights of life and liberty. . . The *Sixth Amendment* stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.").

Any sanction that retards counsel from "functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*," *Strickland v. Washington*, 466 U.S. 668 (1984), should be imposed with the utmost care

[4]"Surface Pressure" by Lin-Manuel Miranda from the film *Encanto*.

and only in the most egregious circumstances. Badaruddin's case does not rise to such a level.

Johnson, *Gideon*, *Cronic* and their ilk all stand for the proposition that one of criminal defense counsel's chief duties is to enforce and implement other constitutional rights such as the defendant's fundamental right to testify on his own behalf. "Even more fundamental to a personal defense than the right of self-representation. . . is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). This was precisely the role Badaruddin was fulfilling in Hartman's case. Had he not done so, had he sacrificed his client's right to testify on the altar of the court's timetable he would have not been acting in the role contemplated by the *Sixth Amendment*. Similarly, had Badaruddin not fully cross-examined a witness, or not called a particular witness on Hartman's behalf, in order to accommodate the court's timeline, he would have been just as ineffective.

B. The sanctions available against a criminal defense attorney should be limited to those authorized by statute.

A district court's authority to award costs must derive from a statute. *Abby/Land, LLC v. Glacier Construction Partners, LLC*, 2019 MT 19, ¶74, 394 Mont. 135, 433 P.3d 1230. "We have long followed the rule in this state that the District Court's power to award costs is purely statutory and, unless some statutory authority exists for such an award, any award of costs is erroneous." *Masonvich v. School District No. 1, et. al.* (1978), 178 Mont. 138, 140, 582 P.2d 1234, 1235, *citing*, *Lunardello v. Republic Coal Co.* (1935), 101 Mont. 94, 53 P.2d 87. While this holding was a civil case, this Court has held that the same rule applies in criminal cases. *State v. Fertterer* (1992), 255 Mont. 73, 83 P.2d 467, 473, *overruled on other grounds in State v. Gatts* (1996), 279 Mont. 42, 52, 928 P.2d 114, 120. Such has been the rule in Montana for over a century. *State v. Stone* (1909), 40 Mont. 88, 92, 105 P.89, 91.

Here, the court imposed these costs on Badaruddin as a sanction (while the district court's order does not break them all down, the State's Affidavit of Costs (Doc. 237) suggests the court's totals are taken verbatim from that Affidavit):

Description	Amount
Fees for Special Prosecutor	$27,000.00
Rental of Event Center	$4,300.00
Court Reporter	$3,853.28
State witness fees	$90.00
Mileage	$2,194.08
Per Diem for State prosecution team	$1,643.50
Lodging for prosecution team	$5,132.56
Jury Costs	$7,710.19
TOTAL	**$51,923.61**

1. Sanctions should be limited to costs, expenses, and fees incurred by the opposing party.

"Section 37-61-421, MCA was modeled after 28 U.S.C. § 1927... " *Estate v. Bayers*, 2001 MT 49, ¶12, 304 Mont. 296, 21 P.3d 3. Both *28 U.S.C. § 1927* and *Mont. Code Ann. § 37-61-421* contain the same language as far as referencing "…excess costs, expenses…" Related federal cases under *28 U.S.C. §1927* have interpreted this terminology to authorize sanctions related to the amount incurred by the opposing party but not on increased costs experienced by the Court. *United States v. Blodgett*, 709 F.2d 608, 611 (9th Cir. 1983) (citing *United States v. Ross*, 535 F.2d 346, 351, note 3 (6th Cir. 1976)). *Ross* held that if *§1927* allowed such amounts "… an attorney who caused the proceedings to be extended 'unreasonably and vexatiously' could be required to pay the *pro rata* salaries of the judge, his staff, the [prosecutor] and marshals, in addition

to the expenses for any witnesses called. We do not believe that the statute was meant to include such 'costs.'" *Ross* at note 3.

