IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0054

SHANDOR S. BADARUDDIN,

Appellant,

v.

STATE OF MONTANA and the NINETEENTH JUDICIAL DISTRICT COURT, HONORABLE MATTHEW CUFFE, Presiding,

Appellees.

ANSWERING BRIEF OF THE STATE OF MONTANA

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

APPEARANCES:

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STATEMENT OF ISSUES

1. Whether the trial court was within its discretion to sanction Badaruddin for "strategic, tactical, calculated, consistent, and considered" conduct that forced a criminal mistrial. (Appx. A, at 8.)

2. Whether the trial court's sanction correctly included costs and expenses in excess of those available to a party prevailing on the merits.

STATEMENT OF THE CASE

This is an appeal of an order imposing sanctions on attorney Shandor Badaruddin pursuant to § 37-61-421, MCA (here, "§421"), for implementing a defense trial strategy that "gam[ed] the system for tactical advantage" and delayed the proceedings in *State of Montana v. Kip Hartman*, "forc[ing] a criminal mistrial after a year and a half of litigation and nine days of trial." (Appx. A, at 8; Appx. B, at 4.)

This Court previewed the sanctions issue in a prior writ filed in March 2021. *Badaruddin v. Mont. Nineteenth Judicial Dist. Court*, 403 Mont. 549, 483 P.3d 478, 2021 Mont. LEXIS 296, OP-21-0076, Order (Mar. 30, 2021). After being forced to declare a mistrial, the trial court concluded defense counsel's "conduct was the cause of this mistrial. As such it is appropriate that he pay the costs of this mistrial." (Appx. B,

at 4.) The court ordered the State to submit an affidavit of certain costs, provided a briefing schedule for defense counsel's legal and factual objections, and then set the matter for a hearing. (*Id.*) This Court dismissed the March 2021 writ as premature because there was no final sanctions order. *Badaruddin*, 2021 Mont. LEXIS 296 *3 (citing *Tigart v. Thompson (Tigart I)*, 237 Mont. 468, 474, 774 P.2d 401, 405 (1989)).

The matter was fully-briefed and came for a hearing on May 21, 2021, after which the judge took the matter under consideration. (R. 237, 242, 258, 261 (briefing on costs and expenses), R. 236, 241, 258 (briefing on attorney fees), R. 266, 275 (order and minute entry for hearing); *see also* Sanctions Hrg. Trans., at 41:12-16 (May 21, 2021).) The court issued its order eight months later, finding, *inter alia*,

> that Mr. Badaruddin deliberately acted to slow proceedings and attempted to leverage his client's Sixth Amendment rights against the Court to gain a strategic advantage, ultimately causing the mistrial[.]

(Appx. A, at 9.) The court determined the appropriate sanction for this conduct under §421 was imposition of specific excess costs, expenses, and attorney fees; Badaruddin was directed to pay the total amount of

$51,923.61 to the Clerk of District Court who would then make disbursements. (*Id.*, at 10.[1]) Badaruddin appealed one week later.

STATEMENT OF RELEVANT FACTS

I. The Criminal Case

Several of the procedural machinations of the underlying criminal case are well-known to this Court from Badaruddin's five petitions for supervisory control, all of which were dismissed. *See e.g.*, OP-20-0017, OP-20-0027, OP-20-0069, OP-21-0536, and OP-22-0037. The first three petitions were filed in a single month. *See Hartman v. Nineteenth Judicial Dist. Court (Hartman I)*, 399 Mont. 549, 460 P.3d 399, 2020 Mont. LEXIS 163, OP-20-0017, Order (Jan. 14, 2020); *Hartman v. Nineteenth Judicial Dist. Court (Hartman II)*, 399 Mont. 550, 460 P.3d 403, 2020 Mont. LEXIS 208, OP-20-0027, Order (Jan. 21, 2020); *Hartman v. Nineteenth Judicial Dist. Court (Hartman III)*, 399 Mont. 551, 460 P.3d 400, 2020 Mont. LEXIS 437, OP-20-0069, Order (Feb. 11, 2020).

The last two of these petitions concerned the denial of Hartman's motion to dismiss for double jeopardy following the mistrial. *Hartman v.*

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[1] (Br., at 39 (incorrectly stating the "State of Montana was awarded" amounts).)

Nineteenth Judicial Dist. Court (Hartman IV), 407 Mont. 440, 500 P.3d 579, 2021 Mont. LEXIS 926, OP-21-0536, Order (Nov. 9, 2021); *Hartman v. Nineteenth Judicial Dist. Court (Hartman VI)*, 408 Mont. 542, 507 P.3d 142, 2022 Mont. LEXIS 187, OP-22-0037, Order (Mar. 8, 2022). The same trial conduct by Badaruddin that resulted in a mistrial of the criminal matter also forms the basis of the sanction order now appealed. (*Compare* R. 285, at 1-6, 9 (Order on double jeopardy) *with* Appx. A, at 1-7, 8-9 (R. 287 (Order on sanctions))); *see also Hartman VI*.

Badaruddin announced, at the conclusion of the penultimate day of trial, that he "failed to provide or safeguard [Hartman's] state constitutional right to the assistance of counsel, because I have failed to leave enough time for him to testify." (TT-VIII-1777:21-24;[2] TT-IX-1804:15-1807:1; R. 285.) This self-described failure, Badaruddin told the court, meant it "must intervene to protect [Hartman's] right to testify." (TT-VIII-1777:12-14; TT-IX-1786:16-19 ("court must, sua sponte, intervene").) The form this demanded intervention took was a mistrial to protect against a structural error that would otherwise result in

[2] The nine volume transcript of the criminal trial from January 26 to February 5, 2021 (docketed below as R. 247-255), is cited herein as "TT-[Volume]-[Page#]:[line#]."

reversal. (*See* TT-VIII-1776:8-11 (Badaruddin); TT-IX-1795:4:13, 1796:11-1797:9 (court).) Hartman later filed a double jeopardy motion which the trial court denied, concluding there was manifest necessity for the mistrial. (R. 285, at 9.)

In dismissing the first petition concerning double jeopardy (fourth overall) this Court was "cognizant of the delay Hartman's filings have caused in the District Court, as well as his waste of this Court's time[,]" and thus imposed a sanction of $500, payable to the district court "in recognition of the disruption the District Court has endured due to Hartman's repeated meritless petitions." *Hartman IV*, *5; *see also Hartman III*, at *3 (recognizing and warning against disruptions to the lower court's calendar by meritless and multiple petitions).

Hartman then filed a habeas corpus petition in federal court, which was also dismissed for failure to properly exhaust or fairly present the claim to state court. *Hartman v. Knudsen (Hartman V)*, No. CV 21-146-M-DWM, 2022 U.S. Dist. LEXIS 7719, at *7 (D. Mont. Jan. 14, 2022). Denying a second petition for supervisory control on the double jeopardy order (fifth petition overall), this Court observed,

> It would be ironic, to say the least, if the District Court's alleged abrogation of Hartman's constitutional right to testify

> could result in his retrial, but the District Court's protection of the same right could not. Hartman is not entitled to such a windfall.

Hartman VI, *10.

Hartman then filed another habeas petition, which the federal court granted. (Appendix C (*Hartman v. Knudsen (Hartman VII)*, No. CV 22-57-M-DLC, 2022 U.S. Dist. LEXIS 145484 (D. Mont. Aug. 12, 2022)).) The State appealed that ruling to the Ninth Circuit and the matter is set for oral argument on May 10, 2023. *See Hartman v. Knudsen and Boris*, Ninth Circuit Court of Appeals, Case No. 22-35694.

II. Pandemic Pressures

Several unique burdens faced the Nineteenth Judicial District in early 2021 which Badaruddin exacerbated with his deliberate trial strategy and conceded failure to protect his client's right to testify.

