FILED
03/09/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 19-0689

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0689

---

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

FANTON SADIKU,

Defendant and Appellant.

---

# AMENDED OPENING BRIEF OF APPELLANT

---

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Shane A. Vannata, Presiding

---

APPEARANCES:

CHAD WRIGHT
Appellate Defender
ALEXANDER H. PYLE
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
AlexPyle@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
BRAD FJELDHEIM
Assistant Attorney General
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

JIM NUGENT
Missoula City Attorney
DOUGLAS C. SCHALLER
Deputy City Attorney
435 Ryman Street
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

## TABLE OF CONTENTS

TABLE OF CONTENTS ....... i

TABLE OF AUTHORITIES ....... iii

STATEMENT OF THE ISSUES ....... 1

STATEMENT OF THE CASE ....... 1

STATEMENT OF THE FACTS ....... 3

STANDARDS OF REVIEW ....... 5

SUMMARY OF THE ARGUMENT ....... 6

ARGUMENT ....... 9

I. Tony's sentence was illegal under the apparently applicable law. . 9

A. By plain language, 2017 law applying to "any offender" does not authorize a revocation without additional findings beyond a mere violation. ....... 9

B. Because the lower court did not make the necessary additional findings, the revocation of Tony's deferred sentence was unauthorized and illegal. ....... 11

II. *Pope* should not be used to validate Tony's revocation. ....... 13

A. *Pope* (2021) breaks from 2017 law to affirm a revocation without findings beyond a mere violation. ....... 13

B. *Pope* should be overruled because it violates the rules of statutory construction. ....... 17

1. *Pope* contradicts § 46-18-203 (2017)'s plain language. 18

2. *Pope*'s contrary interpretation of § 46-18-203 (2017) is not reasonable. ....... 23

3. *Pope* ignores context and secondary rules of statutory interpretation sustaining § 46-18-203 (2017)'s application to any offender subject to revocation........ 26

C. If not overruled, *Pope* should be distinguished because Tony's offense occurred after § 46-18-203 (2017) took effect and before *Pope* was issued................................................ 30

III. Alternatively, the sentencing court abused its discretion in revoking the deferred sentence and imposing a non-deferred sentence. ........................................................................ 36

CONCLUSION ......................................................................... 38

CERTIFICATE OF COMPLIANCE........................................................ 39

APPENDIX ............................................................................ 40

## TABLE OF AUTHORITIES

*Cases*

*Beckles v. United States*,
137 S. Ct. 886 (2017) .......... 31

*Bostock v. Clayton Cnty.*,
140 S. Ct. 1731 (2020) .......... 25, 26, 33

*Bouie v. City of Columbia*,
378 U.S. 347 (1964) .......... 32

*City of Billings v. Barth*,
2017 MT 56, 387 Mont. 32, 390 P.3d 951 .......... 12

*City of Bozeman v. Cantu*,
2013 MT 40, 369 Mont. 81, 296 P.3d 461 .......... 5

*City of Kalispell v. Salsgiver*,
2019 MT 126, 396 Mont. 57, 443 P.3d 504 .......... 30

*City of Missoula v. Franklin*,
2018 MT 218, 392 Mont. 440, 425 P.3d 1285 .......... 12, 16

*City of Missoula v. Pope*,
2021 MT 4, 402 Mont. 416, 478 P.3d 815 .......... passim

*Connally v. General Const. Co.*,
296 U.S. 385 (1926) .......... 31

*Douglas v. Buder*,
412 U.S. 430 (1973) .......... 32

*Exxon Mobil Corp. v. Mont. DOR*,
2019 MT 156, 396 Mont. 298, 444 P.3d 407 .......... 27

*Gagnon v. Scarpelli*,
411 U.S. 778 (1973) .......... 31

*Infinity Ins. Co. v. Dodson*,
2000 MT 287, 302 Mont. 209, 14 P.3d 487 .......... 17, 21

*Kreger v. Francis*,
271 Mont. 444, 898 P.2d 672 (1995) ........ 28

*Langemo v. Mont. Rail Link, Inc.*,
2001 MT 273, 307 Mont. 293, 38 P.3d 782 ........ 19, 20

*McBoyle v. United States*,
283 U.S. 25 (1931) ........ 32

*Oncale v. Sundowner Offshore Services*,
523 U.S. 75 (1998) ........ 25

*State Dept. of Revenue v. Alpine Aviation, Inc.*,
2016 MT 283, 385 Mont. 282, 384 P.3d 1035 ........ 19

*State ex rel. Greely v. Dist. Ct. of Fourth Jud. Dist.*,
590 P.2d 1104 (1979) ........ 36

*State v. Booth*,
2012 MT 40, 364 Mont. 190, 272 P.3d 89 ........ 20

*State v. Brendal*,
2009 MT 236, 351 Mont. 395, 213 P.3d 448 ........ 29

*State v. Brister*,
2002 MT 13, 308 Mont. 154, 41 P.3d 314 ........ 13

*State v. Claassen*,
2012 MT 313, 367 Mont. 478, 291 P.3d 1176 ........ 22

*State v. Coleman*,
605 P.2d 1000 (1979) ........ 36

*State v. Felde*,
2021 MT 1, 402 Mont. 391, 478 P.3d 825 ........ 19, 20, 21

*State v. Gillingham*,
2008 MT 38, 341 Mont. 325, 176 P.3d 1075 ........ 9

*State v. Herd*,
2004 MT 85, 320 Mont. 490, 87 P.3d 1017 ........ 5, 36

*State v. Herman*,
2008 MT 187, 343 Mont. 494, 188 P.3d 978 ........................................ 36

*State v. Krum*,
2007 MT 229, 339 Mont. 154, 168 P.3d 658 .......................................... 5

*State v. LaTray*,
2000 MT 262, 302 Mont. 11, 11 P.3d 116 ...................................... 20, 28

*State v. Nelson*,
225 Mont. 215, 731 P.2d 1299 (1989) .................................................. 31

*State v. Oropeza*,
2020 MT 6, 398 Mont. 379, 456 P.3d 1023 .................................... 22, 27

*State v. Piller*,
2014 MT 342, 378 Mont. 221, 343 P.3d 153 ........................................ 22

*State v. Rogers*,
239 Mont. 327, 779 P.2d 927 (1989) .................................................... 27

*State v. Rogers*,
267 Mont. 190, 883 P.2d 115 (1994) .................................................... 27

