IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 12-0014

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT THOMAS YARLOTT,

Defendant and Appellant.

On Appeal from Montana Thirteenth Judicial District Court,
Yellowstone County- Cause No. DC 10-0519
The Honorable Gregory Todd

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MONTANA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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IDENTITY AND INTEREST OF AMICI CURIAE

The ACLU of Montana is a non-profit organization with a long history of interest and support for the right of indigent defendants to receive adequate legal representation as guaranteed by the Six and Fourteenth Amendments of the U.S. Constitution, and Article II, §§4, 17 and 24 of the Montana Constitution.

INTRODUCTION AND BACKGROUND

Prior to obtaining a court-appointed public defender, a criminal defendant must fill out an Application for Court-Appointed Counsel.[1] This application requires detailed reporting of income, assets, expenses and debts. The application must be signed under oath by the defendant that the information set forth is true, and witnessed. The Office of the Public Defender ("OPD") has a trained staff person, an Indigent Determination Specialist ("IDS"), who assesses the applications to determine whether individuals meet the threshold.[2] A defendant qualifies for court appointed counsel if the applicant's income falls within the Gross Income Guidelines, which are based on the federal poverty level, or if "retaining private counsel would result in substantial hardship to the application or

[1] The Application for Court-Appointed Counsel is publically available at http://www.publicdefender.mt.gov/forms.asp.

[2] This procedure is outlined in Office of the State Public Defender Administrative Policies, Policy 105 Determination of Indigence, available at http://www.publicdefender.mt.gov/forms/pdf/105-IndigencyPolicy.pdf.

his/her household." [3] In the case of substantial hardship, the IDS reviews disposable income and assets, as well as the crime the defendant has been charged with. The IDS verifies the information set forth in the application in all cases where representation is premised on substantial hardship. The IDS verifies the information of every tenth applicant seeking qualification based on income guidelines.[4]

Given this comprehensive verification system prior to the appointment of counsel, it is safe to presume that criminal defendants represented by a public defender are **unable** to pay for legal services. Despite this obvious practical reality, multiple provisions of the Montana Code Annotated require criminal defendants to pay fines and costs as an integral part of their sentence and incarceration. Some examples include:

- M.C.A. 7-32-2245: "An inmate found by the sentencing court to have the **ability to pay** is liable for the costs, including actual medical costs, of the inmate's confinement in a detention center."
- M.C.A. 46-22-1022(2): "The [Department of Corrections] may assess all or part of the costs of such services to a parolee in accordance with the parolee's **ability to pay** for them."

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[3] *Id.*
[4] *Id.*

- M.C.A. 45-6-101: "A person convicted of criminal mischief must be ordered to make restitution in an amount and manner to be set by the court. The court shall determine the manner and amount of restitution after full consideration of the convicted person's ability to pay the restitution."
- M.C.A. 46-18-236: Setting forth set statutory monetary fees for conviction of a misdemeanor or felony, and stating "[i]f a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is **unable to pay** within a reasonable time, the court shall waive payment of the charge imposed by this section."

Similar to these listed examples, the two statutes at issue in this case also require payment of fees and costs by indigent defendants after a finding of ability to pay. Mont. Code Ann. 46-8-113 directs district court judges to determine whether a convicted defendant should pay set amounts as "costs of counsel," including $250.00 for one or more misdemeanors and $800.00 for one or more felony charges. Mont. Code Ann. 46-8-113(1). This statute further provides "if the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial. The office of state public defender shall file with the court a statement of the hours spent on the case and the costs and expenses incurred for the trial." M.C.A. 46-8-113(1)(b). Subsection 3 requires, in a proceeding to determine whether the

defendant "is or will be able" to pay the costs of counsel, "the court shall question the defendant as to the defendant's ability to pay those costs . . ." Section 4 states that a court "may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay the costs imposed . . . In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose."

Mont. Code Ann. 46-8-113 requires that OPD file a statement of hours, costs and expenses, but does not mandate that such statement be filed **prior** to a finding that the defendant has the ability to pay. Indeed, in this case, the defendant was found to have the ability to pay prior to the court having receiving any statement regarding what OPD's costs and expenses actually are. Similarly, the Court found the defendant responsible for jury costs prior to a determination of the dollar amount of those costs.

