IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case Number: DA 22-0054

SHANDOR S. BADARUDDIN,

APPELLANT,

v.

THE STATE OF MONTANA and
THE NINETEENTH JUDICIAL DISTRICT COURT,

APPELLEES.

ON APPEAL FROM ORDER ENTERED IN THE NINETEENTH JUDICIAL DISTRICT COURT OF LINCOLN COUNTY IN THE STATE OF MONTANA BEFORE HONORABLE MATTHEW J. CUFFE

AMICUS CURIAE BRIEF OF THE *NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS* (NACDL)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This amicus brief addresses the following issue:

Whether a criminal defense lawyer may be subjected to a sanction exceeding $50,000 for poor time management at trial.

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. The NACDL has thousands of members nationwide and, when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. The NACDL's members include criminal defense lawyers, public defenders, U.S. military defense counsel, law professors, and judges.

NACDL and its members are acutely interested in this case because this Court will decide both the legal standard justifying monetary sanctions against defense attorneys and the scope of any permissible sanctions. The decision has the potential to gravely affect the criminal defense profession both directly, by deterring defense lawyers from vigorously representing their clients, and indirectly, by deterring attorneys from joining or remaining in the profession given the increased risks.

The circumstances of this case raise significant concerns about the deterrent effect of sanctions on the vigorous advocacy that the Sixth Amendment of the United States Constitution guarantees to criminal defendants. The sanctions here were based on the criminal defense lawyer's purportedly wasting court time and resources by exceeding the time limit placed on each party's presentation by the trial court. The time crunch arose when the defendant decided to testify after counsel used most of his allotted time cross-examining prosecution witnesses. And the sanctions were imposed with a full trial day remaining, without giving the defendant and his counsel a chance to expedite the testimony so that the trial could be completed on the day the trial court desired.

The imposition of sanctions in these circumstances—especially sanctions of the magnitude imposed here—deters defense attorneys from pursuing the active and vigorous defense that the Constitution requires, deters defendants from exercising their constitutional right to testify in their own defense, and creates a conflict of interests and incentives between criminal defense counsel and their clients.

NACDL accordingly has a strong interest in being heard in this matter.

SUMMARY OF ARGUMENT

The imposition of monetary sanctions on a criminal defense attorney (outside the context of contempt) raises significant constitutional concerns. For

that reason, arguments and conduct that might be sanctionable in a civil case often cannot result in sanctions in a criminal case. The threshold for sanctions based on the conduct of a criminal defense should be high in order to avoid impinging on the constitutional right to a vigorous defense.

First, a criminal defense attorney should be warned that monetary sanctions can or will be imposed for specified conduct before being sanctioned for the conduct. Second, sanctions for the conduct of a criminal defense trial should be imposed only upon a finding, supported by evidence, of "subjective bad faith" on part of the attorney. Finally, before setting the amount of sanctions, the trial court should inquire into and establish the attorney's ability to pay.

The $50,000 sanction imposed in this case for failing to meet time limits does not appear to meet any of those criteria, and consequently should be reversed.

ARGUMENT

A. The imposition of monetary sanctions on a criminal defense lawyer for time mismanagement raises significant constitutional concerns.

Any imposition of sanctions on a criminal defense attorney should be tempered by recognition of the defense attorney's "important constitutional function." *In re Plaza-Martinez*, 747 F.3d 10, 13 (1st Cir. 2014) (quoting *United States v. Agosto-Vega*, 731 F.3d 62, 64 (1st Cir. 2013). That function makes "[t]he need for restraint … uppermost when a judge is considering the imposition of sanctions on criminal defense attorney in a criminal case." *Id.* In particular,

sanctions "should not be deployed so as to chill vigorous but legitimate advocacy in a criminal case." *Id.* (cleaned up).

For that reason, the Ninth Circuit is "hesitant to exercise [its] power to sanction … against criminal defendants and their counsel." *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (imposing sanctions for tax protester's frivolous *rehearing petition* where same counsel had track record of repeatedly raising same frivolous argument in other courts of appeals). "[T]he absence of authority imposing sanctions against defense counsel" stems from judicial unwillingness to chill creative and vigorous advocacy in a setting where a "significant liberty deprivation" is "often at stake." *Id.* That is why "courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding." *Id.*; *see also United States v. Aleo*, 681 F.3d 290, 308 (6th Cir. 2012) (Sutton, J. concurring); *State of Wisconsin v. Glick*, 782 F.2d 670, 673 (7th Cir. 1986) (Easterbrook, J.).

