FILED
05/04/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0588

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN PATRICK SULLIVAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Michael G. Moses, Presiding

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B. Even if a no-contact condition could be deemed imposed in each respective judgment, which Mr. Sullivan disputes is possible on the facts presented, his alleged, third-party contact with M.A. through the Happy Birthday text message would have been a compliance violation not subject to direct revocation by the District Court. 36

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STATEMENT OF THE ISSUES

(1) Does the District Court's first revocation order of Ryan Patrick Sullivan's sentence in DC 18-321 conform with its oral disposition?

(2) Did the District Court illegally revoke Mr. Sullivan's sentence for a second time in DC 18-321 and for the first time in DC 19-829 based on an alleged violation of a recommended condition that was not imposed or without following, or requiring the State to follow, nondiscretionary procedures mandated by the Legislature before a sentence may be revoked?

(3) Does the District Court's second revocation order in DC 18-321 and first revocation order in DC 19-829 conform with its oral disposition?

STATEMENT OF THE CASE

These three consolidated appeals involve revocations in two overlapping District Court cases before District Judge Michael Moses in Yellowstone County, DC 18-321 and DC 19-829. In DC 18-321, the District Court twice revoked a probationary sentence following Ryan Patrick Sullivan's guilty plea to one count of aggravated assault, in

violation of Mont. Code Ann. § 45-5-202. In DC 19-829, a jury found Mr. Sullivan guilty of one count of tampering with a witness or informant, a felony, in violation of Mont. Code Ann. § 45-7-206, and three counts of privacy in communication, one felony and two misdemeanors, in violation of Mont. Code Ann. § 45-8-213(1)(a); subsequently, the District Court revoked the suspended sentences in the two felony counts.

Mr. Sullivan appeals the two revocations in DC 18-321 and the revocation in DC 19-829.

STATEMENT OF THE FACTS

DC 18-321 Judgment and Sentence

In October 2018, Ryan Patrick Sullivan pled guilty to a single count of aggravated assault, in exchange for the State dismissing other charges and agreeing to recommend a deferred sentence. (18-321 Doc. 66 at 3, ¶ 6.) In accord with the plea agreement, the District Court sentenced Mr. Sullivan in November 2018, to a five-year deferred sentence, ordered him to pay a $1,000 fine plus other financial obligations, and imposed probationary conditions. (18-321 Doc. 76 at 2 – 5 (Judgment), attached hereto as App. A.; 11/14/2018 Sent. Tr. at 17 –

18, attached hereto as App. B.[1]) The District Court stated it was not necessary to credit Mr. Sullivan's deferred sentence with credit of time served in jail prior to sentencing unless the sentence is revoked. (App. B at 19 – 20.) The written judgment provides, "**Should the Defendant's sentence be revoked, the Defendant shall receive credit for time served.**" (App. A at 4, ¶ 16 (original emphasis).) At the time of sentencing, Mr. Sullivan had served either 254 or 255 days in the Yellowstone County Detention Facility ("YCDF"). (App. B at 4, 20.)

In accord with the parties' plea agreement, the judgment required Mr. Sullivan not to oppose the extension of a protective order obtained by the victim, M.A., Mr. Sullivan's on-again-off-again girlfriend. (App. A at 2; App. B at 18; 18-321 Doc. 66, ¶ 7.) As recommended in the Pre-Sentence Investigation ("PSI"), a separate condition of Mr. Sullivan's sentence prohibited him from knowingly having any type of contact with M.A., including through third parties, unless M.A. voluntarily

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[1] The State attached Mr. Sullivan's sentencing transcript from DC 18-321 as an exhibit to a brief it filed in *State v. Sullivan*, DC 19-829, at Doc. 43, Exh. A. Mr. Sullivan's convictions from the 2019 docket are on appeal in DA 20-0589; the revocations in that docket are addressed herein.

initiated the contact through the Department of Corrections ("DOC").[2] (18-321 Doc. 69 at 7, 9; App. A at 5, ¶ 23; App. B at 6 – 7, 18 – 19.) The District Court also issued a No Contact Order under Mont. Code Ann. § 45-5-209, which, among other things, prohibited Mr. Sullivan from contacting M.A. (18-321 Docs. 75, 77, 78.) As specified in the plea agreement, Mr. Sullivan received permission to serve his deferred sentence under interstate compact supervision in New York, his home state. (18-321 Docs. 66, ¶¶ 8 – 9; 79 – 80; App. B at 16 – 17.)

Mr. Sullivan filed an unopposed motion for release on his own recognizance on December 6, 2018, indicating he had fulfilled certain probationary conditions in Montana and had received approval for interstate compact supervision in New York where he could satisfy the remaining conditions of his probation. (18-321 Doc. 79.) The next day, the District Court signed an order releasing Mr. Sullivan on his own recognizance. (18-321 Doc. 80.) As indicated during subsequent

[2] Mr. Sullivan's PSI contains confidential personal information that is exempt from public disclosure. Mont. Code Ann. § 46-18-113(1); M. R. App. P. 10(7)(a), (b). All references herein to the PSI pertain to information that is also located elsewhere in the record on appeal. Mr. Sullivan reserves the right to object to any disclosure of confidential information by the State in its response brief that is not included herein or in the public record.

revocation proceedings, Mr. Sullivan was released from incarceration on December 8, 2018, and was taken to the Billings airport by Billings police officers who ensured he boarded a plane to fly home to New York. (18-321 Doc. 81, attached affidavit at 2.)

