IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0430

IN THE MATTER OF:

V.K.B.,

A Youth.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald L. Harris, Presiding

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STATEMENT OF THE ISSUE

A youth court is statutorily authorized to order a delinquent youth's placement in a state youth correctional facility if the youth court determines the youth is a serious juvenile offender and finds that placement in youth prison is necessary for the protection of the public. Did the youth court exceed its statutory authority and abuse its discretion when it ordered Appellant's placement in Pine Hills without making the requisite statutory findings, where the record does not contain substantial evidence to support a finding that placement in the most restrictive environment possible was necessary to safeguard the public or that no less restrictive placement would suffice?

FACTUAL AND PROCEDURAL BACKGROUND

In May of 2019, when V.K.B. was 15, he found a gun in a friend's bedroom. V.K.B. had never taken a hunter's safety course before or otherwise been taught how to safely handle a gun. Although someone said the gun was "jammed," he was not sure whether it was loaded or not. He could hear something rattling around inside and started banging on the gun. While he did this, the gun was pointed in the

general direction of his good friend, T.R. The gun discharged, and she died as a result of a gunshot wound. (5/14/20 Tr. at 9–10.)

Prior to this incident, V.K.B. had only one contact with the youth court system regarding a potential criminal mischief charge, for which he received a diversion upon an agreement to pay restitution. (Social History and Recommendations[1] at 2, attached hereto as Appendix C.) But after T.R.'s death, V.K.B. began self-medicating with alcohol and marijuana in an effort to forget what had happened to his friend. (App. C at 4.) On October 28, 2019, the State filed a petition to adjudicate V.K.B. a delinquent youth in this matter, Cause DJ 19-161. The State alleged he engaged in conduct that if committed by an adult would constitute felony negligent homicide and three marijuana misdemeanors: one count of possession of 60 grams or less of marijuana and two counts of possession of marijuana paraphernalia. (Y.C. Doc. 1.)

The youth court ordered V.K.B.'s release on various conditions, including the requirement that he obtain mental health and chemical

[1] On August 24, 2021, this Court granted V.K.B.'s motion to supplement the record with three documents considered by the youth court when imposing its disposition in this case, but which were not included in the record transmitted on appeal. For the Court's convenience, those documents are attached hereto as Appendices B-D.

dependency evaluations. (Y.C. Doc. 8.) V.K.B. was diagnosed with post-traumatic stress disorder, major depressive disorder, and moderate cannabis use disorder. (App. C at 3–4.) These diagnoses qualified V.K.B. for treatment in a therapeutic youth group home through the Montana Medicaid program. (*See* Update to Court, attached hereto as Appendix D; 6/25/20 Tr. at 3.) A therapeutic youth group home is a specialized type of youth care facility providing full-time care and therapeutic services in a residential setting, with the supervision and intensity of treatment required to manage and treat no more than eight youth who present with severe emotional disturbances and/or behavioral disorders. *See* Admin. R. Mont. 37.97.102(20)–(21), (27). In order to be licensed and under contract with the Montana Department of Public Health and Human Services (DPHHS), and to qualify as an approved Medicaid provider, a facility must meet specific criteria, including providing a required number of hours of therapy and therapeutic intervention services by qualified staff members for the purposes of reducing the impairment of the admitted youth's mental disability and improving the youth's functional level; alleviating the emotional disturbances; reversing or changing maladaptive patterns of

behavior; and encouraging personal growth and development. Admin. R. Mont. 37.97.906(1); *see generally* Admin. R. Mont., Title 37, Ch. 97, Subchapter 9. In January 2020, V.K.B. was placed in the STAR Youth Home, a licensed therapeutic youth group home in Billings operated by Youth Dynamics, Inc. (YDI). (App. C at 1–3; YDI Letter, attached hereto as Appendix B.)

On March 6, 2020, the State filed a separate petition to adjudicate V.K.B. a delinquent youth in a separate matter, Cause DJ 20-042. The State alleged in January and February of 2020, while V.K.B. was conditionally released pending his adjudication in this case, he stole about $160 from the Skyview High School student store cash box, and that these acts would constitute first offense misdemeanor theft if committed by an adult.[2] Pursuant to an agreement with the State, V.K.B. pled true to the negligent homicide and theft charges, and the State dismissed the marijuana counts. (5/14/20 Tr. at 1–10.)

[2] V.K.B. has appealed the dispositional order imposed in that case as well. *See Matter of V.K.B.*, DA 20-0432. This Court may take judicial notice of the substance of the State's allegations, which appear in the petition to adjudicate V.K.B. a delinquent youth, Y.C. Doc. 1, in the youth court record filed in that case. Mont. R. Evid. 201(b), (d).

During the change of plea hearing, the youth court noted it had received and read a letter from the manager of the STAR Youth Home regarding V.K.B.'s progress. (5/14/20 Tr. at 10; App. B.) That letter provided, in part:

> [V.K.B.] has been in our group home since 1/27/2020. During this time, we have seen him grow and make many positive changes in his life. He has gone from a boy who struggled to make the right choices, to a young man who is respectful, focused, and committed to being a better person. He takes responsibility for his actions and has become very motivated to complete his treatment. . . .
>
> [V.K.B.] has made some bad decisions in his lifetime, but I have seen such growth in him in these past 4 months. I'm confident in saying that he will graduate our program successfully.

(App. B.)