A. Covid

Some of the key events in and considerations of the pandemic response were fresh in mind for the parties and the court on the first day of trial.

> 15. On March 12, 2020 Governor Bullock declared a state of emergency in light of the coronavirus pandemic.
>
> 16. On March 27, 2020, the Montana Supreme Court directed that all jury trials were to be continued until April 10, 2020, and subsequently April 24, 2020, due to the pandemic.

> 17. On April 8, 2020, this Court continued all of its pending jury trials without date….

(R. 221, at 3-4 (Speedy Trial Order (Jan. 26, 2021)).) When Montana moved to Phase II of reopening on June 1, 2020, these initial shut-down periods put the court's schedule behind approximately six weeks, including the entire docket of pending jury trials vacated the first week of April. (*Id.*, at ¶17); COVID-19 Memo from Chief Justice McGrath, Phase II (May 22, 2020) (citing Gov. Directive on Phase II (May 19, 2020)). The Hartman trial, however, "was designated as the third jury trial case to be heard when the restrictions were lifted." (R. 221, at 3-4, ¶17 (citing § 46-16-101, MCA, prioritizing trials of incarcerated defendants over defendants on bail); *see also id.*, at ¶18 (pretrial conference to re-set trial held June 1, 2020); R. 170 (order).)

The minimum precautions Montana courts were required to follow at the time of trial included, *inter alia*, using face coverings and maintaining physical distance of six feet between individuals in courtrooms during all phases of jury trials, limiting group sizes, strongly encouraging adherence to all recommended hygiene measures like masking, hand sanitizing, temperature checks, etc., and "planning locally for jury trials … [through] consultation with the attorneys involved in

the cases, local law enforcement, and local public health entities." COVID-19 Memo from Chief Justice McGrath, Phase II (May 22, 2020); COVID-19 Memo from Chief Justice McGrath, Updated Judicial Branch Covid-19 Protocols (Dec. 21, 2020); (R. 221, at 6).

When resetting the trial from August 2020 to January 2021, the court determined the August date was not feasible in part because of the impacts of these requirements, including rising infection rates, whether panel members would appear, the effects health precautions on communications, etc. (R. 221, at ¶20.) The restrictions and the virus itself continued to affect other jury trials too; for example, the criminal jury trial scheduled to begin the week after Hartman was itself a retrial that was "continued five times, two of which were due to COVID restrictions and two of which were due to positive COVID tests for participants." (Appx. A, at 4.)

B. Lincoln County & The Nineteenth Judicial District

Following the directive to consult with local officials and plan for jury trials given local concerns, Judge Cuffe documented several issues specific to his judicial district.

1. Community Concerns

Lincoln County faced "particular vulnerabilities" on account of having "a significant population of persons in the older age groups and a significant population with the added vulnerability due to having asbestosis. Moreover, Lincoln County has a single, 25 bed hospital with limited equipment, staffing and space to respond to the medical requirements of those afflicted with the virus…." (R. 221, at 8.) The second day of trial, the court noted the community was "hovering 13-, 14-, 15-percent infection rate[,]" and that week its rural hospital had nine COVID patients. (TT-II-89:21-90:1.) The following day, the court noted concerns with the encroaching virus mutations being found in nearby states. (TT-III-377:11-21.)

The court's "paramount concern" was to avoid creating a "crisis for the local health community by a jury trial resulting in multiple exposures to the virus." (R. 221, at 8.) The reality was that "almost all" of the elderly witnesses in this specific case were "in age groups particularly vulnerable to infection by COVID-19; presumably, many of them also suffer from medical conditions further increasing their

vulnerability." (*Id.*; TT-II-77:1-12, 79:15-80:2, 90:13-91:24 (discussing circumstances of video witnesses).)

2. Court Facilities and Staff

The Nineteenth Judicial District is "managed by a single judge from a single courthouse." (Appx. A, at 8.) It is staffed by three employees, one of which is the judge. (R. 221, at 9.) The other two staff persons were both essential workers and were "in vulnerable age groups and who also have vulnerable family members in their households." (*Id.*, at 8.)

To comply with the required social distancing, the court was forced to locate and secure facilities other than its courtroom—"not a given in this small community." (*Id.*, at ¶20; *see also id.* at 9.) For the Hartman trial, the court secured the Memorial Events Center which provided ample space and had been successfully used for at least four trials by December 2020, though it was "a little complicated for our jury[.]" (R. 245 (Trans. Pretrial Conferences (June 1, 2020 and Dec. 22, 2020)), at 18:10-24, 19:2-5, 26:17-29:11; R. 197 (Amended Minute Entry).)

The event center was also reserved as needed for trials both before and immediately after the Hartman trial. (R. 237, *Affidavit of Costs*, at Ex. L (Invoice, trials on Jan. 6-7 and 14-15, 2021); TT-IX-1789:17-1790:1

(upcoming multi-day criminal jury trials); Appx. A, at 4 (upcoming trials, including two-week asbestos court jury trial).) The court was using COVID-Relief funds to rent the event center. (R. 245, at 34:4-9, 38:20-39:1; R. 237, at Ex. L.) However, its availability was not guaranteed; for example, as vaccines began rolling out in early-2021 the space was "also being scheduled as a vaccine clinic[.]" (Appx. A, at 4; *see also* TT-IX-1799:8-12.)

Finding physical space was not the only hurdle. The district ordinarily uses an electronic recording system in its courtroom operated by an official court reporter, with recordings maintained by the court and transcribed on request. (*See e.g.*, R. 245, at 42-43 (Certificate of Reporter).) However, "when we do these trials the way I'm having to do them at this point in time, we need a live court reporter." (R. 246 (Trans. Pretrial & Jury Sworn (Jan. 26, 2021)), at 4:23-5:4;[3] R. 245, at 26:24-25 (same).) The court reporter secured for the Hartman trial was traveling in from Whitefish, MT. (R. 246, at 5:2-4; R. 221, at 9; R. 237, Ex. A (Goodman Court Reporting Invoice).)

[3] Although the proceedings at R. 246 occur on the first day of trial they are not part of Volume I of the trial transcript. Thus, they are cited as "R. 246."

3. Docket Management

Holding trials off-site was also a burden to the court's functioning, resulting in the office being effectively "shut down[,]" with the district staff only able to return after trial to address other demands and needs. (R. 245, at 39:4-12.) On the first morning of trial, the court recounted these impacts on the "management of the Court's caseload outside of this case" (R. 221, at 9), and stated it was planning for a 90-minute lunch "because I'm going to get buried and I need time to get stuff done back at the office[,]" and elsewhere noting the docket included a multitude of "other stuff in the other 1,200 cases that are going on in this district." (R. 246, at 14:18-15:6, 20:11-16.)

The court's obligation to those other cases and the constitutional rights of those other parties in the face of a global pandemic and the additional, but critically necessary burdens of arranging a jury trial that kept everyone safe had been a topic of discussion going back to the June 1, 2022 pretrial conference. (R. 245, at 8:6-9:3 (6/1/2020, Badaruddin, indicating constitutional concerns with conducting a trial during Phase II); R. 176.5 (Minute Entry, 7/28/2020 status hearing to discuss issues and concerns with August trial); R. 221, at ¶¶19-21 (same); R. 245, at

18:13-20:2, 26:17-29:11 (12/22/20, court, describing event center and compliance with pandemic precautions).) The pressures on the Nineteenth Judicial District were front and center and informed the court's repeated warning that it would "stick to the nine days [for trial] and I want it to be efficiently run." (R. 245, at 29:12-15; *id.*, at 16:2-17:15.)

