

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM EUGENE JOHNSON,

Defendant and Appellant.

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**REDACTED BRIEF OF APPELLANT**

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On Appeal from the Montana Eleventh Judicial District Court,  
Flathead County, the Honorable Amy Eddy, Presiding

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## **STATEMENT OF THE ISSUES**

1. A restitution award requires the State to prove a reasonably close estimate of the losses based on the best evidence available under the circumstances. The State presented testimony Mr. Johnson's store burglary was captured on video, but the State's calculation of the store's losses included some items the store owner testified Mr. Johnson was not shown taking on the video. Where the State did not present the available video surveillance, was the district court's adoption of the State's restitution speculation clearly erroneous?
2. Montana law only allows restitution for the replacement cost of lost property. The State presented evidence of the retail prices at which the store would have sold the lost items, not evidence of the wholesale prices at which the store would have replaced the items. Did the district court impose an illegal sentence by ordering restitution in excess of replacement cost?
3. Was imposition of \$100 prosecution surcharges for each count illegal?

## **STATEMENT OF THE CASE**

William Eugene Johnson appeals restitution ordered by the Montana Eleventh Judicial District, Flathead County. Following his guilty plea for two counts of burglary (2/21/2019 Tr. at 6), Mr. Johnson was ordered to pay \$8,664.24 in restitution. (D.C. Doc. 39 at 7 (attached as App. A); Sentencing Tr. at 35 (attached as App. B).) Mr. Johnson filed a timely notice of appeal. (*See* D.C. Doc. 44.)

## **STATEMENT OF THE FACTS**

During the change of plea hearing, Mr. Johnson admitted that on June 17, 2018, he unlawfully entered Hanson's Hardware in Colombia Falls and committed the offense of theft therein. (2/21/2019 Tr. at 6.) Mr. Johnson further admitted that on July 1, 2018, he again unlawfully entered Hanson's Hardware with the purpose to commit theft therein. (2/21/2019 Tr. at 6–7.)

Under the heading "Restitution," the PSI stated: " [REDACTED]

[REDACTED]

[REDACTED]<sup>1</sup> (D.C. Doc. 32 at 4.)

Attached to the PSI was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (D.C. Doc. 32, attachments.)

The Affidavit of Victim's Pecuniary Loss included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]" (D.C. Doc. 32, Affidavit of Victim's Pecuniary Loss at 1.)

The two invoice ledgers from Hanson's Hardware consisted of six pages and were subsequently admitted individually as Defense Exhibits A–F. (Def. Exs. A–F (offered and admitted Sentencing Tr. at 23, 26; filed at D.C. Doc. 37) (attached as App. C).) The first invoice has a total of \$2,269.05. (Def. Ex. D.) The second invoice has a total of \$1,332.19.

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<sup>1</sup> Montana Code Annotated § 46-18-113(1) requires that "[a]ll presentence investigation reports must be a part of the court record but may not be opened for public inspection." Pursuant to M. R. App. P. 10(7)(a)–(b), Mr. Johnson has, therefore, redacted information obtained directly from the PSI from the public version of this brief.



(Def. Ex. F.) Together, the two invoices total \$3,601.24. The State did not include an affidavit or testimony detailing the items' replacement costs or what the listed price for each item on the invoice represented.

At sentencing, Mr. Johnson contested the amount of restitution requested as follows:

There's four items listed on the Affidavit of Victim's Pecuniary Loss, two of those are without documentation. So I think it would be appropriate for the State to give testimony as to the items that are not supported by documentation. As to the two items that are supported by documentation we would like to give them as to those amounts and why they should be lowered; we would ask for that to be set at a later date.

(Sentencing Tr. at 4–5.)

Mr. Johnson then questioned the store owner about other thefts from his store. The owner acknowledged the existence of other thefts from his store by other individuals. (Sentencing Tr. at 14.) He further testified that the other thefts occurred before, during, and after the period of Mr. Johnson's burglaries. (Sentencing Tr. at 14.)

Mr. Johnson then questioned the store owner regarding the means by which the store determined what items to include on the invoices. The owner testified that all of the items on the invoices were taken by Mr. Johnson because there was "video of him taking *most* of it."