At the close of the change of plea hearing, the youth court told V.K.B., "Congratulations, that's awesome! . . . [Y]ou keep up the hard work, alright?" (5/14/20 Tr. at 11.) The youth court then set both matters for a dispositional hearing on June 11, 2020.

Youth Court Probation Officer LaBree Stephens (Officer Stephens) provided a predisposition report to the youth court. (App. C.) Officer Stephens reported that since his placement at the STAR Youth Home, V.K.B. had participated in individual and family therapy and

chemical dependency treatment, had been placed on medication to treat his anxiety, and had completed his sophomore year of high school with passing grades. (App. C at 1; 6/11/20 Tr. at 9–10.) After the school year ended, he started attending the New Day Ranch day treatment program. (App. D; 6/11/20 Tr. at 10.)

Officer Stephens recommended the youth court place V.K.B. on probation until age 21, with an initial placement at the STAR Youth Home until he successfully completed that treatment program, followed by return to the care of his father, E.B. (App. B at 4.) The prosecutor and the defense both concurred with that recommendation. (6/11/20 Tr. at 8–9.) After learning that V.K.B. might return home in as little as four months, the youth court judge stated the joint recommendation "[m]akes no sense to me." (6/11/20 Tr. at 10–11.) The youth court judge indicated he was "really disturb[ed]" by the fact that Father "did not even bother to fill out his packet that Youth Service – Court Services asked him to do," 6/11/20 Tr. at 11, and he questioned whether Father could appropriately supervise V.K.B., given that "[h]e couldn't even be here today," 6/11/20 Tr at 12–13. Officer Stephens explained that Father's parental rights remained intact and that, generally, in such

situations, when residential treatment is complete, the family is reunited. (6/11/20 Tr. at 11.) However, she noted she had suggested to V.K.B. that he might want to talk to his uncle or one of his two grandmothers who lived in the Billings area about living with them after his discharge from treatment. (6/11/20 Tr. at 11–12.)

The youth court judge indicated he wanted "to make sure . . . that when he's out of the youth home that he's going to go to a home where[] he's going to be held accountable, where he's going to have pretty strict supervision, and I – nothing I see here in this record indicates that his dad is going to provide that for him." (6/11/20 Tr. at 12.) The judge stated definitively, "[i]f my options are Pine Hills or getting him back with his dad in another four months, he's going to Pine Hills, if those are the only options your [*sic*.] giving me. . . . [T]here's got to be a better way." (6/11/20 Tr. at 12.) When defense counsel suggested that the youth court could order "parenting classes or some sort of that form to help engage" Father, the youth court refused to do so, saying that V.K.B. "need[s] something different" than living with Father. (6/11/20 Tr. at 13.) The youth court continued the dispositional hearing for two weeks, ordering Officer Stephens to "work with the family and

see if we can't come up with something that provides more structure after he's done with the group home in four months." (6/11/20 Tr. at 13.)

Officer Stephens provided a written update to the court prior to the continuation of the dispositional hearing. (App. D.) Officer Stephens reported that although Medicaid funding for V.K.B.'s placement at the STAR Youth Home was set to expire in September, the facility could request an extension of benefits if it was determined that V.K.B. required additional treatment and was not ready to discharge. (App. D; *see also* 6/25/20 Tr. at 3.) As for discharge options, she reported two of the three suggested family members indicated they were not available to care for V.K.B. at that time, and she had not been able to reach the third person. (App. D.) However, Officer Stephens explained she had been working with YDI, and they had "put in a referral" for a discharge placement to a therapeutic youth foster home. (App D.) "Therapeutic foster parents are in home treatment providers who, in addition to carrying out usual family foster parent responsibilities, implement treatment strategies, and provide treatment

interventions under the supervision of a therapeutic foster care agency's clinical staff according to the child's individual treatment plan." Admin. R. Mont. 37.51.603(2). *See also* Admin. R. Mont. 37.51.1410 (regarding additional required training for therapeutic youth foster parents). At the time of the dispositional hearing, there currently were no therapeutic youth foster home openings for boys in the Billings area, and it was unknown whether a home would be available when V.K.B. actually discharged. (App. D; 6/25/20 Tr. at 5–6.)

Despite this, Officer Stephens did not change her recommendation that V.K.B. be placed on probation. (App. D.) Instead, she explained V.K.B. would be placed on close supervision and subject to strict conditions designed to ensure his success on probation. He could be subjected to home detention, whereby he was not allowed to leave his home except for specific, delineated activities, such as weekly family and individual therapy sessions, outpatient chemical dependency treatment, medication management appointments, twice weekly check-ins with his probation officer including urinalysis tests, mandatory employment, and mandatory high school attendance and

meetings with his school counselor. (App. D; *see also* 6/25/20 Tr. at 4.) And his compliance with home detention could be monitored using GPS technology. (App. D.)

The prosecutor also continued to recommend probation. She reminded the youth court that under such a disposition, "if there's a violation he can be sent immediately to Pine Hills at that point." (6/25/20 Tr. at 4–5.) Defense counsel once again concurred with the State's and Officer Stephens's recommendation and specifically objected to placement at Pine Hills at that time because V.K.B. "is doing really well where he is at right now," Youth Court Services was still working on finding an alternative placement for discharge, and "they have four months to do so" before V.K.B. was likely to discharge from STAR Youth Home. (6/25/20 Tr. at 5.) Defense counsel requested the youth court postpone disposition in order to allow Officer Stephens and YDI additional time to find a therapeutic youth foster home or alternative family member or friend willing to care for V.K.B upon his discharge from treatment. (6/25/20 Tr. at 5–6.) In addition, both parties stipulated that V.K.B. would pay $2,000 in restitution for funeral expenses incurred by T.R.'s family. (6/11/20 Tr. at 8–9.)

