ORIGINAL

OP 21-0568

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 9

KYLE FOUTS, Montana State Hospital Administrator,
and ADAM MEIER, Director, Department of Health and Human Services,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY, HONORABLE JOHN A. KUTZMAN, Presiding,

Respondent.

ORIGINAL PROCEEDING: Petition for Writ of Certiorari,
In and For the County of Cascade County, Cause No. CDC-21-052
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Petitioners:

Chad G. Parker, Deputy Chief Legal Counsel, Department of Public Health and Human Services, Helena, Montana

For Respondent:

Joshua A. Racki, Cascade County Attorney, Amanda L. Lofink, Deputy County Attorney, Great Falls, Montana

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Decided: January 18, 2022

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion and Order of the Court.

¶1 By petition filed November 9, 2021, Petitioners Kyle Fouts and Adam Meier in their above-referenced official capacities with the Montana Department of Public Health and Human Services (hereinafter interchangeably MDPHHS) petition this Court for certiorari review of the October 17, 2021 judgment of the Montana Eighth Judicial District Court, Cascade County, in the underlying matter of *State v. Hanway*, Cause No. CDC-21-052, finding MDPHHS in indirect contempt of referenced orders (directing the Montana State Hospital (MSH) to accept custody and care of the underlying criminal defendant (Hanway) for fitness rehabilitation pursuant to § 46-14-221(2)-(3), MCA) and thus imposing a $500 per-day coercive civil sanction pending subsequent compliance with the subject orders. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 This case involves an extensive factual and procedural history. In addition to the limited factual record presented here, we take notice of the referenced proceedings in the underlying matter as detailed by the "summary timeline and undisputed facts" set forth in our prior November 2, 2021 Order in the related matter of *Hanway v. Fouts*, Cause No. OP 21-0503 (denying Hanway's verified petition for peremptory writ of mandamus compelling MDPHHS to immediately comply with the District Court's underlying August 19, 2021 order of commitment to MDPHHS fitness rehabilitation pursuant to

§ 46-14-221(2)-(3), MCA).[1] In accordance with the undisputed facts noted in our prior November 2, 2021 Order, as supplemented by the limited factual record presented here, the following summary of facts are not subject to genuine material dispute in regard to the pertinent underlying proceedings in *State v. Hanway*, Cause No. CDC-21-052:

- 2021-01-09: While incarcerated on a City of Great Falls municipal court matter, and after allegedly refusing to eat for several days, Hanway allegedly punched a detention officer in the face through her jail cell food port at the Cascade County Detention Center (CCDC) when the officer delivered food and encouraged her to eat.

- 2021-01-20: The State accordingly charged Hanway by Information with Assault on a Peace Officer, a felony in violation of § 45-5-210(1)(a), MCA.

- 2021-01-22: Defense counsel filed an unopposed motion pursuant to § 46-14-221(2)(a), MCA, for adjudication of Hanway as "unfit to proceed" based on the prior 2020-10-16 defense-commissioned evaluation of Dr. Donna Zook, Ph.D., in BDC-20-165, that diagnosed Hanway with "disorganized schizophrenia" which rendered her unfit "to proceed and stand trial" as referenced in §§ 46-14-101(1)(a)(i) and -103, MCA.

- 2021-01-29: Pursuant to § 46-14-221(2)-(3), MCA, the District Court accordingly: (1) adjudicated Hanway "unfit to proceed"; (2) suspended the criminal proceeding; (3) committed her "to the custody of" MDPHHS "to be placed at an appropriate [MDPHHS] facility . . . for so long as the unfitness endures or until disposition . . . is made pursuant to [§ 46-14-221, MCA], whichever occurs first";[2] (4) directed the Cascade County Sheriff to

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[1] The related matter of *Hanway v. Fouts*, Cause No. OP 21-0503, additionally involved various similar and related MDPHHS fitness/fitness rehabilitation commitment orders regarding the same defendant issued by two other Departments of the District Court in the separate matters of *State v. Hanway*, Cause Nos. BDC-20-165 and DDC-21-492.

[2] In addition to ordering MDPHHS to "develop an individualized treatment plan" to assist in regaining fitness to proceed as required by § 46-14-221(2)(b), MCA, the court ordered MDPHHS to further examine Hanway and report on her "mental condition" and ability to form the requisite

immediately transport Hanway to MSH "without delay" upon coordination with MSH; and (5) set the 90-day review hearing required by § 46-14-221(3)(a), MCA, for April 22, 2021. Upon advisory from MSH that it had no bed-space then available at the MDPHHS Forensic Mental Health Facility (FMHF) at Galen, Montana, and had thus placed Hanway on the FMHF waiting list, the sheriff did not transport her as directed.

- 2021-02-11: Upon notice from MDPHHS of available FMHF bed-space, the sheriff transported Hanway to MSH which accepted her for fitness rehabilitation in accordance with the District Court's 2021-01-29 commitment order in this matter and a similar order in BDC-20-165.

- 2021-04-20: In reference to this matter and the by-then dismissed matter of BDC-20-165, MDPHHS/MSH issued a written evaluation report confirming that Hanway was suffering from "schizoaffective disorder" and that, due to her "severe mental illness," she did not have "the capacity to conform her behavior to the requirements of the law" at the time of the subject offenses.[3] The report further stated, however, that she now "appear[s] to be capable of rational discussions with" defense counsel and was thus "currently fit to proceed."[4]

- 2021-04-22: The District Court conducted the 90-day review hearing required by § 46-14-221(3), MCA. Based on the 2021-04-20 MDPHHS/MSH report, and supplemental hearing testimony of MSH Dr. Virginia Hill, the court adjudicated Hanway fit to proceed and ordered resumption of the previously suspended criminal proceeding.[5]

- 2021-04-23: The District Court reduced Hanway's bail pursuant to her represented motion.

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criminal mental state at the time of the subject offense pursuant to §§ 46-14-202(1), (2), and -206, MCA.

[3] *See* §§ 46-14-206(1)(d), (e), -213, -214(1), and -301, MCA.