DC 19-829 Judgment and Sentence

In September 2020, a jury found Mr. Sullivan guilty of one count of tampering with witnesses and informants, a felony, and three counts of privacy in communication, one felony and two misdemeanors. (19-829 Doc. 152 (Judgment), attached hereto as App. C.). At sentencing, the District Court pronounced the following sentences: Count I, tampering with witnesses and informants, a felony, 10 years to MSP, all suspended, to run concurrently with DC 18-321; Count IV, privacy in communications, a felony, 5 years to MSP, all suspended, to run concurrently with Count I; Count VI, privacy in communications (second offense), a misdemeanor, 6 months to YCDF, all suspended, to run concurrently with Counts I and IV; Count VII, privacy in communications (first offense), a misdemeanor, six months to YCDF, all

suspended, to run concurrently with Counts I, IV, and VI.[3] (App. C at 1 – 2; 10/01/2020 Tr. at 65 – 68, attached hereto as App. D.) The District Court granted Mr. Sullivan credit for time served between August 1, 2019 (the date of his arrest) through October 1, 2020 (the date of sentencing), and recommended conditions of probation. (App. C at 2 – 4; App. D at 66.) One of the recommended conditions prohibits Mr. Sullivan from knowingly having any type of contact with M.A., including through third parties, unless M.A. voluntarily initiated the contact through DOC. (App. C at 4, ¶ 23.) Contrary to the oral pronouncement, the judgment indicates the conditions are imposed, not recommended.[4] (App. C at 2.)

DC 18-321 First Revocation

On October 18, 2019, while DC 19-829 was progressing toward trial, the State filed a petition to revoke Mr. Sullivan's deferred sentence in DC 18-321, alleging he violated the terms of his probation

[3] The District Court dismissed Counts II and III during trial and the jury found Mr. Sullivan not guilty of Count V. (App. B at 1.)

[4] The discrepancy between the oral pronouncement and written judgment in DC 19-829 will be addressed in briefing for DA 20-0589. It is also mentioned herein because it relates to the revocation in DC 19-829.

by committing new felony and misdemeanor offenses on or about December 2018 through June 2019. (18-321 Doc. 81.) In support of its petition, the State attached its Motion for Leave to File Information, Order Granting Leave to File Information, and the Information filed in *State v. Ryan Patrick Sullivan*, Thirteenth Judicial District Court, Yellowstone County, Cause No. DC 19-829, which had commenced on July 3, 2019. Proceedings in the revocation case were stayed pending the outcome of the charges in DC 19-829. (18-321 Docs. 85 – 89.)

After Mr. Sullivan's conviction in DC 19-829 of one count of tampering with a witness and three counts of privacy in communications following a three-day jury trial, Mr. Sullivan appeared in court with counsel and the following colloquy occurred:

> THE COURT: . . . I got a petition for notice of revocation of sentence and affidavit of support. It was actually filed on October 18, 2019.
>
> This petition consists of a number of – nine pages, including the charging documents, the information in DC 19-829. Mr. Sullivan, one of the allegations in the revocation matter was this committing new offenses, you were charged in DC 19-829 with seven counts, four of which were guilty findings of a jury last Wednesday.
>
> As to that particular matter, do you admit or deny a violation based upon those convictions?

> THE DEFENDANT: Admit.
>
> . . .
>
> THE COURT: Very good. Thank you. Also I think that is the sole cause for the petition under the circumstance here. And based upon those guilty verdicts that were entered on Wednesday of last week, this Court will revoke the previous sentence in DC 18-321.

(09/08/2020 Tr. at 4 – 6.) The District Court held a combined dispositional hearing in DC 18-321 and sentencing hearing in DC 19-829 on October 1, 2020.[5]

At the hearing, the Prosecutor called Mr. Sullivan "unredeemable", contending,

> The only appropriate place for this Defendant is the Montana State Prison. For the last three years the beginning of his career in the criminal justice system of Montana, he has blatantly thumbed his nose at every court order and every judgment, every request that was made, that was ordered, that was asked of him.
>
> He cannot follow the rules. He cannot be redeemed. There is not a single quality that could be presented to this Court today that should give you any kind of hope or optimism that he can get out because he's been punished

[5] One PSI was prepared for the DC 18-321 revocation and the DC 19-829 sentencing. The PSI was not filed within DC 18-321 record, but is contained in the DC 19-829 record as Doc. 150.

> enough and go back to New York and be successful. That is not the Ryan Sullivan we all know.

(10/01/2020 Tr. at 24 – 25.)

Actually, Mr. Sullivan had complied with the conditions of his probation but for his contact with M.A. (10/01/2020 Tr. at 28 (Defense Counsel noting the PSI author acknowledged Mr. Sullivan did well on supervision in New York, highlighting his accomplishments). Nevertheless, the Prosecutor claimed Mr. Sullivan was not capable of considering "a different path" and "is a person who needs to be monitored. This is a person who cannot be unfettered out in our community." (10/01/2020 Tr. at 27.) The Prosecutor asserted Mr. Sullivan violated his deferred sentence "in such a cosmic way" that the District Court should "protect our communities. And our communities, whichever one this person goes to live in, will not be safe."[6] (10/01/2020

[6] The State's theme of Mr. Sullivan's allegedly "cosmic" misbehavior was reiterated in a combined dispositional and sentencing memorandum, which the Prosecutor filed only in DC 19-829, despite captioning the document for both DC 19-829 and DC 18-321. (*See* DA 20-0589, 19-829 Doc. 148 at 5 – 7 (contending, *inter alia*, "that redemption and rehabilitation of his Defendant are cosmically impossible", "the Defendant is constitutionally incapable of accurate introspection", and "the Defendant is who he is, and incarceration is the

Tr. at 26.) Thus, the State requested a 20-year MSP sentence with a 10-year parole restriction. (10/01/2020 Tr. at 26 – 27.)

