IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 13-0020

STATE OF MONTANA,

Plaintiff and Appellee,

v.

R.S.A.,

Defendant and Appellant.

AMICUS CURIAE BRIEF OF THE ACLU OF MONTANA FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps III, Presiding

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I. INTRODUCTION

A. Preliminary Statement

ACLU of Montana Foundation respectfully submits this brief as *amicus curiae* in support of R.S.A., Defendant-Appellant.

B. Interest of *Amicus Curiae*

The ACLU of Montana Foundation ("ACLU") is a non-profit, nonpartisan corporation, whose mission is to support and protect civil liberties in the State of Montana. ACLU has a long history of advocating for the due process rights for the accused in a criminal case, based on the Constitutions of the United States and Montana, especially concerning the rights of mentally ill individuals in the criminal justice system. The ACLU is currently litigating issues in federal district court in Montana concerning the treatment of mentally ill individuals by the Montana Department of Corrections. *See Disability Rights Montana v. Opper, et al*, CV 14-25-BU-SEH. The ACLU regularly appears as *amicus* before this Court, and believes that its extensive experience in advocating for due process rights in criminal proceedings will assist the Court in reaching a just decision.

II. BACKGROUND

ACLU refers the Court to the briefs of the parties for the background facts. ACLU believes that the facts pertaining to the issues addressed in this brief are not in dispute: Arrested for robbery, R.S.A., who had long-documented history of

mental illness and interaction with law enforcement, was the subject of a fitness-to-proceed evaluation at Montana State Hospital ("MSH"). The State requested a hearing to determine whether, at the request of MSH, R.S.A. should be transfered to the county jail for "behavior modification." No one made arrangements to secure the presence of R.S.A. at that hearing. The district court ordered R.S.A.'s return to the jail to be held in solitary confinement. That hearing led ultimately to R.S.A.'s incarceration in solitary confinement for a period of approximately five months. During that time, R.S.A. was subjected to a litany of restrictions, deprivation and harsh treatment in carrying out the Behavior Modification Program (BMP). Depriving R.S.A. of medication for his mental illness, the lack of contact with the outside world, and the otherwise extreme conditions of his confinement did not generate positive results. It is undisputed that R.S.A. repeatedly engaged in self destructive, threatening, or mentally unstable behavior, including a nearly successful attempt to chew through his own artery.

R.S.A. was convicted of robbery in a jury trial and sentenced to the Montana State Prison. He has appealed his conviction.

III. SUMMARY OF THE ARGUMENT

A. R.S.A., a mentally ill person charged with stealing a box of tools from a hardware store in Missoula, was subjected to unconstitutional pre-conviction punishment when for nearly five months he was held in solitary confinement, with

no bed, no toilet, deprived of his medication, and with no contact with the outside world.

B. R.S.A.'s Constitutional right to be personally present at all critical stages of the proceedings was violated when he was excluded from a hearing that caused his transfer from MSH, where he was ostensibly undergoing a mental fitness evaluation, to solitary confinement in the county jail, for the purpose of subjecting him to a behavioral modification plan.

IV. ARGUMENT

A. Standard of Review

Impermissible pre-conviction punishment – The Court's review of constitutional due process issues in a criminal case is plenary. *City of Billings v. Nelson*, 214 MT 98, ¶ 16, 374 Mont. 444, 322 P.2d 1039, *citing State v. Dugan*, 2013 MT 38, ¶ 14, 369 Mont. 39, 303 P.3d 755.

Right to be present at critical stages – As a constitutional issue, the Court exercises plenary review over alleged violations of a criminal defendant's right to be personally present at any critical stage in the proceedings. *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934, *citing State v. Berosik*, 2009 MT 260, ¶ 27, 352 Mont. 16, 214 P.3d 776.

B. R.S.A. was subjected to pretrial punishment without due process of law.

To punish a defendant prior to an adjudication of guilt is a violation of his right to due process. *City of Billings v. Layzell*, 242 Mont. 145, 150, 789 P.2d. 221, 224 (1990), *citing Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 1872, 60 L.Ed.2d 447, 466 (1979). In *Bell*, the U.S. Supreme Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 427. The Court said: "[T]he Government concededly may detain [a pretrial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Bell*, 441 U.S. at 536-37.

Here, R.S.A. was held before his conviction in solitary confinement not just as a means to deal with a difficult inmate, but specifically to impose a Behavior Modification Program" ("BMP") at the request of the Montana State Hospital. The range of measures used by the State against R.S.A. in the Missoula County jail appears to be undisputed and well documented, leaving a sole question for the Court's plenary review - did the BMP and other measures used on R.S.A. cross the line into impermissible punishment? *Bell* reaffirmed an earlier case that "provided useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense

of that word." *Bell*, 441 U.S. at 537, *quoting* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-16, 186, 83 S.Ct. 554, 567-568, 576, 9 L.Ed.2d 644 (1963) . The *Bell* and *Kennedy* "guideposts" evaluate whether the conditions imposed on the prisoner were reasonably related to a legitimate governmental purpose, or instead were imposed for the purpose of punishment (or were excessive even if related to a legitimate purpose). More specifically, this is determined by evaluating whether the restriction or sanction:

- involves an affirmative disability or restraint
- has historically been regarded as a punishment
- whether it comes into play only on a finding of scienter
- whether its operation will promote the traditional aims of punishment (retribution and deterrence)
- whether the behavior to which it applies is already a crime
- whether an alternative purpose to which it may rationally be connected is assignable for it
- whether it appears excessive in relation to the alternative purpose assigned

Bell, 441 U.S. at 537-38 and *Kennedy*, 372 U.S. at 168-69.