Similarly, the second statute at issue, Mont. Code Ann. 46-18-232 provides "[a] court may require a convicted defendant in a felony or misdemeanor case to pay costs, as defined in 25-10-201, plus costs of jury service, costs of prosecution, and the cost of pretrial, probation, or community supervision as part of the defendant's sentence. . . (2) The court may not sentence a defendant to pay costs unless the defendant **is or will be able to pay them**." This statute directs district

courts to take into account "the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." M.C.A. 46-18-232(2).

When read together, these statutes establish a criminal justice system in which many thousands of dollars can be assessed upon a criminal defendant whose indigency has already been established. The common thread between all of these statutes is that these costs can **only** be assessed after a finding that, based on relevant evidence, the defendant has the ability to pay. Given the constitutional importance of right to counsel and the practical reality of most indigent defendants' inability to pay, the integrity of the assessment process is crucial to ensure constitutional viability. Without a meaningful inquiry into ability to pay based on relevant evidence of income, assets and liability **after** the dollar amount to be paid is clearly established, **and after** notice and a hearing, a defendant's right to counsel, due process, and a jury trial are infringed based on established case law.

Despite the fact that this Court has repeatedly admonished lower courts for failure to make meaningful findings of defendants' ability to pay, this constitutional problem persists. *See State v. J.C.*, 2000 MT 290, 302 Mont. 265, 14 P.3d 480 (2000) (district court erred in sentencing criminal defendant to pay costs of prosecution without notice and hearing); *State v. Blackwell*, 2001 MT 198, 306 Mont. 267, 32 P.3d 771 (2001) (district court erred in assessing jury-related costs

on a criminal defendant without a hearing on ability to pay); *State v. McLeod*, 2002 MT 358, 313 Mont. 358, 61 P.3d 126, ¶34 (2002) (the sentencing transcript "does not demonstrate a serious inquiry or separate determination, as required by §46-18-231(3), MCA, into the ability of McLeod to pay the fine nor inquiry into his financial resources or the nature of the burden that the $1,000 fine would impose"); *State v. Rudolph*, 2005 MT 41, 326 Mont. 132, 107 P.3f 4896 (2005) (overruled on other grounds) (reversing sentence imposing court appointed attorney costs where district court did not consider defendant's financial resources); *State v. Hirt*, 2005 MT 285, 329 Mont. 267, 124 P.3d 147 (2005) (reversing sentencing including restitution because court articulated no basis for its determination that defendant would have future ability to pay); *State v. Starr*, 2007 MT 238, 339 Mont. 208, 169 P.3d 697 (2007) (reversing and remanding portion of sentencing concerning attorney's fees because court included jury service costs in sentence without knowing what those costs were); *State v. Moore*, 2012 MT 95 (reversing portion of sentence and remanding for determination as to whether defendant has ability to pay counsel, prosecution and jury trial costs).

In Montana, the lack of clear guidelines and procedures set forth to determine ability to pay has resulted in a systematic failure in application of these statutes. Criminal defendants are not uniformly being informed they may have to pay these costs, prosecutors are assuming ability to pay in plea offers that are

offered as "take it or leave it," and district courts are determining a defendant has the ability to pay without knowing the actual amount of costs to be assessed, without notice and a hearing, and in the face of unrebutted evidence that the defendant in fact cannot pay. At a certain point, legislation that is being systematically misapplied must be analyzed with honest reflection – the statutory process is simply not working, and criminal defendants' constitutional rights and protections are being abused in the process. In Montana, M.C.A. 46-8-113 and 46-18-232 have reached this critical juncture. These statutes' rampant history of arbitrary and non-uniform application can only be remedied by the statute itself including more guidelines. Without such guidelines, in the face of the systemic problems arising from these statutes, they are unconstitutionally void as perpetuating and inviting arbitrary application.

ARGUMENT

I. M.C.A. 46-18-232 and M.C.A. 46-8-113 are impermissibly vague for lack of guidelines regarding procedure and factors to be considered in determining a criminal defendant's ability to pay.

The U.S. Supreme Court and this Court have adopted the following well-established test in establishing whether a statute is unconstitutional by virtue of vagueness.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws

> offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. **Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.**

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (a statute can be unconstitutionally vague "if it authorizes or even encourages arbitrary and discriminatory enforcement"); *ABN 51st St. Partners v. City of New York*, 724 F.Supp. 1142, 1147 (S.D.N.Y. 1989) ("[t]he purposes of the vagueness doctrine are to assure fair warning of regulations and to prevent unrestricted delegations of power which facilitate arbitrary and discriminatory enforcement"); *Farrell v. Burke*, 449 F.3d 470, 482 (2d. Cir. 2006) ("[u]ndue vagueness in the law is unfair to the citizens who must rely on it and gives to much discretion to the officials who enforce it. No person should have to

stake his or her liberty on another person's whims or aesthetic judgment"); *Cunney v. Bd. Of Trustees of Vill. Of Grandview, N.Y.*, 660 F.3d 612, 621 (2d Cir. 2011) (finding statute unconstitutionally vague to encouraging arbitrary and discriminatory enforcement).