Defense Counsel contended,

> Incarceration is supposed to be reserved for the most egregious of cases those for which society has decided it requires serious punishment to the point where we are going to put somebody in a cage. This isn't it.
>
> . . .
>
> The behaviors that we have heard [concerning Mr. Sullivan's contact with M.A. that went to trial in DC 19-829] have not been so egregious that we jump immediately to a 20-MSP with a ten-year parole restriction. No. It is unnecessary. It is disproportionate. . . .
>
> . . .
>
> Send him back to New York with a long suspended tail. Send him back. We don't want him in Montana. We don't want him on a DOC placement. We don't want him in a prerelease. We don't want him here. And he doesn't want to be here.

(10/01/2020 Tr. at 34 – 35.) The Defense made no other dispositional recommendation.

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only way M.A., and society as a whole, can be protected from his permanently flawed manner of thinking").)

During the oral disposition, the District Court imposed a 20-year MSP sentence with ten years suspended and an eight-year parole restriction. (App. D at 62 – 65.) The District Court stated, "The conditions set forth in that presentence investigation in 18-321, the conditions that you were supposed to live by previously when you were returned to New York will be conditions recommended to the state of Montana for you." (App. D at 62 – 63 (emphasis added). *Accord* App. D at 66 (indicating the conditions were recommendations to the parole board for parole supervision and to DOC once the suspended sentence commenced).) The District Court gave Mr. Sullivan credit for time served prior to his conviction in 2018 plus the time since his arrest in New York after he was charged with the new offenses in DC 19-829. (App. D at 64 – 65, 66, 67 – 68.) The specific dates were from March 5, 2018, through December 8, 2018, and then from August 1, 2019, through October 1, 2020. (App. D at 67 – 68.)

The written order of revocation conforms with the oral disposition, with two exceptions. (18-321 Doc. 105, attached hereto as App. E.) First, the written order grants credit for time served from March 5, 2018, through November 14, 2018, instead of through December 8,

2018. (*Compare* App. E at 2 *with* App. D at 68.) Mr. Sullivan's second portion of credit for time served is accurately credited in the written order from August 1, 2019, through October 1, 2020. (App. E at 2; App. D at 66 – 68.) Second, the written order provides, with the exception of the new 20-year MSP sentence with ten years suspended, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on November 14, 2018, remain unchanged and are imposed." (App. E at 1.) The written order does not account for the District Court's pronouncement that the imposed conditions in the judgment became recommendations to the State of Montana following revocation. (App. D at 63.) Moreover, the only document entered on the case register on November 14, 2018, is the minutes from the now-revoked judgment.

DC 18-321 Second Revocation and DC 19-829 Revocation

On October 14, 2020, two weeks after the combined sentencing hearing in DC 19-829 and revocation hearing in DC 18-321, while Mr. Sullivan was serving his ten-year prison sentence with an eight-year parole restriction in DC 18-321, the State filed a petition to revoke the suspended sentences for Mr. Sullivan's two felony convictions in DC 19-

829. (19-829 Doc. 153.) Then, on October 20, 2020, the State filed a second petition to revoke the suspended portion of Mr. Sullivan's recently revised sentence in DC 18-321. (18-321 Doc. 106.) The single ground asserted in both petitions was identical: the State indicated a case had been filed in Billings Municipal Court alleging Mr. Sullivan committed the offense of Violation of an Order of Protection – First Offense, in violation of § 45-5-626, Mont. Code Ann., on October 3, 2020. The State averred, "The pending case in cause number CR 2020-0352 constitutes a violation of the Defendant's probation[.]" (18-321 Doc. 106; 19-829 Doc. 153.)

The State asserted that Mr. Sullivan established third-party contact with M.A. on October 3, 2020, in violation of an order of protection prohibiting Mr. Sullivan from doing so. (18-321 Doc. 106, attached Complaint and Affidavit in Support, CR 20-0352, at 3; 19-829 Doc. 152, attached Complaint and Affidavit in Support, CR 20-0352, at 3.) On that date, which was M.A.'s birthday, M.A. received an unsolicited text message from a number she did not recognize, stating, "Happy Birthday I still love you no matter what." The message included an alien emoji. When M.A. asked the sender to identify

themselves, the sender responded, "just delivering a message." The State averred the alien emoji is consistent with an alien tattoo on Mr. Sullivan's right foot and noted Mr. Sullivan included drawings of aliens when he wrote to M.A. in 2018.

The State traced the number of the message sender and determined it belonged to an Amanda Carter. An inmate who previously had been housed in the same unit at YCDF as Mr. Sullivan, Andrew Leeper, allegedly had been calling Amanda Carter's number for several months. (03/26/2021 Tr. at 48 – 49.) On October 3, 2020, Leeper, or someone using Leeper's inmate calling identification number, called Carter to request, "Just send a text message to [telephone number belonging to M.A.] and it's gonna say 'happy birthday, I will still love you no matter what' and you have to put an Alien emoji and that's how she'll know who it is. It's for a buddy of mine who is going to prison for like 8 years and it's her birthday today. She'll get the gist of it." (18-321 Doc. 106, attached Complaint and Affidavit in Support, CR 20-0352, at 3; 19-829 Doc. 153, attached Complaint and Affidavit in Support, CR 20-0352, at 3; 03/26/2021 Tr. at 40 – 43.)