The record shows that the very reason R.S.A. was restrained and subjected to isolation and deprivation was to punish him until he changed his behavior. At the April 18, 2012 hearing, the state psychiatrist Dr. Hill described R.S.A.'s

situation as a "behavior problem" that should be addressed with "tools like Tasers, pepper spray, handcuffs, chair restraint, leg irons." (Tr. 15). Thus, the *Bell* factors can be quickly ticked off as universally pointing to imposition of harsh treatment as punishment.

In any event, the *Bell* analysis is a frame of reference against Montana's more stringent protections against violating individual dignity:

> Montana's Constitution also recognizes that all human beings have the right to individual dignity. Mont. Const. art. II § 4. The U.S. Constitution does not expressly provide for the right to individual dignity. We read together Montana's constitutional right to individual dignity and the right to be free from cruel and unusual punishment when both constitutional provisions are implicated "to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution."

Wilson v. State, 2010 MT 278, ¶ 31, 358 Mont. 438, 249 P.3d 28, *quoting Walker v. State*, 2003 MT 134, ¶ ¶ 73, 75, 316 Mont. 103, 68 P.3d 872.

Bell recognizes that "[l]oss of freedom of choice and privacy are inherent incidents of confinement," and the fact that pretrial detention "interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Bell*, 441 U.S. at 537. This is not a case, however, where restraints were employed just because the defendant was a difficult prisoner. Here, the state disregarded R.S.A.'s mental illness and transferred him from the state hospital so that "[t]asers, pepper spray, handcuffs,

chair restraint, leg irons" could be used to force R.SA. "to understand that those behaviors are not acceptable." (Tr. 15). Those measures amount to punishment because, *inter alia*, they fall squarely within the *Bell* guidepost of promoting the traditional aims of punishment – retribution and deterrence.

It is abundantly clear in this case that the harsh restrictions and conditions forced upon R.S.A. crossed the line from a legitimate government interest into straightforward punishment. In sum, R.S.A. had numerous psychological examinations over the years including two admissions to MSH in 2008 and two in 2001, that identified multiple mental and social disorders. (D.C. Doc. 57 at 11; MSH Soc. Rpt. at 9-38.) Nevertheless, R.S.A. was discharged from MSH and transferred to the county jail for the very purpose of subjecting him to harsh treatment the state hospital could not legally impose. Objective, third-party experts on the treatment of prisoners would never support such a plan. For example, the Court may look to the "Treatment of Prisoners" edition of the American Bar Association's Criminal Justice Standards. The ABA has published a series of "ABA Criminal Justice Standards" covering various topics related to criminal procedure and criminal law. In 2010, the ABA House of Delegates approved the final version of a five-year effort to publish the Treatment of Prisoners' edition. *See*

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjus

t_standards_treatmentprisoners.html (accessed Friday, September 05, 2014 3:48:49 PM). Drawing on the expertise of many participants, the purpose of the ABA Standards is to:

> ...set out principles and functional parameters to guide the operation of American jails and prisons, in order to help the nation's criminal justice policy-makers, correctional administrators, legislators, judges, and advocates protect prisoner's rights while promoting the safety, humaneness, and effectiveness of our correctional facilities.

Id. at p. 1 (excerpt appended hereto as App. A). The full text of all Standards is available at the website listed above. For example, Standard 23.3.2 recommends that:

> Correctional agencies and facilities should provide housing options with conditions of confinement appropriate to meet the protection, programming, and treatment needs of special types of prisoners, including female prisoners, prisoners who have physical or mental disabilities or communicable diseases, and prisoners who are under the age of eighteen or geriatric.

Id. at 70 (App. A). There appears to be little doubt that R.S.A. falls into the category of "special type of prisoner," both from the standpoint of his mental illness and his conduct while incarcerated. Employing a "behavior modification program" in the county jail to deal with a mentally ill prisoner is completely at odds with the ABA Standards, including (among many others): Standard 23-1.2 (Treatment of prisoners); Standard 23-2.8 (Segregated housing and mental health); Standard 23-3.7 (Restrictions relating to programming and privileges); Standard 23-5.9 (Use of restraint mechanisms and techniques); Standard 23-6.5 (Continuity

of care); Standard 23-6.15 (Involuntary mental health treatment and transfer); Standard 23-7.1 (Respect for prisoners); and Standard 23-6.15 (Involuntary mental health treatment and transfer).

