DA 19-0378

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 5

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN THURLOW MOSBY,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-05-403
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright (argued), Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, C. Mark Fowler (argued), Assistant Attorney General, Helena, Montana

Kirsten Pabst, Missoula County Attorney, Jordan Kilby, Deputy County Attorney, Missoula, Montana

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Argued and Submitted: October 13, 2021

Decided: January 11, 2022

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 John Thurlow Mosby appeals two decisions by the Fourth Judicial District Court in Missoula County. The first occurred on February 15, 2018, when the District Court reinstated dismissed criminal charges against Mosby over his counsel's objection. The second was an opinion and order issued December 28, 2018, addressing constitutional arguments Mosby made that continuing the proceeding violated his speedy trial rights.

¶2 We restate the issues on appeal as follows:

> *Issue One: Did the District Court abuse its discretion when it resumed Mosby's dismissed criminal case after Mosby spent years in civil commitment following an earlier finding of his lack of fitness to proceed?*
>
> *Issue Two: Was the District Court's resumption of Mosby's criminal case a violation of his constitutional right to a speedy trial?*
>
> *Issue Three: Should Mosby's time in civil commitment count as credit toward his criminal sentence of incarceration?*

¶3 We reverse on Issue One, and therefore it is unnecessary to address Issues Two and Three.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 2005, the Missoula County Attorney's Office charged Mosby with felony sexual assault and misdemeanor indecent exposure for an incident in the showers at a gym. Mosby had spent his life in and out of foster care and group home settings, and he had long displayed mental and behavioral issues. At the time of the incident, Mosby was 24 years old. He had been in civil commitment at the Montana Developmental Center (MDC) until

September 2001, and in 2005, he was under court-ordered 24-hour supervision. He resided in a group home in Missoula, which had taken residents on an outing to the gym.

¶5 Mosby's attorneys arranged for an expert to psychologically evaluate him, and they presented the District Court with the expert's findings of Mosby's developmental disability, impaired intellectual functioning, and inability to comprehend the proceedings against him. The expert also believed that Mosby's condition was unlikely to ever significantly improve. Based on the expert's findings, the District Court found Mosby unfit to proceed and suspended the criminal process while another, independent expert evaluated Mosby's fitness and whether he could gain competency to stand trial.

¶6 The second expert also found Mosby's ability to participate in his legal defense compromised. Thus, the District Court dismissed his criminal case, and the State opened a civil case with a petition for emergency commitment. The District Court found that Mosby met the requirements for civil commitment, and in May 2006, Mosby was sent to MDC again.

¶7 Each spring for years thereafter, the State filed petitions for recommitment in Mosby's civil case, typically over no objection from Mosby. In 2013, Mosby began to request hearings regarding his recommitment. That year and in 2014, the District Court found he still met the requirements for civil commitment. In 2015, Mosby requested a hearing but later withdrew and stated he did not object to extending the commitment. In 2016, the District Court held a hearing and again renewed Mosby's commitment. Then, in 2017, Mosby requested a hearing and time to complete another psychological evaluation.

¶8 By that time, the Montana Legislature had restructured the state's civil commitment laws to express its intent "to provide services to individuals with developmental disabilities in the community . . . and to close the Montana developmental center." 2015 Mont. Laws Ch. 444, § 1. The new laws also changed the maximum period of a civil commitment order from one year to 90 days. 2015 Mont. Laws ch. 373, § 1. Thus, the acts of Mosby and the State leading to this appeal reflect differing ideas about how to navigate the new landscape that disfavors routine commitment to MDC year after year.

¶9 Mosby's approach was to pursue community-based treatment rather than another 90-day commitment period.[1] For his recommitment hearing scheduled in August 2017, Mosby procured an additional psychological report. The evaluation included notes on Mosby's IQ tests, which ranged from 67 in 2010 to a recent score of 84, and questioned whether his developmental disability label was "bona fide." This opinion was Mosby's evidence to counter the findings submitted by the MDC screening team, which claimed that Mosby's severe developmental disability still warranted his commitment.

¶10 The State took a different approach. Before the District Court's hearing or decision on another commitment period in the civil case, the State entered a new motion in its dismissed criminal case from 2005, the first action in that case in over 11 years. The State

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[1] At the time, MDC had not yet closed; Mosby still resided there. Nor had it closed by the time of the February 2018 hearings in Mosby's criminal docket. However, by the time Mosby was later transferred to criminal custody and other patients were no longer housed at MDC, the facility closed on November 1, 2018. The Montana Legislature passed another law establishing a smaller residential facility, the Intensive Behavior Center (IBC), which can house individuals with developmental disabilities who pose risks to themselves or others. Initial commitment and recommitment periods at IBC may not exceed 90 days, and a task of the IBC is to "foster for each resident the transition to and residency in less restrictive service settings." *See* 2017 Mont. Laws ch. 258, § 2.

pointed to the evaluation Mosby had submitted for the 2017 civil hearing and argued that the court should reassess his fitness to proceed to criminal trial.

¶11 In hearings in 2018, the District Court reinstated Mosby's criminal case and continued the civil case so that he could remain at MDC while the criminal case moved forward. The District Court did this over Mosby's objection that the District Court did not have the statutory authority to revive his dismissed criminal charges from 2005. The case proceeded toward trial upon a later showing he was now fit to face criminal charges. Mosby filed a motion to dismiss the case as a violation of his speedy trial rights, but the District Court denied this motion as well. In an agreement with the State, Mosby pleaded guilty to the sexual assault charge while reserving these issues for appeal. The District Court sentenced him to 100 years of incarceration with 50 suspended.