This Court espoused this test in *Whitefish v. O'Shaugnessy*, 216 Mont. 433, 704 P.2d 1021 (1985). In *State v. Stanko*, 1998 MT 321, 292 Mont. 192, 974 P.2d 1132 (1998), this Court adopted the U.S. Supreme Court's further clarification of the rule that statutes are vague where they encourage arbitrary enforcement, which states as follows:

> Although the doctrine focuses on both actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'
>
> . . .
>
> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and

subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) and *Grayned*, 408 U.S. at 108-09. Like the plaintiff in *Stanko*, who this Court determined was impermissibly subject to a vague statute, criminal defendants being appointed court counsel do not uniformly receive notice of the costs and fees that may be assessed against them, have no way of knowing what amount of fees and costs will ultimately be assessed, and are not receiving notice and a hearing of their ability to pay. As such, the statutes setting forth this assessment procedure are constitutionally vague and therefore, impermissible.

Mont. Code Ann. 46-18-232 and 46-8-113 do not provide explicit standards for the public defenders, prosecutors, and district courts that must apply them. M.C.A. 46-18-113 does not mandate a uniform approach to informing criminal defendants of the potential costs that will be incurred if they utilize a public defender or choose to exercise their right to a jury trial. Some defendants will be informed upon their first discussion with their public defender, and others will likely not be informed until their sentencing hearing in which the costs are imposed as part of their sentence. During the plea bargain process, which is how the majority of cases are resolved, there is no clear or uniform procedure for whether fees are built into plea offers or not. Some prosecutors assume an ability to pay

and build public defender fees into the offer without a clear understanding by the defendant that the offer includes what is essentially a waiver of the defendants' ability to argue he is unable to pay.

More often than not, as in this case, defendants are not provided notice and a hearing regarding their ability to pay. As in this case, defendants are often sentenced to pay costs of defense and jury service without any determination of what those costs will be. Commonly, defendants' ability to pay is addressed as an afterthought in a sentencing hearing without prior notice to the defendant, and without giving the defendant the ability to present evidence, without knowledge of the monetary amount of the costs assessed. Because of M.C.A. 46-8-113's vagueness and lack of guidelines, it is being applied in an arbitrary non-uniform way throughout our state to the detriment of criminal defendants' basic constitutional rights to counsel and due process.

M.C.A. 46-18-232 suffers from more blatantly unconstitutional vagueness. It simply states that a court cannot direct a defendant to pay certain costs "unless the defendant is or will be able to pay them." It then states "in determining the amount and method payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay the costs, and the nature of the burden that payment of costs will impose." Essentially, this statute directs district courts to somehow see into an indigent defendant's

future and determine whether he will be able to pay an unknown amount of costs, considering only the defendant's financial resources (excluding liabilities or other financial obligations) and the "nature of the burden" the costs will impose. To determine whether a defendant will be able to pay, a district court is directed to determine "the future ability of the defendant to pay." This is not guidance, but simply a tautology.

The "future ability" of a criminal defendant who received court appointed counsel to pay is usually quite limited. He already qualified for a public defender based on his indigency. If convicted, he is likely going to prison, a treatment center, a pre-release center, or supervised community placement. His ability to make any money, let alone pay prosecutor, defense and jury trial costs, is quite unlikely. Despite this obvious practical reality, these costs are being assessed with no clear guidelines or procedures on how to conduct this assessment. Given the high likelihood that a convicted defendant utilizing court appointed counsel will not be able to pay, a detailed analysis prior to a finding of a future ability to pay is essential. However, the abundant case law in which this Court determined a district court failed to make a finding of ability to pay, discussed above, evidences a systematic failure in the application of these ability to pay cost assessment statutes. Where, as here, there is a systemic failure in application, rather than send

cases back to the district court year after year, this Court should identify the root of the problem, which is the statute itself.