For similar reasons, Federal Civil Rule 11 was not imported into the criminal rules: "the risk of sanctions can chill legitimate, indeed constitutionally required, advocacy…" such as a "frivolous plea of not guilty" or a "frivolous refusal to admit elements of a charged offense." *Aleo,* 681 3d at 308 (Sutton, J., concurring). Otherwise, "district courts could sanction litigation stances that are utterly appropriate in criminal cases." *Id.*

It appears that Mont. Code Ann. § 37-61-421 has never been applied to the trial conduct of a criminal defense lawyer. If that provision indeed authorizes sanctions in criminal cases, the Court should provide guidance that will prevent the threat of sanctions from chilling vigorous advocacy on behalf of criminal defendants. The need for limiting guidance is especially evident here, where sanctions were imposed based on the possibility that the defendant's decision to testify would preclude the trial from finishing on the trial court's preferred schedule.

The essence of the State's argument—and the trial court's decision—is that a criminal defense attorney is vexatious and unreasonable in failing to compromise his obligations to protect his client's confrontation and effective assistance rights under the Sixth Amendment, U.S. Constitution and Montana Constitution, Art. II, § 24, so that he could safeguard his client's right to present a defense and testify under the Fourteenth Amendment, U.S. Constitution and Montana Constitution, Art. II, § 17. Yet, a defendant in a criminal case should not be forced to exercise one right, the due process right to present witnesses and evidence in his behalf, to the exclusion of the other, the right to testify in his own behalf—or vice versa. The U.S. Supreme Court has found "it intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that defendant's testimony "in support of a motion to suppress evidence on Fourth Amendment grounds … may not thereafter be

admitted against him at trial on the issue of guilt unless he makes no objection"). Yet that was the practical effect of the trial court's rulings here.

Criminal "[d]efendants have a constitutional right to present a defense." *See State v. Reams*, 2020 MT 326, ¶18, 402 Mont. 366, 477 P.3d 1118. Cross-examination has equal constitutional status: "A criminal defendant also has a right to confront the witnesses against him" pursuant to the Sixth Amendment and Art. II, § 24 of the Montana Constitution. *Id.* This Court held in *Reams* that the constitutional right to present a complete defense and the right to confront the State's witnesses "is not an either/or proposition." *Id*. Echoing *Simmons*, *supra*, this Court recognized that "[a] defendant does not exercise one constitutional right to the exclusion of the other." *Id*. Yet in the trial court's view, Badaruddin should have cut short his cross-examination—cross-examination that apparently drew no criticism, let alone warning, from the court until sanctions were imposed after the fact—in order to ensure that several hours would be left in case his client ultimately decided to testify.

As this Court has recognized, "'[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.'" *In re J.S.W.*, 2013 MT 34 ¶ 18, 369 Mont. 12, 16, 303 P.3d 741, 745 (quoting *Rock v. Arkansas*, 483 U.S. 44, 53 (1987) and *Harris v. New York*, 401 U.S. 222, 225 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the

Constitution," and "is one of the rights that are essential to due process of law in a fair adversary process." *Id.*, 2013 MT 34 ¶ 19 (quoting *Rock*, 483 U.S. at 51(cleaned up). Equally central are the constitutional rights to confront witnesses and to effective counsel. But when the specter of sanctions looms in the background, these rights may come into conflict.

This Court should ensure that the standards for imposing sanctions on criminal defense attorneys take into account the exceptionally harmful incentives that arise from cases like this one, where the threat of monetary sanctions put a defense attorney's financial interests in conflict with his duty to put on a full and competent defense. If sanctions may be imposed on a defense attorney for going over the allotted time to present all aspects of the defense, the attorney would have incentives to skimp on cross-examination to avoid sanctions for the case in chief. Likewise, having done thorough cross-examination of the prosecution witnesses, the attorney would have incentives to rush through the case in chief. And if the defendant changes his mind about testifying—or the lawyer exercising his best judgment changes his mind after the close of other evidence—what seemed like enough time for the case in chief and closing argument would not be sufficient. On the other hand, if the defendant ultimately decides not to testify, the attorney's decision to forgo hours of cross-examination or testimony by favorable witnesses to preserve time at the end of the case could materially harm the defense.