*State v. Seals*,
2007 MT 71, 336 Mont. 416, 156 P.3d 15 ...................................... 15, 27

*State v. Southwick*,
2007 MT 257, 339 Mont. 281, 169 P.3d 698 .................................... 5, 13

*State v. Thomas*,
2019 MT 155, 396 Mont. 284, 445 P.3d 777 ........................................ 23

*State v. Tirey*,
2010 MT 283A, 358 Mont. 510, 247 P.3d 701 ............................... 13, 34

*State v. Tracy*,
2005 MT 128, 327 Mont. 220, 113 P.3d 297 ................................... 22, 34

*United States v. Batchelder*,
442 U.S. 114 (1979) ............................................................................. 32

*United States v. Davis*,
139 S. Ct. 2319 (2019) ........ 29, 33

*United States v. Granderson*,
511 U.S. 39 (1994) ........ 29

*United States v. Simmons*,
812 F.2d 561 (9th Cir. 1987) ........ 31

*Montana Code Annotated*

§ 1-2-101 ........ 17, 21, 23

§ 1-2-102 ........ 29

§ 45-5-626 ........ 5

§ 46-1-202 ........ 38

§ 46-18-203 ........ 18

§ 46-18-203 (1991) ........ 9

§ 46-18-203 (2015) ........ passim

§ 46-18-203 (2017) ........ passim

§ 46-18-903 ........ 36

§ 46-18-904 ........ 36

§ 46-23-1005 ........ 28

*Constitutional Provisions*

Mont. Const. art. II, § 17 ........ 30

U.S. Const. amend. XIV ........ 30

*2017 Montana Laws*

Ch. 391 ........ 1, 11

*Other Authorities*

A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ........................................................................................ 25

## STATEMENT OF THE ISSUES

Issue one: Was the revocation of Appellant's deferred sentence illegal and should *City of Missoula v. Pope*, 2021 MT 4, 402 Mont. 416, 478 P.3d 815, be overruled or distinguished when the law did not fairly warn Appellant his deferred sentence could be directly revoked for anything other than a noncompliance violation?

Issue two: Alternatively, was the revocation of Appellant's deferred sentence and imposition of a suspended sentence an abuse of discretion?

## STATEMENT OF THE CASE

Faton ("Tony") Sadiku is a distinguished reservist in the United States Navy. (3/28 Disc 1 at 42:24–42:30, 1:14:30–1:15:25; 3/28 Disc 2, Track 2 at 6:17–7:00.) Charged with a misdemeanor in August 2017, he took a plea deal, exchanging a nolo contendere plea for a deferred sentence, because anything other than a deferred sentence would endanger his ability to continue to serve. (3/28 Disc 1 at 1:05:10–1:06:10, 1:14:30–1:15:25; 3/28 Disc 2, Track 2 at 6:17–7:00.) Montana Code Annotated § 46-18-203 (2017) had taken effect months before the alleged offense, the plea, and the deferred sentence. 2017 Mont. Laws

ch. 391, § 6. The statute's plain language insisted "any" offender's deferred sentence could not be directly revoked for anything not amounting to a noncompliance violation. Section 46-18-203(7)–(8), (12) (2017).

In May 2018, the City alleged a violation and, citing § 46-18-203 as authority, petitioned to revoke. (D.C. Doc. 1, Petition to Revoke.) In March 2019, Missoula Municipal Court held a hearing on the City's petition. After finding a violation, the Municipal Court revoked Tony's deferred sentence and imposed a non-deferred sentence. (3/28 Disc 1 at 43:42–43:46; 3/28 Disc 2, Track 2 at 8:40–13:14; D.C. Doc. 1, 3/28/19 Sentencing Order (attached at App. A).) The court did not identify any statutory authority for its revocation sentence. (*See* 3/28 Discs 1, 2.) The Fourth Judicial District Court, Missoula County, affirmed. (D.C. Doc. 10 (attached at App. B).)

Tony filed a timely notice of appeal to this Court (D.C. Doc. 15), and, in December 2020, he filed an opening brief challenging the revocation. The next month, this Court issued *City of Missoula v. Pope*. In *Pope*, this Court affirmed a 2017 misdemeanor probation revocation stemming directly from conduct not amounting to a noncompliance

violation. *Pope*, ¶¶ 1, 20. In light of *Pope*, Tony moved for, and this Court granted, leave to file an amended opening brief.

## STATEMENT OF THE FACTS

At the end of a chance encounter at a grocery store in August 2017, Tony (who grew up in Europe) gave his ex-wife a departing hug and cheek kiss. (D.C. Doc. 5, Ex. D.)[1] Later, Tony's ex-wife alleged Tony had "groped" her. (D.C. Doc. 1, Citizen Affidavit of Probable Cause.) As part of a psychosexual evaluation, Michael J. Scolatti, Ph.D., P.C., reviewed surveillance footage of the grocery store encounter and found the footage aligned with Tony's innocent description. (D.C. Doc. 5, Ex. D at 11.) The City of Missoula nonetheless prosecuted Tony for misdemeanor sexual assault. (*See* D.C. Doc. 1, Sentencing Order.)

Tony was concerned a permanent misdemeanor conviction would lead to his discharge from the United States Navy Reserve, endangering his pension, his benefits, and his ability to continue to serve his country. (3/28 Disc 1 at 1:14:30–1:15:25; 3/28 Disc 2, Track 2 at 6:17–7:00.) To alleviate the risk of a permanent misdemeanor on his record, he entered

[1] The referenced document is a confidential psychosexual evaluation report. Tony waives the document's confidentiality as to information relating to the encounter at the store.

a plea agreement under which he pleaded nolo contendere and received a six-month deferred sentence. (D.C. Doc. 1, 2/16/18 Sentencing Order, Acknowledgement and Waiver of Rights, Plea Offer.) When he took the deal, the face of the apparently applicable law advised Tony his deferred sentence could not be directly revoked for anything other than a noncompliance violation. Section 46-18-203(7)–(8), (12) (2017).

