

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,*Petitioner,*

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE
COUNTY, THE HONORABLE JOHN W. PARKER, DISTRICT JUDGE,*Respondent.*

**PETITION FOR WRIT OF SUPERVISORY CONTROL OR, IN
THE ALTERNATIVE, FOR WRIT OF REVIEW AND REQUEST
FOR STAY PENDING RESOLUTION**

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RESPONDENT

ATTORNEY FOR PETITIONER

STATEMENT OF FACTS

The Department's factual assertions are based on the exhibits filed contemporaneously with this petition. The Department's petition arises from a separate criminal proceeding, to which the Department is not a party. Many of the facts relevant to the Department's petition are contained in the record of an evidentiary hearing conducted on October 27, 2023. Despite multiple efforts, including a motion made to the Respondent, the Department has been unable to obtain a transcribed or audio record of the hearing at issue. However, the written order issued by Respondent on November 13, 2023 (Exhibit 13) is sufficient to allow this Court to decide the merits of the petition.

The Cascade County Attorney's Office initiated a criminal matter against defendant, William Anderson, in the Eighth Judicial District Court by Information on March 14, 2023 with cause number DC-7-2023-0000181-IN. Exhibit 1, Exhibit 2. On June 13, 2023, defense counsel filed a motion to commit Anderson to the Montana State Hospital (MSH) for evaluation of his fitness to proceed. Exhibit 3. On June 15, 2023, Respondent ordered that Anderson be committed to MSH for evaluation pursuant to Mont. Code Ann. § 46-14-202. Exhibit 4. Respondent set a

status hearing for August 30, 2023. *Id.* As of August 30th, Anderson had not yet been admitted to MSH and Respondent set a second status hearing for September 13, 2023, at which Respondent ordered an administrator from the Department to appear and explain why a bed date was not available. Exhibit 5. Neither the Department, nor MSH, were represented at the August 30th hearing. *Id.*

On September 13, 2023, the MSH Interim Administrator appeared before the district court via videoconference and explained, in brief, the challenges faced by MSH's Forensic Mental Health Facility (FMHF) in meeting the demand for forensic evaluation, treatment, and restoration services. Exhibit 6. Respondent, concerned about the admission backlog crisis currently plaguing FMHF, set an evidentiary hearing for October 27, 2023, and ordered the Department to appear and provide evidence of any emergency resources held by the Department to remediate the forensic backlog crisis. Exhibit 6; Exhibit 7. Respondent stated orally that the October 27, 2023 hearing would proceed, regardless of Anderson's future admission status.

On October 27, 2023, the Department again appeared for the hearing and presented witnesses and testimony in response to

Respondent's order. Exhibit 8, Exhibit 9, Exhibit 13, Exhibit 15.¹ Gene Hermanson, Chief Medicaid Financial Manager; David Culberson, Interim Administrator of MSH; and Dr. Douglas Harrington, State Medical Officer, testified. *Id.* In totality, the witnesses acknowledged and shared Respondent's concern regarding the consequences of the currently overwhelmed treatment capacity of FMHF. Exhibit 15. Mr. Hermanson testified to the appropriations process and the available funding for MSH operations. Exhibit 15. Mr. Culberson testified to the ongoing staffing and resource challenges that impact access to services at FMHF and the remedial measures currently being taken by the Department to achieve day-to-day operations. *Id.* Dr. Harrington testified to the continuing policy initiatives of the Department to increase access to FMHF services and efforts to implement recent legislation as part of a comprehensive plan to increase the availability of mental health services across the state, specifically through House Bill 872 adopted by the 68th Legislature. *Id.* At the hearing, Respondent was informed that Anderson

¹ It appears Exhibit 9 contains a scrivener's error in that it lists the wrong caption and date. However, its substance appears to be reflective of the October 27, 2023 hearing held by Respondent in *State v. Anderson*.

had been admitted to FMHF, but Respondent reiterated that Anderson's admission status, alone, would not affect Respondent's jurisdiction. *Id.*