As explained below, this type of nearly inevitable miscalculation should not be sanctionable at all. But if sanctions are to be available in extreme cases of time mismanagement—which this does not appear to be—the Court should ensure that objective standards of fair warning and proportionality prevent the threat of sanctions from impeding the criminal defense lawyer's constitutional function. A criminal defense attorney cannot intrude on the defendant's constitutional right to testify, and should not be induced—by the threat of a massive fine—to dissuade a client from exercising that right based on concerns of scheduling or time management.

The U.S. Supreme Court has recognized that, while there is a legitimate state interest in "prompt efficacious procedures, … the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). "[T]he Bill of Rights in general, and the Due Process Clause in particular, … were designed to protect" citizens from an "overbearing concern for efficiency and efficacy." *Id.* The sanctions order below appears to have swung in the opposite direction, and should be corrected by this Court.

B. A criminal defense lawyer should not be sanctioned unless warned in advance that monetary sanctions may be imposed for specific conduct.

Fair warning that particular conduct may result in a monetary sanction is necessary to prevent harmful incentives from impinging on a criminal defense

attorney's constitutional functions. This Court has held that due process requires that the target of a sanction under Mont.R.Civ.P. 11 know the basis upon which the district court is considering imposing sanctions, and receive a hearing directed specifically to the propriety and amount of sanctions. *Lindey's Inc. v. Goodover*, 264 Mont. 489, 497 (1994). The federal courts require notice to the target of the sanction that the conduct will not conform with the Court's requirements and therefore possibly result in a sanction. *Mendez v. County of San Bernardino,* 540 F.3d. 1109, 1132 (9th Cir. 2008) (citing *In re Richardson*, 793 F.2d 37, 40 (1st Cir. 1986) (*per curiam*)).

These requirements are constitutionally based. "[D]ue process requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc*., 174 F.3d 87, 92 (2d Cir. 1999) (per curiam joined by Sotomayor, J.) "[A] sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter." *Id.* (quoting *Ted Lapidus SA v. Vann*, 112 F.3d 91, 97 (2d Cir. 1997)); *see also Zuk v. Eastern Pa. Psychiatric Inst. Of the Med. College of Pa.*, 103 F.3d 294, 297-98 (3d Cir. 1996). "The purpose of particularized notice is to put counsel 'on notice as to the particular factors that he must address if he is to avoid sanctions." *Nuwesra*, 174 F.3d at 92 (quoting *Ted Lapidus*, 112 F.3d at 96, and *Jones v.*

Pittsburgh Nat'l Corp., 899 F.2d 1350, 1357 (3d Cir.1990)). Giving notice of the asserted authority only "at the point when [the trial court] actually imposed sanctions[] raises a serious question as to the legal sufficiency of the notice." *Jones*, 899 F.2d at 1357.

In re Richardson, *supra*, involved a $200 sanction "for violating an unwritten rule—namely that the filing of an appearance is an assurance counsel will attend all scheduled hearings—of which the court thought appellants should be aware." 793 F.2d at 41. The First Circuit vacated the sanctions because the sanctioned counsel "did not have fair warning of this unwritten rule." *Id.* The court of appeals imposed a notice requirement because "'fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court.'" *Id*. (quoting *Eash v. Riggins Trucking, Inc*., 757 F.2d 557, 571 (3d Cir. 1985)).

In turn, the Third Circuit in *Eash* held that:

> …the absence, for example, of a statute, Federal Rule, ethical canon, local rule or custom, court order, or, perhaps most pertinent to the case at hand, court admonition, proscribing the act for which a sanction is imposed in a given case may raise questions as to the sanction's validity in a particular case.