Tony's deferred sentence included a condition that he "follow every requirement of the Order of Protection previously granted by this court." (D.C. Doc. 1, Sentencing Order.) The referenced order of protection included a proximity restriction with caveats. The order generally restricted Tony from being within 1,500 feet of his ex-wife's place of work but allowed him to travel on certain streets and to visit businesses within the 1,500-foot zone. (D.C. Doc. 5, Ex. B.) Tony allegedly violated the proximity restriction by taking the wrong turn while driving his son to school one morning in April 2018. (D.C. Doc. 10 at 3.) Based on that alleged violation, the City promptly filed a petition to revoke Tony's deferred sentence "pursuant to § 46-18-203, MCA." (D.C. Doc. 1, Petition to Revoke Sentence.) Also, based on the same alleged conduct, the City filed a new criminal case charging Tony with

committing the offense of violating an order of protection under Mont. Code Ann. § 45-5-626. (D.C. 10 at 3.) A jury found Tony not guilty of the order-of-protection offense. (D.C. Doc. 10 at 4.)

At a revocation hearing occurring after the acquittal, the Municipal Court found the probation violation the City had alleged. (3/28 Disc 1 at 43:42–43:46.) Based on that single finding, the court revoked Tony's deferred sentence and imposed a suspended sentence. (3/28 Disc 1 at 43:42–43:46; 3/28 Disc 2, Track 2 at 8:40–13:14.)

## STANDARDS OF REVIEW

This Court reviews revocation sentences for legality. *State v. Southwick*, 2007 MT 257, ¶¶ 22–23, 339 Mont. 281, 169 P.3d 698. Because "it is well established that '[a] court has no power to impose a sentence in the absence of specific statutory authority,' a "'sentence not based on statutory authority is an illegal sentence.'" *State v. Krum*, 2007 MT 229, ¶ 11, 339 Mont. 154, 168 P.3d 658 (citation omitted). Additionally, this Court reviews sentences imposing less than year of actual incarceration for equity and abuse of discretion. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 11, 369 Mont. 81, 296 P.3d 461; *State v. Herd*, 2004 MT 85, ¶ 22, 320 Mont. 490, 87 P.3d 1017.

## SUMMARY OF THE ARGUMENT

Tony is a layman, not a legal scholar, not a legislative insider. The law expects him to understand what the law says on its face. Tony cannot be fairly expected to understand or predict when the Legislature has an unspoken intent not expressed in the law itself.

Here, at the time of the underlying offense, the plea agreement for the deferred sentence, the imposition of the deferred sentence, the alleged probation violation, and the revocation hearing, the face of the apparently applicable law consistently advised Tony he could not have his deferred sentence directly revoked for anything other than a noncompliance violation. Tony did not commit a noncompliance violation, and the Municipal Court did not find he committed a noncompliance violation. The revocation of Tony's deferred sentence was not statutory authorized, was illegal, and was not what Tony bargained for.

In *Pope*, this Court held, explicitly, that § 46-18-203 (2017) did not apply to a 2017 misdemeanor revocation and held, implicitly, that § 46-18-203 (2015) authorized that revocation. Tony respectfully requests this Court reconsider *Pope* because the opinion conflicts with the plain

language of § 46-18-203 (2017). Section 46-18-203 (2017) expressly states it applies to "any offender," and neither § 46-18-203 (2017) nor the bill creating that law included a savings clause for § 46-18-203 (2015). To Tony's knowledge, prior to *Pope*, this Court has never read out language in a statute as express, clear, and on point as § 46-18-203 (2017)'s "any offender" specification. Nor, to Tony's knowledge, has this Court prior to *Pope* inserted a savings clause into a bill to keep superseded law effective despite no statutory language expressing such an intent. If this Court nonetheless believes, as expressed in *Pope*, that § 46-18-203 (2017) is ambiguous despite its plain language, then the rule of lenity agitates for reading that ambiguity in favor of criminal defendants, not against them. For these reasons and others, *Pope* should be overruled.

If *Pope* is not overruled, it should be distinguished and not apply to offenders like Tony, whose case occurred entirely after § 46-18-203 (2017) took effect and before *Pope* was issued. Probationers have a constitutional right to due process, fundamental fairness, and fair warning. The defendant in *Pope* committed her offense in 2015 and thus received warning under § 46-18-203 (2015) concerning a court's

authority to revoke directly for conduct not amounting to a noncompliance violation. By contrast, here, only § 46-18-203 (2017) was ever apparently applicable to Tony for his 2017 offense and 2018 deferred sentence, and § 46-18-203 (2017) provided no authority to revoke directly for anything other than a noncompliance violation. To retroactively apply to Tony *Pope*'s holding—that § 46-18-203 (2017) does not apply to "any offender" despite the law expressly saying it does; that § 46-18-203 (2015) applies despite no statutory warning about that law carrying forward—would violate due process, fundamental fairness, and the right to fair warning. *Pope* should not apply here. Without *Pope*, Tony's revocation is illegal.

Alternatively, this Court should find the revocation sentence was an abuse of discretion. This Court may review Tony's sentence for equity because the Sentence Review Board cannot. Tony deserves the benefit of his bargain for a deferred sentence under the apparently applicable safeguards of § 46-18-203 (2017). The lower court's sentences also establish Tony's conduct did not warrant anything other than probation. In this context, the evident effect of the revocation sentence ensured Tony would have a permanent misdemeanor that

would endanger his ability to continue to serve his country. In these circumstances, the Court should hold the revocation sentence was unreasonable and reverse for an abuse of discretion.

## ARGUMENT

### I. Tony's sentence was illegal under the apparently applicable law.

#### A. By plain language, 2017 law applying to "any offender" does not authorize a revocation without additional findings beyond a mere violation.

From 1991 through 2015, a probation court's authority to revoke and impose a new sentence had a single precondition: The presiding judge had to "find[] that the offender has violated the terms and conditions of the suspended or deferred sentence." Sections 46-18-203(7)(a) (2015), 46-18-203(7) (1991). Interpreting that plain language, this Court consistently held any "single violation of the conditions" of probation sufficed "to support a district court's revocation of that sentence." *E.g.*, *State v. Gillingham*, 2008 MT 38, ¶ 28, 341 Mont. 325, 176 P.3d 1075.

In 2017, the Legislature placed additional safeguards and preconditions on the authority to revoke. Under § 46-18-203 (2017), a court has two ways to revoke and impose a new sentence, but each way

requires more than a finding of any single violation. The first way requires the presiding judge to find both "that the offender has violated the terms and conditions of the suspended or deferred sentence *and [that] the violation is not a compliance violation*." Section 46-18-203(7)(a) (2017) (additional 2017 language italicized). Only then is the judge authorized to revoke under § 46-18-203(7)(a) (2017). The second way requires the presiding judge to find three things: "that the offender has violated the terms and conditions of the suspended or deferred sentence, *that the violation is a compliance violation, and that the offender's conduct indicates that the offender will not be responsive to further efforts under the incentives and interventions grid*." Section 46-18-203(8)(c) (2017) (additional 2017 language italicized). Only then is the presiding judge authorized to revoke under § 46-18-203(8)(c) (2017).