(Sentencing Tr. at 16 (emphasis added).) The owner acknowledged that there “might be one or two items” on the invoices that the video did not show Mr. Johnson taking. (Sentencing Tr. at 16.) The owner admitted there are items on the invoices that the store had not inventoried for months prior to these burglaries. (Sentencing Tr. at 16.) He acknowledged the store has over 80,000 items and “it’s pretty hard to keep track of 80,000 items except by the computer, but our inventory for the most part is correct.” (Sentencing Tr. at 17.)

The district court imposed the full restitution request, stating: “The court gives greater weight to Mr. Hanson’s testimony that the Defendant is on camera stealing these items . . . and plus that the amount of restitution was stipulated to at the change of plea.” (Sentencing Tr. at 35–36.) In fact, during the change of plea hearing, Mr. Johnson had agreed that the State would be requesting \$7,600, not that he was responsible for that amount. (2/21/2019 Tr. at 7–8.)

The district court imposed all conditions in the PSI, including No. 14, imposing a separate cost of prosecution fee for each count. (Sentencing Tr. at 35.) The Amended Judgement and Sentence memorializes:

The Defendant shall pay costs of legal fees and expenses defined in § 25-10-201, MCA, plus costs of jury service, prosecution, and pretrial, probation, or community service supervision or \$100 per felony or \$50 per misdemeanor, whichever is greater. (§ 46-28-232, MCA).  
**Court Orders Defendant to pay: \$200.**

(D.C. Doc. 39 at 6.)

### **STANDARDS OF REVIEW**

This Court reviews a criminal sentence for legality. *State v. Simpson*, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 1144. A sentence's legality is reviewed de novo. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15. In reviewing a sentence's legality, this Court specifically considers "whether a district court had statutory authority to impose the sentence, whether the sentence falls within the applicable sentencing parameters, and whether the court adhered to mandates of the applicable sentencing statutes." *State v. Johnson*, 2011 MT 116, ¶ 12, 360 Mont. 443, 254 P.3d 578. The appropriate measure of restitution is a question of law, which the Court reviews for correctness. *Johnson*, ¶ 13. This Court will review an illegal sentence even if there was no objection at sentencing. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

Findings of fact regarding the amount of restitution ordered as part of a criminal sentence are reviewed to determine whether they are clearly erroneous. *State v. Coluccio*, 2009 MT 273, ¶ 40, 352 Mont. 122, 214 P.3d 1282 (*overruled in part on other grounds, State v. Kirn*, 2012 MT 69, ¶ 8 n.1, 364 Mont. 356, 274 P.3d 746). Findings are clearly erroneous if they are not supported in the record by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if this Court’s review of the record leaves this Court with a definite and firm conviction that a mistake has been made. *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841. Substantial evidence is “evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.” *State v. Jent*, 2013 MT 93, ¶ 10, 369 Mont. 468, 299 P.3d 332; *see also, Simpson*, ¶ 8.

### **SUMMARY OF THE ARGUMENT**

The State did not use the best evidence available under the circumstances to determine the losses because it did not use the video surveillance of the burglary to determine what items were taken from

Hanson's Hardware. The store owner acknowledged on cross that the video surveillance existed, but the State did not present it. Instead, the State engaged in guess work. By guessing without using the best evidence available under the circumstances, the State failed to meet its burden of proving losses by a preponderance of the evidence. The district court's imposition of the State's full restitution request was clearly erroneous. The matter must be remanded for the district court to correctly calculate the losses based upon the available video evidence.

Additionally, the State calculated the store's pecuniary loss for the items using the retail prices at which the store sells its inventory, rather than the wholesale prices the store pays to replace inventory. The State's use of retail prices as opposed to wholesale prices did not reflect the replacement cost as required by Mont. Code Ann. § 46-18-243(1)(a)–(b). Sentencing Mr. Johnson to pay restitution for the amounts the store owner would sell the inventory, instead of the prices the store owner would pay to replace the stolen inventory, requires Mr. Johnson to pay for damages in excess of his criminal conduct. The restitution ordered is illegal and must be remanded for determination of the store's actual, wholesale replacement costs.