STANDARD OF REVIEW

¶12 We review questions of law and statutory interpretation for correctness. *State v. Tison*, 2003 MT 342, ¶ 5, 318 Mont. 465, 81 P.3d 471. We review a district court's discretionary rulings for abuse of discretion, considering whether the district court's decision is arbitrary and without conscientious judgment or if it "so exceed the bounds of reason as to work a substantial injustice." *State v. Giddings*, 2009 MT 61, ¶ 42, 349 Mont. 347, 208 P.3d 363.

DISCUSSION

¶13 *Issue One: Did the District Court abuse its discretion when it resumed Mosby's dismissed criminal case after Mosby spent years in civil commitment following an earlier finding of his lack of fitness to proceed?*

¶14 Two key issues arise from the way the District Court handled Mosby's case here. The first concerns whether Montana's statutes on fitness to stand trial permit a district court to resume a criminal case that it earlier dismissed due to the defendant's mental unfitness to face trial. We hold that read together, the applicable statutes do permit such action when a once-unfit defendant regains the requisite competence. However, the second issue concerns when and how to appropriately exercise renewed criminal jurisdiction. Here, we find that two significant flaws in the District Court's approach demonstrate why it was an abuse of discretion to renew Mosby's criminal case. The District Court invalidly "revived" charges dismissed over a decade earlier without the issuance of new charging documents as due process requires. And the District Court failed to consider, as the law intends, the justness of proceeding to criminal trial after so much time under Mosby's circumstances.

1. Section 46-14-222, MCA, provides district courts the discretionary authority to resume a criminal case.

¶15 The initial question Mosby raises is whether a dismissal due to mental unfitness always precludes a case from being resumed if the defendant appears to regain fitness. Two of Montana's criminal procedure statutes address such circumstances, and the State and Mosby disagree about how they operate together. The two provisions are §§ 46-14-221 ("Section 221") and -222 ("Section 222"), MCA.

¶16 To understand the effect of these provisions, it helps to review their history. What Section 221 and Section 222 do today was once accomplished in a single statutory paragraph. The law was enacted in 1967 and worked as follows: upon a finding of a defendant's unfitness to proceed in a criminal trial, the district court had to suspend the case and commit the defendant "for so long as such unfitness shall endure." 1967 Mont. Laws ch. 196, § 1. Then, if the defendant regained fitness, the proceeding had to be resumed. The language about resumption in 1967 was nearly identical to that in effect in Section 222 today. This clause includes the caveat that after a defendant regains fitness, a judge may decide to dismiss the case or commence civil commitment proceedings if so much time has passed by that point that it would be unjust to still proceed with criminal charges. *See* § 46-14-222, MCA; 1967 Mont. Laws ch. 196, § 1.

¶17 What might have happened to Mosby under the original law is that his unfitness to proceed would result in the indefinite suspension of the case. He would be held in a state mental health facility as long as he remained unfit, and the case would resume if his status improved—unless, that is, the judge decided it would be unfair to try him at that point. A judge who thought too much time had passed could either release him or send him to civil commitment proceedings.

¶18 Not long after this original lack-of-fitness law went into effect, the United States Supreme Court decided a relevant case that will add context to the Legislature's later amendments. In *Jackson v. Indiana*, 406 U.S. 715, 92. S. Ct. 1845 (1972), the Court held that it was unconstitutional to hold a defendant in commitment for an indefinite period just because the defendant was unfit to proceed in a criminal case. The Court held that

confining a defendant in this way, with no adjudication of the civil commitment factors that usually govern such confinement, was a violation of equal protection and due process under the Fourteenth Amendment of the United States Constitution. Thus, the Court concluded, the State can only hold a defendant who lacks capacity to proceed for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson*, 406 U.S. at 738. If it appears the defendant will not likely regain capacity, then civil commitment proceedings are the only appropriate means of confinement. And even if it appears the defendant may regain capacity, holding him or her solely on the basis of awaiting the criminal trial must be "justified by progress toward" regaining fitness. *Jackson*, 406 U.S. at 738.

¶19 In 1979, the Montana Legislature split its fitness-to-proceed law into two parts, Sections 221 and 222, and added some language that does not affect this analysis. 1979 Mont. Laws ch. 713, §§ 7-8. The essential scheme remained: Section 221 allowed suspension and commitment as long as necessary, and Section 222 required resuming the criminal case if the defendant regained fitness. Then, in 1983, the Legislature added a significant clause to Section 221 to help avoid unconstitutional confinement. 1983 Mont. Laws ch. 352, § 1. This is how the law stands today: rather than committing an unfit defendant simply "for so long as the unfitness endures," Section 221 now says that after a district court finds a defendant unfit and suspends the case, it must review the defendant's fitness within 90 days. If the district court finds then that the defendant is unlikely to foreseeably become fit, it must dismiss the charges and switch to civil commitment proceedings. The unfit defendant's potential confinement is thus adjudicated based on

established civil commitment criteria and not, as the Supreme Court held was improper, based merely on pending criminal charges.

¶20 In Mosby's case, the Section 221 procedures played out in 2006. The District Court found him unfit to proceed to trial and unlikely to gain fitness in the foreseeable future. As the statute requires, the District Court dismissed the criminal proceeding. The State opened a civil cause of action under which Mosby's commitment continued to be renewed every year since.