757 F.2d at 571.

The sanctions here appear not to have conformed to these constitutionally rooted norms. No statute, rule, ethical canon, published local rule or custom, court

order, or court admonition indicated that a failure to finish the trial on time would result in a sanction. Badaruddin was not provided advance warning that a failure to complete the defense case-in-chief in the allotted time would result in a sanction, let alone the legal standard or statutory authority for any contemplated sanction. Moreover, it appears that the trial court's measurement of time may have been both opaque and malleable. *See* Appellant's Opening Brief, App. C, at 3-7 ("App. C."). This was not a trial conducted under a transparent chess-clock system where each party knew at all times how much time it had consumed and how much time remained.

Not only was there no written or otherwise express standard or warning against which counsel could measure his conduct, but it appears that the trial court did not criticize his cross-examination or other time management as dilatory or time-wasting. The court never admonished Badaruddin about any passive-aggressive foot-dragging in his presentation. On the contrary, it appears that Badaruddin told the trial court early and often that the allotted time might not be sufficient for the defense case. *See* App. C, at 3. Nor did the trial court warn Badruddin that his slowness might be taken as evidence of vexatious bad faith. Indeed, the federal district court that granted habeas relief to the defendant in this case concluded that, "in eight days of trial, the trial court expressed no concern at any point that the defense team was wasting time." App. C, at 19.

This Court should now hold that a criminal defense attorney may not be sanctioned unless he is on reasonable notice that the conduct at issue may result in a sanction, as well as the statutory authority upon which the court will rely to impose any sanction.

C. A criminal defense lawyer should not be sanctioned unless he acted in subjective bad faith.

Mont. Code Ann. § 37-61-421 permits the imposition of sanctions on an attorney who "multiplies the proceedings" both "unreasonably and vexatiously." Because Mont. Code Ann. § 37-61-421 "was modeled after 28 U.S.C. § 1927," (*Estate v. Bayers*, 2001 MT 49, ¶12, 304 Mont. 296, 21 P.3d 3), case law interpreting 28 U.S.C. § 1927 is persuasive in interpreting Mont. Code Ann. § 37-61-421.

The "unreasonably and vexatiously" language in 28 U.S.C. § 1927 has been construed to require a showing of "subjective bad faith." *Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1020 (9th Cir. 2015) (quoting *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989)); *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 45 n. 9, (D.C. Cir. 1990) ("subjective bad faith"); *MacDraw, Inc. v. CIT Group Equipment Financing Corp.*, 73 F3d 1253, 1262 (2d Cir. 1996) ("subjective bad faith"); *Gaiardo v. Ethyl Corp*., 835 F.2d 479, 484 (3d Cir. 1987) ("bad faith").

"The bad faith requirement sets a high threshold…." *Primus Auto Fin. Servs. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997). In a case where the trial court described the attorney's conduct as "'totally frivolous,' 'outrageous,' and 'inexcusable,' and called [counsel's] behavior 'appalling,'" the Ninth Circuit "refused to equate this characterization of conduct as synonymous with a finding of bad faith." *Mendez v. County of San Bernardino,* 540 F.3d 1109, 1132 (9th Cir. 2008) (citing *Primus*), overruled in part on other grounds, *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1058 n.1 (9th Cir. 2014)). Nothing apparent in the orders of the trial court below (App. A & B) or the federal habeas court (App. C) suggests conduct approaching the level found insufficient in *Mendez.*

A trial court imposing significant sanctions against a criminal defense attorney should identify the basis for inferring subjective bad faith in the way the defense was conducted, instead of broadly stating that the time was "mismanaged." At a minimum a sanctioning court should identify a witness or examination topic that amounted to subjective bad faith. The State argued below that the Appellant criminal defense attorney should have taken less time with cross examinations in order to allow himself more time to present his case in chief. But there were no sustained objections to Appellant's cross-examination of the State's witnesses for relevancy (MRE 401) or for "considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (MRE 403).

And, although the trial court seemed to believe that Badaruddin intentionally ran out the clock before presenting the defendant's testimony, "[t]he trial court did not explain the objective counsel hoped to realize by stalling." App. C, at 21. There was no evidence that Badaruddin wanted a mistrial. On the contrary, both parties expressed an interest in streamlining the last phase of the case so that it could be completed. App. C, at 11-12, 20-21, 35-36. Badaruddin offered to cut in half the time his client required to testify so long as a mistrial could be avoided. App. A, at 5; App. C, at 11 (citing T. 1790). Indeed, Badaruddin frankly acknowledged that his time management might amount to ineffective assistance of counsel (App. C, at 8 (citing T. 1777)—hardly the hallmark of one who had stalled tactically.