The imposed \$200 cost of prosecution was also illegal. The State did not provide evidence of any additional recoupable costs and Mont. Code Ann. § 46-18-232 otherwise provides for only a single \$100 fee per case. The additional \$100 fee must be struck.

### **ARGUMENT**

**I. The restitution awarded by the district court was not supported by substantial evidence because the best evidence available under the circumstances was not used to determine losses.**

A district court's power to impose a criminal sentence is constrained to specific statutory authority. *State v. Breeding*, 2008 MT 162, ¶ 12, 343 Mont. 323, 184 P.3d 313. Under Montana law, a sentencing court must order restitution when a defendant's crime results in pecuniary loss to a victim. *State v. Hill*, 2016 MT 219, ¶ 10, 384 Mont. 486, 380 P.3d 768 (citing Mont. Code Ann. § 46-18-201(5); *Aragon*, ¶ 12).

The State has the burden of establishing the restitution value, and "a defendant may not be ordered to pay restitution in excess of the damages caused by his criminal conduct." *State v. Beavers*, 2000 MT 145, ¶ 12, 300 Mont. 49, 3 P.3d 614. The State must prove the restitution amount by a preponderance of the evidence. *Aragon*, ¶ 16.

A preponderance of the evidence is evidence showing that a claim is more probably true than not. *State v. Scarborough*, 2000 MT 301, ¶ 52, 302 Mont. 350, 14 P.3d 1202. When determining losses, the Court has approved of the use of “some guess work” if necessary and concluded that even if actual losses are uncertain, they may be recoverable if they are calculated by use of reasonable methods based on the best evidence available under the circumstances. *State v. McMaster*, 2008 MT 268, ¶ 28, 345 Mont. 172, 190 P.3d 302. “Reasonable methods include a reasonably close estimate of the loss.” *Simpson*, ¶ 14 (quotation omitted).

This Court has upheld guess work when losses are not capable of being determined with certainty and the guessing is based on the best evidence available under the circumstances. *Aragon*, ¶ 13 (citing *State v. Benoit*, 2002 MT 166, ¶¶ 5, 30, 310 Mont. 449, 51 P.3d 495; *State v. O’Connor*, 2009 MT 222, ¶¶ 4, 16, 351 Mont. 329, 212 P.3d 276). In *Benoit*, ¶ 5, an employee pled guilty to theft from her employer after she falsely voided transactions and inappropriately discounted sales. The defendant’s witness subsequently acknowledged that there is often “some guess work” associated with determining losses from employee

theft, and the defendant failed to provide the Court with a reasonable estimation of the losses sustained by the victim. *Benoit*, ¶ 30. In *O'Connor*, ¶¶ 4, 16, an employee pled no contest to theft after falsifying merchandise returns and the defendant contested the method used by the State to calculate losses but failed to present evidence of an alternate method of calculating restitution.

Conversely, this Court has held the required best evidence available under the circumstances was not satisfied in an embezzlement case by exclusive reliance on “actual records” when those records were known to be inaccurate and an employee had skimmed cash from the business. *McMaster*, ¶¶ 16, 37. Further, this Court concluded that “[a]ssumptions, ballpark figures from friends, and purely speculative calculations” could not substantiate findings of fact regarding amounts of restitution owed. *Coluccio*, ¶ 45. Additionally, this Court held that the evidence presented by the State was not calculated by use of “reasonable methods based on the best evidence available under the circumstances” where the determination of lost profits was based upon speculation and not supported by substantial evidence. *State v. O'Connell*, 2011 MT 242, ¶ 14, 362 Mont. 171, 261 P.3d 1042.