Father addressed the court as well. He explained that he did not "blow off" the initial dispositional hearing but was "confused" about the date and had been told by his supervisor that he would lose his job if he missed work. (6/25/20 Tr. at 10.) Father explained he was a single father who had been raising three kids on his own.[3] (6/25/20 Tr. at 7.) Father stated his situation was "totally different from what it was when all this happened" back in 2019. (6/25/20 Tr. at 8.) When V.K.B. got into trouble, Father was working in the refineries and regularly worked 15-hour shifts, including night shifts, seven days a week. Since then, he had moved and obtained a new job and was working a regular schedule of 6:00 a.m. to 4:00 p.m., four days a week, with Fridays, Saturdays, and Sundays off. (6/25/20 Tr. at 6–8.) Father further explained that he had made arrangements for his mother to watch V.K.B. in her home in the mornings before school or work, and that his mother and sister had agreed to provide transportation for V.K.B. when Father was at work. (6/25/20 Tr. at 6–8.)

[3] V.K.B.'s mother died when he was only eight years old. (App. B at 1.)

The youth court refused defense counsel's request to continue the dispositional hearing to attempt to find an alternative residential placement upon discharge, stating:

> Unfortunately, this Court has been assured only that [V.K.B] would be in the group home until September, and then after that I don't know where [V.K.B.'s] going to be, and this is the time and date set for disposition in this matter, and so what I'm afraid of is that even if the Court were to delay this any longer, which I don't think would be a good idea for anybody, that we'd be no closer to figuring out where we're going to be and what could happen at that time.

(6/25/20 Tr. at 11.)

The youth court then imposed a single disposition in both matters, without differentiating between this misdemeanor theft case and the separate felony negligent homicide matter:

> Sir, for the offenses of Negligent Homicide, which is a felony if committed as an adult, and Theft, which is a misdemeanor, I'm going to adjudicate[] you as a delinquent youth based upon your admissions earlier. I'm going to impose the following disposition: That you be committed to the custody of the Department of Corrections until age 18 or sooner legally discharged with placement at the Pine Hills Youth Correctional Facility. And then I will place you on probation until age 21 under certain conditions. . . .
>
> . . . .

> I'm going to impose restitution in the amount of $2,000 payable to [T.R.'s grandmother] . . . .

(6/25/20 Tr. at 12–13.)

Although the youth court judge had told Father that his decision in this case had "nothing to do with parenting," and that it only wanted to "help [V.K.B] get the treatment and the – what he needs at the time he really needs it," 6/25/20 Tr. at 14, the youth court rejected the agreed-upon disposition that V.K.B. be allowed to remain in the therapeutic youth group home where he was thriving and from which he was supposed to graduate in about three months, struck the proposed condition requiring his placement in that facility, and ordered his immediate remand to the custody of the Department of Corrections (DOC) for placement in youth prison. (6/25/20 Tr. at 13–14.)

The youth court explained the reasons for its dispositional order as follows:

> We got to do four things for you. We got to give you structure. We got to give you treatment and that's for substance use disorder, for trauma, and for grief. If you don't get all three of those things, you're not going to turn your life around. It's not going to happen. You don't get on top of any addiction issue if you can't address the underlying trauma issues that often times is a trigger, and same with grief. It's a trigger for substance abuse disorders. We have to put you in a place where there is consistent

> accountability. The – Youth Services has had conditions for your probation before. You've been unable to meet them in part because of these issues I've just talked about. You've been through a lot in your young life, and the Court's aware of that, but we're to a point in your life where a very tragic thing has happened, and now we've got to kind of come to grips with things, and we've got to turn things around. The other thing that we need to do is that we have to make sure that you complete your education or get additional training. If we can do those things, then you got a shot, alright.

(6/25/20 Tr. at 10–11.)

The youth court did not orally find that V.K.B. was a serious juvenile offender; that V.K.B. had committed four or more misdemeanors in the prior 12 months; that a mental health professional had recommended placement in youth prison after an evaluation; or that placement in Pine Hills was necessary for the protection of the public, or that V.K.B. would be a danger to society if he was not incarcerated in youth prison. (6/25/20 Tr. at 10–14.) The written dispositional order in this matter contains none of these findings either. (Y.C. Doc. 25, attached hereto as Appendix A.)

V.K.B. is currently residing at Pine Hills. He timely appealed the dispositional order in this matter.