Section 46-18-203 (2017), moreover, states its provisions apply to "*any offender* whose suspended or deferred sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's original sentence." Section 46-18-203(12) (2017) (emphasis supplied). In its provisions stating the preconditions to revocation, § 46-18-203 (2017)

does not make any distinctions based on the type of court handling the revocation proceeding or the type of offense causing the offender's probation. *See* § 46-18-203(7)–(8) (2017). Section 46-18-203 (2017) became effective on May 19, 2017. 2017 Mont. Laws ch. 391, § 6.

### B. Because the lower court did not make the necessary additional findings, the revocation of Tony's deferred sentence was unauthorized and illegal.

Tony was charged for conduct occurring in August 2017 and his revocation hearing occurred in March 2019. Both were after § 46-18-203 (2017) became effective. Despite that, the Municipal Court made none of the additional findings § 46-18-203 (2017) requires in order to impose a revocation sentence.

As for authority to revoke under § 46-18-203(7)(a) (2017), the Municipal Court never found Tony's violation was "not a compliance violation." The record would not have supported such a finding. The violation was based on a one-time incident occurring when Tony was driving his son to school. (D.C. Doc. 10 at 3.) At the revocation hearing, the City did not argue the one-time incident was a new criminal

offense,[2] harassment, absconding, possession of a firearm, or failure to complete a treatment program. (*See* 3/28 Disc 1; 3/28 Disc 2, Tracks 1–2.) The Municipal Court did not find the one-time incident was any of those things. (*See* 3/28 Disc 1 at 43:42–43:46.) A violation that is not one those things is not a noncompliance violation. Section 46-18-203(11)(b) (2017). A violation that is not a noncompliance violation cannot authorize a revocation under § 46-18-203(7)(a) (2017).

As for authority to revoke under § 46-18-203(8)(c) (2017), the Municipal Court never found—and the City presented no evidence regarding—Tony's conduct indicating he would not respond to "further efforts" short of petitioning to revoke. Without such evidence or such a finding, § 46-18-203(8)(c) also does not authorize a revocation sentence.

Because "[c]ourts have no power to impose a criminal sentence in the absence of specific statutory authority," a sentence imposed without such statutory authority "is illegal." *City of Missoula v. Franklin*, 2018 MT 218, ¶ 10, 392 Mont. 440, 425 P.3d 1285; *accord, e.g.*, *City of Billings v. Barth*, 2017 MT 56, ¶ 8, 387 Mont. 32, 390 P.3d 951. The

[2] By the time of the revocation hearing, a jury had already determined Tony was not guilty of a new criminal offense. (D.C. Doc. 10 at 4.)

same goes for to an unauthorized revocation sentence—such a sentence is illegal. *Southwick*, ¶¶ 22–23 (explaining that when a court "applie[s] the incorrect statute when revoking a suspended sentence," the sentence is illegal); *accord State v. Brister*, 2002 MT 13, ¶¶ 16–17, 25–29, 308 Mont. 154, 41 P.3d 314, overruled on other grounds by *State v. Tirey*, 2010 MT 283A, ¶ 27, 358 Mont. 510, 247 P.3d 701. Under § 46-18-203 (2017), Tony's revocation sentence was unauthorized and illegal.

## II. *Pope* should not be used to validate Tony's revocation.

### A. *Pope* (2021) breaks from 2017 law to affirm a revocation without findings beyond a mere violation.

In January 2021—43 months after § 46-18-203 (2017) took effect, 40 months after Tony's offense, and 22 months after Tony's revocation hearing—this Court issued *Pope.* In *Pope*, this Court affirmed a revocation sentence occurring in Fall 2017 despite the revocation court not making any of the additional findings § 46-18-203 (2017) requires as a precondition to revocation.

Pope's case originated in 2015, when she committed a misdemeanor and received a deferred sentence. *Pope*, ¶ 2. Before § 46-18-203 (2017) took effect, she had already been revoked twice. In September 2017, she was serving a suspended sentence when the

government petitioned to revoke a third time for an apparent compliance violation. *Pope*, ¶¶ 2–3. Pope moved to dismiss the petition because there was no basis to conclude (1) that she committed a noncompliance violation under § 46-18-203(7)(a) (2017) or (2) that her "conduct indicate[d] [she would] not be responsive to further efforts under the incentives and interventions grid" under § 46-18-203(8)(c) (2017). *Pope*, ¶ 3. The revocation court denied the motion and revoked Pope's sentence without making any finding beyond a simple violation. *Pope*, ¶¶ 1, 3.

No one in *Pope* appeared to dispute that § 46-18-203 (2017) did not authorize Pope's revocation sentence. Rather, this Court, the revocation court, and the government all offered analyses circumventing § 46-18-203 (2017).

The revocation court ruled it had authority to revoke under statutes other than § 46-18-203. This Court did not explicitly address that argument but essentially rejected it, noting, "§ 46-18-203, MCA, is the sole source of statutory authority allowing a court to revoke a suspended sentence," *Pope*, ¶ 11, and "there is no other statute that authorizes revocation of deferred or suspended misdemeanor

sentences," *Pope*, ¶ 15. *See also State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15 ("The revocation of a suspended or deferred sentence is particularly and expressly governed by § 46–18–203.").

The government alternatively argued that—despite the revocation occurring after § 46-18-203 (2017) took effect—the revocation court had authority to revoke Pope under § 46-18-203 (2015). *Pope*, ¶ 8. This Court did not explicitly address that argument or straight out say that § 46-18-203 (2015) authorized Pope's 2017 revocation. *See Pope*, ¶¶ 6–20.

The *Pope* Court instead endeavored to answer whether the Legislature intended § 46-18-203 (2017) to apply to misdemeanor revocations. *See Pope*, ¶ 20. The Court briefly acknowledged § 46-18-203(12) (2017) explicitly said the statute applied to "any offender." *Pope*, ¶¶ 14–15. But the Court impugned that language through the fact that the 2017 legislation that revised § 46-18-203 also revised other statutes relating to felony probation but not other statutes relating to misdemeanor probation. *Pope*, ¶16. The Court found these revisions and non-revisions of other statutes to render § 46-18-203 (2017) itself ambiguous about whether it applied to any offender. *Pope*, ¶16.