¶21 The Section 222 process played out for Mosby in 2017 and 2018. Armed with the evaluation that Mosby had produced for his latest civil commitment reinstatement hearing, the State moved to have another hearing on Mosby's fitness to proceed in the old criminal case. The District Court granted that motion and ultimately resumed the 2005 criminal case on the basis of Mosby's regained fitness to proceed.[2] The District Court made this decision in reference to Section 222's requirement. The State argues that this was a proper application of Section 222, but Mosby disagrees.

¶22 Although the plain language of Section 222 directs a court to resume a case when it determines a defendant has regained fitness, Mosby argues that Section 222 should only apply to *some* situations. Mosby interprets the law to apply to suspended criminal cases only and never to those that have been dismissed, like his was in 2006.

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[2] While the District Court revived the criminal case to review Mosby's fitness in February 2018, Mosby's ultimate fitness to proceed was not adjudged until July following a new psychological evaluation.

¶23 However, Sections 221 and 222 should be read together, and nothing in the text itself compels Mosby's interpretation. *See Montana Contractors Ass'n v. Dep't of Hwys.*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986) ("[T]he Court must harmonize statutes relating to the same subject, giving effect to each."). Section 222 speaks broadly of resuming criminal proceedings when the defendant regains fitness and does not carve out only the review period while a case is suspended. Section 221 requires the substitution of civil commitment proceedings if the defendant's unfitness stands to persist indefinitely, but the point of this rule is to place any commitment on legally sound, independent grounds—civil commitment criteria are concerned not with an ability to comprehend and face a criminal trial but instead with things like the danger someone poses to themselves and others.[3] If a case is dismissed in favor of civil commitment, as opposed to suspended pending evaluation, nothing in Section 221 or 222 says it cannot also be resumed if the defendant regains fitness.

¶24 Mosby relies on several cases in which we have applied Section 221, but each of these cases occurred in a different context than here. In one case, we faulted a district court for holding a defendant in the state hospital beyond the 90-day review period; we noted that if it does not appear the defendant will soon become fit, Section 221 requires dismissal and civil commitment procedures. *State v. Meeks*, 2002 MT 246, ¶¶ 22, 26, 312 Mont.

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[3] Civil commitment under Title 53, chapter 20, depends on "serious developmental disability." Serious developmental disability is defined by a developmental disability, impaired cognitive functioning, and an inability to be safely habilitated in community services because of behaviors posing a risk of harm to self or others. Section 53-20-102(19), MCA. District court judges may only commit people to residential facilities based on a finding of serious developmental disability by the facility's screening team. Section 53-20-125(1)(b), MCA.

126, 58 P.3d 167. We reiterated this requirement in another case, and we noted that "once the ninety-day statutory period expired [absent findings of foreseeable fitness], the State lacked the power to proceed further with criminal charges." *State v. Tison*, 2003 MT 342, ¶ 15, 318 Mont. 465, 81 P.3d 471. And later, we permitted extension beyond the 90-day period when a physician presented a treatment plan she hoped would render the defendant fit; we noted that dismissal is only required when it does *not* appear that the defendant could become fit in the foreseeable future. *State v. Yarnall*, 2004 MT 333, ¶¶ 32-34, 324 Mont. 164, 102 P.3d 34. Each of these cases was concerned with Section 221's requirement that prolonged commitment be predicated on either treatment towards foreseeable fitness or else a separate civil commitment proceeding after dismissal. None of them said anything about the finality of the dismissal or what should happen if a civilly committed defendant regains fitness to face a criminal trial.

¶25 Mosby's interpretation of Sections 221 and 222 would read limits into the law that are not apparent in the text, and it would add an implied "dismissal with prejudice" that Section 222 does not state. As we have noted, "our job is to construe statutes as written," and we are directed by law "not to insert what has been omitted." *Dakota Fire Ins. Co. v. Oie*, 1998 MT 288, ¶ 35, 291 Mont. 486, 968 P.2d 1126 (quoting § 1-2-101, MCA). Furthermore, even if the unqualified dismissal in Section 221 was ambiguous, our longstanding rule is to take statutes that cover the same subject and construe them together to give effect to both. *Cortese v. Cortese*, 2008 MT 28, ¶ 11, 341 Mont. 287, 176 P.3d 1064; *Billings v. Smith*, 158 Mont. 197, 212, 490 P.2d 221, 230 (1971); *State ex rel. Boone v. Tullock*, 72 Mont. 482, 486, 234 P. 277, 279 (1925) ("[T]he two should be read together

and harmonized, if possible."). The legislative intent of Section 222 is clearly to create a mechanism to resume a criminal case if the defendant regains fitness. We therefore conclude that giving effect to both provisions requires a reading that if a court finds the defendant regained fitness, it *can* resume a criminal case.

¶26 However, our analysis of Mosby's case does not end there. We must next consider whether the District Court's actions under Section 222 were appropriate here.

2. The District Court's decision to resume Mosby's criminal case.

¶27 The District Court made two significant errors when it granted the State's motion to proceed on Mosby's long-dismissed criminal case. The first was a matter of improper procedure and the second a failure to conscientiously exercise its discretion.

¶28 Back in 2006, the District Court followed the mandate of Section 221 and ordered Mosby's criminal case dismissed. The effect of a dismissal order in a criminal case is provided by § 46-13-402, MCA, which requires a defendant's release from criminal custody. We have held that this law renders a dismissed information "no longer effective against the defendant, though the court may retain custody over the defendant pending the filing of a *new* information. The statute does not provide for reinstatement of the dismissed information." *State v. Onstad*, 234 Mont. 487, 490, 764 P.2d 473, 475 (1988) (emphasis in original).