STANDARD OF REVIEW

"[A] youth court proceeding is a remedial civil proceeding rather than a criminal proceeding." *Matter of K.J.R.*, 2017 MT 45, ¶ 31, 386 Mont. 381, 391 P.3d 71. The Montana Youth Court Act "authorizes various final dispositions in the discretion of the court." *Matter of K.J.R.*, ¶ 18; *see also* Mont. Code Ann. §§ 1513(1)(a), -1512(1) (indicating the youth court "may" impose a variety of dispositions individually or in combination when a youth is found to be a delinquent youth). This Court reviews discretionary decisions of the youth court for an abuse of discretion. *See, e.g., Matter of K.J.R.*, ¶ 12 (modification of a prior dispositional order); *In re C.D.H.*, 2009 MT 8, ¶¶ 21-28, 349 Mont. 1, 201 P.3d 126 (requirement to register as a sexual offender under Mont. Code Ann. § 41-5-1513(1)(d)); *Matter of J.K.C.*, 270 Mont. 342, 344, 891 P.2d 1169, 1171 (1995) (order transferring a matter from youth court to district court under Mont. Code Ann. § 41-5-206).

"An abuse of discretion occurs if a court exercises discretion based on a clearly erroneous finding of fact, erroneous conclusion of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial

injustice." *Matter of L.H.*, 2021 MT 199, ¶ 8, ___ Mont. ___, ___ P.3d ___ (youth in need of care case); *see also Matter of K.J.R.*, ¶ 23 ("Exercise of . . . discretion necessarily requires non-arbitrary findings of fact and conclusions of law warranting the . . . disposition under the relevant statutory criteria. . . ."). A finding of fact is clearly erroneous if "it is not supported by substantial evidence, if the youth court clearly misapprehended the effect of the evidence, or if this Court is left with a definite and firm conviction that the youth court made a mistake." *Matter of J.W.*, 2016 MT 330, ¶ 10, 386 Mont. 1, 387 P.3d 195 (internal quotation marks and citation omitted).

SUMMARY OF THE ARGUMENT

The youth court exceeded its statutory authority and abused its discretion when it placed V.K.B. in Pine Hills, contrary to the recommendations of the defense, the prosecutor, and the youth court probation officer. As applicable here, Mont. Code Ann.

§ 41-5-1513(1)(b), (e) (2017) [4] authorize a youth court to order a delinquent youth's placement in Pine Hills if the court determines that the youth is a serious juvenile offender and placement in youth prison, the most restrictive environment possible, is necessary for the protection of the public and no less restrictive environment will suffice. The youth court did not have the statutory authority to impose such a disposition in this case because it did not find any of the requisite statutory criteria existed and there was not substantial evidence in the record to support the latter finding in any event.

The youth court based its decision to commit V.K.B. to youth prison on its inaccurate belief that V.K.B. had previously been granted the grace of a probationary sentence and failed to abide by the conditions thereof while under Father's care. It further failed to account for both Father's and V.K.B.'s changed circumstances since V.K.B.'s last violations. Thus, the youth court's determination that an out-of-home placement was required in this case to provide "structure"

[4] V.K.B. committed the acts that resulted in his adjudication as a delinquent youth in this case in May of 2019. Accordingly, all references to the Montana Code Annotated in this brief are to the 2017 version of the Code unless otherwise specifically provided.

and "accountability" was based on clearly erroneous facts, made without employment of conscientious judgment regarding all of the relevant evidence, and contrary to the express purposes of the Montana Youth Court Act, which require the youth court to preserve the family unit and rehabilitate the youth in his home whenever possible.

Regardless, the youth court did not believe, nor could it have found on this record, that other, less restrictive out-of-home placements than youth prison—such as a placement with a relative, or a placement in a therapeutic youth foster home—were insufficient to protect the public in this case. The record shows the youth court sent V.K.B. to Pine Hills solely because no such placements were currently available at the time of the dispositional hearing. But V.K.B. did not need an immediate placement and would not need such a placement for at least three months. In light of these facts, the youth court arbitrarily denied defense counsel's request to continue the hearing to allow the youth probation officer to continue working on finding an appropriate and available less restrictive placement for V.K.B.—a decision that resulted in his removal from the treatment program where he had been thriving three months before he was scheduled to graduate, and his immediate

placement in youth prison instead. Under these circumstances, the youth court could not have lawfully found that youth prison was the least restrictive alternative for the protection of the community or that V.K.B. would be a danger to the public unless placed in that most restrictive environment. The portion of the youth court's dispositional order committing him to the custody of DOC for placement in Pine Hills should be reversed and stricken from the dispositional order in this case.

ARGUMENT

The youth court exceeded its statutory authority and abused its discretion when it committed V.K.B. to the custody of the Department of Corrections for placement in youth prison.

The purposes of the Montana Youth Court Act (the Act) include providing "for the care, protection, and wholesome mental and physical development of a youth" deemed at risk of becoming an adult offender. Mont. Code Ann. § 41-5-102(1). To that end, the Act sets forth "a program of supervision, care, rehabilitation, detention, competency development, and community protection for youth" falling under the auspices of the Act. Mont. Code Ann. § 41-5-102(2)(b). However, the Act specifically requires youth courts to apply its provisions so as

"to preserve the unity and welfare of the family whenever possible," Mont. Code Ann. § 41-5-102(1), and to "separat[e] the youth from the parents only when necessary for the welfare of the youth or for the safety and protection of the community," Mont. Code Ann. § 41-5-102(3).

After a youth is adjudicated a delinquent youth, the youth court shall direct the juvenile probation officer to complete a predisposition report. Mont. Code Ann. § 41-5-1511(2). The evidence presented during the dispositional hearing must include the predisposition report, and the youth court must consider the predisposition report when imposing its disposition. *Matter of K.J.R.*, ¶ 18; Mont. Code Ann. § 41-5-1511(4).