From there, this Court consulted legislative history showing a positive intent to revise the procedures for felony probation—without more, this Court took that positive intent as also establishing a negative intent that the revisions were not to apply to misdemeanor offenders. *Pope*, ¶ 17; *accord Pope*, ¶ 20. This Court considered that inferred negative intent to control. *Pope*, ¶ 17. The Court also suggested—with the only support being that the Legislature had not revised misdemeanor statutes other than § 46-18-203 (2017)—that it would be "impossible" for § 46-18-203 (2017) to apply to misdemeanor offenders. *Pope*, ¶ 19.

All this still left the question: If § 46-18-203 (2017) did not authorize Pope's 2017 revocation, what statute did? Under oft-cited precedent, "[c]ourts have no power to impose a criminal sentence in the absence of specific statutory authority," and a sentence without such authority "is illegal." *Franklin*, ¶ 10. Yet the *Pope* Court omitted an explicit answer to that question, simply taking its analysis that § 46-18-203 (2017) did not apply to Pope to mean the lower court "thus acted within its authority when it revoked Pope's suspended sentence for violating its terms and conditions." *Pope*, ¶ 20. The reader is left to

infer (as argued by the government) that the 2015 version of § 46-18-203 was still effective in Pope's 2017 misdemeanor revocation, and that was the authority that the revocation court "acted within." *Pope*, ¶ 20. Again, however, the Court offered no specific analysis to get from the negative conclusion that § 46-18-203 (2017) did not apply to Pope's revocation to a positive conclusion that § 46-18-203 (2015) did apply and authorized the revocation. *See Pope*, ¶ 20.

### B. *Pope* should be overruled because it violates the rules of statutory construction.

The fundamental rule for statutory interpretation in Montana is this:

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Mont. Code Ann. § 1-2-101. This Court has recognized that due to § 1-2-101, this Court has a more "stringent mandate" to adhere to statutory text than many other courts do. *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. *Pope*, however, departs from

that mandate to an extent that is, to Tony's knowledge, anomalous and unprecedented in Montana.

### 1. *Pope* contradicts § 46-18-203 (2017)'s plain language.

*Pope* has two holdings, one explicit and the other implicit. The explicit holding is that § 46-18-203 (2017)'s revocation provisions do not apply to any offender subject to revocation, only to felony offenders. *Pope*, ¶ 20. The implicit holding is that the Legislature intended § 46-18-203 (2015) to apply to misdemeanor offenders subject to revocation even after § 46-18-203 (2017) took effect. *See Pope*, ¶ 20. But those limitations and specifications are found nowhere in § 46-18-203 (2017)'s text nor in the enacting bill. In fact, those limitations and specifications contradict and strike what is specified in § 46-18-203 (2017)'s text.

As addressed earlier in this brief, § 46-18-203 (2017)'s text places preconditions on a court's authority to revoke an "offender." Section 46-18-203(7), (8) (2017). The text does not on its face limit those preconditions to a felony offender or contain the words "misdemeanor" or "felony" at all. *See* § 46-18-203(7), (8) (2017). Indeed, the statute expressly and expansively defines the "offender" to whom preconditions to revocation apply as "*any offender* whose suspended or deferred

sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's original sentence." Section 46-18-203(12) (2017) (emphasis supplied).

"'[L]egislative intent is to be ascertained, in the first instance, from the plain meaning of the words used' by the legislature." *State Dept. of Revenue v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035 (citation omitted). "[W]hen the legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning." *Alpine Aviation*, ¶ 11.

This Court has previously recognized the plain meaning of statutes with the adverb "any" and how that word does not permit this Court to restrict the noun to which the adverb applies. "Any" means "every." *State v. Felde*, 2021 MT 1, ¶ 19, 402 Mont. 391, 478 P.3d 825; *Langemo v. Mont. Rail Link, Inc.*, 2001 MT 273, ¶ 23, 307 Mont. 293, 38 P.3d 782. Thus, a statute applying to "any . . . railroad crossing" applies to "every" railroad crossing, which does not permit a claim that the statute does not apply to private crossings. *Langemo*, ¶ 23. Or, a child pornography statute criminalizing "any image" with restricted material "clearly and unambiguously supports conviction for *every* image of child

pornography the defendant possessed." *Felde*, ¶ 19 (emphasis supplied). Or, a statute referring to "any victim" cannot be said to encompass only some victims because "clearly, the term *any* is not limiting in *any* way." *State v. LaTray*, 2000 MT 262, ¶ 13, 302 Mont. 11, 11 P.3d 116 (emphasis in original). This Court found the respective "any" provisions examined in *Langemo*, *Felde*, and *LaTray* to all be "clear and unambiguous," which means "the statute speaks for itself and this Court cannot resort to any other means of interpretation." *Langemo*, ¶ 23; *see Felde*, ¶ 19; *LaTray*, ¶ 13.

The meaning of § 46-18-203(12) (2017)'s direction that "[t]he provisions of this section apply to any offender" is just as clear and unambiguous. Consistent with *Felde*, ¶ 19, and *Langemo*, ¶ 23, the "any offender" provision means the statute and its revocation provisions apply to "every" person who has committed an offense and is subject to a revocation hearing. Consistent with *LaTray*, ¶ 13, the provision communicates that the offenders to which the statute applies are "not limit[ed] in *any* way." Given the express language, the statute "speaks for itself" without "resort[ing] to any other means of interpretation." *Langemo*, ¶ 23; *accord State v. Booth*, 2012 MT 40, ¶ 11, 364 Mont. 190,

272 P.3d 89 ("If legislative intent can be determined by the plain meaning of the words, we may go no further in applying any other meaning or interpretation."); *Felde*, ¶ 16 ("[I]f the language is clear and unambiguous on its face, we need not engage in any further construction.").

*Pope*'s first, explicit holding—that the Legislature did not intend § 46-18-203 (2017)'s revocation provisions to apply to any offender subject to revocation, only to felony offenders—contradicts § 46-18-203 (2017)'s clear language. Under *Pope*, § 46-18-203 (2017) does not apply to "any offender" even though the text of the statute expressly directs such application. *Pope*'s effect, then, is to strike § 46-18-203 (2017)'s "any offender" provision, replacing it with a provision stating the statute applies only to felony offenders and not misdemeanor offenders. *Pope* "insert[s] what has been omitted," "omit[s] what has been inserted," and does not "give effect" to all of § 46-18-203 (2017)'s plain and unambiguous terms. Section 1-2-101. *Pope* thus violates Montana's "stringent mandate" of plain language statutory interpretation. *Infinity Ins. Co.*, ¶ 46.