¶29 Thus, the proper procedure in a case like Mosby's, if the State later wishes to again pursue charges for the same conduct, is to file new charging documents. This procedural requirement is not merely a formality; it is integral to protecting the due process rights of the accused, and it affects such matters as statutes of limitations and analysis of speedy

trial rights.[4] At argument in this case, the State conceded this point and admitted that it should have filed new charges. But the State argued that it should not matter because the ultimate destination was the same, downplaying the effect of Mosby's jumbled procedural treatment. We disagree—as we noted previously in *Onstad*, the lack of a valid new information means that the "subsequent trial, conviction and sentence under the reinstated information [are] invalid." *Onstad*, 234 Mont. at 490. This procedural flaw itself warrants reversal, but we must also address how the District Court's substantive decision-making under Section 222 constituted an abuse of the discretion that the law provides.

¶30 Recall that Section 222 includes an important caveat, which is as follows: "If . . . the court is of the view that so much time has passed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or [adjudicate and order civil commitment]." Section 46-14-222, MCA. The effect of this language is to grant the district court discretion whether to permit the State to refile dismissed criminal charges in these situations. Here, we find that in addition to the procedural misstep, the passage of over 12 years in Mosby's circumstances also renders the District Court's decision to renew the criminal process an abuse of discretion.

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[4] *See State v. Butterfly*, 2016 MT 195, 384 Mont. 287, 377 P.3d 1191 (discussing how a dismissal of charges removes the protection of the Sixth Amendment's speedy trial rights and substitutes due process standards similar to pre-indictment delay). Justice McKinnon's Concurrence adds context to the manner in which substantive due process and speedy trial analyses can dovetail under a statutory standard like Section 222's.

¶31 The District Court faced a clear choice between another civil commitment period for Mosby and, alternatively, a trial and potential prison sentence. In Mosby's civil case, the State had continually petitioned for renewal of his commitment. For the hearing scheduled in August 2017, the screening team at MDC had reviewed Mosby's condition as required by law. They recommended, once again, that he be recommitted due to his developmental disability, impaired cognitive functioning, and risk to himself and others. Mosby had requested the hearing, hoping the District Court might disagree with the screening team and find he had gained the maturity to live in a community setting. Mosby's attorney procured the additional psychological evaluation, which offered doubt about whether Mosby's developmental disability was "bona fide."

¶32 The State inserted Mosby's evaluation into the criminal docket to resume his 2005 prosecution, taking the position that if his developmental disability was in doubt, the District Court should consider dropping the civil commitment process and instead advance toward trial and incarceration. The District Court held hearings in February 2018 to weigh this option, but the hearings were marred by confusion about exactly which process the parties and the court were discussing. For example, when Mosby's counsel raised the "so much time" clause from Section 222, he argued that resuming after 12 years in this case would be unjust, highlighting for the District Court this discretionary standard. The District Court framed its response not in terms of the justness of the criminal process after such delay but in terms of whether Mosby's commitment might remain justified: "I think he continues to pose a risk to the community. And so I think, given that, it's just for me to

authorize the reopening of this charge and proceed so that we can get him the proper controls and treatment that he needs."

¶33 The District Court proceeded into a discussion similar to the one it would have undertaken in the civil case on renewing commitment. It reviewed the materials from MDC and determined that Mosby should not be released. Had the State treated the 2017 recommitment process like the rest that preceded it, the District Court would likely have again renewed Mosby's commitment. However, because the State decided to pursue the criminal charges at this point, the issues became jumbled, and ultimately, the District Court decided to postpone proceedings on the civil case so that Mosby would remain at MDC while awaiting an opportunity to review his fitness to stand trial.

¶34 Our standard for abuse of discretion considers whether a district court judge acts with arbitrariness or without "conscientious judgment." *Giddings*, ¶ 42. Here, the District Court's route through the confusion of the criminal and civil cases and its procedural workarounds demonstrate insufficient consideration of whether renewed prosecution would be unjust to Mosby.

¶35 Furthermore, the District Court granted the State's motion to revisit Mosby's fitness based on evidence that the District Court itself apparently did not credit. The State presented the evaluation that Mosby's attorney had procured for the civil commitment hearing. This report, which the author characterized as a "second opinion and/or review" of the screening team's findings favoring commitment, raised doubts about Mosby's "developmental disability" classification. It was on this basis that the State argued Mosby's fitness to stand trial should be revisited. But during the hearing at which the

District Court revived the criminal case, the judge found the evidence from the screening team's assessment more compelling and reasoned that Mosby was "still severely mentally disabled." After reviewing the materials, the judge said that "based on that, it's pretty current[,] he still poses a risk to the community and himself. So there's nothing I've seen that leads me to a different conclusion here." Thus, the report the State presented was apparently unconvincing enough to alter Mosby's commitment but simultaneously sufficient grounds to resume criminal charges[5]—this inconsistency in rationale illustrates the abuse of discretion. *State v. Beach*, 217 Mont. 132, 145, 705 P.2d 94, 102 (1985); *State v. Brasda*, 2003 MT 374, ¶ 14, 319 Mont. 146, 82 P.3d 922 (decisions that exceed "the bounds of reason").