The Act gives the youth court the discretion to impose a number of different dispositional options in isolation or combination as part of its final disposition in a delinquent youth proceeding. The most restrictive disposition that a youth court may impose on certain delinquent youths is a commitment to the custody of DOC for placement in youth prison. Mont. Code Ann. § 41-5-1513(1)(b), (1)(e); *see generally* Mont. Code Ann. §§ 41-5-1513(1), -1512(1). Less restrictive alternatives include, but are not limited to:

- Placing the youth on probation, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(a);

- Placing the youth in a residence that ensures that the youth is accountable, that provides for rehabilitation, and that protects the public, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(b);

- Committing the youth to the youth court for the purposes of placement in a private, out-of-home facility, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(c);

- Ordering restitution for damages that result from the offense for which the youth is disposed by the youth court, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(d);

- Requiring the youth or the youth's parents to receive counseling services, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(f);

- Requiring the medical and psychological evaluation of the youth or the youth's parents, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(g);

- Requiring the parents of the youth to furnish services the court may designate, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(h);

- Ordering further care, treatment, evaluation, or relief that the court considers beneficial to the youth and community, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(i); or

- Placing the youth on home arrest, Mont. Code Ann. §§ 41-5-1513(1)(a), -1512(1)(k).

When V.K.B. accidentally shot T.R., two subsections of Mont. Code Ann. § 41-5-1513(1) discussed the youth court's authority to commit certain delinquent youths to the custody of DOC for placement

in a youth prison such as Pine Hills, subsections (1)(b) and (1)(e). Those subsections provided a youth court may:

> (b) commit the [delinquent] youth to the department for placement in a state youth correctional facility and recommend to the department that the youth not be released until the youth reaches 18 years of age. The provisions of 41-5-355 relating to alternative placements apply to placements under this subsection (1)(b). The court may not place a youth adjudicated to be a delinquent youth in a state youth correctional facility for an act that would be a misdemeanor if committed by an adult unless:
>
> (i) the youth committed four or more misdemeanors in the prior 12 months;
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> (ii) a psychiatrist or a psychologist licensed by the state or a licensed clinical professional counselor or a licensed clinical social worker has evaluated the youth and recommends placement in a state youth correctional facility; and
>
> (iii) the court finds that the youth will present a danger to the public if the youth is not placed in a state youth correctional facility.
>
> . . . .
>
> (e) *in the case of a delinquent youth who is determined by the court to be a serious juvenile offender, the judge may specify that the youth be placed in a state youth correctional facility . . . if the judge finds that the placement is necessary for the protection of the public.* The court may order the department to notify the court within 5 working days before the proposed release of a youth from a youth correctional facility. Once a youth is committed to the department for placement in a state youth correctional facility, the department is

> responsible for determining an appropriate date of release or an alternative placement.

Mont. Code Ann. § 41-5-1513(1) (emphasis added).

A serious juvenile offender was defined as a "a youth who has committed an offense that would be considered a felony offense if committed by an adult and that is an offense against a person, an offense against property, or an offense involving dangerous drugs." Mont. Code Ann. § 41-5-103(38).

When construing a statute, this Court's "cardinal first step" is "'to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted or to omit what has been inserted.'" *State v. Running Wolf*, 2020 MT 24, ¶ 15, 398 Mont. 403, 457 P.3d 218 (quoting Mont. Code Ann. § 1-2-101). "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 presumes the Legislature does not pass meaningless legislation and will harmonize statutes relating to the same subject in order to give effect to each statute. *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. "This Court also presumes that the Legislature acts with deliberation and full knowledge of all existing

laws on a subject," including when it chooses not to eliminate an existing provision of law. *Brendal*, ¶ 18. Where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls. *Brendal*, ¶ 18.

Because both subsections (1)(b) and (1)(e) discuss the youth court's authority to commit a youth to the custody of DOC for placement in a youth prison, both subsections must be read together and harmonized if possible. Although the first sentence of Mont. Code. Ann. § 41-5-1513(1)(b) standing alone would appear to generally authorize a youth court to commit any delinquent youth to the custody of DOC for placement in a youth prison without limitation, that authority is expressly and plainly limited by the remainder of subsection (1)(b). *See In re K.M.G.*, 2010 MT 81, ¶ 32, 356 Mont. 91, 229 P.3d 1227 (describing this language as restricting the youth court's authority to commit youths to Pine Hills for petty offenses). The youth court's authority is further expressly restricted by the provisions in subsection (1)(e). That section authorizes the youth court to issue an order specifying placement in a youth prison only if the court determines the delinquent youth meets the definition of a serious

juvenile offender and finds that placement in the most restrictive environment possible for delinquent youths is necessary for the protection of the public.

Because this Court presumes the Legislature does not pass meaningless legislation and may not omit what the Legislature has included, it must give meaning to Mont. Code Ann. § 41-5-1513(1)(e), if possible. The only reasonable reading of these two provisions is that the general authority granted by the first sentence of subsection (1)(b) is limited by the more specific language in the first sentence of subsection (1)(e). That is, a youth court may commit a youth to the custody of DOC for placement in youth prison under (1)(b)— thereby specifying placement in youth prison under (1)(e)—only if the youth court finds the youth is a serious juvenile offender and such placement is necessary for the protection of the public. Any other reading of the two subsections would render the first sentence in Mont. Code Ann.