R.S.A.'s litany of aggressive and self-destructive behavior provides dramatic proof of how ill advised the BMP was. It more than sustains the burden on R.S.A. to show that the State "consciously disregarded a substantial risk of serious harm to [R.S.A.'s] health or safety." *Wilson*, ¶ 32, *quoting Walker v. State*, 2003 MT 134, ¶ 56, 316 Mont. 103, 68 P.3d 872. As *Wilson* notes, the State deprives mentally ill inmates of the basic necessities of human existence when the conditions imposed "inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity." *Id.*, *quoting Walker*, ¶ 76. Evidence that R.S.A. gnawed at the vein in his own arm in a suicide bid is proof enough.

C. R.S.A. was improperly excluded from a critical stage of the case.

The United States and Montana Constitutions both contain the fundamental right to be personally present at any critical stage in the proceedings. *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934. A "critical stage" is any step in the proceedings with the potential for substantial prejudice to the defendant. *Id.* at ¶ 21. This Court recognizes that on a question of whether defendant was unconstitutionally excluded, "it will ipso facto be the State as the prevailing party in an appeal of this nature who has "benefitted" from the error."

Id. at ¶ 45. Thus, the State must "demonstrate that there is no reasonable possibility that the violation prejudiced the defendant; in other words, the State will carry the burden of persuading the Court, based upon the record before us and given the interests the right of presence was designed to protect, that the violation was harmless." *Id.* That will be a difficult task in this case. The district court conducted a hearing without R.S.A.'s knowledge or presence, resulting in his transfer from MSH to the Missoula County jail for a behavior modification program.

The State cannot contend that R.S.A. waived his right to be present. He was never given that choice. The defendant must be given an explanation of that right on the record. *State v. Bird,* 2002 MT 2, ¶ 27, 308 Mont. 75, 43 P.3d 266. In this case, apparently no one explained to R.S.A. that he had the right to be present at the hearing on whether his mental health evaluation should be terminated and he should be placed in solitary confinement. In *Bird*, the Court held that for an effective waiver, the district court must "explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial... and that if a defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right." *Id.* at ¶ 38.

While the Court has not had the opportunity to rule on whether a hearing of

the type at issue in this case is a critical stage, its direct impact on R.S.A.'s constitutional rights makes it so. Given R.S.A.'s history of mental illness and the severe treatment he would receive because of the hearing, R.S.A.'s exclusion meant that the potential for prejudice was great, and in fact, did cause actual prejudice. It is true that the hearing did not involve an evidentiary question or the jury panel, like *State v. Charlie* or *State v. Berosik*, respectively. However, the hearing from which R.S.A. was excluded no less impacted his fundamental due process rights because it determined that instead of continuing with a mental health evaluation directly relating to his fitness to proceed and the possibility of a mental state defense to the charge, R.S.A. was imprisoned in solitary confinement until trial.

R.S.A.'s exclusion also falls within the parameters the Court recently reiterated in *State v. Reim*, 2014 MT 108, 374 Mont. 487, 323 P.3d 880: The defendant's "right to be present attaches whenever the defendant's presence 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Id.* at ¶ 36, *quoting State v. Charlie*, ¶ 40. In addition, *Reim* identified legitimate broader policy concerns about excluding a defendant from court proceedings, and those are squarely implicated here: "The right to physical presence allows a criminal defendant to participate in the preservation of his or her rights and safeguards the public's interest in a fair and orderly judicial system." *Id.*

In R.S.A.'s case, a fair and orderly justice system took a back seat to punishing a mentally ill defendant who presented difficult detention issues.

Moreover, the record reflects that the state's psychiatrist, Dr. Hill, participated in the transfer hearing by phone. (Tr. 13). Yet the record shows no effort to allow R.S.A. to participate. If the trial court had the opportunity to personally observe, or at least talk to R.S.A, it is possible the result would have been different, especially considering Judge Deschamps' expressed concern about R.S.A.'s mental condition and fitness to proceed. (Tr. 9). This scenario emphasizes the importance of R.S.A.'s fundamental right under the Montana Constitution "to appear and defend *in person*." Mont. Const. Art. 2, § 24 (emphasis added).

V. CONCLUSION

R.S.A.'s fundamental rights under the Montana and U.S. Constitution were violated when he was subjected to months of punishment ("behavior modification") before trial, and when he was excluded from the hearing in which that decision was reached.

DATED this 8 day of September, 2014.

for Mark L. Stermitz
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CERTIFICATE OF COMPLIANCE

I hereby certify that this *Amicus* Brief confirms with the requirements articulated in Rule 11(4) of the Montana Rules of Appellate Procedure and does not exceed 5,000 words excluding tables and certificates; is double spaced except lengthy quotations; is printed in a proportionally spaced Times New Roman text typefont of 14 points; and has left, right, top, and bottom margins of one inch.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, a true and correct copy of this Brief of *Amicus Curiae* was served to the following individuals via first-class mail and email.

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