*Pope*'s second, implicit holding—that the Legislature intended § 46-18-203 (2015) to apply to misdemeanor offenders subject to revocation even after § 46-18-203 (2017) took effect—also strays widely from the plain language of § 46-18-203 (2017) and its enacting bill.

This Court has previously recognized that § 46-18-203 (2017)'s "regardless of the date of the offender's conviction" clause is an "express retroactivity provision." *State v. Claassen*, 2012 MT 313, ¶ 24 n. 2, 367 Mont. 478, 291 P.3d 1176; *accord State v. Piller*, 2014 MT 342, ¶ 21, 378 Mont. 221, 343 P.3d 153. Unless constitutional concerns demand otherwise, *see State v. Tracy*, 2005 MT 128, ¶ 20, 327 Mont. 220, 113 P.3d 297, a retroactivity provision's effect is to require a revocation court to apply the version of § 46-18-203 in effect at the time of the revocation hearing, not some prior version of the statute. *See State v. Oropeza*, 2020 MT 6, ¶ 4, 398 Mont. 379, 456 P.3d 1023 (citing § 46-18-203(12) (2017) and explaining the clause means the statute "retroactively applie[s] to all suspended and deferred sentences, regardless of the original conviction date"). This Court has also previously recognized a presumption that, unless the Legislature inserts a savings clause or its equivalent into an ameliorative sentence

statute, the Legislature does not intend the superseded statute to carry forward in application. *See, generally, State v. Thomas*, 2019 MT 155, ¶¶ 13–14, 396 Mont. 284, 445 P.3d 777.

By apparently concluding § 46-18-203 (2015) applies even after § 46-18-203 (2017) took effect, *Pope* reads out the Legislature's express direction that once § 46-18-203 (2017) took effect in May 2017, the statute would apply retroactively, regardless of prior versions of the law. Further, the same conclusion in *Pope* reads into § 46-18-203 (2017) a savings clause for older versions of § 46-18-203 that the Legislature at no point expressed and that *Pope* offers no support for. *See Pope*, ¶ 20. Again, to Tony's knowledge, this Court has never gone so far to insert what has been omitted and omit what has been inserted into a law, *contra* § 1-2-101. *Pope*'s implicit conclusion, like its explicit conclusion, cannot stand.

#### 2. ***Pope*'s contrary interpretation of § 46-18-203 (2017) is not reasonable.**

Against this plain language, *Pope* asserts § 46-18-203 (2017)'s application to misdemeanor offenders is ambiguous not because of anything in the plain language of § 46-18-203 (2017)'s text, but because of other statutes to which § 46-18-203 (2017) relates. However, there is

nothing in the other invoked statutes—or the legislative history—that contradicts § 46-18-203 (2017)'s lack of a savings clause and express and unambiguous command that § 46-18-203 (2017) applies to "any offender."

*Pope*'s mistake in this regard is to take evidence suggesting the 2017 Legislature's primary concern was felony probation and to confuse that for evidence that § 46-18-203 (2017)'s plain terms do not also encompass misdemeanor offenders. *Pope* references legislative history speaking to felony probation and revisions to other statutes addressing felony probation as "mak[ing] plain" § 46-18-203 (2017) does not apply to "misdemeanants." *Pope,* ¶¶ 15–16. But what *Pope* is pointing to outside of § 46-18-203 (2017) is silence—legislative history *not* referencing misdemeanors, other misdemeanor statutes *not* referencing the Montana Incentives and Interventions Grid. *See Pope,* ¶¶ 15–16. A holistic approach to statutory interpretation would interpret that silence in relation to § 46-18-203 (2017)'s express direction that the statute applies to "any offender." So contextualized, that silence cannot outweigh—or render reasonable an interpretation that calls for striking—the statute's express statement of legislative intent.

Just last year, the U.S. Supreme Court explained the folly of an argument contending a statute's scope is ambiguous despite express language in the statute defining its scope. In *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), the question was whether Title VII's prohibition on discrimination "because of . . . sex" applied to discrimination against homosexual or transgender persons. After showing the statute's key phrase encompassed discrimination against such persons, the Court rejected that the statute should not apply to cover such discrimination because Congress would not have expected such coverage at the time of the law's enactment. As stated in *Bostock*, "it is ultimately the provisions of" the law "rather than the principal concerns of our legislators by which we are governed." *Bostock*, 140 S. Ct. at 1749 (quoting *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998)). If broad statutory language produces applications some do not expect, that reflects only the Legislature's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" *Bostock*, 140 S. Ct. at 1749 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012)).

The same applies here. Section 46-18-203 (2017) expressly states it applies to "any offender," which plainly includes misdemeanor offenders. Though the legislative history and surrounding provisions may suggest the Legislature may have been principally concerned with felony probationers, it is ultimately the provisions of § 46-18-203 (2017) that control, not the Legislature's principle concerns. *Bostock*, 140 S. Ct. at 1749. The plain language of § 46-18-203 (2017)'s terms do not leave this Court room for creating any ad hoc exceptions in the § 46-18-203 (2017)'s coverage. And even if they did, that would not sustain *Pope*'s further implicit, unsupported, and yet necessary holding that § 46-18-203 (2015) has application beyond § 46-18-203 (2017)'s effective date—despite the fact that § 46-18-203 (2017) contains a retroactivity clause and lacks a savings clause.

**3. *Pope* ignores context and secondary rules of statutory interpretation sustaining § 46-18-203 (2017)'s application to any offender subject to revocation.**

*Pope* also does not examine the entirety of § 46-18-203 (2017)'s context.

One contextual factor is the state of the law prior to the legislation. This Court usually presumes the Legislature is "aware of

existing law when it enacts or revises statutes, including [this Court's] decisions interpreting individual statutes." *Exxon Mobil Corp. v. Mont. DOR*, 2019 MT 156, ¶ 20, 396 Mont. 298, 444 P.3d 407. That presumption is more applicable here than with most legislative acts. Section 46-18-203 (2017) stemmed from a two-year process and a bipartisan, interbranch commission's study; it was not some hastily done, unconsidered act. *See Oropeza*, ¶¶ 3–4 (discussing this history).