STANDARD OF REVIEW

A district court's determination to impose a sanction of costs, expenses, and fees under § 37-61-421, MCA, is reviewed for an abuse of discretion. *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶39, 350 Mont. 538, 208 P.3d 836 (citations omitted). As the party challenging the ruling, Badaruddin "carries the burden to demonstrate the abuse of discretion." *Id.* (citing *In re G.M.*, 2009 MT 59, ¶11, 349 Mont. 320, 203 P.3d 818).

"[T]he question is not whether the reviewing court agrees with the trial court, but rather whether the trial court acted arbitrarily." *G.M.*, ¶11. "Because the district court is in the best position to know the nature and extent of any alleged violation," this Court "generally defer[s] to the district court's discretion in addressing costs and fees under § 37-61-421,

MCA." *Larchick*, ¶39 (citing *McKenzie v. Scheeler*, 285 Mont. 500, 506, 949 P.2d 1168, 1172 (1997)).

The determination that legal authority exists to impose fees is reviewed for correctness. *City of Helena v. Svee*, 2014 MT 311, ¶7, 377 Mont. 158, 339 P.3d 32 (citing *Hughes v. Ahlgren*, 2011 MT 189, ¶10, 361 Mont. 319, 258 P.3d 439). If the authority exists, the order granting or denying fees is reviewed for abuse of discretion. *Id.*

SUMMARY OF ARGUMENT

I.A. This trial occurred during a time when "nothing about the justice system was functioning normally." (Br., at 27.) The claimed risk of chilling criminal defense attorneys' legitimate advocacy in future cases is unpersuasive, while reversing the trial court and allowing that conduct to go unchecked weakens judges' ability to control their courtrooms. After nearly eleven months of pandemic-related disruption, the system-wide stress facing the Nineteenth Judicial District was unique. Badaruddin's intentional conduct to exploit these unprecedented circumstances was extraordinary and sanctionable. "To hold otherwise … would render any order from any court, scheduling or otherwise, meaningless." (Appx. A, at 9.)

I.B. The trial court's sanction was not imposed "because [Badaruddin's] delivery was unsophisticated," but rather, "because once the finish line was in sight, his seemingly unsophisticated delivery was revealed to be a tactical strategy to delay proceedings." (Appx. A, at 9.) On review, this Court gives deference to the first-hand assessment of the trial judge in imposing discretionary sanctions precisely because a cold review of the record many months later necessarily cannot fully capture events at trial. Judge Cuffe immediately began documenting the nuances, concerns, and events he had been observing as soon as Badaruddin's gamesmanship was revealed. This went beyond pettifoggery. The court's impressions of and conclusions about counsel's conduct establish that Badaruddin acted deliberately. Badaruddin's "intentional conduct that caused the mistrial is precisely the type of 'tactical' maneuvering that justifies" sanctions under §421. (*Id.*)

I.C. The standard of review for the question of sanctions is not whether this Court agrees with the trial court, and even less whether a different judge, evaluating a separate legal question in a collateral review of the criminal case assessed Badaruddin's conduct differently. The question is whether Judge Cuffe—having sat, day in and day out for nine

days, personally observing everything going on his displaced trial space—acted arbitrarily, and he did not.

II.A. The statutory power to sanction vexatious attorney conduct in court proceedings is a form of punishment and nothing in §421 suggests it is limited to "costs" of a prevailing party, as that term is used and defined in other statutes.

II.B. In every instance, the trial court was within its discretion to include each component of its sanction under §421's allowance for imposition of excess "expenses," to the extent the amounts were not *also* within the allowance for "costs."

ARGUMENT

I. THE TRIAL COURT WAS WITHIN ITS DISCRETION TO SANCTION BADARUDDIN FOR "STRATEGIC, TACTICAL, CALCULATED, CONSISTENT, AND CONSIDERED" CONDUCT THAT VEXATIOUSLY AND UNREASONABLY DELAYED A CRIMINAL CASE[4]

> [T]he Court finds that Mr. Badaruddin's admitted mismanagement of time … was deliberate and intentional. It was done for tactical and strategic reasons, creating a conflict with the trial schedule and his client's Sixth Amendment rights.

(Appx. A, at 8-9.) Such egregious conduct abusing judicial process for

[4] The undersigned appreciates the legal research and drafting assistance provided here by CSI Legal Intern Hailey Oestreicher.

tactical gain is what § 37-61-421, MCA ("§421"), exists to guard against. *In Re Estate of Bayers*, 2001 MT 49, ¶12, 304 Mont. 296, 21 P.3d 3.

Judge Cuffe's findings were made after observing two weeks of Badaruddin's trial conduct, receiving robust briefing from all parties, hearing oral argument, and taking the foregoing under advisement for nearly a year before issuing an order imposing sanctions. The lower court's considered, supported decision is the hallmark of the "employment of conscientious judgment" for which discretionary sanctions decisions should be affirmed. *Higgins ex rel. E.A. v. Augustine*, 2022 MT 25, ¶7, 407 Mont. 308, 503 P.3d 1118 (citing *Larchick*, ¶39).

A. The Circumstances Of This Case Were Extraordinary and Defense Counsel Went Beyond Vigorous-But-Legitimate Advocacy

Upholding the court's sanctions imposed under the unique circumstances of this criminal trial does not threaten zealous advocacy by criminal defense counsel system-wide; rather, it illustrates the extraordinary context in which Badaruddin's considered failure to preserve his client's Sixth Amendment rights took place.

Punishing an individual for obstructing the judicial process is a well-established power of the courts. While attorneys must zealously

advance their clients' interests, trial court judges retain broad discretion in scheduling and managing trials. *See Quercia v. United States*, 289 U.S. 466, 469 (1933) (reasoning that judge is not merely a moderator, "but is the governor of the trial for the purpose of assuring its proper conduct"). In *Ex parte Robinson*, 86 U.S. 505, 510 (1873), the Supreme Court stated: "[t]he power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." The Court recognizes defense counsel's "overarching duty to advocate the defendant's case," but limits that duty to "legitimate, lawful conduct compatible with the very nature of trial…." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Nix v. Whiteside*, 457 U.S. 157 (1986). That the Montana criminal defense bar has yet to trigger sanctions under §421 by engaging in conduct so egregious and deliberate as witnessed by Judge Cuffe reflects the minor risk of chilling zealous advocacy by upholding these sanctions.

Here, defense counsel's deliberate actions, including stalling and withholding disclosure of his client's desire to testify until only minutes

remained in a two-week trial,[5] were not compatible with the nature of a trial in the midst of the COVID-19 pandemic. The sanctions imposed on Badaruddin are appropriate and should be upheld.

As cannot be ignored, "nothing about the justice system was functioning normally" during the pandemic. (Br., at 27.) Trials had been suspended for nearly two months in 2020, backing up the judicial branch system-wide, and although trials resumed in June 2020, they were conducted under considerable and appropriate safety mandates. (R. 221, at 3-4; *see also supra* at 6 (II.A).) The Hartman case was originally set for a four-day trial, then seven days and, ultimately, to nine days after several meetings with counsel. (Appx. A, at 1; R. 221, at ¶¶2-3, 18.) The court's calendar following the Hartman trial was packed with cases presenting equally, if not more important constitutional considerations

[5] Badaruddin points to an obvious mistake in the time calculation announced at the end of testimony on Day 8. (Br., at 9-10 (citing TT-VIII-1774:6-7).) *But see and compare id.*, at 1773:7-18 (referring to the "fifteen minutes left for the day") *with id.*, at 1774:5-15 (moments later, incorrectly stating "Defendant has 15 minutes"). Before the misstatement could be addressed, however, Badaruddin launched immediately into his argument for additional time for Hartman's testimony. (TT-VIII-1774:22-25.)

such as incarcerated defendants and dependent neglect matters. (Appx. A, at 4); *Hartman VI*, at *11.