The Federal Courts "have defined costs under *§1927* according to *28 U.S.C. § 1920*, which enumerates the costs that ordinarily may be taxed to a losing party." *Roadway Express v. Piper*, 447 U.S. 752, 757 (1980). The equivalent relevant statute in Montana is *Mont. Code Ann. § 25-10-201.*

As such, neither the State nor the Court can recover costs not provided for under *Mont. Code Ann. § 25-10-201.* Only those costs or expenses provided for under *Mont. Code Ann. § 25-10-201*, may be assessed against Badaruddin pursuant to a valid sanction order under *Mont. Code Ann. § 37-61-421.* Yet the court imposed costs for more than the excess costs, expenses, and fees incurred by the opposing party.

The State of Montana indicated in its Affidavit of Costs (Doc. 237) that it was "guided" as to what to include as costs by reference to the costs contemplated by *Mont. Code Ann. § 46-18-232*, and its civil counterpart, *Mont. Code Ann. § 25-10-201. See* Doc. 237 at page 2, ¶3.

Mont. Code Ann. § 46-18-232 provides:

> (1) A court may require **a convicted defendant** in a felony or misdemeanor case to pay costs, as defined in 25-10-201, plus costs of jury service, costs of prosecution, and the cost of pretrial, probation, or community service supervision as a part of the defendant's sentence. The costs, in addition to those allowable under 25-10-201, must be limited to expenses specifically incurred by the prosecution or other agency in connection with the proceedings against the defendant or $100 per felony case or $50 per misdemeanor case, whichever is greater.

Badaruddin was not a convicted defendant. *Mont. Code Ann. § 46-18-232* authorizes no costs to be imposed against a criminal defense attorney regardless of the outcome of the trial. Not only does the plain language of the statute render this statute inapplicable, but the legislative history does so as well.

Prior to the amendment of *Mont. Code Ann. § 46-18-232* (2009), the only costs allowed in a criminal case were those permitted by *Mont. Code Ann. § 25-10-201*, and the Legislature amended the statute after making, *inter alia*, the following findings: "… (2) it is in the state's best interest to attempt to recover as much as possible of the cost of criminal proceedings from individuals who have been convicted of violating state laws." Legislative History, SB 341, Montana 61st Legislature, 2009 Mt. ALS 180, 2009 Mt. Ch. 180, 2009 Mt. Laws 180. "In the construction of a

statute, the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Mont. Code Ann. § 1-2-101*, (Role of the Judge). Badaruddin is not an "[individual] who has been convicted of violating [a] state law" and Badaruddin is not and has not been prosecuted as a criminal defendant. *Mont. Code Ann. § 46-18-232* authorized no costs to be imposed against Badaruddin.

Here, the court interpreted "costs" as anything that the State of Montana, or the court, or someone else, spent money on at Hartman's trial. This is a much more expansive definition of costs (and sanctions) than the statutes permit. *Mont. Code Ann. § 25-10-201* enumerates the items of costs that may be recovered in a civil action. The list of items in *Mont. Code Ann. § 25-10-201* is exclusive, unless a case is taken out of its operation or purview by a special statute, by stipulation of the parties, or by rule of Court. *See Masonvich,* 178 Mont. at 140, 582 P.2d at 1235 (*citing Roseneau Foods, Inc., v. Coleman* (1962), 140 Mont. 572, 374 P.2d 87). The only special statute or rule referenced by the State of Montana below was *Mont. Code Ann. § 46-18-232*. As argued above, this statute does not apply, but if it did, the relevant costs that might be allowed

against a Defendant, in a criminal case, after conviction of a crime, pursuant to *Mont. Code Ann. § 46-18-232* would be (1) all those costs allowed in a civil case, by *Mont. Code Ann. § 25-10-201*; (2) the costs of jury service; and (3) costs of prosecution specifically incurred by the prosecution.