Here, the evidence available under the circumstances includes the video surveillance. The store owner described the surveillance video as footage that shows Mr. Johnson on camera taking items from Hanson's Hardware. (Sentencing Tr. at 16.) Although the store owner testified that there was video surveillance from the store showing what items were taken, he also admitted to engaging in guess work by adding items to the Affidavit of Victim's Pecuniary Loss that were not shown being taken in the video. (Sentencing Tr. at 16.) The owner relied upon an admittedly out-of-date inventory to speculate that Mr. Johnson took every single item that was missing from the store's inventory. (Sentencing Tr. at 16–17.) The owner admitted that he ascribed items to Mr. Johnson that the store had not inventoried for months prior to these burglaries and that "it's pretty hard to keep track of 80,000 items except by the computer, but our inventory for the most part is correct." (Sentencing Tr. at 16–17.) Critically, the inventory could not distinguish between items taken by Mr. Johnson and those taken by others who were shoplifting items during the same period. (Sentencing Tr. at 14.) The store owner admitted that the store was not catching every theft. (Sentencing Tr. at 14.) Attributing every item missing

from the out-of-date inventory to Mr. Johnson, including items Mr. Johnson was not recorded taking on the video, is clearly erroneous when the evidence established the store was losing inventory to other unresolved thefts during the same period.

While the sentencing court is authorized to use reasonable methods to estimate losses, those methods must be “based on the best evidence available under the circumstances.” *McMaster*, ¶ 28. Here, the video surveillance was the best evidence available. The video surveillance is able to provide a reasonably close estimate of the loss because, as described by the store owner, it provides footage of Mr. Johnson taking specific items during the burglary. (Sentencing Tr. at 16.) In all of the aforementioned cases where the Court has held guess work necessary, there was no other, better option for determining restitution. *See Benoit*, ¶¶ 5, 30; *O’Connor*, ¶¶ 4, 16. Here, there is: the video. The existence of the surveillance video means the extent of the property loss is capable of being determined without resorting to guess work. *Aragon*, ¶ 13 (citing *Benoit*, ¶¶ 5, 30; *O’Connor*, ¶¶ 4, 16). In contrast to *Benoit*, ¶¶ 5, 30, Mr. Johnson provided the Court with a reasonable estimation of losses sustained by the store owner when he

circled all of the inventory items that he actually took. (Def. Exs. A–F.) Additionally, in contrast to *O'Connor*, ¶¶ 4, 16, there is an alternate method of calculating losses: the video.

Further, the district court stated, “The Court gives greater weight to Mr. Hanson’s testimony that the Defendant is on camera stealing these items.” (Sentencing Tr. at 35–36.) However, the district court failed to acknowledge that the video is not how Mr. Hanson determined his losses; he instead used the out-of-date inventory and engaged in guess work. Similar to *McMaster*, ¶¶ 16, 37, the inventory was known to be inaccurate due to the loss of unspecified items during the other unresolved thefts. (Sentencing Tr. at 14.)

In consideration of the other shoplifting and the out-of-date inventory, the sentencing court must rely on the video surveillance to determine losses because it is the only reliable evidence there is. Any other method for determining restitution would consist of speculation under the circumstances presented here. By using the inventory to determine losses, the determination of restitution is based upon speculation and not supported by substantial evidence. As was held in *O’Connell*, ¶ 14, where a determination is based upon speculation and

not supported by substantial evidence, it is not based upon the best evidence available. Similarly, to *Coluccio*, ¶ 45, since the calculation by the State was based on assumptions and speculation, it cannot substantiate findings of fact regarding amounts of restitution owed.

Additionally, in the district court's oral pronouncement of Mr. Johnson's sentence, the court stated that it gave greater weight to the fact "that the amount of restitution was stipulated to at the change of plea." (Sentencing Tr. at 35–36.) The district court's recollection of the change of plea hearing was inaccurate. At the change of plea hearing, Mr. Johnson only agreed that he knew "the State's going to be asking that [he] be ordered to pay that \$7,600 at sentencing." (2/21/2019 Tr. at 8.) In the change of plea hearing, Mr. Johnson explicitly stated that the restitution was "in an amount to be determined" and that he was "going to ask the State to present evidence . . . to support that specific amount." (2/21/2019 Tr. at 7.) Therefore, Mr. Johnson did not agree to the amount requested by the State, he only agreed that he knew the State would be asking that he be ordered to pay restitution at sentencing.