¶36 We conclude by stressing the passage of time through Mosby's chronicle as a whole, as is the direct intent of Section 222 when it raises the concern that "so much time" might elapse that criminal process would be unjust against a once-unfit defendant. Here, Mosby was long ago found to lack the mental capacity to face criminal prosecution. The result was 13.5 years of confinement in state mental institutions—a type of confinement that Montana law now explicitly recognizes as equivalent to imprisonment and subject to credit as such. Section 46-18-403, MCA. And trial after such long-term institutionalization is

[5] As Mosby's counsel pointed out, fitness to stand trial ultimately turns on more factors than the existence of a developmental disability alone. Months after this hearing, a psychologist reevaluated Mosby's cognitive ability to participate in his defense and understand the criminal trial and opined that he was now fit to proceed. However, our concern here is how the District Court exercised its discretion to revive Mosby's criminal case in the first instance based on the materials that came out of Mosby's civil commitment case.

exactly the situation that the Commission Comments to Section 222 suggested might seem unjust.[6]

¶37 After some years without objection to renewed civil commitment, Mosby exercised his legal right to have that renewal adjudicated in a hearing. *See* § 53-20-125(5), MCA. There, Mosby had a right to present materials questioning the MDC screening team's findings about his disability and his risk to society. But rather than wait for the District Court to weigh this evidence, the State reacted to Mosby's exercise of his rights by wielding Mosby's report as a tool to crack open his criminal prosecution after 12 years. The District Court acquiesced in this approach despite doubting Mosby's developmental disability had abated, and despite the inherent flaw in proceeding under a dismissed information. And the District Court did not seriously consider the justness of proceeding to criminal trial after 12 years' delay, instead conflating this decision with the one it might have made in the civil commitment case had the State pursued resolution there. The result was Mosby's transfer to an effective life sentence in state prison. The District Court's arrival at this outcome over a decade after Mosby was initially charged raises serious questions of due process and the failure of the District Court to examine the fairness of the new prosecution

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[6] "The provision permitting the court to dismiss the prosecution, if because of the lapse of time it would be unjust to continue it, is novel in American law but not in actual practice. The result is usually reached at the discretion of the county attorney through the entry of a nolle prosequi. However, this plea is not available in Montana (R.C.M. 1947, 94-9506) [repealed in 1967], but the same result is now reached under R.C.M. 1947, section 94-9505 [repealed in 1967] as will be reached under the proposed section. There would seem to be some value in vesting such a power in the court, to be exercised where either, due to lapse of time the defendant is unable to produce witnesses or evidence once available which is essential to his defense, or where because of the length of the intervening period, which he has spent in a mental institution, subsequent to the alleged wrongful conduct, it seems 'unjust' to subject him to trial and punishment." Section 46-14-222, MCA, *Annotations*, Comm'rs Note (1982).

as suggested by § 46-14-222, MCA, and this requires reversal of the District Court's decision to resume the criminal proceeding.

¶38 Because we find that resumption of the criminal proceedings by the District Court was error, we need not address Mosby's alternative arguments in Issues Two and Three.

CONCLUSION

¶39 We reverse the District Court's decisions granting the State's motion to reevaluate Mosby's fitness to proceed and reopening his criminal case. While double jeopardy and other due process considerations preclude the State from resuming Mosby's criminal case, nothing herein precludes the State from filing a new civil case should the law and the evidence at the time support a new filing.

Chief Justice

We Concur:

Justices

Justice Laurie McKinnon, concurring.

¶40 I agree with the Court that Sections 221 and 222 should be construed consistently together. Opinion, ¶ 23. More importantly, Section 222 speaks broadly of the court's overarching duty to ensure a criminal proceeding against a defendant after regaining fitness does not offend substantive due process and is just, regardless of how the proceeding is "resumed." Sections 221 and 222 clearly relate to the same subject matter and rules of statutory construction require us to harmonize them, giving effect to each. *Crist v. Segna*, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981). Thus, I would hold that nothing in Section 222 restricts judicial oversight over a resumed prosecution to *exclude* refiled informations. In my opinion, the "just" inquiry for "resuming" criminal proceedings under Section 222 includes both refiling a new information for the same offense *or* proceeding on the original information for that offense. To place a contrary construction on Section 222 would be unreasonable and prevent a consistent reading of the statutes: a defendant who has taken longer to regain fitness and whose information has been refiled would have less due process and judicial oversight over the fairness of the State proceeding against him than a defendant being prosecuted on the original information. I cannot accept that the Legislature would have provided more protection for those who may regain fitness within a reasonable period of time than those who take longer to regain fitness. Accordingly, I believe the Court incorrectly focuses on the "procedural misstep" in its Section 222 "unjust" analysis and I would hold that Section 222's "unjust" inquiry applies to resumption of a criminal prosecution regardless of how it has been initiated. Whether

the charging document has been resurrected or a new one refiled, Section 222 compels an inquiry by the court of whether resumption of the criminal prosecution is unjust.

¶41 The Court places too much weight on factors tangential to the pertinent inquiry—the unjustness of resuming the prosecution—by focusing on the "procedural misstep" arising from the State's failure to file a new information and the District Court's apparent confusion. Opinion, ¶¶ 30, 34. I note the "unjust" inquiry under Section 222 is expressly conditioned on the passage of time—"[i]f, however, the court is of the view that so much time has elapsed since the commitment of the defendant . . ."—and, because the Sixth Amendment speedy trial right does not apply to a dismissed case, I believe our analysis should also be informed by substantive due process protections. I would conclude that resuming proceedings after a pre-charge delay of 12 years, while Mosby was confined at MDC relative to the underlying criminal offenses, violated Mosby's substantive right to due process.

¶42 Section 222 contains a unique provision permitting dismissal if the time it takes a defendant to regain fitness becomes so long that resumption of criminal proceedings is unjust.