In this context, the 2017 Legislature would have been aware the statute it was revising, § 46-18-203, has long applied in both felony and misdemeanor revocations. *See State v. Rogers*, 239 Mont. 327, 329, 779 P.2d 927, 929 (1989) (applying § 46-18-203 in a felony revocation); *State v. Rogers*, 267 Mont. 190, 191–92, 883 P.2d 115, 116–17 (1994) (applying § 46-18-203 in a misdemeanor revocation). The Legislature would also have been aware that unless it created external authority, § 46-18-203 was the only source of revocation authority in any felony or misdemeanor case. *See Seals*, ¶ 15 ("[T]he revocation of a suspended or deferred sentence is particularly and expressly governed by § 46–18–203."). With this awareness, the Legislature passed a bill that (1) specifically said § 46-18-203 (2017) applied to "any offender," (2) did

not say § 46-18-203 (2017) applied only to felony offenders rather than misdemeanor offenders, (3) specifically said § 46-18-203 (2017) applied retroactively, and (4) did not say § 46-18-203 (2015) still existed to apply to misdemeanors.

Had the Legislature wished to add limiting terms to § 46-18-203 (2017) such that it would apply only to felony revocations, or had the Legislature wished to carve out separate authority for misdemeanor revocations, the Legislature surely would have done so. *See LaTray*, ¶ 15 ("Had the legislature wished to add the limiting terms that LaTray's argument suggest, it surely could have done so."). But the Legislature did not do so. In these circumstances, this Court has previously held firm that it "cannot insert limiting language" or create alternative statutory authority "where none exists." *Kreger v. Francis,* 271 Mont. 444, 447–48, 898 P.2d 672, 674 (1995).

Second, even if one accepts *Pope*'s suggestion of a conflict between § 46-18-203 (2017)'s "any offender" provision and how Mont. Code Ann. § 46-23-1005 does not separately require (but also does not foreclose) local probation officers using the Montana Incentives and Interventions Grid *see Pope*, ¶¶ 16, 19, then the rules of statutory interpretation

dictate that "where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls." *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 402, 213 P.3d 448, 453; *accord* Mont. Code Ann. § 1-2-102. The question in both *Pope* and in the present case is whether § 46-18-203 (2017) applies to any offender, whether felony or misdemeanor. Section 46-18-203 (2017) is more specific than any other statute to answering that question. Indeed, § 46-18-203 (2017) specifically answers the question by saying it applies to "any offender."

Finally, *Pope* ignores that if there is ambiguity about § 46-18-203 (2017)'s scope, then the rule of lenity would apply. To guard the right to fair warning and to guard against judicial encroachment on the legislative function, the rule of lenity demands construing statutory ambiguity in favor of a criminal defendant. *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule of lenity applies to ambiguous probation revocation statutes. *United States v. Granderson*, 511 U.S. 39, 54 (1994). Because *Pope* contends § 46-18-203 (2017) is ambiguous, *Pope*, ¶ 16, the rule of lenity applies. The rule demands construing and

applying § 46-18-203 (2017)'s ameliorative terms in favor of a criminal defendant like Pope or Tony.

This Court has recognized an "obligat[ion] to overrule precedent where it appears the 'construction is manifestly wrong.'" *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (emphasis and citation omitted). Tony knows of no case (including any of the cases cited in *Pope*) in which this Court has overridden applicable statutory language as clear as § 46-18-203 (2017)'s "any offender" provision. Moreover, Tony knows of no case in which this Court effectively inserted a savings clause into an ameliorative sentencing statute despite the Legislature communicating no intent to preserve the superseded law (indeed, *Pope* musters no evidence of such an intent, *see Pope*, ¶ 20). Rather than let *Pope* overthrow this Court's sound, stringent, and foundational rules of statutory interpretation, this Court should overrule *Pope*.

### C. If not overruled, *Pope* should be distinguished because Tony's offense occurred after § 46-18-203 (2017) took effect and before *Pope* was issued.

The Fourteenth Amendment to the United States Constitution and Article II, § 17 of the Montana Constitution guarantee due process

of law. Because a revocation of probation entails a significant deprivation of liberty, revocations must comply with at least the "minimum requirements of due process." *State v. Nelson*, 225 Mont. 215, 218, 731 P.2d 1299, 302 (1989) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)).

"[F]air warning of acts which may lead to revocation" is an "essential component" of due process. *United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987). The law must fairly warn a person of both the conduct that is prohibited and the punishment for that conduct. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). Punishing someone without fair warning or notice is fundamentally unfair—it deprives a person of the ability to conform his or her conduct to the law in contemplation of the attendant consequences. *See Connally v. General Const. Co.*, 296 U.S. 385, 391 (1926). Because fundamental unfairness is the "touchstone of due process," *Gagnon*, 411 U.S. at 790, a lack of fair warning or notice "violates the first essential of due process." *Connally*, 296 U.S. at 391.

A law that does not "state with sufficient clarity the consequences" of its violation deprives a person of fair warning through its vagueness.

*United States v. Batchelder*, 442 U.S. 114, 123 (1979). Similarly, an unforeseeable judicial departure from precise statutory language deprives a person of fair warning when applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). "[W]hether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning" turns on examining the law at the time of the punished transgression from the standpoint of a reasonable person. *Bouie*, 378 U.S. at 354. "It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). This principle is "fully applicable" in the context of probation revocation. *Douglas v. Buder*, 412 U.S. 430, 432 (1973).

*Pope*'s two conclusions—that § 46-18-203 (2017)'s preconditions to revocation authority do not apply to misdemeanor offenders, and that § 46-18-203 (2015) instead applies to such offenders—cannot be applied to Tony without violating Tony's due process right to fair warning. Thus, those conclusions must not apply to Tony.

As addressed in the previous section, *Pope* proceeds with a construction of § 46-18-203 (2017) that is contrary to both plain meaning and lenity. Specifically, § 46-18-203 (2017) says it applies to "any offender," yet *Pope* obviates § 46-18-203 (2017)'s application to misdemeanor offenders. What's more, *Pope* contends § 46-18-203 (2017) is ambiguous, yet *Pope* ignores the rule of lenity's command to construe ambiguities in favor of criminal defendants.