The District Court continued proceedings to allow the case in CR 2020-352 to proceed to trial. (18-321 Docs. 115, 116; 19-829 Docs. 164, 165.) On February 1, 2021, Mr. Sullivan provided notice to the District Court that CR 20-352 had been dismissed. (18-321 Doc. 118; 19-829 Doc. 167.) A contested, evidentiary hearing on the State's revocation petitions in both dockets occurred on March 26, 2021.

Notwithstanding the State's voluntary dismissal of the case that constituted the only alleged basis for revocation, the State argued the District Court should revoke Mr. Sullivan's suspended sentences in both cases anyway. One prosecutor asserted:

> It is the State's position, Judge, as it has always been that the Defendant is incapable of any meaningful introspection, incapable of any meaningful change, and incapable of getting past his own delusion.
>
> And the only thing I think that the Defendant and I will ever agree on, Judge, is his obsession with aliens. It is truly fitting, your Honor, that he does appear to live on a different planet, living out a violent and in my opinion, Judge, a sociopathic narrative of his own making.
>
> I told this Court at sentencing that this Defendant was unredeemable. And this Court disagreed vehemently with me. I have never wavered in that. And I think that it is now even more patently clear that I am correct.

(03/26/2021 Tr. at 60.)

A second prosecutor contended, "It was purely a matter of strategy [to dismiss the Municipal Court charge]. Mr. Sullivan by the end of next week, will have already served the minimum – mandatory – maximum sentence possible for first offense violation of protective order, even a felony offense only carries a two-year penalty." (03/26/2021 Tr. at 61 – 62.) Thus, the Prosecutor asserted it was not worth holding another trial or allowing Mr. Sullivan to see M.A. in the courtroom during trial. (03/26/2021 Tr. at 62.)

In contrast, the Defense contended the petition should be dismissed because the State failed to prove by a preponderance of the evidence Mr. Sullivan violated an order of protection, as demonstrated by the City's dismissal of CR 20-352. (03/26/2021 Tr. at 62 – 63.) Counsel also argued the City dismissed CR 20-352 because it could not meet its burden to prove beyond a reasonable doubt that Mr. Sullivan initiated third-party contact with M.A., remarking "This case needs to be done. This individual [i.e., Mr. Sullivan] needs to be gone." (03/26/2021 Tr. at 62 – 63.)

The District Court revoked "the previous judgments entered in both of those cases", i.e., DC 18-321 and DC 19-829. (03/26/2021 Tr. at 69, attached hereto as App. F.) Relying on the State's affidavits in its petitions for revocation, the District Court determined, "The real allegation is that quote, 'The pending case in Cause Number CR-2020-0352 constitutes a violation of the Defendant's probation . . . .' Montana Supreme Court last month has ruled that we don't need a conviction on an underlying criminal case to bring and work our way forward on a probation violation." (App. F at 65.) Thus the District Court ruled it had "to take a look at whether or not the State has met its burden of proving by a preponderance of the evidence that there has been a violation here." (App. F at 65.)

The District Court remarked "the critical condition of this sentence" is for Mr. Sullivan to have no contact with M.A. (App. F at 66.) The Judge commented "it is just crystal clear" the text message to M.A. came from Mr. Sullivan, observing it took only two days after sentencing in DC 19-829 and the first revocation in DC 18-321 "before Mr. Sullivan couldn't help himself but to send a happy birthday to

[M.A.], two days later on October 3, 2020, her birthday." (App. F at 67 – 68.) The District Court continued,

> So there is no question in my mind that the State has met its burden by proving that Mr. Sullivan has violated the orders of this Court, the conditions of this Court's judgment, both – in both of these cases. No questions about that. But where we really get to the issue is whether or not it is a substantial violation.
>
> . . . The biggest problem with that is that this is the one condition that this Court – that is unacceptable to this Court.
>
> It is just totally unacceptable. . . .
>
> And so, this is a substantial violation of the conditions of his sentence and the conditions of his two judgments now that are in place, the disposition in the 2018 matter and the judgment in the 2019 matter. So I find there are substantial violations under the circumstances.
>
> And I revoke the previous judgments entered in both of those cases.

(App. F at 68 – 69.)

The State once again requested a 20-year MSP sentence and 10-year parole restriction in DC 18-321. (App. F at 69.) In DC 19-829, the State requested a 10-year MSP sentence for Count I, a five-year MSP sentence for Count IV, and a one-year jail sentence for Count VI, even

though the State did not even petition to revoke Count VI. (App. F at 69 – 70.) The State further requested the sentences in the two causes to run consecutively. (App. F at 70.)

Defense Counsel pointed out the sentences in the two cases could not be increased by running them consecutively because the District Court ordered the DC 19-829 sentences to run concurrently in the judgment. Counsel argued the District Court should "reimpose the same sentence. The sentence this Court imposed in 18-321 is sufficiently severe as to – to be enough for the type of behavior that we are dealing with today." (App. F at 70.) Counsel did not make a separate recommendation for DC 19-829.

The District Court ruled,

> I'm going to reimpose the exact same sentence as I did October 1 of 2020, for all of the reasons that I did on October 1, 2020. Mr. Sullivan, I have told you I can't – I don't know how many times that you can't have any contact with [M.A.].
>
> . . .
>
> . . . [I]t is time to stop any and all contact. That is the number one item and condition of these sentences. Always has been. Always will be. And this is a free pass today for a strike two.

(App. F at 71.)