> When the court, on its own motion or upon the application of the director of the department of public health and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. *If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charges and may order the defendant to be discharged* or, subject to the law governing the civil commitment of persons suffering from serious mental

> illness, order the defendant committed to an appropriate facility of the department of public health and human services.

(Emphasis added.)

¶43 The Commission Comments to Section 221 explain the need to give the court the authority to dismiss the charge:

> The provision permitting the court to dismiss the prosecution, if because of the lapse of time it would be unjust to continue it, is novel in codified American law but not in actual practice. The result is usually reached at the discretion of the county attorney through the entry of a nolle prosequi. However, this plea is not available in Montana (R.C.M. 1947, 94-9506) [repealed in 1967], but the same result is now reached under R.C.M. 1947, section 94-9505 [repealed in 1967] as will be reached under the proposed section. There would seem to be some value in vesting such a power in the court, to be exercised where either, due to lapse of time the defendant is unable to produce witnesses or evidence once available which is essential to his defense, or where because of the length of the intervening period, which he has spent in a mental institution, subsequent to the alleged wrongful conduct, it seems "unjust" to subject him to trial and punishment.

Section 46-14-222, MCA, *Annotations*, Comm'rs Note (2013).

¶44 As the Court correctly notes, "[t]he effect of a dismissal order in a criminal case is provided by § 46-13-402, MCA, which requires a defendant's release from criminal custody. . . [and] renders a dismissed information no longer effective against the defendant . . . ." Opinion, ¶ 28. However, Section 221's dismissal requirement, which would allow for refiling of the same charges, must be read consistently with Section 222's broader requirement that a court consider the fairness of resuming criminal proceedings. I agree with the Court that when Mosby's case was dismissed in 2006 the proper procedure would have been to file a new Information. I also agree that the plain language of Section 222 directs proceedings to be resumed, after they have been suspended, when a court

determines a defendant has regained fitness. However, I believe the "unjust" inquiry in Section 222, which is the inquiry upon which the Court resolves this case, implicates substantive due process guarantees and is not informed by a "procedural misstep" or what this Court thinks the District Court was confused about. Those procedural concerns may justify a different inquiry but not one related to substantive due process and whether it is "just" to allow proceedings to resume. Because of the temporal component of this analysis, it easily is informed by some of the same considerations inherent in a speedy trial analysis. I would be clear, nonetheless, that the Sixth Amendment's right to a speedy trial affords Mosby no protection for his pre-charge delay.

¶45 It has long been recognized that the Sixth Amendment right to a speedy trial "is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." *United States v. Macdonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502 (1982). The speedy trial provision protects many demands of justice and "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Macdonald*, 456 U.S. at 8, 102 S. Ct. at 1502. The purpose of the speedy trial provision is an "important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."

United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 776 (1966). Accordingly, "[o]nce charges are dismissed, the speedy trial guarantee is no longer applicable." *Macdonald*, 456 U.S. at 8, 102 S. Ct. at 1502. Thus, when Mosby's Information was dismissed in 2006, he no longer had the protection of the Sixth Amendment speedy trial provision.

¶46 While the speedy trial provision protects several demands of justice, these demands do not belong *only* to the speedy trial right nor are they rendered any less compelling when considered through a different applicable constitutional provision. "A speedy trial analysis, which focuses on post-indictment delay, involves an inquiry similar to that which we engage in for pre-indictment delay." *State v. Taylor*, 1998 MT 121, ¶18, 289 Mont. 63, 960 P.2d 773. The law provides other mechanisms to guard against prejudice resulting from the passage of time between crime and arrest and charge, such as statutes of limitations. "Indeed, this is the primary guarantee against bringing overly stale criminal charges." *State v. Passmore*, 2010 MT 34, ¶ 26, 355 Mont. 187, 225 P.3d 1229 (citing *United States v. Marion*, 404 U.S. 307, 322, 92 S. Ct. 455, 464 (1971)). The statute of limitation for sexual assault is 10 years. Section 45-1-205(1)(b), MCA. However, when the victim, as here, was under 18 years of age, the prosecution may be commenced at any time. Section 45-1-205(1)(c), MCA. Of course, statutes of limitations represent legislative assessments of the relative interests of the State and the defendant in administering and receiving justice and thus do not fully define a defendant's rights. *Passmore*, ¶¶ 26-27. In my opinion, the answer does not lie in the fact that the statute of limitations had not run in

Mosby's case; it is perhaps one consideration of many. Section 222 directs a broader inquiry by allowing a court to dismiss if resuming proceedings would be "unjust." A court lacks this discretionary power if the applicable statute of limitations has run. Similarly, a court may not dismiss a charge filed within the applicable statute of limitations except where, as here, the Legislature has specifically allowed for an inquiry into the justness of continuing the proceedings. Accordingly, I would conclude that Section 222 contemplates a situation where the passage of time makes it unjust to proceed, even though the statute of limitations has not run. The inquiry necessarily must depend on the facts of each case.

¶47 "The essence of substantive due process is that the State cannot use its police power to take unreasonable, arbitrary or capricious action against an individual." *State v. Webb*, 2005 MT 5, ¶ 22, 325 Mont. 317, 106 P.3d 521 (citations omitted). Due process, by its nature, remains flexible and calls for situationally appropriate protections. *State v. West*, 2008 MT 338, ¶ 32, 346 Mont. 244, 194 P.3d 683 (citations omitted). An asserted denial of due process is assessed by the totality of the facts of a given case. *West*, ¶ 32 (citations omitted). "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial." *West*, ¶ 32 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S. Ct. 1708, 1719 (1998)). Accordingly, "due process is ultimately measured by the fundamental fairness of the proceeding[,]" *State v. Edmundson*, 2014 MT 12, ¶ 17, 373 Mont. 338, 317 P.3d 169, and whether the State's action "violates those fundamental conceptions of justice which lie at the base of our civil and

political institutions and which define the community's sense of fair play and decency." *State v. Krinitt*, 251 Mont. 28, 35, 823 P.2d 848, 849 (1991) (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049 (1977)).