[4] *See* §§ 46-14-103, -206(1)(c), -221(3)(a), and -222, MCA.

[5] *See* § 46-14-222, MCA.

- 2021-04-27: MDPHHS discharged Hanway for transport back to the CCDC, after which her mother bailed her out of jail on her recently reduced bail.

- 2021-05-18: The District Court reset trial in the underlying matter for June 14, 2021.

- 2021-06-01: The District Court granted an unopposed defense motion for a 60-day trial continuance in furtherance of plea negotiations with the State.

- 2021-07-13: Following Hanway's recent June 29, 2021, arrest on a new offense allegedly committed when she was out on bail (later formally charged in DDC-21-492), defense counsel filed a motion for reevaluation of Hanway's fitness to proceed pursuant to § 46-14-202, MCA.

- 2021-08-14: In conjunction with the July 13, 2021 defense motion, Dr. Zook attempted but was unable to conduct a new fitness evaluation due to Hanway's reported refusal to cooperate. Based on "extrapolation" from Hanway's prior condition and circumstances, reported discontinuation of prescribed mental health medication, and referenced recent behavior, Dr. Zook again diagnosed Hanway with "disorganized schizophrenia" and concluded that she was again unfit to proceed.

- 2021-08-19: Based on Dr. Zook's 2020-08-14 evaluation update,[6] the District Court: (1) re-adjudicated Hanway "unfit to proceed"; (2) again suspended the criminal proceeding; (3) committed her "to the custody of" MDPHHS "to be placed in an appropriate [MDPHHS] facility . . . for so long as the unfitness endures or until disposition . . . is made pursuant to [§ 46-14-221, MCA]"; and (4) ordered the sheriff to immediately transport her to MSH on

[6] The District Court noted in its subsequent October 17, 2021 contempt ruling that it also considered the related hearing testimony of a CCDC jail nurse that Hanway "had recently refused to leave her cell to shower" and, in her cell, had been walking around naked and openly revealed and engaged in certain typically private functions. The October 2021 order further noted the nurse's additional testimony that Hanway had refused "psychotropic medication" offered by the jail medical staff and the court's observation that Hanway incoherently babbled and interjected at the prior hearing and generally displayed behavior "thoroughly inconsistent with" the ability to understand the criminal proceeding against her or assist counsel in regard thereto.

coordination with MSH. As before, however, upon advisory from MSH that it had no bed-space then available at the MDPHHS FMHF, and that it had thus placed Hanway on the FMHF waiting list, the sheriff again did not transport as directed.

- 2021-10-05: The State, through the Cascade County Attorney, filed a motion for issuance of a contempt/show cause order compelling MDPHHS to either accept custody of Hanway pursuant to the court's 2021-08-19 commitment order "within seven days," or alternatively, appear and show cause why not. The court issued the State's accompanying proposed order that same day.

- 2021-10-14: The District Court conducted a contempt/show cause hearing at which the State, MDPHHS, and Hanway appeared through counsel, with Hanway also present via videoconferencing. The parties presented oral argument, but no evidence. At the close of hearing, the court orally found MDPHHS in indirect contempt of court based on non-compliance with its 2021-10-05 alternative contempt show cause order.

¶3 On October 17, 2021, the District Court issued written findings of fact, conclusions of law, and a "Contempt Order" based on the pertinent procedural history in the underlying matter and the October 14th hearing record. *Inter alia*, the court found that MDPHHS's counsel made the following unsworn "represent[ations]" of fact:

(1) MDPHHS/MSH "only has six beds allocated for women" at its FMHF;

(2) Hanway was then "'technically' in 9th place on a list of 12 women awaiting admission" to the FMHF unit but, as a practical matter, "may be closer to . . . sixth";

(3) the "other women ahead of [her]" on the waiting list "have been displaying at least equally troubling psychotic behavior"; and

(4) "realistically . . . it would be a month and a half or so," at best, "before she would naturally be admitted."

The court's findings further noted that MDPHHS "had no witnesses present" at the show cause hearing and that it "did not ask to present testimony." The findings further noted, however, that neither the State nor Hanway's counsel disputed MDPHHS's "representations." In its "conclusions of law" the court further concluded, *inter alia*, that:

(1) the "[c]ourt issued [its] October 5 transport order without a hearing to implement its August 19 commitment order";

(2) MDPHHS's "non-compliance with its" legal obligations "threatens public safety";

(3) state agency "funding and staffing problems [do] not excuse compliance with court orders issued to meet" agency legal duties; and

(4) "[i]t is undisputed that [MDPHHS] has the *power* to admit" Hanway "*now*" "for restorative treatment" as ordered pursuant to § 46-14-221(2), MCA. (Emphasis original.)

Based on its written findings of fact and conclusions of law, the District Court ultimately adjudicated MDPHHS in indirect contempt of court "for failing to transport Ms. Hanway to its facilities at Warm Springs or Galen within 7 days as . . . required" by its October 5, 2021 alternative contempt show cause order. Pursuant to § 3-1-520, MCA, the court thus imposed a cascading $500 per day fine as a coercive civil sanction "for each day" after October 12, 2021, that MDPHHS "has not transported" Hanway "to Warm Springs or Galen." The court ordered, however, that MDPHHS could:

> purge the contempt by transporting . . . Hanway to Warm Springs early enough to permit treatment before the 90-day . . . deadline [specified by § 46-14-221(3)(a), MCA]. . . . But if [it] does not transport [her] at all, or does so too late to comply with the statutory 90-day deadline, the [c]ourt may have to consider converting this sanction into a criminal contempt penalty.