§ 41-5-1513(1)(e) superfluous and the statutorily-defined term "serious juvenile offender" essentially meaningless.[5]

This Court construed a prior version of the dispositional statute in a similar fashion. In 1989, the Act's dispositional statute provided:

> (1) If a youth is found to be delinquent . . ., the youth court may . . . .
>
> > (b) commit the youth to the department[6] if the court determines that the youth is in need of placement in other than the youth's own home; provided, however, that:
> >
> > . . . .
> >
> > > (ii) in the case of a delinquent youth who is determined by the court to be a serious juvenile offender, the judge may specify that the youth be placed in a youth correctional facility if the judge finds that such placement is necessary for the protection of the public.

Mont. Code Ann. § 41-5-523(1)(b)(ii) (1989).

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[5] The term serious juvenile offender only appears in one other statute in the Code, Mont. Code Ann. § 41-5-1416(4), regarding the provision of victims' services in youth proceedings. ("For purposes of this section, "juvenile felony offense" means an offense committed by a juvenile that, if committed by an adult, would constitute a felony offense. The term includes any offense for which a juvenile may be declared a serious juvenile offender, as defined in 41-5-103."). As such, the term serves no statutory purpose other than to delineate which delinquent youths may be committed to a state youth correctional facility.

[6] At that time, "the Department" meant the Department of Family Services, the predecessor of DPHHS.

In *Matter of J.F.*, 241 Mont. 434, 437, 787 P.2d 364, 366 (1990), the youth argued on appeal that the youth court erred when it found placement in youth prison was necessary for the protection of the public under the facts of the case. This Court reversed the dispositional order because the youth court failed to "consider[] a lesser restrictive alternative," and, thus, the court's finding that youth prison was necessary for the protection of the public was clearly erroneous. Shortly thereafter, in *Matter of H.F.*, 242 Mont. 381, 383, 791 P.2d 53, 53 (1990), this Court struck the portion of the youth court's disposition placing the youth in Pine Hills because the youth court was "without authority to commit H.F. to a youth correctional facility" where the youth court "did not find that H.F. was a serious juvenile offender" and the acts for which the disposition was being imposed did not bring her within the definition of a serious juvenile offender.

Although the Legislature has since moved the provision regarding serious juvenile offenders to Mont. Code Ann. § 41-5-1513(1)(e), it has not deleted that provision or eliminated its requirements from the law. Accordingly, under the reasoning of *Matter of J.F.* and *Matter of H.F.*, a youth court lacks the authority to commit a youth to the custody of DOC

for placement in youth prison under (1)(b) unless it first determines the youth is a serious juvenile offender and, after considering less restrictive alternatives, finds the placement is necessary for the protection of the public under (1)(e), and the substantial evidence in the record supports those findings.

In this matter, the youth court found V.K.B. was a delinquent youth because he engaged in conduct that if committed by an adult would constitute a felony offense against a person—negligent homicide.[7] However, the youth court did not determine on the record that V.K.B. was a serious juvenile offender or that placement in youth prison was necessary for the protection of the public. Nor did the court explain why less restrictive alternatives than youth prison, such as placement with a relative or in a therapeutic youth foster home, would be insufficient to protect the public. Although the court's written dispositional order indicates that V.K.B. is "a suitable person to be committed to the custody of the Department of Corrections," *see* App. A

[7] Negligent homicide is a felony punishable by more than one year in prison. *See* Mont. Code Ann. §§ 45-1-201(1), 45-5-104(3). It is codified in Chapter 5 of Title 45, which identifies "Offenses Against a Person."

at 2, the statutorily-required factual findings rendering him "suitable" for such a placement appear nowhere in the record.[8]

Nor is there substantial evidence in the record to support an implied finding that V.K.B. would present a danger to the public if not placed in a state youth correctional facility. This Court previously held that a youth court cannot find as a matter of fact that placement in a state youth correctional facility is necessary for the protection of the public if it fails to consider less restrictive alternatives. *See Matter of J.F.*, 241 Mont. at 437, 787 P.2d at 366. The youth in that case was placed on probation after he burglarized a grocery store after hours and stole beer, chips, and ice cream. While on probation, he successfully completed an inpatient chemical dependency program, but he repeatedly violated the curfew and no alcohol probation conditions and was suspected of another theft. A petition to revoke his probation was filed. The Youth Placement Committee recommended alcohol

[8] Previously, the youth court was authorized to commit a delinquent youth to the youth forest camp only if both the court and DOC's predecessor, the Department of Institutions, deemed the youth "a suitable person for placement in a youth forest camp" and there was space available in that facility. *See, e.g.*, Mont. Code Ann. § 41-5-523(2)(b) (1983). This language does not appear anywhere in the 2017 version of the Act.

treatment, but specifically did not recommend placement at Pine Hills. J.F.'s alcohol counselor testified he had gone through three counselors in six months and had made little progress in treatment because each time there was a new counselor, "'we basically go back to square one.'" He further testified that J.F.'s alcohol use, age, and family situation all contributed to his inability to follow the terms of his probation. *Matter of J.F.*, 241 Mont. at 435–36, 787 P.2d at 365.