After the presentation of evidence, Respondent made factual findings and ordered that the Department submit to Respondent a status report by November 17, 2023, jointly filed with the Department; the Governor's Office; the Legislature's Law and Justice Interim Committee; and the Legislature's Children, Families, Health, and Human Services Interim Committee that was to address active efforts to improve the current waitlist at FMHF.² Exhibit 9, Exhibit 13, Exhibit 15. Respondent further ordered the Department to appear at a second evidentiary hearing in early December to present updated testimony consistent with the status report. Exhibit 13, Exhibit 15. Respondent further ordered any

² Respondent's order, as orally pronounced, and Respondent's written order filed approximately two weeks after the hearing, appear to be in conflict. There appear to be inconsistencies regarding whether the Department was required to author the report jointly with the committees and Governor's Office, or solely author the report and submit it to the court and concurrently submit it to the committees and Governor's Office. Further, there appear to be inconsistencies regarding whether Respondent required the Department to prepare a "report" or a "plan." See Exhibit 9, Exhibit 15; *cf.* Exhibit 13. Because the Department was unable to obtain a record of the hearing, it has been unable to resolve these inconsistencies. The Department, however, maintains that they are immaterial to the question presented by this petition.

written objections and briefings challenging Respondent's order be submitted within 14 days. Exhibit 9, Exhibit 13, Exhibit 15.

The Department filed a Notice of Objection and Motion to Vacate on November 9, 2023, challenging the legality of Respondent's order. Exhibit 11. Despite efforts made by counsel to obtain the record of the hearing, the Department submitted its filings by Respondent's deadline without a transcript of the hearing, audio recordings of the hearing, or a written order from the October 27th hearing. Exhibit 10.

On November 13, 2023, the Department filed a Motion to Stay Respondent's order, as orally pronounced, based on the November 17th report due date, the submitted briefing, and the continued absence of a record. Exhibit 12. Also on November 13, 2023, the Department received a copy of Respondent's written order directing the Department to prepare a "plan" and submit it to Respondent; the Governor's Office; and the two aforementioned committees, by November 17, 2023. Exhibit 13. Respondent's written order made multiple references to greater detail preserved on the record, despite no record having been produced. *Id.*

On November 14, 2023, the Department received notification by e-mail from the chambers of Respondent that Respondent would be

denying the Department's motion to vacate in a written order to follow later the same week.³ Exhibit 14.

QUESTION PRESENTED

Whether, under the justiciability and separation of powers doctrines, a district court, in exercising its criminal jurisdiction, may order an executive branch department to repeatedly report to the court its ongoing public policy efforts with respect to a facility operated by the department, where the department is not party to the criminal proceedings; the court has not initiated contempt proceedings; the court's order does not invoke legal but, rather, political and policy remedies; and the court's requirements are duplicative of the Legislature's efforts?

ARGUMENT

I. THE REQUISITE ELEMENTS FOR THE COURT TO EXERCISE SUPERVISORY CONTROL ARE SATISFIED

The Supreme Court has supervisory authority over all other courts and may exercise such authority pursuant to a writ when justified by the following: (1) The existence of urgency or emergency factors which make

³ As of this filing, the Department has not received a copy of Respondent's order denying the motion to vacate and understands the Department will be held to the November 17, 2023 deadline set by Respondent.

the normal appeal process inadequate, (2) the involvement of a purely legal question, and (3) the involvement of constitutional issues of statewide importance. Mont. Const., art. VII § 2; M. R. App. P., Rule 14(3). Here, all three elements are satisfied and the Court should exercise the extraordinary remedy of supervisory control over Respondent.

First, no “normal appeal process” exists as an avenue for the Department. The precipitating circumstances for the Department’s petition arise from a criminal matter. Exhibit 2. Appeals in criminal matters may only be taken by the State, as the prosecutor, or the defendant. *See* Mont. Code Ann. §§ 46-20-103 and 46-20-104. Further, setting aside the Department’s inability to seek review on direct appeal after a final judgment has issued, the Department’s continuing efforts to comply with Respondent’s orders are utilizing increasingly numerous departmental resources. *See* Exhibit 9, Exhibit 13, Exhibit 15. The cost to the Department in time, effort, and redirection of finite resources to address Respondent’s continued orders cannot be recovered once expended.