¶4 As noted in our prior November 2, 2021 Order in *Hanway v. Fouts*, MDPHHS later made the following unsworn factual assertions to this Court in its October 22, 2021 summary response to Hanway's related mandamus petition:

> [MSH] is comprised of several different components, which operate under different licenses (and legal requirements) and provide different types of services pursuant to different protocols. For purposes relevant to the district court's finding of contempt and Hanway's [mandamus] [p]etition, the Main Hospital at Warm Springs (MSH or Main Hospital) is an acute psychiatric care facility that provides intensive inpatient psychiatric services, including for patients who are involuntarily committed to the hospital according to the involuntary civil commitment provisions of . . . Title 53, Chapter 21[,] [MCA]. FMHF is a forensic hospital that serves patients who are in the custody of penal authorities, primarily pursuant to the procedures established under . . . Title 46, Chapter 14[,] [MCA].
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> Currently, FMHF has 54 beds . . . for inpatient forensic evaluation services for the State['s] . . . 56 counties. Forty-eight (48) of those beds are currently designated for male defendants. Six (6) are designated for female defendants. Since its inception in 2016, the FMHF has been operating at capacity. FMHF has maintained forensic evaluation waiting lists since 2010, with an increase in the number of defendants on the waiting lists since the onset of the COVID-19 pandemic. COVID-19 quarantine protocols have further limited the [MDPHHS]'s ability to rotate patients civilly committed to MSH and defendants ordered to FMHF for criminal commitments into bed space. The limitations on bed space has, therefore, become an increasingly critical factor in the delay of admissions to the FMHF.
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> The reasons for limited bed space include:
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> 1. Defendants present with complex psychiatric and medical illnesses, related to homelessness, drug abuse, and limited services in the community and take longer to stabilize.
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> 2. Defendants refuse to take psychotropic medications resulting in the need for *Sell* Hearings, which can take months to schedule.

3. Pre-trial detainees being maintained at MSH to ensure medication adherence, even if found fit to proceed, to prevent cessation of medications and decompensation.

4. Overwhelmed court dockets create admission delays.

5. Disinclination by county and defense attorneys to pursue civil commitment hearings [under Title 53, chapter 21, MCA, in accordance with § 46-14-221(3)(b), MCA].

6. COVID-19 protocols, which limit admissions during 14-day quarantines and limit admissions to no more than three individuals at any one time, have exacerbated delays in admissions.

More simply stated, the primary factors contributing to delayed admissions are finite bed space and the conflict between the time required to evaluate and appropriately restore defendants' fitness, if possible, and the continuous and ever-increasing number of court-ordered admissions.

. . .

[MDPHHS] is currently engaged in a concentrated and deliberate effort to address the factors within its control that lead to delayed FMHF admissions, to increase its capacity for admissions, including reconfiguring physical space to create more available beds. This is, however, a temporary, emergency remedy, designed at this time to alleviate the larger backlog of admissions affecting female defendants. It cannot be sustained long-term and has the potential to exacerbate wait times for admissions of male defendants. The fact remains that current circumstances make it impossible for the [MDPHHS] to comply with the district court's order to transport and admit Hanway immediately.

However, as previously noted in our November 2, 2021 Order, MDPHHS filed supplemental notices on October 28, 2021, in *Hanway v. Fouts*, and the underlying CDC-21-052 and DDC-21-492 matters, that, as of October 27, 2021, it had complied with the commitment orders in those matters by accepting custody of Hanway for placement in in the MSH FMHF for fitness rehabilitation in accordance with § 46-14-221(2)-(3), MCA.

¶5 By subsequent affidavit dated November 10, 2021, MSH Dr. Virginia Hill reported, *inter alia*, that following fitness rehabilitation efforts pursuant to § 46-14-221(2)(a), MCA, Hanway continued to suffer from schizoaffective disorder, "bipolar type, currently in an acute phase," as primarily manifest in various described symptoms, behaviors, and psychological impediments. Dr. Hill further reported that Hanway could nonetheless "be treated to adjudicatory competency in the reasonably foreseeable future," estimated at "between three and six months of hospital level care." At the subsequent 90-day status hearing on November 17, 2021, Dr. Hill appeared and gave supplemental testimony in support of her prior report. At the close of hearing, the District Court made oral findings of fact, conclusions of law, and judgment, followed by a conforming written judgment in which it ultimately found and concluded:

> [T]he Court believes Dr. Hill and her staff will eventually and temporarily restore Ms. Hanway's fitness to proceed, but that this will not occur "within the reasonably foreseeable future" as [required by § 46-14-221(3)(a), MCA]. The plain language of that statute, together with two controlling decisions interpreting it . . . , now collectively require the Court to dismiss the case. . . . These authorities leave the Court no discretion to do otherwise.
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> Ms. Hanway's proposed order . . . contains a proposed clause directing the State to petition immediately for civil commitment, because . . . § 46-14-221(3)(b)[,] [MCA] requires this. This Court continues to doubt that a finding of unfitness to proceed pursuant to . . . § 46-14-221(3)[,] [MCA] necessarily supplants, circumvents, or meets the civil commitment criteria in Title 53[,] [chapter 21, MCA]. . . . The Court accordingly declines to use the last few minutes of its jurisdiction over the current case to try to constrain the State's prosecutorial discretion with respect to the next case.

The District Court thus dismissed the underlying criminal case with prejudice.

¶6 In support of its November 9, 2021 petition for certiorari review of the District Court's October 17, 2021 indirect contempt citation and coercive sanction, MDPHHS filed in this matter the separate affidavits of the MSH Director (Fouts) and "admitting [MSH/FMHF] forensic mental health social worker" (Cathy Orrino) attesting that, upon review, all "factual assertions" set forth in its petition here, and previously in *Hanway v. Fouts* (OP 21-0503) and *Khmelev v. Fouts* (OP 21-0450), "are true and accurate to the best of [their] knowledge." In its response filed in this matter on December 1, 2021, the State[7] asserted that the District Court properly found MDPHHS in indirect contempt based on non-compliance with its October 5, 2021 alternative contempt show cause order. The State acknowledged, however, that "it is impossible [for MDPHHS/MSH] to immediately and simultaneously admit all unfit defendants from across the state" as required under Title 46, chapter 14, MCA. The State further acknowledged that:

> Pursuant to the statute and case law[,] it appears that the [c]ourt did not have the authority to issue a per diem contempt fine. . . . [T]he amount of the fine was [improper]. The [c]ourt is limited to issuing a fine of only up to $500 for each individual violation and a per diem fine is not allowed.