Due to the logjam in the judicial system caused by COVID-19, time was of the essence in concluding Hartman's trial. Cuffe, as the "governor of the trial," was clear that trial would be completed within the agreed-to nine days. *Quercia*, 289 U.S. at 469; (*e.g.*, R. 245, at 16:2-3; R. 246, at 14:4-15; TT-IV-747:6-9). Badaruddin acknowledged the unique nature of this trial and the importance of being mindful of time while conducting cross-examination and his case-in-chief. (*E.g.*, TT-II-164:9-21.) However, the court found Badaruddin's litigation strategy was anything but expeditious. With "[e]very witness" Badaruddin engaged in some version of delay "that elongated their testimony[,]" and his efforts at delay "became even more noticeable" when starting his case-in-chief. (*See e.g.*, Appx. A, at 2, 3; *infra*, at I.B.)

Badaruddin was familiar with his client and had ample opportunity to ascertain whether Hartman wanted to exercise his Sixth Amendment right to testify at trial. (*E.g.*, TT-VIII-1781:11-1782:4.) Yet, Badaruddin waited until only minutes remained in his allotted time to mention his client's desire to testify. (*Id.*, at 1774:5-25.) Badaruddin's own litigation

tactics placed the court in a catch-22 situation for which the only solutions—declaring a mistrial or up-ending the court's already crowded calendar during a pandemic—were mutually conflicting.

A similar scenario presented itself in *U.S. v. Elliot*, 463 F.3d 858 (9th Cir. 2006). There, the trial court discovered the defendant's attorney had a conflict of interest with a key defense witness. *Id.*, at 861. The defendant refused to waive the conflict. *Id.* The court then declared a mistrial, to which the defendant objected. *Id.* The Ninth Circuit upheld the trial court's decision, noting the defendant was attempting to "have it both ways." *Id.*, at 867. The court of appeals stated: "'[w]e should be aware of the trial court's prospects of being 'whip-sawed' by assertions of error no matter which way it rules.'" *Id.*, at 868 (quoting *Thomas v. Municipal Court of Antelope Valley Judicial Dist. of California*, 878 F.2d 285, 290 (9th Cir. 1989)). The Court concluded there was manifest necessity for the mistrial where a breakdown in the representation occurred after jeopardy had attached. *Id.*, at 867 (citing cases).

Faced with an analogous manifest necessity question in Hartman's case, this Court recognized it was "ironic, to say the least" that the trial court's actions to protect Hartman's constitutional rights and *not* commit

reversible error would somehow mean he could not be retried: "Hartman is not entitled to such a windfall." *Hartman VI*, at *10; (*accord* TT-IX-1792:4-20 (having ruled in reliance on Badaruddin's representations, now "you [Badaruddin] say Oh, wait, Judge, no, I'll do it shorter. And then you file an appeal saying The judge made me shorten it because he threatened me with a mistrial"); TT-IX-1792:4-20; 1795:4-24 (similar concerns)).

Regardless of the resolution of that legal question in the criminal appeal, Judge Cuffe was facing the issue in real time as the breakdown between Badaruddin and Hartman became apparent during the final two days of trial, after jeopardy attached. (*See also infra*, I.B.) Badaruddin admitted knowing, for certain, that his client intended to take the stand on Day 7 (*id.*, at 1781:21-1782:4), yet throughout Day 8 he took no action indicating he prioritized his client's constitutional right (*see generally* TT-VIII). Badaruddin characterized his strategy as ineffective assistance of counsel and cautioned numerous times that the failure to intervene and allow the defendant's testimony would result in reversal. (Appx. A, at 5-6; *see also* TT-VIII-1777:19-24.) The judge carefully considered this predicament, and concluded a mistrial was not only necessary and its

only option given the obvious procedural error stemming from Badaruddin's "deliberate attempt to stall this proceeding," but also that his "calculated maneuvers" warranted imposing a substantial sanction. (TT-IX-1790:23-1791:17; Appx. A, at 4-5; Appx. B, at 2-3; R. 285.) Badaruddin played the court's packed schedule and its "conscientious protection of the constitutional rights of all parties before it, including Hartman," *Hartman VI*, at *11, against the judge. Badaruddin implemented a considered strategy that "create[d] a conflict with the trial court's schedule and his client's Sixth Amendment rights." (Appx. A, at 9.)

Then 11 months into pandemic delays and complications across its docket, the court was simply out of time for an unforeseen continuation requested on the penultimate day of a two-week trial. It was not merely rescheduling *this* case, it was delay to the entire docket, including at least three jury trials, two of them criminal—if the rented courtroom was even available. (Appx. A, at 4; TT-IX-1789:17-1790:4, 1799:10-23.) Badaruddin was "attempt[ing] to use [his] mismanagement to force the Court's hand[,]" and doing so in a way that "threatened to

disrupt the administration of justice *throughout* the Nineteenth Judicial District[.]" (Appx. A, at 8, 9 (emphasis added).)

An attorney's negligence or error should not deprive his client of his day in court and, when it does, it is proper to impose upon the attorney "personally, a penalty for his neglect." *Moran v. Rynar*, 39 A.D.2d 718, 719 (N.Y. App. Div. 1972). Badaruddin's conduct, however, went far beyond negligence and he was appropriately sanctioned after the trial judge observed him engage in "strategic, tactical, calculated, consistent and considered conduct" resulting in his client's inability to testify, a right he weaponized against the judge's control of his docket and the rights of other criminal defendants awaiting precious court time. (Appx. A, at 5; Appx. B, at 3; R. 285.) Engaging in conduct that necessitates a retrial or attempting to cause a mistrial is a long-recognized basis for imposition of hefty sections pursuant to §421. *Kuhnke v. Fisher*, 227 Mont. 62, 740 P.2d 625, 628-29 (1987) (denying a third trial, but "in no way condoning or ignoring [attorney's] courtroom antics," and remanding to consider increasing $20,000 sanction). Reversing the sanction here risks further gamesmanship specifically in criminal cases and weakens judges' ability to control their courtrooms. (*See e.g.*, Appx. A, at 9.)

The court's declaration of a mistrial was necessitated not only by factors traditionally considered in criminal law,[6] but by the extraordinary circumstances of the mistrial being situated within a pandemic. Ordinarily, a judge may have more flexibility within their schedule; a trial court may not face the logistical challenges faced here. The Hartman trial was far from ordinary, and constraints placed on the court were unavoidable and well-understood. Badaruddin turned these circumstances to maximum advantage, "throw[ing] in [the court's] face" the constitutional rights defense counsel is supposed to be safeguarding during a time when adherence to the schedule was of the utmost importance to facilitate speedy trials and ensure public safety. (TT-IX-1795:4-24.) Therefore, upholding the court's sanctions imposed under the exceptional circumstances presented during this criminal trial does not pose a threat to the functioning of other defendants' Sixth Amendment rights. Rather, it affirms the authority of trial courts to control their courtrooms in the face of vexatious and unreasonable conduct by attorneys, whether civil or criminal.

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[6] *See e.g.*, *State v. Newrobe*, 2021 MT 105, ¶11, 404 Mont. 135, 485 P.3d 1240; *Elliot*, 463 F.3d at 867; *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

B. Badaruddin Was Sanctioned For His Strategic, Considered Conduct To Intentionally Delay Trial, Not For His Advocacy Of His Client's Right To Testify

The trial court employed its conscientious judgement in sanctioning Badaruddin personally for engaging in a deliberate, tactical strategy to delay criminal proceedings before it and its order should be affirmed.