The written order of revocation in DC 18-321 is inconsistent with the prior order of revocation, and thus the oral disposition, because it grants credit for time served only between October 27, 2020, through March 26, 2021, instead of from March 5, 2018, through December 8, 2018, and August 1, 2019, through March 26, 2021. (18-321 Doc. 127, attached hereto as App. G; App. D at 64 – 65, 67 – 68.) On the State's motion, the District Court issued a Nunc Pro Tunc Order clarifying that the eight-year parole restriction remains in effect. (18-321 D.C. Doc. 132, attached hereto as App. H. *Accord* App. F at 71 (imposing "the exact same sentence" as it did in the first revocation on October 1, 2020).) Similarly to the first revocation order, the second order provides, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on November 14, 2018, remain unchanged and are imposed." (App. G at 1.) The written order does not account for the District Court's pronouncement that the imposed conditions in the judgment became recommendations to the State of Montana following the first revocation. (App. D at 63.)

The written order of revocation in DC 19-829 is inconsistent with the oral disposition in two respects. First, it grants credit for time

served only between October 20, 2020, through March 26, 2021, instead of from August 1, 2019, the date of Mr. Sullivan's arrest in DC 19-829, through March 26, 2021. (19-829 Doc. 175 at 2, attached hereto as App. I; App. C at 2.) Second, it states the maximum term of incarceration that may be imposed in the event that Mr. Sullivan's sentence is revoked is "EIGHT (8) YEARS ONE HUNDRED FORTY-FOUR DAYS", a time frame untethered to the oral pronouncement or actual time served. (App. I at 2 (original emphasis).) Like the two written revocation orders in DC 18-321, the order contains what appears to be a boilerplate sentence, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on October 1, 2020, remain unchanged and are imposed." (App. I at 1.) The only document entered on the case register on October 1, 2020, is the minutes from the now-revoked sentence.

Pro Se Filings

Mr. Sullivan has filed various *pro se* documents in District Court and this Court while represented by counsel. Three of Mr. Sullivan's *pro se* documents merit note:

1. Motion to Withdraw Guilty Plea filed in DC 18-321, which the District Court denied following discussion with Defense Counsel. (D.C. Docs. 97 (motion), 98 (order); 08-14-2020 Tr. at 3 – 9 (Defense Counsel discussion), 9 – 12 (District Court decision and order.) This motion is not addressed herein.

2. Petition for Post-Conviction Relief, Thirteenth Judicial District, Yellowstone County, DV 20-1132, which the District Court denied as procedurally barred. *Sullivan v. State*, 2021 MT 220N, ¶¶ 2 – 5 (*Sullivan I*). This Court affirmed. *Sullivan*, ¶ 13. This petition is not part of the instant appeal and, thus, is not addressed herein.

3. Petition for Writ of Habeas Corpus, which this Court denied. *Sullivan v. Salmonsen*, OP 21-0415, Order (08/31/2021). Matters raised in the habeas petition are addressed herein to the extent they involve correcting credit for time served. Mr. Sullivan notes the Court described the instant appeal, DA 20-0588, as an "appeal of the original conviction and sentence". *Sullivan Habeas Order* at 1. That description is inaccurate, as recognized in *Sullivan I*, ¶ 8. The consolidated appeals within DA 20-0588 involve revocations, as set forth above.

STANDARDS OF REVIEW

"A trial court's statutory interpretation is a question of law this Court reviews for correctness." *State v. Oropeza*, 2020 MT 16, ¶ 14, 398 Mont. 379, 456 P.3d 1023 (citation omitted). When the issue presented in a revocation case is whether a district court had statutory authority to take a specific action, the question is one of law and this Court's review is de novo. *Oropeza*, ¶ 14, *citing State v. Graves*, 2015 262, ¶ 12. 381 Mont. 37, 355 P.3d 769.

Calculating credit for time served is a question of law subject to de novo review. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889 (citations omitted).

The Court's review of legality is generally confined to determining whether the sentence falls within the statutory parameters; whether the district court had statutory authority to impose the sentence; and whether the district court followed the affirmative mandates of the applicable sentencing statutes. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297. *Accord State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197 (*en banc*).

SUMMARY OF ARGUMENT

The first order of revocation in DC 18-321 is illegal for three reasons. First, the order denies Mr. Sullivan all the credit for time served at YCDF that was correctly acknowledged in the oral disposition. Second, the order contains an opaque sentence, not included in the oral disposition, purporting to impose previous orders, conditions, and reasons entered on the date of the revoked judgment, even though the minutes of the now-revoked sentence was the only document entered on that date. Third, the order imposes conditions of supervision that were stated as recommendations in the oral disposition. This Court should remand the revocation order with instructions to state the full amount of credit for time served Mr. Sullivan must receive; delete the sentence purporting to impose revoked orders, conditions, and reasons; and restate the recommended conditions for any period of community supervision on probation.

The second order of revocation in DC 18-321 and the order of revocation in DC 19-829 are also illegal. There were no imposed conditions in either case that Mr. Sullivan could have violated by allegedly sending the Happy Birthday text through a third-party to

M.A. There were only recommendations to the State for Mr. Sullivan's probationary period: but his probation had not commenced in DC 18-321 and there is no record evidence DOC had imposed conditions in DC 19-829. Assuming, but not in any respect conceding, probationary conditions had been imposed and further that they applied during Mr. Sullivan's period of incarceration, his alleged behavior did not constitute a non-compliance violation subject to direct revocation by the District Court before the State pursued incentives and interventions under the Montana incentives and intervention grid in accordance with Mont. Code Ann. § 46-18-203(7), (8), (11)(b). Accordingly, the second order of revocation in DC 18-321 and the order of revocation in DC 19-829 are illegal and should be reversed and vacated.

Finally, if the Court declines to reverse and vacate the second order of revocation in DC 18-321 and the order of revocation in DC 19-829, the Court should remand both orders with instructions to state the correct date range for which Mr. Sullivan must receive credit for time served; strike the non-conforming sentence in each order imposing previous orders, conditions, and reasons in the now-revoked judgments;

and restate the conditions imposed as recommendations for any period of community supervision on probation.