[7] For referential clarity, three distinct state executive branch officers/entities are involved and referenced in this case. The Director of the Montana Department of Public Health and Human Services and the Montana State Hospital, which is a subordinate subdivision of the Montana Department of Public Health and Human Services, are collectively referred to herein as "MDPHHS," except where the State Hospital is singularly and more particularly referred to as "MSH." The State of Montana in its larger criminal prosecutorial capacity, in this case by and through the Cascade County Attorney (see § 7-4-2716(1), MCA), is separately referred to herein as the "State."

DISCUSSION

¶7 "[D]isobedience of any lawful judgment, order, or process of the court" is a contempt of court. Section 3-1-501(1)(e), MCA. In contrast to a direct contempt, a contempt "not committed in the immediate view and presence of the court or judge in chambers" is an indirect or constructive contempt. *Kauffman v. Mont. Twenty-First Jud. Dist. Ct.*, 1998 MT 239, ¶¶ 19 and 25, 291 Mont. 122, 966 P.2d 715; *Malee v. Mont. Second Jud. Dist. Ct.*, 275 Mont. 72, 75, 911 P.2d 831, 832 (1996). *See also* §§ 3-1-512 through -520, MCA.[8] Whether direct or indirect, "[a] contempt may be either civil or criminal" depending on the nature of the resulting sanction imposed. Section 3-1-501(3), MCA; *Huffine v. Mont. Sixth Jud. Dist. Ct.*, 285 Mont. 104, 108-09, 945 P.2d 927, 929-30 (1997) (nature of the sanction determines whether a contempt is criminal or civil). "A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order" and the contemnor may avoid the sanction "by complying with" the subject order. Section 3-1-501(3), MCA. In contrast, a contempt is criminal if the purpose of sanction is to "punish the contemnor" to "vindicate the authority of the court" and the contemnor may *not* avoid the sanction "by complying with" the order. Section 3-1-501(3), MCA.

¶8 An indirect contempt proceeding may be initiated either by issuance of an affidavit-supported "warrant of attachment" for the arrest, appearance, and answer of the alleged contemnor in accordance with §§ 3-1-513 through -518, MCA, or by a contempt

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[8] *Compare* §§ 3-1-511 and -501(4), MCA (procedure on direct contempt of court).

show cause order issued on motion or sua sponte by the court. *See* §§ 3-1-512 and -513, MCA ("warrant may be issued to bring" the alleged contemnor "to the court to answer the charge" "[w]hen the contempt is not committed in the immediate view and presence of the court or judge"); *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54-55, 754 P.2d 822, 824 (1988) (holding that issuance of contempt order initiated on show cause motion and supporting affidavit was not in excess of the court's jurisdiction); *In re Graveley*, 188 Mont. 546, 556, 614 P.2d 1033, 1039 (1980) (finding no "jurisdictional defect" in contempt proceeding initiated on contempt show cause order "instead of a warrant" under § 3-1-513, MCA). In either event, the warrant of attachment or contempt show cause order must be supported either by "an affidavit of the facts . . . presented to the court or judge" or appropriate judicial notice of pertinent facts sufficient to state a prima facie case of contempt followed by a hearing on the merits. *See* §§ 3-1-512 and -513, MCA (procedure on indirect contempt); *Malee*, 275 Mont. at 75-76, 911 P.2d at 832-33 ("procedures . . . in § 3-1-512, MCA, must be followed" in indirect contempt proceedings—constitutional "due process require[s]" notice of the alleged contempt, "reasonable opportunity to [respond] by way of defense or explanation," including opportunity "to testify and call other witnesses"—internal citations and punctuation omitted); *Graveley*, 188 Mont. at 556, 614 P.2d at 1039 (no "jurisdictional defect in the contempt proceeding" initiated on show cause order and judicial notice of referenced facts).

¶9 Upon a finding on hearing of indirect contempt, the court may impose a coercive civil sanction of incarceration, a fine "not to exceed $500, or both" to attempt "to compel

the contemnor to perform" the subject act. Section 3-1-520, MCA. *See also* § 3-1-501(3), MCA (defining civil contempt). However, the court may impose a coercive civil sanction only if the act "is in the power of the contemnor to perform." Section 3-1-520, MCA; *VanSkyock v. Mont. Twentieth Jud. Dist. Ct.*, 2017 MT 99, ¶ 13, 387 Mont. 307, 393 P.3d 1068 (cognizable claim for civil contempt must seek to compel performance of "an act that is in the power of the contemnor to perform"—citing § 3-1-520, MCA).

> [I]nability to [comply with] . . . an order is a good defense to . . . contempt . . . unless . . . the [alleged contemnor] has [willfully] brought the disability upon himself. . . . [It is] sufficient to entitle the party to be discharged to show that his disobedience [was] *not . . . willful, but was solely on account of his pecuniary inability, or some other misfortune over which he had no control.* . . . Courts [may] not adjudge a defendant in contempt for not doing an impossibility, nor for not doing what it is not in his power to do, unless he has voluntarily disabled himself to do the act where the creation of the disability was itself a [willful] act.

State ex rel. McLean v. Mont. Second Jud. Dist. Ct., 37 Mont. 485, 488-89, 97 P. 841, 842 (1908) (internal citations and punctuation omitted—emphasis added). "[I]nability to perform" the subject act is thus a complete defense to an alleged contempt unless the contemnor willfully caused the inability to perform. *State ex rel. Murphy v. Mont. Second Jud. Dist. Ct.*, 99 Mont. 209, 215, 41 P.2d 1113, 1116 (1935). *Accord Gillispie v. Sherlock*, 279 Mont. 21, 25, 929 P.2d 199, 201 (1996) (citing *Murphy*); *State ex rel. Scott v. Mont. Thirteenth Jud. Dist. Ct.*, 58 Mont. 355, 366-68, 192 P. 829, 831-32 (1920) (the statutory power to sanction an indirect civil contempt to compel performance "depends upon a proper showing" of the ability to perform the subject act—"the court is without authority" to so sanction the contemnor absent such showing); *Dunlavey v. Doggett*, 38 Mont. 204,

208-09, 99 P. 436, 437 (1909) (the purpose of the power to sanction an indirect civil contempt under § 7318, RCM (1907) (now § 3-1-520, MCA), is to "enforce obedience" to the subject order and the power to sanction a contempt "is limited by the manner in which the statute says the power shall be exercised").