Second, the question presented is one purely of legal character. While the Department’s petition is supported by numerous exhibits, the

facts do not likely appear to be in dispute. *State v. Mont. Eighteenth Judicial Dist. Court*, 403 Mont. 548, 483 P.3d 475 (2021) (discussing the existence of a purely legal question when the underlying facts are not in dispute). Rather, the question presented is whether Respondent exceeded its authority under the law when it issued its November 13th order. Exhibit 13.

Third, the question presented, while one of pure legal substance, presents multiple potential constitutional issues of statewide importance. As summarized in Section II of this petition, Respondent's order implicates the doctrines of justiciability and separation of powers enshrined in the Constitution of the State of Montana. The question of whether, and to what extent, a district court may, as part of a criminal case, order an executive branch entity to take specific action to remedy public policy challenges has substantial consequences for the ongoing function of every branch of state government and, particularly, would be of widespread importance to the functioning and day-to-day operations of the 16 executive branch departments that operate across the state. See Mont. Code Ann. § 2-15-104. Further, if Respondent's order is left unaddressed, the Department is concerned that there is potential for

repetition of the same action by other district courts across the state, which would require the Department to increase the amount of resources expended in response to these orders and, potentially, divert attention away from directly resolving the critical issues facing MSH.

For these reasons, the requisite elements for the Court to exercise supervisory control are satisfied and the Court should grant the Department's petition.⁴

II. RESPONDENT'S NOVEMBER 13TH ORDER IN *STATE V. ANDERSON* SHOULD BE VACATED

The Department seeks vacatur of the Respondent's November 13th order. Respondent did not have jurisdiction over the Department because no justiciable controversy involving the agency existed. Respondent's order exceeded Respondent's jurisdiction because no justiciable controversy existed as a precedent to the order. Respondent's order

⁴ The Department, in the alternative, requests the Court to grant the Department's petition for a writ of review. A writ of review may be granted when the district court has exceeded its jurisdiction and there is no appeal or other plain, speedy, and adequate remedy. Mont. Code Ann. § 27-25-102(2). Here, the circumstances presented would be appropriate for either supervisory control or a writ of review. However, given the urgency of Respondent's filing deadline and the Respondent's repeated conduct in other matters (Exhibit 15), the Department has fashioned its petition primarily for a request of supervisory control.

violated the separation of powers doctrine when it ordered the Department to continue submitting updates on public policy efforts to the district court. And Respondent's order exceeded the narrow jurisdiction granted to district courts in criminal matters.

A. Respondent's order exceeded the district court's jurisdiction in the absence of a justiciable controversy.

Justiciability is a threshold question that determines whether a court can exercise jurisdiction over a case or claim. *Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 10, 410 Mont. 450, 454, 520 P.3d 301, 304 (citing *State v. Whalen*, 2013 MT 26, 368 Mont. 354, 295 P.3d 1055). Constitutional restraints on judicial authority limit the power of the courts to hear only “real” controversies. *Seubert*, ¶ 18, 301 Mont. at 387, 13 P.3d at 368 (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)). “The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise,

or give abstract opinions.” *Seubert*, ¶ 19, 301 Mont. at 387, 13 P.3d at 368 (quoting *Marbut v. Sec’y of State*, 231 Mont. 131, 752 P.2d 148 (1988)).

The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them. *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997).

Here, none of the elements establishing a judicial controversy were met. Respondent’s order relied on further official action that must be taken by the two political branches of government. None of the entities subject to Respondent’s order were parties to the criminal proceeding and could not become parties to the proceeding due to Respondent’s limited

criminal jurisdiction. *See*, Section II.C., *infra*. Respondent did not have a legal remedy to decide the issue raised⁵, as evidenced by the necessity of Respondent to order action by the Department, in conjunction with the Governor, and two legislative interim committees. Respondent's judgment could not "effectively operate" as a legal matter, but rather invoked political, administrative, and public policy elements outside the jurisdiction of a district court. Further, Respondent's order that other governmental entities cooperate to fashion a political solution to a systemic problem was not a judicial determination that would affect the rights, status, or relationships of the parties to the criminal case as a *final* judgment. Respondent's attempt to initiate a political process was not a legal remedy and did not provide finality for the parties.⁶ Respondent's order demonstrates that there was no justiciable

⁵ It is important to note that no issue had been raised by the parties (*i.e.*, the prosecution and defense) seeking a remedy to the admission backlog at FMHF.