¶48 In *West*, we declined to hold that a delay of over two years in executing a probation-violation warrant and bringing the defendant before the court amounted to a per se due process violation. *West*, ¶¶ 33, 38. Rather, we noted that several factors, reminiscent of those analyzed under a speedy trial claim, guide our due process analysis. *West*, ¶¶ 34-35. Ultimately, we concluded the record required more development regarding those factors to fully decide West's due process claim on the merits. *West*, ¶¶ 39-41. Recently, in *State v. Cameron*, we found due process violations in the State's failure to bring Cameron before a judge on revocation proceedings for nearly two years. 2021 MT 198, ¶ 29, 405 Mont. 160, 494 P.3d 314. We have also previously found due process protections violated by pre-indictment delays of nearly two years. *See, e.g.*, *Taylor*, ¶¶ 33-34. Similarly, we have held that delaying an initial appearance shocks the concepts of fundamental fairness and due process, noting "there is no justification for unnecessarily holding a prisoner incommunicado, unrepresented, and without the proceedings required by law." *State v. Strong*, 2010 MT 163, ¶¶ 15, 19, 357 Mont. 114, 236 P.3d 580.

¶49 Here, Mosby was charged with fondling the penis and testicles of a young boy (a felony) and exposing himself to another young boy (a misdemeanor) while in the locker room of the Missoula YMCA. Mosby, who was developmentally delayed and severely mentally ill, was with his caregiver. Mosby was 23 years old at the time of the offense.

He admitted to the offenses when questioned by police. Mosby had been in foster care, group homes, and secure youth detention facilities since the age of nine. Because of Mosby's handicaps, and because of the criminal charges, Mosby spent 13.5 years imprisoned at either Warm Springs State Hospital or MDC. Undisputedly, Mosby was confined for 13.5 years to regain his fitness for the State to pursue its case against him. Mosby's counsel points out that Mosby's imprisonment here is equivalent to a 54-year sentence in the Montana State Prison with quarter-time eligibility. Section 46-23-201(3), MCA. The District Court imposed roughly an equivalent sentence to Mosby's pre-charge confinement when it imposed a 100-year sentence, with 50 years suspended, and no credit for the time he spent in mental health institutions. Although the Information had been dismissed, the pendency of the criminal case loomed over Mosby. Mosby was subject to the same public scorn any accused endures, and he was deprived of his liberty, his ability to seek employment, his ability to associate, and other freedoms enjoyed in a normal life.

¶50 I would conclude these facts "constitute a denial of fundamental fairness, shocking to the universal sense of justice" and make it unjust under substantive due process standards for the State to resume its proceedings against Mosby after his commitment for over 13 years in a mental hospital. *See West*, ¶ 32. I believe, in this case, allowing the State to refile charges fails to protect Mosby's constitutional rights. When a due process violation taints the fundamental fairness of the proceedings, it is appropriate to vacate a conviction or dismiss the charges. *Cameron*, ¶ 28. Typically, a dismissal for delay would be without

prejudice, but we have recognized dismissal with prejudice may be warranted in some instances. *Cameron*, ¶ 28 (citing *Strong*, ¶ 20). Mosby has already been deprived of his due process rights once and allowing the State to refile permits the State to start over with a clean slate. Dismissal with prejudice deters aggressive, questionable actions by the State and provides an incentive for the State to respect the interests of those involved. Consequently, dismissal without prejudice would trivialize the violation of Mosby's rights.

¶51 My conclusion considers the severity of the underlying offenses and the length of pre-charge delay. If Mosby is dangerous because he is mentally ill, then his civil commitment should have been extended. However, for the instant offenses, Mosby has paid his price to society.

Justice

Justice Ingrid Gustafson and Justice Dirk Sandefur join in the Concurrence of Justice McKinnon.

Justices

Justice James Jeremiah Shea, concurring and dissenting.

¶52 I concur with the Court's conclusion that if the State wishes to pursue a prosecution against a defendant whose case has been dismissed pursuant to Section 221(3), the State must refile the charges, just as it would have to do with any case that had been dismissed for whatever reason. Opinion, ¶¶ 28-29. I also concur that dismissal pursuant to Section 221 does not constitute dismissal with prejudice, and that nothing precludes the State from filing a new civil case should the law and evidence at the time support a new filing. Opinion, ¶¶ 24-25, 39. I dissent from the Court's analysis of Section 222, however, because a plain reading of Section 222 evinces that it has no application to the *refiling* of a dismissed case. Section 222 applies only to the resumption or dismissal of suspended criminal proceedings once a defendant regains fitness to proceed. Moreover, even if Section 222 applied to the refiling of dismissed charges, since that did not occur in this case the Court's analysis constitutes an advisory opinion.

¶53 Section 222 provides in pertinent part:

> When the court . . . determines . . . that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge.

Boiled down, Section 222 authorizes two options when a court has determined a defendant has regained fitness to proceed: (1) "resume the criminal proceedings" or (2) "dismiss the charge." Neither of these options can logically be read to apply to a case that has already been dismissed pursuant to Section 221.