On appeal, J.F. argued the youth court erred in designating him a danger to the public if not committed to youth prison. *Matter of J.F.*, 241 Mont. at 436, 787 P.2d 364. This Court held although the youth court explicitly found placement at Pine Hills was necessary for the protection of the public, the order could not stand because the youth court failed to "consider[] a lesser restrictive alternative which, under § 41-5-523(1)(i), MCA, would provide J.F. with . . . further care and treatment for alcohol dependency," which the record indicated he needed and which was not available at Pine Hills. *Matter of J.F.*, 241 Mont. at 437, 787 P.2d at 366. Without doing so, there was insufficient evidence in the record to support the finding that placement

at Pine Hills was necessary to protect the public or that J.F. was a danger to the public without such a placement.

The probation officer, prosecutor, the defense, and V.K.B.'s current treatment provider all agreed the public could be adequately protected by placing V.K.B. on formal probation so that he could complete his current treatment program in the therapeutic youth group home and then transition back to the community and his Father's care. No treatment provider or expert indicated that a higher level of care or a longer period of inpatient treatment was required in this case. And none testified that the community would be better protected by removing V.K.B. from that therapeutic placement before he successfully completed it and placing him in youth prison. Yet, that is exactly what the youth court did here.

The youth court initially rejected the parties' joint recommendation because it believed that upon discharge, Father would not hold V.K.B. accountable because V.K.B. had previously been on "probation" and failed to abide the conditions of that sentence while in Father's custody. (*See* 6/11/20 Tr. at 11–12 ("he's going to go right back into an[] environment that he's had a lot of problems with right");

6/25/20 Tr. at 11 ("Youth Services has had conditions for your probation before. You've been unable to meet them . . . .").) To the extent the youth court believed V.K.B. had already received an act of grace through a probationary sentence and failed, that finding is not supported by any evidence in the record and is clearly erroneous. V.K.B. had never been adjudicated a delinquent youth or youth in need of intervention before. He had never been placed on probation. His first formal petition—this one— resulted in youth prison.

Although V.K.B. skimmed a small sum from his high school store's cash box while he was released pre-adjudication in this case, and, thus, violated his conditions of release, conditional release prior to adjudication is not the same as probation—especially not probation with a home detention condition with GPS monitoring, as Officer Stephens recommended in this case. And violations of a release order do not carry the same consequences as probation violations, which can directly result in placement in youth prison for years. To the extent the youth court did not comprehend the difference, its decision to place V.K.B. in the most restrictive environment possible due to his alleged

past failure at "probation" was arbitrary and capricious and based on a clearly erroneous fact or misunderstanding of the law.

Moreover, the youth court failed to take into consideration that both V.K.B.'s and Father's situations had changed since V.K.B. violated the terms of his conditional release in this case. Father had changed jobs and moved so he could be more available to parent V.K.B. directly and personally. Although the youth court judge assured Father his parenting was not at issue, his rationale for sending V.K.B. to youth prison continued to rely heavily on the need to provide more "structure" and "accountability" for V.K.B. than Father had provided in the past, without any discussion of Father's changed circumstances. In addition, V.K.B. was thriving in treatment. By the time V.K.B. would be released to Father's care under the joint recommendation of the parties, he would have spent at least eight months in a therapeutic setting, where he received individual and family counseling, mental health medication management, chemical dependency treatment, and completed his sophomore year of school. He was maturing, he was getting treatment, and he was taking responsibility for his actions. The youth court judge acknowledged V.K.B.'s success and praised him for it, but his

disposition in no way accounted for these changed circumstances and continued to rely on V.K.B.'s alleged need for treatment—treatment he was currently successfully completing.

Everyone involved in this case believed that the community could be adequately protected by placing V.K.B. with Father and on probation with close supervision, including GPS monitoring and home detention that required him to remain in the home except for pre-approved and necessary appointments, school, and work—everyone, that is, except the youth court judge. The youth court judge seemed to reject that recommendation in no small part because Father failed to fill out some paperwork and appear at the original dispositional hearing due to confusion and fear of losing his job. But a natural parent has a fundamental right to the care and custody of his child, and a child has a fundamental right to be placed in the care and custody of his parent. *Matter of B.H.*, 2020 MT 4, ¶ 39, 398 Mont. 275, 456 P.3d 233. Because of this, the Act requires a youth court to preserve the unity and welfare of the family and to achieve the purposes of rehabilitation of the youth and community safety in a family environment *whenever possible*. Mont. Code Ann. § 41-5-102(1), (3). The record shows the youth court

failed to apply these principles and abide by these legislative purposes when exercising its discretion in this case. The substantial evidence in the record did not support the conclusion that the public could not be protected unless V.K.B. was removed from his Father's home.

Nor did the youth court adequately consider and reject other less restrictive out-of-home placement options than youth prison. Notably, the youth court specifically continued the dispositional hearing in this case in order to give Officer Stephens time to find an appropriate and willing relative or family friend to care for V.K.B. upon discharge from the STAR Youth Home. That is, the youth court did not find or believe that placement in a residential setting—with someone other than Father—would be inadequate to protect the public. Nor did the youth court find that the community could not be protected if V.K.B. was placed in a therapeutic youth foster home. The youth court instead rejected these less restrictive options on the grounds that there was not a current placement available *at the time of the dispositional hearing*, and no one could assure the youth court that a placement would be available when V.K.B. was expected to graduate from the STAR Youth Home three months in the future. (*See* 6/25/20 Tr. at 11.) But, of

course, that was an impossible request. Therapeutic youth foster homes do not take reservations. And children do not move in and out of them on a pre-arranged schedule. No one could know for certain whether a therapeutic youth foster home would be available months in the future at the moment that V.K.B. would discharge. But with at least three months advance notice, Officer Stephens could work with DPHHS and YDI to find an appropriate placement for V.K.B. and to negotiate a mutually agreeable discharge date to enable such a transition.