⁶ This remains true even if Respondent's order only required the Department to submit its report, or plan, to the Governor's Office and the two legislative interim committees. The purpose of requiring such submission would seem to directly encourage, and in this case require, political action or policy initiation of the other branches of government.

controversy in which Respondent may have exercised jurisdiction over the Department and, therefore, the order should be vacated.

B. Respondent violated the separation of powers doctrine.

The governmental powers of the State of Montana are separated into three equal branches. Mont. Const., art. III § 1; *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 417, 859 P.2d 992, 996 (1993). Generally, persons charged with the exercise of power properly belonging to one branch are prohibited from exercising any power properly belonging to the other branches. *Dep't of Corr. v. Lake Cty. (In re J.A.)*, 1999 MT 148, ¶ 11, 295 Mont. 46, 48-49, 983 P.2d 327, 329 (quoting Mont. Const., art. III § 1).

The executive power of the state is vested in the governor. Mont. Const., art. VI § 4; *State Pub. Employee's Ass'n v. Office of the Governor*, 271 Mont. 450, 898 P.2d 675, 679 (1995). The governor's executive powers include the "supervision, approval, direction, and appointment over all departments and their units," with certain exceptions. Mont. Code Ann. § 2-15-103. Further, the governor has the duty to supervise all executive and ministerial officers and the duty to apply a remedy where an executive office's performance has defaulted. Mont. Code Ann. § 2-15-

201(1)(a)-(b); *State Pub. Employee's Ass'n v. Office of the Governor*, 271 Mont. 450, 898 P.2d 675, 679 (1995) (discussing the Governor's authority over the Department of Administration). Where an executive office's performance is in default, and the governor has an imperfect remedy, the governor shall "acquaint the legislature with the issue at its next session." Mont. Code Ann. § 2-15-201(1)(b). Further, specific to MSH, the Department has the duty, and authority, to adopt rules to manage the hospital patient population. Mont. Code Ann. § 53-21-601.

The judicial power of the state is vested in the Supreme Court of the State of Montana, district courts, justice courts, and other courts provided for by the legislature. Mont. Const., art. VII § 1. Judicial powers encompass the authority of a court "to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Seubert v. Seubert*, 2000 MT 241, ¶ 35, 301 Mont. 382, 391, 13 P.3d 365, 371 (citing *Shea v. N.-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919)); see also *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 52, 361 Mont. 77, 95, 255 P.3d 179, 190. Generally, judicial power does not include the authority of a court to prosecute a claim or case *sua sponte* which has not properly raised by a

party with standing. See Mont. Code Ann. § 3-1-111; *McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405, 410, 515 P.3d 777, 781 (“A justiciable controversy is one that is definite and concrete, touching legal relations of parties having adverse legal interests and admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.”) (internal quotations omitted).

The legislative power of the state is vested in the senate and house of representatives, except for the powers of initiative and referendum reserved directly for the people. Mont. Const., art. V § 1. Legislative powers include, in part, the power to enact laws by the passage of bills (Mont. Const., art. V § 11; *Jacobsen*, ¶ 20, 409 Mont. at 416, 515 P.3d at 785), the power to investigate and issue subpoenas (Mont. Const., art. V § 1; Mont. Code Ann. § 5-5-101; *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 6, 405 Mont. 1, 9, 493 P.3d 980, 984-85), the power to appropriate and audit (Mont. Const., art. V § 11(4); Mont. Const., art. VIII § 14; *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 12, 409 Mont. 96, 103, 512 P.3d 748, 751), and the power to delegate (*State v. Akhmedli*, 2023 MT 120, ¶ 8, 412 Mont. 538, 543, 531 P.3d 562,

564-65). Further, the executive branch has the capacity, and in some instances a duty, to cooperate with the legislature to provide research, drafting, and consensus building. Mont. Const., art. VI § 9; *Powder River Cty. v. State*, 2002 MT 259, ¶¶ 115-116, 312 Mont. 198, 232-33, 60 P.3d 357, 381 (noting that the Constitution explicitly contemplates cooperation between the executive and legislative branches during the lawmaking process).