Since 1985, §421 has provided a statutory mechanism for courts to personally sanction an attorney to any court proceeding for vexatiously and unreasonably prolonging the proceedings. It exists "to provide redress against persons who abuse the judicial process for their convenience, tactical reasons, personal gain, or the satisfaction of vengeful motives." *Bayers*, ¶12 (citing legislative history). This Court has affirmed §421 sanctions for conduct ranging from causing a second mistrial, *Kuhnke*, 740 P.2d at 627-28, 629, to "'playing games' and 'pushing [opposing counsel's] buttons[,]'" *Bayers*, ¶16.

While Judge Cuffe's order against Badaruddin appears to be the first application of §421 in a criminal case, the statute plainly states it applies to "*any* court proceeding[.]" (Emphasis added.) The federal corollary, 28 U.S.C. § 1927, has long been used for redress against criminal defense counsel. *Bayers*, ¶12 (Montana's §421 modeled on

federal §1927); *see e.g.*, *United States v. Milito*, 638 F. Supp. 974, 977, 979 (E.D.N.Y. 1986) (citing Ninth Circuit decisions applying statute to criminal cases); *United States v. Perfecto*, Case No. 1:06-cr-20387-JDB-2, 2010 WL 11602757 (W.D. Tenn. July 21, 2010) (attached hereto as Appendix D); *see also United States v. Kouri-Perez*, 8 F. Supp. 2d 133, 137-141 (D.P.R. 1998) (sanctions for misrepresentations and impugning opposing counsel; "'there is a point beyond which zeal becomes vexation, the 'novel' approach to a legal issue converts to frivolity....'" (quoting *Cruz v. Savage*, 691 F. Supp. 549, 556 (D.P.R. 1988)). The language of Montana's statute is unambiguous and contains neither a limitation to civil proceedings nor an exclusion for criminal defense counsel and this Court should reject Badaruddin's arguments to imply such provisions. Section 1-2-101, MCA; *Mont. Independent Living Project v. City of Helena*, 2021 MT 14, ¶11, 403 Mont. 81, 479 P.3d 961.

The Court should also reject Badaruddin's unsupported assertions regarding the standards applicable to the trial court's imposition or this Court's review of sanctions. Badaruddin contends, for example, that to be sanctionable, his conduct "had to have been apparent and repeated[,]" and on review his actions and trial court's conclusions "must be reviewed

for objective reasonableness." (Br., at 18, 24.) No such standards exist in Montana law and Badaruddin cites none. The applicable standards are set forth in the statute itself (vexatious and unreasonable conduct) and in this Court's abuse of discretion definitions (arbitrarily imposing sanctions without employment of conscientious judgment, or exceeding the bounds of reason resulting in substantial injustice, *Higgins*, ¶7). *See also Larchick*, ¶39; *G.M.*, ¶11.

Executing a strategy of intentional delay with such success that no one saw it coming until the very moment it was revealed—*i.e.*, failing to make it apparent—does not make the strategy objectively reasonable, let alone beyond sanction. Indeed, this is what the trial court concluded Badaruddin vexatiously and unreasonably did here.

Badaruddin carefully chooses his words in arguing about what "the trial record" does or does not show; he argues various aspects of his case were not "found to be repetitive, irrelevant, or immaterial contemporaneous with their presentation." (Br., at 17, 19, 22.) These arguments attempt to limit this case to the transcript, the record of what is spoken aloud in court. But "the record" is more than the transcript of questions and answers; it is the oral and written findings of the trial court

judge as to his observations having personally overseen two weeks of trial. (*See* TT-VIII-1778:17-22; TT-IX-1788-1802, 1804-1807; Appx. B; Appx. A; R. 285.)

As this Court found, throughout trial the trial court "kept meticulous track of the parties' time and repeatedly reminded the parties … as to how much of their allotted time was remaining." *Hartman VI*, at *1. At the close of the penultimate eighth day, after receiving this reminder (TT-VIII-1774:1-18), Badaruddin suddenly announced the defendant intended to testify and could not do so in the time remaining, and then gave a prepared and fully-formed argument, with attendant legal authorities, on his client's constitutional rights to testify, his obligations as defense counsel including his failure to protect his client's rights, and the rules which should guide the intervention he insisted was required. (TT-VIII-1774:22-1778:11.) In this moment, it was plain to the trial court that the pettifoggery it had been witnessing was actually a ruse. (TT-VIII-1778:17-23 ("You've been planning this the whole time….").) Badaruddin's conduct purposely put the Court in an untenable position of either violating his client's rights or forcing the Court to violate another defendant's rights.

No "contemporaneous" findings[7] were made up to that point because Badaruddin waited until "the finish line was in sight" to reveal the catch-22 he created. *See e.g.*, *U.S. v. Romero-Lobato*, No. 3:18-cr-00047-LRH-CBC, 2020 U.S. Dist. LEXIS 18332 at *32-37 (D. Nev. Feb. 4, 2020) (trial court faced with prohibiting untimely defense and creating "ready-made issue on appeal" or declaring mistrial and delay to allow fair opportunity to explain, which would also be objected to; reviewing policy issues and decisions of other courts, including *Elliot,* 463 F.3d 858). Recognizing the deliberate nature of what just occurred, the judge immediately set about making a record of Badaruddin's conduct now that he had a context in which to interpret it. (*E.g.*, TT-VIII-1778:17-23.) The judge continued making that record the following morning (*e.g.*, TT-IX-1788-1802), including the serious ethical implications of Badaruddin having created the error that was imperiling his client's rights (*id.*, at 1796:11-15, 1799:24-1802:14, 1804:15-1807:1). The court memorialized its reasoned assessment of Badaruddin's conduct in its post-trial orders.

[7] Badaruddin also suggests the lack of objection from the State is somehow relevant (Br., at 19), but the State had no obligation to help Badaruddin present a less confusing case or draw attention to Badaruddin's irrelevant material by objecting.

(Appx. B; Appx. A; R. 285.) The drip, drip, drip of delay the court observed was revealed as a "calculated, methodical and consistent" trial strategy. (TT-VIII-1778:20-22.)

With less than an hour of the defense time remaining,[8] and having admittedly "failed" all day "to leave enough time for [Hartman] to testify" (TT-VIII-1777:20-24), Badaruddin represented his client needed three hours for direct examination (*id.*, at 1778:24-1779:5). The small buffer of time on Friday morning (TT-IX-1798:25-1799:4) was insufficient because there was not merely 90-180 minutes for Hartman's direct testimony. There was cross examination, there was general uncharged time for breaks and set-up, time preserved by the State for rebuttal—which "gets us past lunch at 1:30, two o'clock"—after which was the time to settle 60+ jury instructions with no stipulations, time to physically produce them for the jury, time to then read the instructions, and *then* time for closings on a nine-count indictment by both sides. (*Id.*, at 1797:14-1799:9.) The time needed meant the court was looking at a continuation of at least three weeks. (*Id.*, at 1789:17-1791:7.)

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[8] *See supra*, n.5.

Only *after* Badaruddin confirmed he had no further argument the following morning (TT-IX-1787:2-4), *after* the court's extended and uninterrupted recitation of its schedule and timing issues created by the request for 3-hours minimum (*id.*, at 1788:1-1790:25), *after* a mistrial was formally declared (*id.*, at 1791:1-7), and *after* the court indicated Badaruddin would be personally "responsible for the costs associated with these nine days" (*id.*, at 1791:1-17) did Badaruddin assert he "th[ought] we can get [Hartman's testimony] done in 90 minutes" (*id.*, at 1792:5-6). (*See also* Appx. A, at 5-6 (Hartman needed "meaningful opportunity to seek independent advice from different counsel" before waiving or limiting Sixth Amendment right to testify), 8 (having identified conflict between Badaruddin and Hartman, Badaruddin "exacerbated his actions, offering to limit his client's testimony").) This series of events illustrates the trap Badaruddin laid for the court and its conclusion that Badaruddin "was gaming the system for tactical advantage and 'the games [had] gotten in the way of justice.'" (Appx. A, at 8.)