For that reason, V.K.B.'s counsel requested the youth court continue the proceeding to allow the parties additional time to find an available, appropriate, less restrictive alternative than youth prison—and to allow V.K.B. to graduate from the residential treatment program in which he had been successfully participating for the past five months. The youth court arbitrarily refused to do so, stating that "this is the time and date set for disposition in this matter." (6/25/20 Tr. at 11.). The youth court seemed to believe its hands were tied. But that is not the case. The Act only requires that the youth court hold a dispositional hearing "[a]s soon as practicable" after the adjudication or change of plea, not that it occur within a certain time period or as soon

as possible. *See* Mont. Code Ann. § 41-5-1511(1). Moreover, this Court has held that the youth court maintains continuing jurisdiction over youth court proceedings and may modify an order, including a dispositional order, at any time. *Matter of K.J.R.*, ¶ 25 (holding "the Youth Court retained broad discretion under § 41-5-1422(1), MCA, to revoke K.J.R.'s original youth court commitment under § 41-5-1512(1)(c), MCA, and then to recommit him to DOC for placement in a youth correctional facility pursuant to § 41-5-1513(1)(b), MCA"). Nothing prevented the youth court from postponing the decision regarding V.K.B.'s placement upon discharge from the therapeutic youth group home for a couple months, when it would be known whether a less restrictive alternative than prison was actually available or not. Importantly, V.K.B. was not going to be released to Father that day; he was in a safe, appropriate, therapeutic environment and was expected to stay there for at least three months. The youth court had time to work with—it just arbitrarily refused to do so. Because the youth court believed less restrictive alternatives were appropriate, just not currently available, it abused its discretion when it imposed a Pine Hills commitment at that time.

In bears repeating that V.K.B. was found to be a delinquent youth in this matter for accidentally killing his friend when he was only 15 years old. V.K.B. did not intentionally hurt anyone. He has never been adjudicated a delinquent youth for an act that would constitute a violent offense if committed by an adult. *See* Mont. Code Ann. § 46-23-502(13). His only arguably intentional harmful conduct—directed at someone other than himself—was skimming a small sum from his school store's cash box which he promptly repaid. As the youth court understood, V.K.B. was struggling with PTSD, major depression, and chemical dependency and he needed mental health and chemical dependency treatment—treatment he was then receiving at his therapeutic youth group home and that his providers believed could be adequately provided in the community upon graduation and discharge. Although the youth court assured Father his disposition was designed to ensure that V.K.B. "get[s] the treatment and the – what he needs at the time he really needs it," the youth court rejected the recommendations of everyone involved in V.K.B.'s case and ripped him out of a small, residential treatment program in his home community where he was thriving and from which he was close to graduating, to

send him to a youth prison 150 miles away. While Pine Hills does offer some youth programming at this time, unlike when this Court decided *Matter of J.F.*, a youth prison is not a therapeutic treatment facility—it is a secure correctional facility staffed by correctional officers and housing both youth and young adult offenders. And to the extent the youth court believed it could order Pine Hills to provide specific treatment to V.K.B., counsel is unaware of any statute granting the youth court authority to do so. (*See* 6/25/20 Tr. at 12, "I want to make very, very clear that while you're at Pine Hills, I expect you to receive the following treatment . . . .") V.K.B., of course, had no control over the type of programming or treatment he was to receive from DOC while at Pine Hills.

Contrary to popular belief, research has found that juvenile incarceration fails to reduce recidivism and, in fact, increases it in some cases. *See, e.g.,* Pew Charitable Trusts, *Issue Brief: Re-Examining Juvenile Incarceration* at *1 (Apr. 20, 2015), *available at* https://www.pewtrusts.org/~/media/assets/2015/04/reexamining_juvenile_incarceration.pdf (last accessed Aug. 13, 2021). That is, while placing a delinquent youth in a youth prison may provide "structure" and

"accountability" for a youth while he is confined there, it does not result in improved community safety or protection in the long run. Nothing in this case indicates that V.K.B. presented a greater risk to the public than an average juvenile offender. The record does not contain substantial evidence to support a finding that committing V.K.B. to the most restrictive environment possible, youth prison, was necessary to protect the public or that no less restrictive alternative would have sufficed.

The youth court failed to make the statutorily-required factual findings authorizing the imprisonment of a delinquent youth, and the record in this matter does not contain substantial evidence supporting a finding that placement in youth prison was necessary for the protection of society or that no less restrictive environment would do so. As such, the youth court was not authorized to impose a dispositional order committing V.K.B. to DOC for placement in Pine Hills in this case, and its decision to do so was an abuse of discretion. This Court should strike the portions of the disposition order that order this commitment and placement.

CONCLUSION

Based on the foregoing, V.K.B. respectfully requests this Court reverse and strike from the dispositional order in this case the portion of the order committing him to the custody of DOC for placement in Pine Hills.

Respectfully submitted this 13th day of September, 2021.

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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 8,480, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
TAMMY A. HINDERMAN

APPENDIX

CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-13-2021:

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