Ignoring plain meaning and lenity is significant for due process because both rules have their origin in assuring fair warning. Plain meaning controls because doing otherwise "den[ies] the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Bostock*, 140 S. Ct. at 1738. Lenity controls because of "the tenderness of the law for the rights of individuals to fair notice of the law." *Davis*, 139 S. Ct. at 2333. Not applying these rules enables construing a law in a way that will not assure persons receive their constitutionally-guaranteed fair warning. If *Pope* is applied here, that will be the result.

One can see this in the timeline of this case. By its terms, § 46-18-203 (2017) took effect several months before Tony's underlying offense

in 2017. Tony agreed to plea nolo contender for a deferred sentence when § 46-18-203 (2017) was in effect. Had Tony opened the Montana Code Annotated current at the time, the only statute authorizing the revocation of the deferred sentence that he bargained for would have been § 46-18-203 (2017). That statute would have assured Tony that it applied to "any offender," including him, and that the only sort of violation upon which his deferred sentence could be directly revoked was a noncompliance violation. Thus, when Tony made the decision to plead in exchange for a deferred sentence, the law did not fairly warn that the deferred sentence could be directly revoked for anything other than a noncompliance violation; in actuality, the face of the law assured Tony that could not happen.

Surrounding principles of law also told Tony § 46-18-203 (2017) would apply. After all, "[t]he law in effect at the time an offense is committed controls as to the possible sentence for the offense, as well as the revocation of that sentence." *Tirey*, ¶ 26; *accord Tracy*, ¶ 16. Further, neither § 46-18-203 (2017) nor its enacting bill contained a savings clause or its equivalent to extend § 46-18-203 (2015)'s application beyond § 46-18-203 (2017)'s effective date.

Critically in this regard, Tony is distinguishable from Pope. Pope committed her offense in 2015. The law in effect at the time Pope's offense was committed was § 46-18-203 (2015), which fairly warned Pope that any probation violation could result directly in a revocation sentence. Under *Pope*, Pope got the revocation law that was in effect at the time of her offense and her original plea. *See Pope*, ¶ 20. By contrast, § 46-18-203 (2017) was in effect at both the time of Tony's offense and Tony's decision to plead in exchange for a deferred sentence. He was never warned under § 46-18-203 (2015).

In these circumstances, one cannot fairly say Tony should have foreseen this Court's ruling in *Pope*, holding that § 46-18-203 (2017) does not apply to misdemeanor offenders and that § 46-18-203 (2015) does. While perhaps someone who committed her offense before § 46-18-203 (2017) took effect or after *Pope* was issued will have fair warning of this Court's conclusions in *Pope*, Tony did not. Because Tony did not have fair warning of *Pope* or that § 46-18-203 (2015) might apply to his post-May 2017 offense, due process and fundamental fairness require that this Court not apply *Pope* or § 46-18-203 (2015) to Tony. This

Court should reverse because Tony's sentence is illegal under § 46-18-203 (2017), the only law under which Tony had fair warning.

## III. Alternatively, the sentencing court abused its discretion in revoking the deferred sentence and imposing a non-deferred sentence.

Upon petition, the Sentence Review Division reviews sentences imposing one or more years of actual incarceration for equity and appropriateness under the circumstances. *State ex rel. Greely v. Dist. Ct. of Fourth Jud. Dist.*, 590 P.2d 1104, 1110 (1979); *State v. Coleman*, 605 P.2d 1000, 1006 (1979); *see* Mont. Code Ann. §§ 46-18-903, -904. When a sentence imposes less than a year of actual incarceration, this Court steps into the place of the Sentence Review Division. *State v. Herman*, 2008 MT 187, ¶ 11, 343 Mont. 494, 188 P.3d 978; *Herd*, ¶ 25.

The Municipal Court's sentence at the revocation hearing—revoking Tony's deferred sentence and imposing a suspended, one-year sentence—entails less than a year of actual incarceration. Because Tony cannot petition to the Sentence Review Division, he petitions this Court to review the reasonableness of the Municipal Court's sentence. Under the circumstances, the sentence was unreasonable.

First, as addressed above, by not applying § 46-18-203 (2017), the revocation sentence unreasonably deprived Tony of the benefit of the deferred sentence he bargained for—a deferred sentence bargained for while § 46-18-203 (2017) was in effect.

Second, the underlying offense and the alleged violation did not warrant a heavy response. The nature of the alleged violation was that of a one-time event in which Tony mistakenly took the wrong road while driving his son to school in a section of Missoula with a complicated layout. (D.C. Doc. 10 at 3.) A jury found this did not knowingly violate an order of protection. (D.C. Doc. 10 at 4.) Also, the underlying offense was questionable at best, with Dr. Scolatti finding that video footage supported Tony's innocence. (D.C. Doc. 5, Ex. D at 11.) The Municipal Court's conclusions that neither the underlying offense nor the alleged violation warranted sentences of actual incarceration (*see* D.C. Doc. 1, 2/16/18 & 3/28/19 Sentencing Orders) reflects the less than severe nature of the conduct at issue.

Third, for that less than severe conduct, the revocation sentence harshly ensured Tony would have a permanent misdemeanor on his record that would endanger his ability to continue to serve his country.

Upon revoking and imposing a suspended sentence, the Municipal Court correctly concluded the alleged violation here did not warrant any actual incarceration and instead could be addressed through probation. (3/28 Disc 2, Track 2 at 8:40–13:14.) As between a deferred or suspended sentence, either was probation. Mont. Code Ann. § 46-1-202(21) (defining probation). It may have been reasonable to lengthen Tony's probation through a continuing deferred sentence. It was not reasonable to lengthen Tony's probation through a suspended sentence that would endanger Tony's service to his country. This Court should reverse for an abuse of discretion.

## CONCLUSION

For the foregoing reasons, Tony respectfully requests that this Court hold the revocation sentence was illegal or an abuse of discretion.

Respectfully submitted this 9th day of March, 2021.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Alexander H. Pyle
ALEXANDER H. PYLE
Assistant Appellate Defender

## 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 7,506, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
ALEXANDER H. PYLE

**APPENDIX**

Written Judgment ........................................................................App. A

District Court's Opinion and Order ................................................App. B

## CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-09-2021:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: City of Missoula
Service Method: eService

James P. Nugent (Attorney)
City Hall
435 Ryman
Missoula MT 59802-4279
Representing: City of Missoula
Service Method: E-mail Delivery

Electronically signed by Pamela S. Rossi on behalf of Alexander H. Pyle
Dated: 03-09-2021