A. Manner and Scope of Review of Non-Appealable Indirect Contempt Judgments and Sanctions.

¶10 Contempt orders and judgments are final, conclusive, and generally not appealable, but are nonetheless generally subject to review by extraordinary "writ of certiorari." Sections 3-1-523(1) and 27-25-102(1), MCA.[9] The scope of certiorari review is limited, however, to record review as to whether the lower court acted in excess of its jurisdiction. Section 27-25-102(2), MCA; *Cross Guns v. Mont. Eighth Jud. Dist. Ct.*, 2017 MT 144, ¶ 8, 387 Mont. 525, 396 P.3d 133; *Graveley*, 188 Mont. at 555, 614 P.2d at 1038 (citing *State ex rel. King v. Mont. Second Jud. Dist. Ct.*, 24 Mont. 494, 62 P. 820 (1900)); *State ex rel. Middleton v. Third Jud. Dist. Ct.*, 85 Mont. 215, 218, 278 P. 122, 123 (1929) (citing § 9837, RCM (1921) (now § 27-25-102, MCA), and *King*).[10] In isolation, the express reference in § 27-25-102(2), MCA, to "jurisdiction" seemingly limits the scope of certiorari review of

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[9] *But see* § 3-1-523(2), MCA (narrow statutory exception providing for appeal of contempt orders ancillary to a family law proceeding order "that affects the substantial rights of the parties involved").

[10] *See also State ex rel. Anderson v. Eighth Jud. Dist. Ct.*, 188 Mont. 77, 79, 610 P.2d 1183, 1185 (1980) (certiorari "not a proper remedy" absent a "fully certified transcript of the record and proceedings" subject to review); § 27-25-202, MCA (certiorari writ "must command the party to . . . certify fully to the court . . . a transcript of the record and proceedings").

unappealable contempt judgments to the threshold questions of whether the court acted within its subject matter and personal jurisdiction. *See, e.g.*, *Gottlob v. DesRosier*, 2020 MT 210, ¶¶ 7-10, 401 Mont. 50, 470 P.3d 188 (defining subject matter jurisdiction as "the threshold authority of a court to consider and adjudicate particular types or classes of cases, controversies, or proceedings" and distinguishing lack of subject matter jurisdiction under M. R. Civ. P. 12(b)(1) from related lack of justiciability and other pleading deficiencies under Rule 12(b)(6)—citing *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655); *Larson v. State*, 2019 MT 28, ¶¶ 17-19, 394 Mont. 167, 434 P.3d 241 (distinguishing Rule 12(b)(1) subject matter jurisdiction from 12(b)(6) justiciability and failure to state a claim).

¶11 However, under Montana's pre- and post-statehood codification of the common law writ, certiorari review applies not only to courts, but also to other "lower tribunal[s], board[s], or officer[s] exercising judicial functions" who are not similarly subject to such technical subject matter and personal jurisdiction requirements. *See* § 27-25-102, MCA. Beyond threshold considerations of subject matter and personal jurisdiction uniquely applicable to courts, the scope of review under the Montana writ more broadly extends to "whether the inferior tribunal, board, or officer has *regularly pursued* . . . [its] *authority*." Section 27-25-303, MCA (emphasis added). Thus, while we have not always been so explicit, and have often loosely referred to "jurisdiction" without reference to the broader language of § 27-25-303, MCA, we have long recognized that the scope of certiorari review of lower court contempt adjudications and sanctions is not solely limited to whether the

court acted within its subject matter and personal jurisdiction, but also more broadly to whether it acted within its authority under the governing procedural and substantive law based on the requisite facts as supported by substantial evidence. *See Bugli v. Ravalli Cty.*, 2019 MT 154, ¶ 19, 396 Mont. 271, 444 P.3d 399 (noting that certiorari "is limited to whether the tribunal or board exceeded its jurisdiction" and court "cannot employ [it] to correct errors made by a tribunal or board acting within its jurisdiction"—but holding that court properly denied writ of certiorari to correct alleged county commission errors where commission acted within its authority under county road statutes *as supported by historical road record*); *El Dorado Heights Homeowners' Ass'n v. Dewitt*, 2008 MT 199, ¶ 15, 344 Mont. 77, 186 P.3d 1249 (scope of review of a contempt sanction "is [whether it is] legally complicit with the statutes authorizing [it]"); *Morton v. Lanier*, 2002 MT 214, ¶ 27, 311 Mont. 301, 55 P.3d 380 (standard of review of contempt order "is whether substantial evidence supports the judgment of contempt"); *Lee v. Lee*, 2000 MT 67, ¶¶ 20 and 57, 299 Mont. 78, 996 P.2d 389 (court acts "within its jurisdiction" if it acts within subject matter jurisdiction, has personal jurisdiction over the parties, and its "action . . . [is] invoked by proper pleadings and the judgment within the issues raised"—"court lacks or exceeds such jurisdiction by any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or [jurisprudential] rules"—internal citations and punctuation omitted); *First Nat'l Bank of Ekalaka v. Hereford*, 225 Mont. 281, 282-85, 731 P.2d 1323, 1324-25 (1987) (§ 27-25-303, MCA, limits scope of certiorari review to whether the lower tribunal or board