This is not a case in which the "attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986). A criminal defense attorney act does not act with subjective bad faith by erroneously expecting, or even demanding, that a trial court afford any and all time needed to present the client's defense. That is what the attorney should be expected to do.

Nor does a criminal defense attorney act in subjective bad faith by failing to sufficiently truncate the defense case-in-chief, or failing to convince the defendant to make a swifter decision on whether to testify, whenever cross-examination

consumes more time than was planned. Moreover, a criminal defense attorney does not act with subjective bad faith by failing to present the testimony of the defendant earlier in the trial. A defendant has a fundamental right to testify even contrary to counsel's advice. *See e.g., Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). Yet, in many—perhaps most—cases a defense attorney will prefer to not present any testimony by the defendant unless necessary. Notwithstanding the attorney's preference, it would be patently improper for a defense attorney (let alone a trial court) to pressure a defendant not to testify if the client wished to exercise that right. In cases where the need or desire for the defendant's testimony is in question, it is prudent to wait until all other evidence has been presented so that the defendant can make a fully informed choice with counsel's best assessment of the whole of the evidence.

Consequently, a criminal defense attorney does not act with subjective bad faith by asserting all of a client's constitutional rights: the right to confrontation, the right to present a defense, and the right to testify. The exercise of all of these rights by a defense attorney as desired by the client cannot be deemed to be either vexatious or unreasonable because all are constitutionally compelled—subject, of course, to rules of evidence that permit the trial court to exclude both evidence that is irrelevant (MRE 401) and even relevant evidence that is needlessly cumulative or otherwise results in "undue delay" or "waste of time." (MRE 403). But no

issues under MRE 401 or MRE 403 arose here. Badaruddin merely failed to beat the clock by a few hours.

A criminal defense attorney does not engage in subjective bad faith in failing to meet a schedule that would require choosing which fundamental right a client will exercise, and which he should surrender in order to do so. The attorney may have created a time crunch through negligent time management, but asserting his client's constitutional rights at every turn cannot be sanctionable.

D. A trial court imposing a sanction should establish a criminal defense lawyer's ability to pay before imposing monetary sanctions.

Finally, a trial court imposing a monetary sanction on a criminal defense attorney should be required to establish the attorney's ability to pay. The risk of substantial fines like the $50,000 sanction imposed here would have significant deleterious effects on the criminal defense bar. Affordable criminal defense representation is sufficiently scarce that tax-supported public defenders must carry much of the load. Lawyers would be deterred from undertaking defense work if they had to balance the personal financial risks of a vigorous defense against the economics of a normal criminal defense retention. That deterrence would affect not only current criminal practitioners, but also lawyers who might consider doing criminal defense as a career, or part of a career, or even pro bono.

These harms would be mitigated by a high threshold standard for culpability before fining lawyers for undertaking a vigorous defense. Yet monetary sanctions also should be sharply limited—and tied to the lawyer's ability to pay—given the fragile economics of criminal defense. A $50,000 sanction like the one imposed in this case may constitute a large proportion of the annual income of most criminal defense lawyers.

Current law requires a court to consider a criminal *defendant's* ability to pay before imposing a fine. Under Mont. Code Ann. § 46-18-231(3),

> The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

Similarly, Mont. Code Ann. § 46-18-232(2) requires a court to consider a criminal defendant's ability to pay before imposing an order to pay costs:

> The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose.

Awards of costs against criminal defense attorneys should be subject to the same considerations. A federal district court imposing sanctions under 28 U.S.C. § 1927 abuses its discretion by failing to consider the attorney's ability to pay. *See*

Haynes v. City of San Francisco, 688 F.3d 984, 989 (9th Cir. 2012). The same rule should apply under Montana law. The trial court in this case should have inquired into and considered Badaruddin's ability to pay before imposing the significant monetary sanctions imposed here.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the order imposing sanctions should be reversed.

Respectfully submitted this 4th day of October, 2022.

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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 version 2208 is 4,242 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).

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