The finding Mr. Johnson took all of the missing items is clearly erroneous. It is speculation that did not use the best evidence available and that is not supported by substantial evidence. The proper remedy when restitution is based on a clearly erroneous finding is to reverse and remand to district court for further proceedings. *Aragon*, ¶ 21. Mr. Johnson asks that his case be returned to the district court for the district court to recalculate the correct amount of restitution based on the best available video evidence.

**II. The State’s calculation of pecuniary loss for the items taken from Hanson’s Hardware was based on retail prices, instead of wholesale prices, and therefore was not the store’s replacement cost.**

Under Montana law, a sentencing court must order restitution when a defendant’s crime results in pecuniary loss to a victim. *Hill*, ¶ 10 (citing Mont. Code Ann. § 46-18-201(5); *Aragon*, ¶ 12). Restitution “engrafts a civil remedy onto a criminal statute, creating a procedural shortcut for crime victims who would be entitled to a civil recovery against the offender.” *State v. Brownback*, 2010 MT 96, ¶ 19, 356 Mont. 190, 232 P.3d 385. Pecuniary loss includes “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action” and “the *full*

*replacement cost* of property taken, destroyed, harmed, or otherwise devalued as a result of the offender’s criminal conduct.” Mont. Code Ann. § 46-18-243(1)(a)–(b) (emphasis added). A defendant may not be ordered to pay restitution in excess of the damages caused by his criminal conduct. Mont. Code Ann. §§ 46-18-201, -241, -243; *Beavers*, ¶ 12.

Replacement cost is “the cost of a substitute asset that is equivalent to an asset currently held.” Replacement Cost, *Black’s Law Dictionary* (Bryan A. Garner ed., 11th ed., West 2019). Cost is “the amount paid or charged for something; price or expenditure.” Cost, *Black’s Law Dictionary* (Bryan A. Garner ed., 11th ed., West 2019). In *State v. Pritchett*, 2000 MT 261, ¶ 21, 302 Mont. 1, 11 P.3d 539, the Court held that replacement cost was used to calculate pecuniary loss when the injured party “went and tried to find out what the new cost would be or the replacement value for the item.” The Court referred to the injured party’s calculation of replacement cost as “a valuation based on the cost of a new item.” *Pritchett*, ¶ 23.

When the Court has previously had occasion to consider replacement cost for retail stores, it has determined that it is wholesale,

not retail, price and highlighted the difference between the two. In *State v. Young*, 206 Mont. 19, 21, 669 P.2d 239, 240 (1983), the Court held, in the context of determining the amount element of felony theft, that the replacement cost of a stolen guitar, strap, and case to a music store owner to be approximately \$100.00, although the suggested retail price for the guitar, strap, and case was \$183.00. Similarly, in *State v. Barker* 211 Mont. 452, 454, 685 P.2d 357, 359 (1984), again for purposes of determining the value element in the context of felony theft, a boot store owner testified that the wholesale price he paid for a pair of boots stolen from his store was \$116.50, but the price the boots were offered for sale to the general public was \$178.50. Further, although not binding precedence, a Montana district court has held that a store owner was not entitled to receive the nine percent profit markup figure that the store owner indicated he adds onto his wholesale price in restitution for cigarettes burglarized from his store. *State v. Novak*, 2004 Mont. Dist. LEXIS 2134, ¶ 8. Although *Younger* and *Barker* were in the felony theft context, these cases illustrate the difference between retail price, the amount for which a store sells inventory, and wholesale

price, the amount a store pays to buy inventory, for the purposes of determining replacement cost for a store owner.

Here, the State did not include an affidavit or testimony detailing replacement cost or what the price given for each item on the invoice represented. However, the victim, Mr. Hanson, is a retail store owner. The lost property at issue is inventory items in Mr. Hanson's store. The replacement cost for Mr. Hanson's inventory are the prices at which the store can buy equivalent replacement inventory. In other words, the replacement cost of a store's inventory is based on the cost of a new inventory item. *Pritchett*, ¶ 23. The price a store owner pays for inventory is wholesale price. *See Novak*, ¶ 8; *Barker*, 211 Mont. at 454, 685 P.2d at 359; *Young*, 206 Mont. at 21, 669 P.2d at 240. The proper measure of replacement cost for Mr. Hanson's pecuniary loss is wholesale price since that is the price at which a store replaces its inventory.