"exceeded its *authority*" under the record evidence and applicable law—emphasis added); *Buffalo v. Thiel*, 213 Mont. 280, 284-90, 691 P.2d 1343, 1345-48 (1984) (certiorari review includes "whether . . . court had . . . personal and subject matter jurisdiction" and, when "acting under . . . particular . . . [authority] to act only in certain circumstances[,] . . . whether all of the conditions precedent to such [authority] are present"—this "class of facts . . . necessary . . . to set the machinery of the law in motion . . . [pertains to a] want of jurisdiction [that] does not go to the subject-matter . . . , but to a preliminary fact necessary to be proven to authorize the court to act"—holding that the district court erroneously denied certiorari relief reversing lower court issuance of a writ of attachment due to lack of proof of sufficient facts required for issuance of the writ); *Milanovich v. Milanovich*, 201 Mont. 332, 333-34, 655 P.2d 963, 964 (1982) (holding that court lacked jurisdiction to hold husband in contempt due to factual insufficiency of wife's motion and supporting affidavit); *In re Estate of Gordon*, 192 Mont. 499, 504, 628 P.2d 1117, 1119 (1981) (noting necessity of petition for certiorari review of contempt judgment and "any underlying supportive findings[] [or] conclusions" of law); *Rose v. Eighth Jud. Dist. Ct.*, 192 Mont. 341, 348-50, 628 P.2d 662, 666-67 (1981) (voiding and vacating contempt order on certiorari review based on non-compliance of predicate paternity blood test order with Uniform Parentage Act); *Graveley*, 188 Mont. at 556, 614 P.2d at 1039 (no "jurisdictional defect in the contempt proceeding" initiated on show cause order rather than statutory affidavit and warrant procedure); *State ex rel. Porter v. First Jud. Dist. Ct.*, 123 Mont. 447, 454-55, 215 P.2d 279, 283-84 (1950) (an action was within the "jurisdiction" of a lower

court for purposes of certiorari review if court acted within its subject matter jurisdiction, had personal jurisdiction over the subject parties, the "action [was] invoked by proper pleadings[,] and the judgment [was] within the issues raised" under the governing law), *overruled on other grounds by Malee*, 275 Mont. at 76, 911 P.2d at 833; *State ex rel. Lay v. Mont. Fourth Jud. Dist. Ct.*, 122 Mont. 61, 70-76, 198 P.2d 761, 766-69 (1948) (§ 9843, RCM (1935) (now § 27-25-303, MCA), limits scope of certiorari review to record review as to whether the subject tribunal, board, or officer had the "authority" to "do the act, . . . make the order[,] or . . . render the judgment"—affirming contempt adjudication and sanction based on compliance with applicable contempt statutes and "evidence . . . sufficient to" act thereunder); *White v. Corbett*, 101 Mont. 1, 52 P.2d 156 (1935) (holding on certiorari review that justice court exceeded its jurisdiction in erroneously granting a statutory execution levy exemption without the requisite qualifying factual affidavit); *Murphy*, 99 Mont. at 216, 41 P.2d at 1116 (certiorari "cannot be used to correct errors committed in the exercise of jurisdiction" but noting that it nonetheless includes whether the court exceeded its jurisdiction and whether substantial evidence supported the contempt finding); *State ex rel. Burns v. Mont. Second Jud. Dist. Ct.*, 83 Mont. 200, 212, 271 P. 439, 443-44 (1928) (holding that court was "without jurisdiction to make the order of [contempt] commitment" absent "substantial evidence"); *State ex rel. Griffiths v. City of Butte*, 57 Mont. 368, 372-73, 188 P. 367, 368-69 (1920) (citing § 7209, RCM (1907) (now § 27-25-303, MCA), and noting that certiorari "cannot be used to correct errors committed in the exercise of jurisdiction," but court will nonetheless "inspect the

record to see whether the [subject body] had jurisdiction," whether the "evidence . . . furnishes any legal and substantial basis for the" subject action under governing law, whether "all . . . proceedings . . . were regular and in conformity with . . . [governing] statutes" and the body thus "kept within it[s]" jurisdiction);[11] *State ex rel. Keiley v. Third Jud. Dist. Ct.*, 58 Mont. 272, 274, 191 P. 519, 520 (1920) ("jurisdiction and the legality of its exercise [are] the only questions subject to review" on review of a contempt judgment); *State ex rel. Malin-Yates Co. v. Yellowstone Cty. Justice Ct.*, 51 Mont. 133, 140, 149 P. 709, 711 (1915) (if court "had jurisdiction to discharge the writ of attachment, an error of judgment, or an error in the exercise of discretion, could not be corrected upon certiorari"—"[b]ut the jurisdiction thus comprehended comprises more than jurisdiction of the parties and subject matter . . . [and] includes as well the *power or authority* to make the particular order in controversy" under the circumstances—emphasis added); *State ex rel. Boston & Mont. Consol. Copper & Silver Mining Co. v. Second. Jud. Dist. Ct.*, 27 Mont. 441, 447, 71 P. 602, 604 (1903) (court order for statutory mining "papers and document" inspection without requisite showing that relevant evidence may

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[11] *See also Williams v. Stillwater Bd. of Cty. Comm'rs*, 2021 MT 159, ¶ 16, 404 Mont. 424, 490 P.3d 1234 ("court reviews the record of the lower tribunal, board, or officer on a writ of review to determine whether the body had jurisdiction and kept within it"—citing *Griffiths*, 57 Mont. at 373, 188 P. at 369); *Cross Guns*, ¶¶ 8-9 and 19 (certiorari review of contempt proceedings is limited to whether the court acted within its jurisdiction *and* the contempt finding is supported by substantial evidence). *Accord Christian v. Sixth Jud. Dist. Ct.*, 2004 MT 1, ¶ 8, 319 Mont. 162, 83 P.3d 811; *Kauffman* ¶ 16; *Schneider v. Ostwald*, 190 Mont. 29, 31-32, 617 P.2d 1293, 1295 (1980).

be found therein and specified time limit for inspection exceeded court's jurisdiction and was thus remediable on certiorari).