¶54 As to the first option, the "resum[ption] of criminal proceedings" necessarily requires that there are criminal proceedings still in existence. But as the Court correctly notes, § 46-13-402, MCA, renders a dismissed charge "no longer effective against the defendant." The statute requires "the filing of a *new* information [and] does not provide for reinstatement of the dismissed information." Opinion, ¶ 28 (quoting *Onstad*, 234 Mont. at 490, 764 P.2d at 475) (emphasis in original). The filing of a *new* information initiates *new* criminal proceedings. In *Stanfield v. State*, No. OP 18-0144, 392 Mont. 551, 421 P.3d 261 (April 4, 2018), we addressed the manner by which "criminal proceedings may be initiated" in accordance with Article II, Section 20 of the Montana Constitution. We noted that, consistent with that constitutional provision, § 46-11-201, MCA, allows criminal proceedings to be initiated by filing an information. When an information is dismissed, then, the criminal proceedings initiated by that information are terminated and cease to exist. "Dismiss" means to "send away; to terminate (an action or claim) without further hearing." *Dismiss*, *Black's Law Dictionary* (11th ed. 2019). Since the filing of a *new* information, as required by § 46-13-402, MCA, initiates *new* criminal proceedings, it does not and cannot *resume* terminated proceedings in the manner that the Court interprets Section 222.

¶55 The second option available to the court when a defendant regains fitness to proceed makes it even more clear that Section 222 cannot apply to a dismissed case. The second option allows a court that has determined "it would be unjust to resume the criminal proceedings [to] dismiss the charge." It is axiomatic that when a charge has already been

dismissed, it cannot be dismissed *again*. The only way this part of Section 222 can have any practical effect is if the charge remains pending, albeit suspended, during the defendant's period of unfitness.

¶56 Section 222 serves an important function in that it allows for criminal proceedings that have been suspended pursuant to Section 221 either to be resumed upon a defendant regaining fitness to proceed, or to be dismissed in the interests of justice if the criminal proceedings have been suspended for too long. In that way, both Section 221 and Section 222 work *in pari materia* to expeditiously move a case either towards trial or dismissal, and both serve "to prevent the abhorrent situation where a defendant languishes indefinitely in a mental hospital with criminal charges hanging over his head like the sword of Damocles." *Tison*, ¶ 11 (citing *Jackson*, 406 U.S. at 738, 92 S. Ct. at 1858). Section 221 allows for dismissal of suspended proceedings when a defendant is not fit to proceed and it appears the defendant will not become fit to proceed within the reasonably foreseeable future. Section 222 allows for dismissal of suspended proceedings when a defendant regains fitness to proceed but it would be unjust to resume the suspended proceedings because of the passage of time. But once a case is *dismissed* pursuant to Section 221, as happened in this case, Section 222 ceases to have any application.

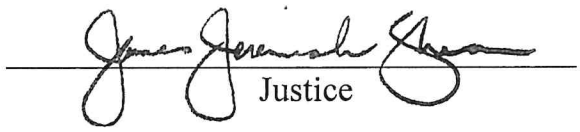
¶57 Although Section 222 has no application to a case dismissed pursuant to Section 221, this does not preclude Mosby from moving to dismiss any refiled charges on whatever grounds he views to be applicable. To that point, Justice McKinnon articulates a thoughtful analysis for the application of substantive due process as a bar to refiling

charges in this case, and while I agree that "the 'unjust' inquiry in Section 222 . . . implicates substantive due process guarantees," McKinnon Concurrence, ¶ 44, a defendant's right to due process does not require a statute as the vehicle by which due process rights may be asserted. "[T]he Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution protect the substantive and procedural rights of persons faced with a deprivation of liberty." *State v. West*, 2008 MT 338, ¶ 26, 346 Mont. 244, 194 P.3d 683. Mosby's constitutional right to due process is no less assertable as a constitutional right when moving to dismiss a refiled charge than it would be when moving to dismiss a suspended charge pursuant to Section 222.

¶58 More fundamentally, I dissent from the Court's holding as to the application of Section 222 particularly as it applies to the circumstances of this case. The Court correctly holds that the District Court erred by attempting to resurrect a dismissed charge, and that "the proper procedure . . . if the State wishes to again pursue charges for the same conduct, is to file new charging documents." Opinion, ¶ 29. The Court then correctly observes that "[t]his procedural flaw itself warrants reversal." Opinion, ¶ 29. But the Court then concludes that it "must also address how the District Court's substantive decision-making under Section 222 constituted an abuse of the discretion that the law provides." Opinion, ¶ 29. Why? Even assuming, for the sake of argument, that Section 222 applied to the refiling of dismissed cases, it remains unclear to me why the Court must address the District Court's substantive decision-making under Section 222 in this case. The

procedural posture of this case is that the charges were dismissed and the State has not filed new charging documents. Reversal on that basis should be the end of the analysis. Any analysis as to the possible bases for dismissal if the State refiled charges constitutes an advisory opinion. "We consistently have held that this Court does not render advisory opinions." *Serena Vista, LLC v. Dept. of Nat. Resources and Conserv.*, 2008 MT 65, ¶ 14, 342 Mont. 73, 179 P.3d 510. I can find no reason to make an exception in this case.

¶59 I concur with the Court's conclusion that the District Court erred by attempting to resurrect a dismissed case in the absence of refiled charging documents. For the substantive and procedural reasons set forth above, I dissent from the Court's application of Section 222 to this case.



Justice