Badaruddin invites a review of the record that ignores the express findings of the trial court and focuses almost exclusively on his witness

examinations. For example, he dissects the "16"[9] times he asked to approach the stand. (Br., at 21.) In doing so, he omits details like six of these instances occurring with his own witnesses when he could have prepared; four of those times were to introduce exhibits through a single witness (Ms. Olsen), three of which the State had no objection to admitting. (*See e.g.*, Appx. A, at 2.)

The cataloguing of every misstep is not what §421 demands, nor is it the question asked by this Court under the abuse of discretion standard. Nor is the question whether some other outcome might have been chosen by some other judge (*infra*, at I.C). *G.M.*, ¶11. Badaruddin was not sanctioned for, *e.g.*, asking to approach; the court sanctioned him "because, once the finish line was in sight, his seemingly unsophisticated delivery was revealed to be a tactical strategy[.]" (Appx. A, at 9.) A judge's ability to make a first-hand assessment of the matters in front of them, their ability to control the goings on of their courtroom and

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[9] Badaruddin does not count a 17th instance—the one where he quotes the court's statement, "we aren't here to do it fast." (Br., at 22 (citing TT-I-54:6-8).) This request to approach occurred on Day 1 and chewed through enormous time afterwards because Badaruddin attempted to refresh a witness's recollection by playing a tape-recorded police interview in front of the jury. (TT-I-50:20-61:17.)

redress an unreasonable and vexatious multiplication of proceedings is at the heart of discretion. Judge Cuffe concluded, in his determination as the governor of this two week trial, that Badaruddin deliberately attempted to delay and prolong the proceedings. *See Quercia*, 289 U.S. at 469; § 37-61-421, MCA.

Badaruddin suggests "there was no practical advantage to slow playing the case" and faults the trial court for not identifying his goal. (Br., at 23.) Even if the Court accepts *arguendo* Badaruddin's representation that no advantage existed, such a reality only further illustrates the vexatiousness of Badaruddin's conduct. Delay with no aim is no less vexatious. Yet his contention ignores not only the most likely aim (creating an issue for appeal), but also the most obvious advantage: Badaruddin's conduct has resulted in his client avoiding even the potential of conviction for more than two years in a case with elderly victims, some of whom have already been lost. (*See e.g.* R. 135, Ex. A at 8, ¶2.dd (regarding W.H. and S.J.); TT-V-852:16-853:12, 855:4-20.)

Judge Cuffe determined Badaruddin "willfully chose to disregard his client's Sixth Amendment right to take the stand, except to the degree that the right could be used to gain tactical advantage at the end of the

trial." (Appx. A, at 9.) Abusing the judicial process for tactical gain is precisely why §421 allows a judge to sanction attorneys personally for such conduct. *Bayers*, ¶12. This Court has affirmed sanctions ranging upwards of tens-of-thousands of dollars for wasted trials, to more minor amounts for unsupported motions that disrupt the docket, including on appeal. *Kuhnke*, 740 P.2d at 628, 629 ($20,000 or more to cover costs of retrial); *Tigart v. Thompson (Tigart II)*, 244 Mont. 156, 796 P.2d 582, 583, 584 (1990) ($31,275.97 attorney fees and costs associated with first trial); *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶17, 319 Mont. 105, 82 P.3d 896 (attorney fees and $500 sanction for "unnecessary consumption of the time of the District Court and this Court"); *Bayers*, ¶17 (counsel's "inclination to prolong this matter … did not end in the district court," imposing expenses and fees on appeal); *Hartman IV*, at *5 ($500 payable to trial court for disruption to its docket). The imposition of sanctions against Badaruddin in this case was not arbitrary; it was directly in line with the statute and this Court's cases.

C. Deference Accords To The Conclusion of The Trial Court Judge

The trial court "is in the best position to know whether parties are disregarding the rights of others and which sanction is most

appropriate," *Bayers*, ¶9, and therefore, Judge Cuffe's imposition of sanctions must be given proper deference under the law. *Accord United States v. Sanders*, 591 F.2d 1293 (9th Cir. 1979) ("high degree of deference" accorded to mistrial declaration where defendant's constitutional rights were jeopardized; deferring to trial judge "as to competence of counsel when the judge heard and observed his performance as criminal defense counsel").

Badaruddin attempts to seek refuge from Judge Cuffe's first-hand observations in the decision of the United States District Court on the collateral matter of Hartman's plea of double jeopardy. (Br., at 23-24, 31-33.) In contrast to the considered view of this Court, *Hartman VI*, at *10, the federal court concluded Badruddin "did not violate his client's right to testify[,]" *Hartman VII*, at *31. (*But see contra* TT-VIII-1777:19-24 (Badaruddin asserting, *inter alia*, "I've taken [Hartman's right to testify] away from him…").) That order dubbed Badaruddin's inconsistent requests for additional time, ranging from 3 hours to ninety minutes, "the hallmark of competence." *Id.*

Badaruddin points to the acts of "loyal opposition" to unfavorable precedent carried out by criminal defense attorneys writ large as a

cautionary tale against the sanctions imposed upon him here. (Br., at 31.) He now asserts the federal court's order "fundamentally affects the factual analysis here" regarding his trial conduct, contending the differing assessments establish sanctions were allegedly arbitrary. (Br., at 23-24.) Both arguments are misplaced.

First, Badaruddin was not, as he contends, fulfilling the historic, important role of defense attorneys by refusing to "sacrifice[] his client's right to testify on the altar of the court's timetable." (Br., at 33.) In fact, Badaruddin admitted he "failed to protect or safeguard" his client's rights: "I've taken it away from him … I have failed to leave enough time for him to testify." (TT-VII-1777:20-24.) Badaruddin instead forced the *court* to undertake the sacred protection of his client's Sixth Amendment right. He created a structural error wherein either the court allowed the testimony by disrupting its docket and subordinating the rights of other parties to make the time counsel knew the court did not have (*see* TT-VI-1279:2-1281:1; *see also* TT-IV-747:6-9) or the court denied (or limited) the defendant's testimony and virtually guaranteed reversal on appeal. Neither criminal law, nor §421 condones such "whip-saw[ing]" of the court. *Elliot*, 463 F.3d at 868. Badaruddin's conduct as a criminal

defense lawyer should find no comfort in the lofty cases of "*Johnson, Gideon, Cronic*, and their ilk[.]" (Br., at 33.)

Second, the federal court fails to mention many of the trial court's considerations in declaring a mistrial and imposing sanctions.[10] Nowhere does the Order account for the deliberate delays caused by Badaruddin. (*E.g.*, TT-VIII-1778:17-23 ("You've been planning this whole time…."); TT-IX-1790:13-16 ("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…."); *see also* Appx. A, at 3 (outlining concerning conduct observed throughout trial).) The federal court disposes of the enormous strain placed on the court by the pandemic within a footnote. *Hartman VII*, at *2, n.1.

Thus, while acknowledging its duty to defer to a trial judge's "assessment of the situation before him," *id.*, at *22, the federal court largely ignores critical portions of Judge Cuffe's first-hand valuation of

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[10] Instead, the federal court trivializes the trial court's declaration of a mistrial and imposition of sanctions to simply "running out of time." *Hartman VII*, *23, n.3. Yet, management of a court's calendar is a long-recognized power inherent to the court itself, and its attendant authority to sanction. *Roadway Express v. Piper*, 447 U.S. 762, 765 (1980) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 629-630, 632 (1962)); *accord Hartman IV*, at *5.

defense counsel during the eight days of trial preceding the imposition of sanctions, including Judge Cuffe's determination that Badaruddin was willfully attempting to bargain away his client's constitutional right to testify. (*See e.g.*, Appx. A, at 5-6, 8-9.) Even were this, *arguendo*, a matter of "two fair minded jurists" reviewing allegedly the "same facts" and "law" and reaching "opposite conclusions" (Br., at 24), the question before this Court is *not* whether it, or any other reviewing court "agrees with the trial court[.]" *G.M.*, ¶11.