¶12 However, regardless of the broader scope of certiorari review beyond threshold subject matter and personal jurisdiction, an abuse of discretion committed by a lower court within the scope of its otherwise lawful authority "is not [an] act without jurisdiction or in excess of jurisdiction," and thus not properly subject to certiorari review under § 27-25-303, MCA. *See State ex rel. Cotter v. Mont. Second Jud. Dist. Ct.*, 34 Mont. 306, 307, 87 P. 615, 615 (1906). Consequently, upon recognition that there would otherwise be no remedy for abuses of discretion committed in non-appealable contempt proceedings, we have long recognized that assertions of error in contempt proceedings that are not subject to review within the limited scope of certiorari review are nonetheless subject to review on supervisory control for an abuse of discretion. *See Jones v. Mont. Nineteenth Jud. Dist. Ct.*, 2001 MT 276, ¶¶ 2 and 15, 307 Mont. 305, 37 P.3d 682 (non-appealable contempt orders are subject to review on certiorari per § 3-1-523, MCA, or on supervisory control to extent not reviewable on certiorari); *Lee*, ¶¶ 24 and 35 (contempt judgments generally subject to certiorari review "where the court acts without jurisdiction" but, "where the court acts *within jurisdiction*," by supervisory control as to whether it acted in an arbitrary or unlawful manner that "prejudic[ed] the substantial rights of a party"—emphasis original); *Buffalo*, 213 Mont. at 284, 691 P.2d at 1345 (certiorari "cannot be used to correct errors with the lower court's jurisdiction" but "erroneous decision[s] made . . . in exercising [existing] jurisdiction" are subject to review on supervisory control); *State ex rel. Anderson*

v. Eighth Jud. Dist. Ct., 188 Mont. 77, 79, 610 P.2d 1183, 1185 (1980) (supervisory control "may be [used] in contempt cases when the relator is barred from using a writ of certiorari"—internal citations omitted); *Middleton*, 85 Mont. at 217-18, 278 P. at 123 (supervisory control available for "correction of manifest error" in contempt proceeding "within [the] jurisdiction" of the court where court "acted . . . arbitrarily" or "unlawfully" in disregard of the substantial rights of the contemnor—contempt "power . . . is not arbitrary" and "must be exercised only . . . with intelligent discretion to serve its purpose . . . under the rules of procedure established" based on substantial evidence); *State ex rel. Zosel v. Mont. Third Jud. Dist. Ct.*, 56 Mont. 578, 582, 185 P. 1112, 1113 (1919) (contempt proceedings subject to review on supervisory control where court acted within jurisdiction in re whether the judgment was "arbitrary and unlawful" or justified by "substantial evidence"); *State ex rel. Coleman v. Mont. Tenth Jud. Dist. Ct.*, 51 Mont. 195, 200, 149 P. 973, 975 (1915) (reviewing indirect criminal contempt judgment on supervisory control); *State ex rel. Sutton v. Mont. Second Jud. Dist. Ct.*, 27 Mont. 128, 132, 69 P. 988, 989-90 (1902) (whether substantial evidence supported indirect civil contempt judgment not reviewable on certiorari but was subject to review by supervisory control "notwithstanding" § 2183, Code Civ. Proc. (1895) (now § 3-1-523, MCA)).[12] Accordingly,

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[12] *Accord In re Marriage of Nevin*, 284 Mont. 468, 471, 945 P.2d 58, 60 (1997) (noting that contempt orders are reviewable on certiorari but then framing the issue as whether court "abuse[d] its discretion" in holding the subject in contempt); *Gillispie*, 279 Mont. at 26, 929 P.2d at 202 (finding no abuse of discretion in ordering incarceration as a coercive contempt sanction until contemnor filed state income tax return); *Doran v. Whitefish City Ct.*, 239 Mont. 94, 98, 779 P.2d 68, 70-71 (1989) (holding that court "acted arbitrarily" in imposing contempt sanction thus resulting in unlawful order in excess of jurisdiction); *Hereford*, 225 Mont. at 285, 731 P.2d at 1325

to the extent a certiorari petition seeks review of a contempt proceeding based on an assertion of error committed *within* the jurisdiction and authority of the lower court, "we will . . . treat the petition . . . as one for an alternative writ . . . [of] supervisory control." *Graveley*, 188 Mont. at 555 and 557, 614 P.2d at 1038 and 1040 (noting that civil contempt findings on the evidentiary "showing made" and the "type, character and extent of" the resulting sanction are all discretionary matters). By tandem operation of certiorari and supervisory control, our scope of review of indirect civil contempt judgments for which there is no remedy of appeal may therefore encompass, as at issue or implicated in a particular case, whether the court: (1) acted within its subject matter and personal jurisdiction; (2) acted within its statutory or common law authority based on substantial evidence; or (3) otherwise abused its discretion in finding the contemnor in contempt or imposing a related coercive sanction resulting in prejudice to the contemnor.[13]

B. October 2021 Indirect Contempt Citation and Coercive Civil Sanction at Issue.

¶13 Here, MDPHHS does not assert that the District Court's October 2021 contempt finding and sanction were lacking in subject matter or personal jurisdiction. Nor does it dispute that it failed to timely comply with the court's August 19, 2021 commitment order,

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(holding that court abused its discretion in holding a bank in contempt for failure to release on statutory notice and demand).

[13] An abuse of discretion occurs if an exercise of discretion is based on a clearly erroneous finding of fact, erroneous interpretation or application of law, or is otherwise arbitrary, or lacking in conscientious judgment, beyond the bounds of reason resulting in substantial injustice. *Larson*, ¶ 16; *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 9, 391 Mont. 422, 419 P.3d 685.

or October 5, 2021 implementing order. MDPHHS asserts, rather, that the District Court erroneously held it in indirect contempt, and imposed a related coercive sanction, for failure to perform an act beyond its then-present ability to perform. MDPHHS further asserts that the court then compounded matters by erroneously imposing a cascading "per diem sanction" in contravention of the limiting language of § 3-1-520, MCA.