The burden of proving (1) the amount of costs and (2) that the costs fall within an allowed category of taxable costs, lies with the party seeking the costs. *Allison v. Bank One Denver*, 289 F.3d 1223, 1248-1249 (10th Cir. 2002). Ignoring the jurisdictional prerequisite that the statutes in question do not apply to a criminal defense attorney or authorize costs to be imposed against a criminal defense attorney, the State of Montana did not meet its burden as detailed below.

2. Specific categories assessed against Badaruddin were not authorized by statute.

a. Court Reporter Fees.

The State of Montana was awarded $3,853.28 for a court reporter. (Appendix A) at 10. This item is not a cost allowed by *Mont. Code Ann. §25-10-201* or *§ 46-18-232*. Costs or fees must have actually been incurred by the prevailing party in order to recover them under a statute permitting recovery. *Moore v. Imperial Hotels Corp*. (1997), 285 Mont.

188, 194, 948 P.2d 211, 215 (interpreting award under *Mont. Code Ann. § 39-2-915*); *See Also, Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, note 42, (1975), *superseded by statute*, (federal cost statute at issue only allowed costs "actually incurred"). This was a cost billed to or incurred by the court, not the State. *See* Doc. 237, Exhibit A at A-1. The Court Reporter invoiced the Montana 19th Judicial District Court, not any Agency prosecuting the case against the Defendant Hartman. This was not a cost incurred or paid by the State. This cost was not likely paid by the 19th Judicial District Court either. Pursuant to *Mont. Code Ann. § 3-5-901(1)(a)(iii)* and *§ 3-5-901(1)(i)*, this cost was to be paid by the Judicial Branch, (the Supreme Court of Montana Court Administrator's Office). It is an ordinary cost of maintaining a court system and the administration of justice and based on Title 3, Part 9, and it was not a cost paid by either the Prosecution or the court.

The Florida Intermediate Appellate Court held, under a statute with language similar to that of *Mont. Code Ann. § 46-18-232*, that "ancillary costs of 'prosecution' as judicial salaries, clerical and reportorial services, or juror reimbursement" are not properly considered costs of prosecution. *Williams v. State*, 596 So.2d 758, 759 (Fla. Ct. App.

2d. Dist. 1992). Similarly, "costs" do not include "the general expenses of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government." *Gleckman v. United States*, 80 F.2d 394, 403 (8th Cir. 1935). Unsuccessful litigants should not have to bear "…the costs of maintaining a judicial system." *Walden v. State*, 258 Ga. 503, 503-504, 371 S.E.2d 852 (1988). The general expense of maintaining a system of courts and the administration of justice are an ordinary burden of government and are not properly taxed as costs. *Arnold v. State*, 76 Wyo. 445, 306 P.2d 368, 376-377(1957)*; State v. Hanson*, 92 Idaho 665, 668, 448 P.2d 758, 761 (1968). No amount of costs for the court reporter should be allowed as costs against a criminal defense attorney because the State did not and will not incur or pay it. The cost was an ordinary expense of maintaining a court or judicial system, paid by the judicial branch.

b. Prosecution Witness Fees, Mileage, Per Diem and Lodging.

The court improperly awarded a combined $9,060.14 for witness fees, mileage, per diem and lodging expenses. *Mont. Code Ann. § 26-2-501(1)* provides a witness fee of $10 per day in any civil or criminal action before a court of record. This is the entirety of what is allowed as a

witness fee. No per diem is allowed by *Mont. Code Ann. § 25-10-201* or *§ 26-2-501*, and the "costs" associated with this claim should not have been allowed. No lodging rate is allowed by *Mont. Code Ann. § 25-10-201. See Thayer v. Hicks* (1990), 243 Mont. 138, 159-160, 793 P.2d 784, 798; *Springer v. Becker* (1997), 284 Mont. 267, 278, 943 P.2d 641, 647 (*citing Thayer).* In addition, this Court has held that "…airfare, rental car costs, and hotel charges..." are not charged against the losing party pursuant to *Mont. Code Ann. § 25-10-201(9). Thayer*, 243 Mont. at 159-160, 793 P.2d at 798. Similarly, counsel's mileage, as distinguished from witness mileage, is an incidental expense and is not a recoverable cost. *Id. See Also Springer*, 284 Mont. at 278, 943 P.2d at 647 (*citing Thayer*). The State's claims for counsels' mileage, and both counsel and witnesses' hotel, and "per diem" should not be allowed.