These statutes are constitutional if and only if a meaningful assessment of a defendants' ability to pay is uniformly conducted after notice and a hearing. Without a meaningful assessment of ability to pay, it is well established that cost assessments chill a defendant's right to counsel and right to a jury trial. All the state and federal case law that has upheld similar statutes assumes that the statutes are being applied as written. For example, in *Moore*, 2012 MT 95 this Court recently held "[w]ithout further evidence indicating his ability to pay, to require [defendant] to pay those jury costs would encroach upon his 'inviolate' constitutional right to a jury trial." *Id.* at ¶20. As explained by another state court:

> The possibility of being subjected at the close of trial to an arbitrary determination as to ability to pay for the services of appointed counsel, without any of the protections afforded by a hearing comporting with due process, may lead persons truly indigent and therefore eligible for free counsel to choose to forgo counsel initially.

Com. v. Opara, 240 Pa. Super. 511, 362 A.2d 305, 312-13 (1976).

The U.S. District Court for Kansas came to a similar conclusion in *Simmons v. James*, 467 F.Supp. 1068 (1979):

> Where neither the order nor the proceeding out of which it arose contains assurance that only those able to repay will ever be required to there is a real danger that some may choose to forgo their right to appointed counsel. This being so, such an order is invalid in that it unnecessarily infringes on the right to counsel. Action by the state which unnecessarily chills the exercise of a constitutional right is invalid.

Id. at 1078.

The U.S. District for Oregon also concluded:

> Indigent defendants may not hesitate to exercise their right to counsel **if they know repayment will be ordered only if there is ability to repay without hardship**. But here, an indigent defendant must promise repayment, regardless of ability to repay, at the time of request for counsel. Rather than commit to an unrestricted agreement to repay, an indigent defendant may simply decline representation.

Fitch v. Belshaw, 581 F.Supp. 273, 277 (1984).

Many courts blindly rely on the U.S. Supreme Court's decision in *Fuller v. Oregon*, 417 US 40 (1974), to justify reimbursement statutes. However, *Fuller* assumed lower courts were conducting meaningful inquiries into defendants' ability to pay after notice and a hearing. *See Simmons*, 467 F.Supp. at 1077-78

("[u]nderlying the Fuller decision is a concern that indigent defendants might be discouraged from utilizing court-appointed counsel where repayment for such services could later be required without regard to the defendant's particular circumstances"); *Opara*, 240 Pa. Super. at 313. Because there is a systemic failure in application of our reimbursement statutes in Montana, the *Fuller* holding does not apply. Regardless, *Fuller* does **not** allow assessments on criminal defendants without due process guarantees and without a meaningful inquiry into ability to pay.

Several examples exist of what these statutes could look like to guarantee they are not applied in an arbitrary and discriminatory manner. For example, M.C.A. 53-1-406, which governs the required investigation before the Department of Public Health and Human Services can find an institutionalized individual's ability to pay his costs of care, sets forth a long list of detailed documents regarding income, assets and liabilities that must be considered. The presence of these specific guidelines in this statutory scheme highlights the absence of any such factors in the statutes at issue here.

Similarly, federal courts, including the U.S. District Court for Montana, have construed 18 U.S.C. §3006A(f), which allows a U.S. magistrate or district court judge to direct a defendant to pay the costs of his court appointed lawyer, to require "full inquiry into his actual ability to bear those costs." *U.S. v. Fransden*,

2008 WL 5348235 (D. Mont. Dec. 1, 2008) (unreported decision). *Fransden* requires the ability to pay determination to be made "in light of the liquidity of the individual's finances, his personal and familial needs, or changes in his financial circumstances." *Id.* at *2. This includes a hearing in which a defendant testifies specifically regarding his ability to pay, presents evidence, and detailed financial information is evaluated. *See e.g., id.*

Not only are M.C.A. 46-8-113 and 46-18-232 impermissibly vague for lack of any guidelines that must be utilizes in a determination of ability to pay, they are also vague as to what exactly needs to be paid. Mont. Code Ann. 46-8-113(1)(b) specifies that the defendant shall pay the "costs incurred by [OPD]," which by its plain language would not include an hourly rate for the public defender. However, it then requires public defenders to file a statement of hours spent on the case. It is elementary that "costs" does not include hourly fees. *C.R. Weaver v. Advanced Refrigeration*, 2011 MT 174, 361 Mont. 233, 257 P.3d 378, ¶24 (2011) ("[c]osts do not include attorney fees"). As such, according to the plain language of M.C.A. 46-8-113, defendants should not be charged hourly fees of the public defender assigned to their case.