ARGUMENT

I. The first revocation order in DC 18-321 conflicts with the District Court's oral disposition and must be remanded for conforming amendments.

A. The written revocation order fails to grant Mr. Sullivan statutorily mandated credit for time served that was correctly included in the oral disposition.

Mr. Sullivan was incarcerated in the YCDF between March 5, 2018, through December 8, 2018, and from August 1, 2019, through October 1, 2020. In the oral disposition, the District Court granted Mr. Sullivan credit for all that time served. (App. D at 67 - 68.) The written order of revocation order, however, mistakenly limits Mr. Sullivan's time-served credit in 2018, by cutting it off on the day judgment was issued, November 14, instead of on the day Mr. Sullivan was released from jail, December 8. (App. E at 2.)

This Court has "repeatedly held that the oral pronouncement of sentence controls where a conflict exists between the oral and written judgments." *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843 (citations omitted). Further, Mont. Code Ann. § 46-18-403(1)

requires a sentencing judge to offset a defendant's sentence upon conviction with each day of incarceration prior to conviction. "Calculating credit for time served is not a discretionary act, but a legal mandate. . . . A district court may not decide to withhold credit in anticipation that credit may be given in a subsequent sentencing."[7] *Parks*, ¶ 9 (citations omitted).

"The *Lenihan* rule[8] provides a sentence not objected to in the district court that is 'illegal or exceeds statutory mandates,' *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000, and not merely an 'objectionable' statutory violation, *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citations omitted), may be reviewed on appeal." *State v. Hansen*, 2017 MT 280, ¶ 12, 389 Mont. 299, 405 P.3d 625, *overruled in part on other grounds Gardipee v. Salmonsen*, 2021 MT 115, 486 P.3d 689 (pro se petition for writ of habeas corpus). This Court may review

[7] In its original judgment, the District Court incorrectly declined to apply Mr. Sullivan's credit for time served between March 5, 2018, through December 8, 2018, against his deferred sentence, asserting that such credit would be awarded if the deferred sentence were revoked in the future. (App. A at 4, ¶ 16; App. B at 19 – 20.) *Parks*, ¶ 9. This legal error was rectified during the dispositional hearing when the District Court granted Mr. Sullivan credit for the time he spent in jail in 2018.

[8] *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

Mr. Sullivan's credit-for-time-served claim under *Lenihan*, notwithstanding the lack of an objection below.

Here, the District Court correctly granted Mr. Sullivan credit for all time served in jail in its oral disposition, but shortchanged Mr. Sullivan more than three weeks of the acknowledged credit in its written revocation order. This Court should remand the order of revocation with instructions to amend "November 14, 2018" on page two, paragraph two, to "December 8, 2018".

B. The first written revocation order in DC 18-321 imposes conditions of probation that were stated as recommendations in the oral disposition and declares that unspecified, previous orders and reasons from the revoked judgment, which were not mentioned in the oral disposition, remain unchanged and are imposed.

In the oral disposition, the District Court ruled, "You are sentenced to 20 years to the Montana State Prison. Ten of those years are suspended. The conditions set forth in that presentence investigation contained within DC 18-321, the conditions that you were supposed to live by previously when you were returned to New York will be the conditions recommended to the state of Montana for you." (App. D at 62 – 63 (underscore added).) Near the end of the hearing, the

District Court repeated, "The conditions set forth in that presentence investigation report are the conditions that will be recommended to the Montana State Prison and to probation and parole once he's on parole and on the suspended ten years in DC 18-321." (App. D at 66 (underscore added).)

The written order of revocation accurately imposes a 20-year MSP sentence with ten years suspended, but also provides, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on November 14, 2018, remain unchanged and are imposed." (App. E at 1 (underscore added).) Thus, the written order conflicts with the oral disposition concerning the conditions of Mr. Sullivan's supervision while on parole or probation. The written order imposes conditions that the District Court twice clearly stated were recommendations for Mr. Sullivan's periods of parole and probation.

The rest of the sentence declares that "previous Orders, . . ., and reasons entered on November 14, 2018" remain unchanged. But this proclamation was not included in the oral disposition. The District Court revoked its sentence entered on November 14, 2018, and replaced it with the new disposition entered on October 1, 2020. Nothing

remains of the original judgment to impose. The District Court's reasons for its deferred sentence in the original judgment were superseded by its reasons for imposing the new sentence upon revocation of the deferred sentence. (*Compare* App. A at 5 – 6 (Reasons for Deferred Sentence) *with* App. E at 2 (Reasons for Sentence).) The case register shows no "Orders" entered on November 14, 2018, only the minutes of the oral pronouncement of sentence that was revoked. This sentence makes no sense and could create unnecessary, avoidable uncertainty in the future.

The "oral pronouncement of a criminal sentence ... is the 'legally effective sentence and valid, final judgment.'" *Thompson,* ¶ 8, (*citing State v. Johnson*, 2000 MT 290, ¶ 15, 302 Mont. 265, 14 P.3d 480 (*quoting State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9)). A "written judgment is merely evidence of the oral sentence." *Johnson*, ¶ 15." *State v. LaField*, 2017 MT 312, ¶ 32, 390 Mont. 1, 407 P.3d 682.