Whatever comes of the double jeopardy issue, this Court is not bound by the second-hand assessments of the federal court on the collateral matter of Hartman's constitutional rights more than a year after the trial court was forced to declare the mistrial. The facts and the law applicable to the question before this Court is whether Judge Cuffe abused his discretion and arbitrarily sanctioned Badaruddin's conduct necessitating that mistrial. *Larchick*, ¶39; *G.M.*, ¶11. This Court's 1987 decision in *Kuhnke*, 740 P.2d at 628-29, established that an attorney's vexatious conduct may be sanctionable under §421 even if it does not also warrant a retrial. Montana law places the discretion to impose personal sanctions on attorneys "in the determination of the court" overseeing the

proceedings, §421, precisely because it is best suited to evaluate such behavior, *Larchick*, ¶39; *Bayers*, ¶9.

Once Badaruddin's stalling tactics were revealed in full, Judge Cuffe's determination was that he strategically and intentionally delayed the proceedings to force a procedural error. The decision to impose sanctions for such conduct was not an abuse of discretion and should be affirmed.

II. THE JUDGE CORRECTLY IMPOSED EXCESS COSTS, EXPENSES, AND ATTORNEY FEES PURSUANT TO § 37-61-421, MCA

The authority to impose costs in either a civil or criminal case must derive from statute. (Br., at 34 (citing, *inter alia*, *Abby/Land, LLC v. Glacier Construction Partners, LLC*, 2019 MT 19 ¶74, 394 Mont. 135, 433 P.3d 1230; *State v. Ferriter*, 255 Mont. 73, 83 P.2d 461 (1992), *overruled on other grounds in State v. Gatts*, 279 Mont. 42, 928 P.2d 114, 120 (1996)).) Here, that express statutory authority derives from § 37-61-421, MCA ("§421").

A. Sanctions Are Not Confined To Expenses Of The Opposing Party

Although Montana's §421 was modeled after its federal counterpart, 28 U.S.C. § 1927 ("§1927"), Badaruddin overstates the

federal case law interpreting §1927 as applying only to amounts incurred by the opposing party. (Br., at 35.) The statute is not so limited.

Badaruddin mix-and-matches statements of the federal courts regarding imposition of sanctions under two different theories. For example, he looks to the Ninth Circuit's decision in *United States v. Blodgett*, 709 F.2d 608, 611 (9th Cir. 1983), noting that sanctions have been limited to those occurred by the opposing party rather than "on increased costs experienced by the court[.]" That statement is predicated not on §1927, but rather on "cases that have considered the district court's inherent power to sanction attorneys[.]" *Id.* (citing *Roadway Express*, 447 U.S. at 766 and *United States v. Ross*, 535 F.2d 346, 351, 351 n.3 (6th Cir. 1976)). Even still, the Supreme Court's 1980 *Roadway Express* decision recognized the "'well-acknowledged' inherent power" to impose sanctions to, e.g., "'prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.'" 447 U.S. at 765 (quoting *Link*, 370 U.S. at 629-630, 632). However, a court's inherent judicial power is a separate basis for imposing sanctions, distinct from §1927. *Compare* 447 U.S. at 757-64 (II.A (28 U.S.C. § 1927)) *with id.*, at 764-67 (III (inherent authority)).

To the extent *Ross* and *Roadway Express* addressed sanctions authority under §1927 and concluded "costs" were limited to costs taxable under a specific statute, Badaruddin ignores that both cases were decided under an older version of the statute. *Ross*, 535 F.2d at 350-51 (costs of jury not taxable, referring to "costs of prosecution"); *Roadway Express*, 477 U.S. at 757-763 (attorney fees are not "costs" taxable to losing party under 28 U.S.C. § 1920). Following the Court's invitation to change the statute in *Roadway Express*, 447 U.S. at 760, n.8, Congress amended §1927 to allow excess "expenses, and attorney fees[,]" rather than only "costs[.]" *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1229 (6th Cir. 1986) (citing 28 U.S.C. § 1927 (1982) (as amended by Pub. L. 96-349, § 3, 94 Stat. 1156 (Sept. 12, 1980))). This change fundamentally alters the reasoning of the cases relied on by Badaruddin by expanding the scope of available sanctions. *Compare e.g.*, *Ross*, 535 F.2d at 351 (pre-amendment, disallowing jury costs as sanction) *with Dowe v. AMTRAK*, No. 01 C 5808, 2004 U.S. Dist. LEXIS 11377, at *11-14 (N.D. Ill. June 18, 2004) (post-amendment, "In short, even if jury fees are not a recoverable 'cost' under §1927 because they are not a taxable cost under §1920, they certainly can

be an 'expense' that may be included in a sanction under §1927[,]" and imposing, *inter alia*, $6,140 for jury expenses, payable to the court).

Montana's statute, adopted in 1985, employs the broader, updated language permitting courts to impose "excess costs, expenses, and attorney fees" as a sanction upon counsel personally. Section 37-61-421, MCA. Badaruddin's contrary argument—that the scope of sanctions is limited to the "costs" enumerated in § 25-10-201, MCA, and available to prevailing parties generally—is inapposite and not controlling. The plain language of §421 states it applies to "[a]n attorney or party to any court proceeding[,]" without mention of the statutes Badaruddin insists impliedly limit the statute's stated reach. *Cf. In re Potts*, 2007 MT 236, ¶¶10, 16, 18, 23-24, 339 Mont. 186, 171 P.3d 286 (rule of disciplinary proceedings allowing assessment of "cost of the proceedings …" was a form of discipline and sanction, separate and distinct from a successful party's "costs" awarded under § 25-10-201, MCA).

Nevertheless, the State used the taxable costs statutes, §§ 46-18-232 and 25-10-201, MCA, as "guide[s]" for what amounts to submit—but these were not the "only" points of reference. (Br. at 36, 38.) The State *also* looked to §421 "and the *Order Re: Mistrial*[.]" (R. 237, ¶¶3-4; Appx.

B, at 4.) The State never contended Badaruddin was a "convicted defendant" or that he was subject to the imposition of costs under § 46-18-232, MCA, as a sanction "against a criminal defense attorney regardless of the outcome of trial." (Br. at 37.) Rather, the State contends Badaruddin is subject to §421 and that statute *does* authorize such sanctions. *But see Roadway Express*, 447 U.S. at 771-72 (Burger, C.J., dissenting (whether amount is recoverable depends on the statutes controlling the type of case; dissenting from holding that it was improper for the lower court in that civil rights action "to look to 42 U.S.C. §§ 1988 and 2000e-5(k) to determine whether attorney's fees were assessable as part of the excess costs" under §1927)).

Section 37-61-421 applies to "[a]n attorney … to any court proceeding" and contains no exception for criminal defense counsel. Badaruddin is an attorney to the proceedings before the Nineteenth Judicial District in the Hartman criminal trial. This statute and these facts satisfy any "jurisdictional prerequisite" for sanctioning Badaruddin. (Br. at 39.)