Here, the prices used in the State's calculation of losses were retail. In the Affidavit of Victim's Pecuniary Loss, there is an attachment receipt from Hanson's Hardware which includes a price for each item that was allegedly taken. (Def. Exs. A–F.) The heading at



the top of the receipt suggests that these items are being sold by Hanson's Hardware to a customer, not to Hanson's Hardware from a wholesale distributor. (Def. Exs. A–F.) This receipt is charging each item to Mr. Johnson as if he were a customer. (Def. Exs. A–F.) At the top, it states, "THIS RECEIPT IS REQUIRED FOR REFUND." (Def. Exs. A–F.) The receipt says: "Sold to C-FALLS CASH CUSTOMER." (Def. Exs. A–F.) There is also a customer number column, which designates this receipt to Customer Number 4. (Def. Exs. A–F.) The receipt also lists a clerk, Gary; a salesperson, SLSPR: 94; and a terminal number, TERM#591. (Def. Exs. A–F.) There is also a suggested retail price column "SUGG" which is mostly blank but where it contains a price, it lists the same price as the "PRICE/PER" column that Mr. Johnson is being charged for each item. (Def. Ex. F.) The invoices give the prices a customer would spend to obtain these items from a salesperson at Hanson's Hardware, not Hanson's Hardware's replacement prices.

The State incorrectly calculated restitution to the store based on these retail prices. These retail prices are not what it costs the victim in this case, a retail store, to replace each item. *See Novak*, ¶ 8; *Barker*,

211 Mont. at 454, 685 P.2d at 359; *Young*, 206 Mont. at 21, 669 P.2d at 240. By using the prices for which the store sells its inventory, instead of the prices the store pays to replace its inventory, the State has not used “replacement cost” under Mont. Code Ann. § 46-18-243(1)(b) to determine restitution. *See Pritchett*, ¶¶ 21, 23; Replacement Cost, *Black’s Law Dictionary*; Cost, *Black’s Law Dictionary*.

Nor under Mont. Code Ann. § 46-18-243(1)(a) are the items’ retail prices special damages the store could recover from Mr. Johnson in a civil action. Because the definition of “pecuniary loss” includes damages that could be recovered in a civil action, the Court looks to precedent in tort and contract law to determine the proper measure of restitution. *State v. Kalal*, 2009 MT 103, ¶ 9, 350 Mont. 128, 204 P.3d 1240. “Both contract and tort damages restrict recovery to prevent the party from receiving a windfall.” *McEwen v. MCR*, 2012 MT 319, ¶ 72, 368 Mont. 38, 291 P.3d 1253. Further, the goal of compensation in tort law is “to ensure that an award of damages restores an injured party as near as possible to the party’s pre-tort position—no better, no worse.” *Lampi v. Speed*, 2011 MT 231, ¶ 21, 362 Mont. 122, 261 P.3d 1000.

Additionally, in *State v. Barrick*, 2015 MT 94, ¶ 22, 378 Mont. 441, 347 P.3d 241, this Court made clear that the ability of a victim to recover restitution under Mont. Code Ann. § 46-18-243(1)(a) is “contingent upon the victim being able to recover the claimed damages in a civil action.” In making this determination, the Court in *Barrick*, ¶ 21, looked to its decisions in *State v. Good*, 2004 MT 296, ¶ 15, 323 Mont. 378, 100 P.3d 644 (affirming an award of mortgage payments because the victim “could recover them in a civil action” for assault); *State v. Essig*, 2009 MT 340, ¶ 21, 353 Mont. 99, 218 P.3d 838 (affirming a restitution award because the “expenses could be recovered in a civil action by the [victim] against [the defendant] and thus . . . they [were] legally imposed as restitution”); and *Pritchett*, ¶ 20 (reversing a restitution award because the victim could not recover the damages claimed in an “appropriate civil action” for conversion). Using this reasoning, the Court held that the victims could not be awarded restitution for lost wages or income because it was not demonstrated that they could recover such damages in “a civil action arising out of the facts or events constituting [Barrick’s] criminal activities.” *Barrick*, ¶ 22.