> In determining whether portions of a written judgment conflict with the oral pronouncement of sentence, we "determine first, whether the defendant was afforded the opportunity to respond to its inclusion upon sufficient notice at sentencing, and second, whether that portion of the written judgment substantively increases one of two things: (1) the

> defendant's loss of liberty; and (2) the defendant's sacrifice of property." *Johnson*, ¶ 24. What is
>
> "truly at issue" under this inquiry is "whether a written judgment had, without notice, substantively increased a defendant's criminal sentence which had been previously imposed in open court." *State v. Kroll*, 2004 MT 203, ¶ 20, 322 Mont. 294, 95 P.3d 717 (citing *Johnson*, ¶ 24).

Thompson, ¶ 8. This Court reviews conflicts between the oral disposition and the written judgment even where the defendant did not object below, because if the written judgment controlled, the defendant effectively would be sentenced *in absentia*, violating their statutory right to be present in open court when sentenced. *State v. Hamilton*, 2018 MT 253, ¶ 51, 393 Mont. 102, 428 P.3d 849, citing *Lane*, ¶ 33.

> Defendants, as well as correctional, probation and law enforcement personnel, often have occasion to reference and implement a sentence in a criminal case. The sentencing document should therefore accurately reflect the sentence and any applicable conditions. This can best be accomplished by remanding to the district court to correct the illegal provision so that the sentencing document on file in the district court is accurate. This practice should be followed whether this Court remands for correction of an illegal provision or orders that a particular provision be stricken.
>
> Correcting invalid sentence provisions when it is possible to do so protects the integrity of the

> judicial process and furthers the express correctional and sentencing policy of the state. Section 46-18-101, MCA.

State v. Heafner, 2010 MT 87, ¶¶ 11 – 12, 356 Mont. 128, 231 P.3d 1087.

Here, the written revocation order does not conform with the oral disposition. It is illegal and can be addressed by this Court on appeal under *Lenihan*. *Hammer*, ¶ 27. By changing recommendations to imposed conditions, as well as inserting vague, new language about unspecified orders and reasons remaining unchanged, the written disposition substantively increases Mr. Sullivan's new sentence without having provided an opportunity for him to respond to this confusing language during the dispositional hearing.

The revocation order should be remanded with instructions to conform it with the oral disposition by: (1) striking the sentence, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on November 14, 2018, remain unchanged and are imposed."; and (2) restating Conditions 1 – 27 from the original judgment (App. A at 2 – 5) as recommendations for any period of community supervision on parole or probation.

II. The March 2021 revocations in DC 18-321 and DC 19-829 are illegal because there were no imposed conditions of probation Mr. Sullivan could have violated while he remained incarcerated, and even if conditions had been imposed and applied to the alleged conduct, that conduct would have been a compliance violation not subject to direct revocation by the District Court.

A. Mr. Sullivan cannot be revoked for violating a recommendation that had not been imposed in either DC 18-321 or DC 19-829.

In March 2021, the District Court revoked Mr. Sullivan for violating "the orders of this Court, the conditions of this Court's judgment . . . in both of these cases." (App. F at 68.) Problem is, there were no conditions imposed in either the DC 18-321 first revocation or the DC 19-829 judgment. There were only recommendations for the State to consider in the future as conditions of Mr. Sullivan's probation. (App. D at 63 (DC 18-321), 66 (DC 19-829).) Thus, the District Court revoked Mr. Sullivan for purportedly violating a non-existent, "critical condition" of both sentences while he was serving time in DC 18-321. (App. F at 66.)

This Court has acknowledged, "Revocation of a suspended or deferred sentence can adversely implicate a probationer's liberty interests as seriously as the original determination of guilt. . . . The

foundation of the guarantee of due process is fairness, which calls for safeguards tailored to the demands of the particular legal context of probation revocation. *State v. Finley*, 2003 MT 239, ¶ 29, 317 Mont. 268, 77 P.3d 193 (citations omitted). "Due process protections for a revocation hearing are codified in § 46-18-203, MCA[.]" *State v. Triplett*, 2008 MT 360, ¶ 17, 346 Mont. 383, 195 P.3d 819. A defendant must receive notice of all alleged violations leading to the petition to revoke. *State v. Sebastian*, 2013 MT 347, ¶ 18, 372 Mont. 522, 313 P.3d 198 (citation omitted); Mont. Code Ann. § 46-18-203(1), (4), (6).

Here, the District Court did not, and could not, find Mr. Sullivan had committed a new criminal offense. (App. F at 65 – 66.) The State abandoned that theory of revocation when it dismissed CR 20-352 and did not pursue the claim during the revocation hearing. (03/26/2021 Tr. at 60 – 62.) Rather, the District Court determined Mr. Sullivan substantially had violated its orders concerning "the critical condition" of his suspended sentences. (App. F at 66, 68 – 69.) But the District Court had not imposed any conditions on any of Mr. Sullivan's suspended sentences, including the sentences pronounced in DC 19-829, which run while Mr. Sullivan remains incarcerated in DC 18-321. The

State introduced no evidence that DOC had imposed conditions in either case.

Mr. Sullivan had no notice he could be revoked for violating a recommendation that had not gone into effect in DC 18-321 or DC 19-829. Furthermore, this Court never has held a revocation may be based on violating a recommendation for future probation. Nor does Mont. Code Ann. § 46-18-203 authorize such a thing. Instead, the statute requires, in pertinent part, the State to prove by a preponderance of the evidence a defendant has violated "the terms and conditions of the suspended or deferred sentence[.]" Mont. Code Ann. § 46-18-203(6)(a)(i).

No conditions existed for Mr. Sullivan to violate. Accordingly, both revocations are illegal and reviewable under *Lenihan*. This Court should reverse the District Court's revocation orders in DC 18-321 and DC 19-829 and remand with instructions to dismiss the petitions to revoke in each case.