Here, Respondent ordered the Department to jointly report to Respondent, along with the Governor's Office and two legislative interim committees, about ongoing policy implementation and resource allocation processes. There is no constitutional role for the judiciary to order a policy remedy where an executive office is alleged to have defaulted, nor to dictate the political process of appropriation. Even if Respondent's order was limited to requiring the Department to submit a report, or plan, to the Governor's Office and the two legislative interim committees, such order would invade the autonomy of the executive and legislative branches and would interfere with the executive branch's constitutional authority to cooperate with the legislature during the lawmaking process. While there has been no allegation or finding of default here,

even such extraordinary circumstances would not give rise to Respondent's order. Further, nearly identical, though more focused, efforts have already been undertaken by the Behavioral Health System for Future Generations (BHSFG) Commission, established by House Bill 872. Exhibit 16. Respondent endeavored to step into both the role of the Governor to oversee the Department and the role of the legislature to contemplate and, if proper, appropriate additional public resources to resolve the ongoing capacity concerns of FMHF. Respondent's order violates the separation of powers and should be vacated.

C. Respondent's order exceeded the district court's jurisdictional authority in a criminal matter.

Jurisdiction is the power and authority of a court to hear and decide the case or matter before it. *State v. Martz*, 2008 MT 382, ¶ 21, 347 Mont. 47, 52, 196 P.3d 1239, 1243; *see also State v. Osborne*, 2005 MT 264, ¶ 12, 329 Mont. 95, 98, 124 P.3d 1085, 1087 (citing *State ex rel. Johnson v. Dist. Court*, 147 Mont. 263, 410 P.2d 933 (1966)). A court's jurisdiction is conferred only by the Constitution or statutes adopted pursuant to the Constitution. *Martz*, ¶ 21, 347 Mont. at 52, 196 P.3d at 1243 (citing *Pinnow v. Mont. State Fund*, 2007 MT 332, 340 Mont. 217, 172 P.3d

1273). In a criminal matter, the district court's jurisdiction is limited to "public offenses." *See* Mont. Code Ann. § 46-2-201. An "offense" involves a violation of Montana penal statute. Mont. Code Ann. § 46-1-202(15). The state may only exercise criminal jurisdiction over a person who is alleged to have committed an offense. Mont. Code Ann. § 46-2-101.

Here, the case from which this petition arises is a criminal matter filed by the Cascade County Attorney's Office against the Defendant, Mr. Anderson. Respondent's jurisdiction is limited to resolving public offenses in violation of Montana criminal law and may generally only be exercised over Mr. Anderson. The Department is not challenging Respondent's authority to seek information or conduct limited fact finding for the purpose of exercising its jurisdictional authority in a criminal matter or over a criminal defendant. However, the criminal jurisdiction of the district court is sharply narrowed by statute and does not present an opportunity to impose remedies that may be appropriately ordered as part of a different type of action or petition.

Respondent's criminal jurisdiction may encompass the legitimate authority of the district court to make requests of the executive branch which have a direct impact on proceedings before the district court. This

authority, however, is limited to the provisions and underlying policy goals of the district court's criminal jurisdiction to resolve individual criminal offenses alleged against individual defendants. Respondent's order exceeds the scope of its jurisdictional authority.

Here, Mr. Anderson was admitted to FMHF for a fitness evaluation, pursuant to existing waitlist procedures, prior to the October 27, 2023 hearing. Despite this fact, Respondent held the hearing and ordered the Department to jointly report to Respondent, along with the Governor's Office and two legislative interim committees, regarding ongoing policy plans and lawmaking processes. Respondent's order exceeds the scope of the district court's jurisdiction to decide the public offense charged against Mr. Anderson and should be vacated.

CONCLUSION

For these reasons, the Department requests that the Court immediately stay Respondent's November 13, 2023 order pending further proceedings of this Court. Further, the Department petitions the Court to grant supervisory control or, in the alternative, to grant a writ of review and vacate Respondent's November 13th order.


Respectfully submitted this 16th day of November, 2023.



Chanan Brown
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 14(9)(b) and 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this petition is printed with a proportionately-spaced Century Schoolbook 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 Microsoft 365 MSO (Version 2308 Build 16.0.16731.20310) 64-bit is 3,999 words, excluding the certificate of service and certificate of compliance.


Chanan Brown
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Chanan Brown, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 11-16-2023:

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