As in *Barrick*, ¶ 23, the civil action arising out of the facts or events of Mr. Johnson’s criminal activities of depriving the store of its property would be an action for conversion. Montana Code Annotated § 27-1-320 provides that “[t]he detriment caused by the wrongful conversion of personal property is presumed to be: (a) the value of the property at the time of its conversion.” Here, Mr. Hanson would not be able to recover the retail damages awarded by the trial court in a civil action for conversion because the value of the stolen property at the time of its conversion to Mr. Hanson, as a store owner, would be wholesale price, not retail price. *See Novak*, ¶ 8; *Barker*, 211 Mont. at 454, 685 P.2d at 359; *Young*, 206 Mont. at 21, 669 P.2d at 240. By using retail prices, the awarded restitution not only made the store owner whole and brought him to the same place he was in before the injury; it left him better off. The store received a windfall in the amount of the difference between the retail prices awarded as restitution and the actual wholesale costs required to replace the inventory items. *See McEwen*, ¶ 72; *Lampi*, ¶ 21. The store will also gain this difference a second time when it sells the restocked inventory items to its retail customers. Since the restitution ordered awards Mr. Hanson more than

the cost to replace the items stolen by Mr. Johnson, the restitution order is in excess of the damages caused by Mr. Johnson's criminal conduct.

A sentence is illegal if it does not fall within statutory parameters. *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892. Since the restitution Mr. Johnson was ordered to pay exceeds replacement cost and the damages recoverable in a civil action, Mr. Johnson's sentence exceeds the statutory parameters of Mont. Code Ann. § 46-18-243(1)(a)–(b) and is illegal. Generally, the Court will not hear issues raised for the first time on appeal. However, under *Lenihan*, the Court may review a sentence's illegality even if the defendant raised no objection in the district court. *City of Kalispell v. Salsgiver*, 2019 MT 216, ¶ 33, 396 Mont. 57, 443 P.3d 504. Since the restitution Mr. Johnson was ordered to pay was illegal, it is subject to review for the first time on appeal through the *Lenihan* exception.

The proper remedy for imposition of illegal restitution is to reverse and remand to the district court to determine the correct amount. *Aragon*, ¶ 21.

### **III. The cost of prosecution exceeded the statutory maximum and must be amended.**

Montana Code Annotated § 46-18-232 specifically limits the cost of prosecution to \$100 per felony case or to expenses specifically incurred by the prosecution. In *State v. Barrows*, 2018 MT 204, ¶ 23, 392 Mont. 358, 424 P.3d 612, the Court held that “[w]hen the State does not present any evidence of additional recoupable costs, . . . § 46-18-232, MCA, authorizes the district court to impose one fee of \$100 under each separate felony criminal cause number.”

The judgment here unlawfully imposed prosecution fees of “\$100 per felony” for a total of \$200. (D.C. Doc. 39 at 6.) Since the State did not present evidence of any additional recoupable costs, Mont. Code Ann. § 46-18-232 only authorized the district court to impose one fee of \$100 for Mr. Johnson’s criminal case. As an illegal sentence, this error can be reviewed for the first time on appeal. *Salsgiver*, ¶ 33. The proper remedy is to remand for the district court to amend the prosecution surcharge from \$200 to \$100 to conform with Montana law. *Barrows*, ¶ 23.

## **CONCLUSION**

Mr. Johnson respectfully requests this Court to remand to the district court to determine the correct restitution amount and to amend the cost of prosecution to conform with Montana law.

Respectfully submitted this 28<sup>th</sup> day of May, 2020.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,219, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Koan Mercer

KOAN MERCER



## **APPENDIX**

Amended Judgment and Sentence .....	App. A
Oral Pronouncement .....	App. B
Defense Exhibits A–F.....	App. C

## **CERTIFICATE OF SERVICE**

I, Gem Koan Mercer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-04-2020:

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