Regarding the per diem of State's witnesses, (rather than State's counsel), Keller, Egan, Burner, *Mont. Code Ann. § 26-2-501(2)* provides that "…an officer of the…State of Montana may not receive any per diem when testifying in a criminal proceeding…" The State's claim for a per diem for Keller, Egan, and Burner, in the Affidavit (Doc. 237) at 5-7, ¶23(b)(Egan Per Diem), ¶23(d)(Keller Per Diem), and 23(e)(Burner Per

Diem), was not taxable for this additional reason. The scope of sanctions available against a criminal defense attorney should not be broader than that which might be imposed against a civil attorney.

c. Facility Rental.

The rental fee—$4,300.00—for the event-center turned courthouse is not an item allowed by any part of *Mont. Code Ann. § 25-10-201* or *§ 46-18-232*. The State did not allege it had incurred this cost as required by either *Mont. Code Ann.* § *25-10-201* or *Mont. Code Ann.* § *46-18-232*. This was an expense incurred by the 19th Judicial District Court. This cost was most likely paid by the Judicial Branch, (the Supreme Court of Montana Court Administrator's Office), pursuant to *Mont. Code Ann. § 3-5-901(1)(b)(iii)* or *§ 3-5-901(2)*. Like the Court Reporter fee, this is a general expense of maintaining a system of courts and the administration of justice and is an ordinary burden of government and is not properly taxed as a cost. *Arnold, supra*; *Hanson*, *supra*. It is an "ancillary cost of prosecution." *Williams, supra; Gleckman, supra.* It is part of "…the costs of maintaining a judicial system." *Walden, supra; Arnold, supra*; *Hanson; supra*. This is an expense of holding a required term of court and not taxable as a cost. *People v. Hope*, 297 Mich. 115, 119, 297 N.W. 206 (1941).

Finally, if *Mont. Code Ann. § 46-18-232* is the guide for what costs may be taxed and what may not, the cost of renting the courthouse facility is not properly taxable against a civil or criminal litigant in any state of the union. It should not be imposed against a criminal defense attorney.

d. **Jury Costs.**

The court imposed $7,710.19 in jury costs. These costs were not incurred by the State. Exhibit M to the Affidavit of Costs, as well as the Affidavit itself (Doc. 237) at page 8, ¶32, demonstrate that these costs were incurred by the Judiciary (Supreme Court of Montana Office of the Court Administrator), except for $60.18 which was incurred by the 19th Judicial District Court. Costs may not be taxed against criminal defense attorney unless the cost was incurred by the prevailing party. *Moore, supra; Alyeska Pipeline Serv. Co., supra.* This cost was not incurred by the State and these costs are not allowed by *Mont. Code Ann. § 25-10-201*. These costs may be allowed by *Mont. Code Ann. § 46-18-232*, but only against defendants who are convicted of the crimes for which the jury in question returns a guilty verdict. A criminal defense attorney does

not qualify for this cost to be assessed against him under the plain language of Mont. Code Ann. § 46-18-232, or its legislative history.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the district court's sanction order.

Respectfully submitted this 23rd day of September 2022.

/s/ Colin M. Stephens
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STEPHENS BROOKE, P.C.

/s/ Peter F. Lacny
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac version 16.47 is 9233 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11(4)(d).

So certified this 23rd day of September, 2022.

/s/ Colin M. Stephens
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APPENDIX

Pursuant to M. R. App. P. 12(1)(i)

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