¶14 In support of its primary assertion of error, MDPHHS asserts that the District Court erroneously failed to "meaningfully consider" its inability to timely comply with the subject commitment orders based on various referenced practical difficulties and obstacles to immediate compliance as "described" and "explained" *by* its *counsel* at the contempt show cause hearing. However, the court ordered MDPHHS to appear and show cause why it should not be found in contempt for failure to comply with the subject commitment orders. In addition to being a statutory impediment to imposition of a coercive civil fine, any asserted inability to comply with the subject order is also more preliminarily a complete defense to the predicate contempt allegation. *See Gillispie*, 279 Mont. at 25, 929 P.2d at 201; *Murphy*, 99 Mont. at 215, 41 P.2d at 1116; *Scott*, 58 Mont. at 366-68, 192 P. at 831-32; *McLean*, 37 Mont. at 488-89, 97 P. at 842. Consequently, at least in regard to the predicate contempt allegation, and in light of the undisputed fact that MDPHHS failed to timely comply with the subject court orders, the Court's show cause order effectively imposed on MDPHHS the responsive burden of proving any asserted inability to timely comply with the subject commitment orders. As noted by the District Court, however, MDPHHS made no attempt to satisfy its responsive *evidentiary* burden regarding its

undisputed failure to timely comply with the subject orders. "Unsupported arguments of counsel are not evidence and do not establish the existence of the matters that are argued." *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1173 (1997). Nor can or could MDPHHS's back-loaded, after-the-fact affidavit showings in support of its certiorari petition retroactively cure that glaring omission in the first instance.

¶15 Nonetheless, a court still may not impose a coercive civil sanction unless the subject act "is in the power of the contemnor to perform." Section 3-1-520, MCA; *VanSkyock*, ¶ 13. In order to facilitate subsequent review of an indirect contempt adjudication and sanction, courts must generally make supporting findings of fact based on record evidence or other facts not subject to genuine material dispute on proper judicial notice. *Burns*, 83 Mont. at 207, 271 P. at 442 (in re supporting findings of fact). *See also Graveley*, 188 Mont. at 556, 614 P.2d at 1039 (no "jurisdictional defect in the contempt proceeding" initiated on show cause order and judicial notice of referenced facts); M. R. Evid. 201 (judicial notice of facts). Here, while MDPHHS certainly failed to meet its responsive burden of proving its asserted inability to comply with the subject orders, it is equally true, as an even more fundamental matter, that neither party made any evidentiary showing below as to whether MDPHHS was able or unable to comply with the subject orders, nor were there any facts susceptible to judicial notice without proof in either regard. Compounding matters, MDPHHS did in fact assert, albeit without evidentiary support, that it was unable to immediately comply with the subject orders for at least a month or more—a factual assertion, as noted by the court, not in dispute below, and further affirmatively

acknowledged by the State on subsequent review here. Whether for purposes of supporting its threshold contempt finding or its resulting coercive civil sanction, the court's finding of fact, denominated by the court as a conclusion of law, that "it is undisputed that [MDPHHS] has the *power* to admit" Hanway "*now*" (emphasis original) was not supported by substantial evidence and was thus clearly erroneous. Therefore, whether viewed as an act beyond the court's authority without substantial evidence for purposes of certiorari review, or an abuse of discretion within the court's authority for purposes of supervisory control, we hold that the District Court's threshold contempt finding, and resulting imposition of a coercive civil sanction, were both erroneously based on a clearly erroneous finding of material fact.

¶16 As to MDPHHS's second assertion of error, upon a finding on hearing of indirect contempt, the court may impose a coercive civil sanction "*not to exceed* $500" to attempt "to compel the contemnor" to perform the subject act. Section 3-1-520, MCA (emphasis added). *See also* § 3-1-501(3), MCA (defining civil contempt). We have previously construed the limiting language of § 3-1-501(3), MCA, to preclude imposition of a continuing or cascading per-day fine "for each day past" the court-imposed deadline for performance of the subject act. *Dewitt*, ¶¶ 13 and 20. Thus, whether viewed as an act beyond the court's authority for purposes of certiorari review, or an abuse of discretion within the court's authority for purposes of supervisory control, we hold that the District Court's imposition of a continuing or cascading per-day fine was further erroneous in excess of the limiting language of § 3-1-501(3), MCA.

¶17 IT IS THEREFORE ORDERED that MDPHHS's petition for extraordinary review, filed in this matter on November 9, 2021, is hereby granted and thus the subject Contempt Order, including judgment of contempt and coercive sanction, of the Montana Eighth Judicial District Court in the underlying matter of *State v Hanway*, Cause No. CDC-21-052, is hereby REVERSED. The Clerk is directed to provide immediate notice of this Opinion and Order to counsel of record for MDPHHS and the State, as well as the District Court in the underlying matter of *State v. Hanway*, Cause No. CDC-21-052, Honorable John A. Kutzman, presiding.

DATED this 18th day of January, 2022.

Justice

We concur:

Chief Justice

Justices

Chief Justice Mike McGrath, concurring.

¶18 It appears that much of this conflict could and should have been resolved by the State taking the alternative path of filing a civil commitment proceeding or pursuing other alternatives available under the provisions of Tile 53, MCA.

¶19 Persisting with criminal charges against a long-term severely mentally ill individual seems to have been a fool's errand lacking benefit to anyone, including the detention officer, the community, the Department, the courts, and especially Ms. Hanway. The criminal procedure statutes regarding unfit-to-proceed defendants, Title 46, chapter 14, part 2, MCA, are complex and confusing, and they don't offer a reasonable path to follow in many cases. *See State v. Mosby*, 2022 MT 5, 407 Mont. 143, ___ P.3d ___. In cases involving certain mental illnesses that do not respond to short-term treatments, criminal charges are often not a viable long-term option.

¶20 I encourage the Legislature to take a hard look at these statutes and the lack of appropriate alternatives to incarceration that the Department and local governments face in addressing the needs of the long-term mentally ill.

¶21 I concur with the Court's Opinion and Order.

Chief Justice