B. Sanctions Are A Punishment Controlled By § 37-61-421, MCA, Not A Reward To A Prevailing Party

By its plain language, §421 is agnostic to who incurred the costs and expenses, only that they are "excess" in nature. This broad language has been applied to costs beyond those incurred strictly in a trial or by opposing counsel. *See e.g.*, *Cross Guns v. Eighth Judicial District Ct.*, 2017 MT 144, ¶¶13-14, 387 Mont. 525, 396 P.3d 133 (affirming $500 contempt fine, and sanction under §421 of "costs of $1,124.76, which represented the costs of the [parental] termination hearing that had to be continued"); *see also Dowe*, 2004 U.S. Dist. LEXIS 11377 at *6-7, *11-14 (§1927 sanctions are appropriate for conduct causing a mistrial even if case is not retried, and imposing, *inter alia*, jury costs). Every cost and expense of the wasted trial resulted from Badaruddin's deliberate tactics and §421 authorized the court to impose those excess amounts as a sanction.

The State did not incur, and has not claimed, every cost or expense challenged by Badaruddin here. To the State's understanding, the court reporter's fee of $3,853.28 was paid by the Court Administrator's Office,

and Lincoln County paid witness fees of $90,[11] facility rental costs of $4,300, and jury costs of $7,710.19. (R. 237, at ¶¶11-12, 16-18, 28-32 (Exs. A, C, L, M).) The State maintains that every one of these amounts *could* be assessed as an "excess cost[or] expense[]" against Badaruddin pursuant to §421. *See e.g.*, *Dowe*, 2004 U.S. Dist. LEXIS 11377 at *11-14. The State continues to take no position on whether these amounts *should* be so-imposed. (*See* R. 258, at 15, 17.)

Of the components Badaruddin challenges here (Br., at 38-45), the State incurred excess costs and expenses for mileage ($2,022.98),[12] per diem ($1,643.50), and lodging ($5,132.56). (*See* R. 237, ¶¶20-25 (Exs. D-K); R. 258, at 13-14, 14 n.2, 16-17 (§III.d-g).) Each travel-related amount was properly established by the Affidavit of Costs and supporting documentation (R. 237), and the validity of that support was not challenged below.[13]

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[11] The total mileage costs, *infra*, include $204.40 paid by Lincoln County. (R. 237, ¶¶20, 21.f-k (Ex. C).)

[12] The total mileage should be reduced by $171.10 to $2,022.98 due to an error in the calculation. (Sanctions Hrg. Trans., at 32:13-20.) As the State acknowledged (*id.*), witness Valerie Burner elected to drive her personal vehicle and per § 2-18-503(2)(a), MCA, only sought reimbursement of 27.16¢ per mile, for a total of $159.30 (not 56¢ per mile, or $330.40). *Compare* R. 237 at ¶21.d *with* R. 237 at Ex. H.

[13] Save the mileage calculation error described in n.12.

No authority limits the sanctions under §421 to costs available to a prevailing party post-trial. The statute plainly permits a trial court to impose not only "costs," but also "expenses" as part of its sanction when "in the determination of the court" an attorney has unreasonably and vexatiously multiplied the proceedings. This Court reviews whether the trial court acted arbitrarily, *G.M.*, ¶11, recognizing the court "in the *best position* to the know the nature and extent of any alleged violation" is the *trial court* before whom Badaruddin's conduct occurred, *Larchick*, ¶39 (emphasis added).

Here, Judge Cuffe determined:

> Mr. Badaruddin deliberately acted to slow proceedings and attempted to leverage his client's Sixth Amendment rights against the Court to gain a strategic advantage, ultimately causing the mistrial[.]

(Appx. A, at 9.) Based on that finding and the unchallenged documentation presented to it, the trial court was well-within its discretion to impose each individual amount under §421, whether as a "cost" within the meaning of § 25-10-201 and related statutes, or under the boarder allowance for excess "expenses[.]" *Larchick*, ¶39 (citing *McKenzie*, 949 P.2d at 1172); *Svee*, ¶7.

This Court, therefore, need not engage in the line-item dissection of the total sanction that Badaruddin invites. Such a review nevertheless confirms there is record and legal support for the amounts and they were not imposed arbitrarily. *G.M.*, ¶11.

Regarding the challenged travel-related amounts incurred by the State as mileage, per diem and lodging, these amounts broke down as follows: As for mileage ($2,194.08), the State paid $ 1,818.58[14] of this amount (R. 237, ¶¶20, 21.a-e, l (Exs. D-H, J); of which $1,424.90 was for State witnesses (*id.*, at ¶21.a, c, d, l (Exs. E, G, H, J)), and $393.68[15] was for counsel's mileage (*id.*, at ¶21.b, e (Exs. E, F)). As for per diem ($1,643.50) and lodging ($5,132.56), the State paid the entire amounts challenged (*id.*, at ¶¶22-25), of which $833.50 in per diem and $2,504.48 for lodging was related to witnesses (*id.*, at ¶¶23 and 25 at b, d-g (Exs. E, G-H, J-K)), while $810 in per diem and $2,504.48 in lodging was for counsel (*id.*, at ¶¶23 and 25, at a, c (Exs D, I)).

Contrary to Badaruddin's assertion that a $10 appearance fee "is the entirety of what is allowed as a witness fee" (Br., at 41-42), witnesses

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[14] *See supra* nn.11-12 (describing adjustments).

[15] Because attorney Ellis and witness Egan traveled together, no additional amount was sought for Ellis' Libby-Helena mileage.

are statutorily entitled to mileage to and from the place of trial pursuant to § 26-2-601(1)(b), MCA. *See also* § 26-10-201(1), MCA ("legal fees of witnesses, including mileage," are a generally allowable cost). "The award of counsel's mileage costs" for trial (as opposed to depositions) is a matter "left to the broad discretion of the District Court to determine" under § 25-10-201(9), MCA. *Springer v. Becker*, 284 Mont. 267, 943 P.2d 1300, 1306 (1997) (citing *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784, 798 (1990)).

Although § 25-10-201, MCA, is silent as to per diem and lodging, these amounts were due from the State to its employees pursuant to § 2-18-501(4), MCA.[16] Given the location of trial was nearly 300 miles from the State's offices in Helena, such expenses were logistically unavoidable and fairly considered within the trial court's discretion. Further, this Court has allowed the imposition of "attorney travel expenses" as a sanction under §421. *In re Marriage of Rager*, 263 Mont. 361, 868 P.2d 625, 626, 628 (1994) (district court's order to pay "attorney's fees and attorney travel expenses," affirmed under §421); *accord*, *e.g., Nautilus*

[16] Rhem and Olinger were not state employees, but were reimbursed at the same rates. (R. 237, Exs. J-K.)

Ins. Co. v. Club Boxing, Inc., Fourth Jud. Dist. Cause No. DV-06-601, 2008 Mont. Dist. LEXIS 815, *5, Opinion and Order (Oct. 17, 2008, McLean, J.) (awarding "Attorney Travel Expenses" related to court-ordered hearings and conferences, including rental car, air service, hotel and meals under § 25-10-201(9), MCA). *Cf. Potts*, ¶¶34-37 (disciplinary proceeding, imposing travel expenses of tribunal, including mileage, food, and accommodations, finding § 25-10-201 "in no way limits or constraints the Court's options in imposing discipline or sanctions pursuant to Rule 9 MRLDE.").

The trial court had the legal authority and the discretion to include all of the foregoing amounts as part of its sanction under §421 for Badaruddin's gamesmanship, and its order should be upheld. *Svee*, ¶7; *Larchick*, ¶39.

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CONCLUSION

For all of the foregoing reasons, the State requests this Court affirm the trial court's order sanctioning Badaruddin pursuant to § 37-61-421, MCA.

Respectfully submitted this 8th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief of Appellee State of Montana is printed with a proportionately spaced Century text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,969 words, excluding caption, tables of contents and authority, and certificates of service and of compliance.

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