II. Mont. Code Ann. 46-8-113 and 46-18-232 violate criminal defendants' right to due process.

This Court has repeatedly affirmed the absolute right to due process as follows:

> Under the due process guarantee, every person must be given an opportunity to explain, argue and rebut any information that may lead to a deprivation of life, liberty, or property. . . . Concerning due process at sentencing hearings, we have held that "[i]t is not the duration or severity of this sentence that renders it constitutionally invalid, it is the careless or designed pronouncement of a sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by services which counsel would provide, that renders the proceeding lacking in due process."

State v. Webb, 325 Mont. 317, 106 P.3d 521, ¶19 (2005) (citations omitted); *State v. McLeod*, 2002 MT 348, 313 Mont. 358, 61 P.3d 126, ¶¶18, 19 (2002).

It is well established that "proceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing." *People v. Poindexter*, 210 Cal.App.3d 803 (1989). Other courts have concluded that where, as here, there is a systematic practice of inadequate assessments of a defendant's ability to pay, due process is violated. For example, in *Fitch*, 581 F.Supp. 273, a federal court concluded:

> The risk of an erroneous deprivation of an indigent defendant's property and liberty is substantial in light of the statute's failure to

provide notice and hearing. The facts presented by these plaintiffs, as well as the State's forms, indicate a practice of summary assessments made with little or no consideration of a defendant's ability to repay without substantial hardship.

The statute provides neither notice nor hearing. There is no evidence that the state's practice is to supplement the statute with the necessary elements of due process. As a result, indigent defendants are deprived of liberty and property in violation of the Fourteenth Amendment Due process Clause.

Id. at 278. *See also Poindexter*, 210 Cal.App.3d at 810 (finding due process required proper notice to defendant of hearing regarding fee assessment and ability to call witnesses and confront adverse witnesses).

Defendants' due process rights are violated at each step during the assessment process. First, there is no uniform method of informing defendant of potential assessments. Some public defenders inform criminal defendants of potential assessments at the outset of representation, and some do not. Further, there is no uniform approach taken by prosecutors regarding whether the statutory fees are built into plea offers, which are often presented as take it or leave it offers. Often, with no ability to present evidence on ability to pay, a defendant will take a plea offer with the fees built into the offers. This impermissibly requires a

defendant to waive his right to present evidence on ability to pay, often times without even knowing it. If a defendant is ultimately sentenced, these statutes then allow a court to assess costs without having first determined what those costs will be. How can a meaningful inquiry be made into ability to pay without first knowing the amount assessed?

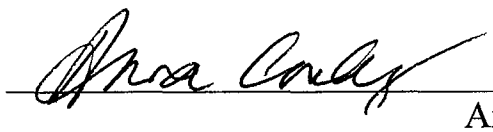
This Court and federal courts have relied upon the fact that a defendant can petition the court for remission of payment of costs supporting the idea that ability to pay assessments comport with due process. M.C.A. 46-8-113(5), M.C.A. 46-18-232(3). Mont. Code Ann. 46-18-232(3) allows a defendant to exercise this right only if the defendant "is not in default in the payment." This condition impermissibly infringes on criminal defendant's right to due process. Despite this obvious constitutional infirmity, this petition right is nothing but a hollow promise. After a criminal defendant is sentenced, his attorney-client relationship with his public defender is over. An established indigent criminal defendant will not be able to afford retaining an attorney to petition an assessment of costs. As such, this petition right will rarely, if ever, be utilized by a defendant. If a defendant's due process rights are contingent on this petition right, a defendant must be explicitly given the right to court-appointed counsel to pursue petition hearings, and be informed of his right to such hearings. As written, and in practice, this petition

right does nothing to ameliorate the established constitutional violations occurring in our state regarding ability to pay determinations.

CONCLUSION

For the reasons set forth above, M.C.A. 46-8-113 and 46-18-232 are unconstitutionally vague and violate criminal defendants' right to due process.

RESPECTFULLY SUBMITTED this 26 day of June, 2012.



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Certificate of Compliance

Pursuant to Rule 11 (4) of the Montana Rules of Appellate Procedure, I hereby certify that the foregoing brief is printed in a proportionally spaced Times New Roman text typeface of 14 points; has left, right, top and bottom margins of 1 inch; is double spaced; and word count calculated by Microsoft Word is 4375 words, excluding the Table of Contents, the Table of Authorities, the Certificate of Service, and this Certificate of Compliance.

Dated this 26 day of June, 2012.

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I certify that a true and correct copy of the Brief of *Amici Curiae*, American Civil Liberties Union of Montana, was sent by first-class mail on June 27, 2012, to the following.

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