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B. Even if a no-contact condition could be deemed imposed in each respective judgment, which Mr. Sullivan disputes is possible on the facts presented, his alleged, third-party contact with M.A. through the Happy Birthday text message would have been a compliance violation not subject to direct revocation by the District Court.

In 2017, Montana's revocation statutes were amended significantly in "sweeping criminal justice reform legislation". *Oropeza*, ¶ 4. The amendments apply to any offender whose suspended or deferred sentence is subject to revocation, regardless of the date of conviction or the terms and conditions of the offender's sentence. Mont. Code Ann. § 46-18-203(12). Accordingly, these amendments, which were in effect when Mr. Sullivan was convicted in DC 18-321 and DC 19-829, governed his revocation proceedings.

The amendments divided probationary violations into two categories – compliance violations and non-compliance violations. Mont. Code Ann. § 46-18-203(7), (8), (11)(b). The procedures a sentencing court must follow in a revocation proceeding differ depending on whether a violation is a compliance or a non-compliance violation.

> "Compliance violation" means a violation of the conditions of supervision that is not:

> (i) a new criminal offense;
>
> (ii) possession of a firearm in violation of a condition of probation;
>
> (iii) behavior by the offender or any person acting at the offender's direction that could be considered stalking, harassing, or threatening the victim of the offense or a member of the victim's immediate family or support network;
>
> (iv) absconding; or
>
> (v) failure to enroll in or complete a required sex offender treatment program or a treatment program designed to treat violent offenders.

Mont. Code Ann. § 46-18-203(11)(b). A probationary violation that is not a compliance violation is necessarily a non-compliance violation.

If a district court determines a probationary violation is a non-compliance violation, the court, in its discretion, may revoke a defendant's sentence directly. Mont. Code Ann. § 46-18-203(7)(iii); *Oropeza*, ¶ 7. "If a court finds by a preponderance of the evidence that an offender has committed a non-compliance violation, it may revoke a suspended or deferred sentence and impose any sentence that may have been originally imposed. Section 46-18-203(6)(a), (7)(a)(iii), MCA." *Oropeza*, ¶ 17.

By contrast, if a district court finds a probationary violation is only a compliance violation, the court first must determine whether measures under the Montana incentives and intervention grid ("MIIG") have been exhausted and if they have not whether an offender would be responsive to further efforts under the MIIG before revoking a sentence. Mont. Code Ann. § 46-18-203(8)(a) – (c); *Oropeza*, ¶ 17. DOC is charged with revising, maintaining, and "fully implement[ing]" the MIIG.[9] Mont. Code Ann. § 46-23-1028(1). Among other things, the MIIG "must recommend the least restrictive placement for offenders based on the result of a validated risk and needs assessment." Mont. Code Ann. § 46-23-1028(2).

This Court has described the MIIG's enactment in 2017 as part of the "sweeping criminal justice reform legislation aimed at utilizing data driven decisions and evidence-based practices to reduce incarceration, statewide pressure on detention facilities, and the accompanying burden on taxpayers." *Oropeza*, ¶ 4 (citations omitted). In *Oropeza*, the

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[9] The 06/17/2019 version of the MIIG is available at https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Committee-Topics/Agency-Oversight/Corrections/DOC-miig-grid-june-2019.pdf (last visited 02/14/2022).

Court determined the district court did not abuse its discretion in holding Oropeza had absconded by not reporting to his probation officer for three months and the probation officer made reasonable efforts to contact Oropeza during that time. *Oropeza*, ¶¶ 18 – 19. Accordingly, because Oropeza committed a non-compliance violation, the district court did not abuse its discretion by revoking Oropeza's deferred sentence without requiring DOC to exhaust MIIG procedures. *Oropeza*, ¶ 21.

Since *Oropeza*, the Court has addressed whether a probation violation is a compliance or non-compliance violation in multiple cases. *State v. Fjelsted*, 2020 MT 278, ¶¶ 15 – 18, 402 Mont. 46, 475 P.3d 387 (finding no abuse of discretion in the district court determining defendant had absconded, the probation officer made reasonable efforts to locate defendant, and thus defendant committed a non-compliance violation to which the MIIG did not apply by failing to report for supervision for over five months); *State v. Howard*, 2020 MT 279, ¶¶ 16 – 17, 402 Mont. 54, 475 P.3d 398 (concluding the district court did not abuse its discretion in finding defendant committed sexual abuse of children, a non-compliance violation to which the MIIG did not apply,

even though that offense was dismissed in a plea deal, because the State proved defendant committed the offense by a preponderance of the evidence in the civil, revocation proceeding that was fundamentally fair); *State v. Fetveit*, 2020 MT 264, 401 Mont. 538, 474 P.3d 811 (ruling district court did not abuse its discretion by holding defendant absconded and the probation officer made reasonable efforts to contact him over a ten month period). Notably, in these cases counsel and the sentencing courts addressed whether the probationary violations were compliance or non-compliance violations. *Oropeza*, ¶¶ 9 – 13, 18 – 19; *Fjelsted*, ¶¶ 7, 12, 17 – 18; *Howard*, ¶ 7; *Fetveit*, ¶¶ 4 – 9, 19 – 22. Further, the revocations in all the cases included reports of violations from a probation officer who documented their supervision efforts, facts indicating a violation, and whether the violation was a compliance or non-compliance violation. *Oropeza*, ¶¶ 9 – 10; *Fjelsted*, ¶¶ 4 – 5; *Howard*, ¶ 5[10]; *Fetveit*, ¶¶ 4 – 9.

[10] The *Howard* opinion does not indicate the probation officer's report was attached to the petition to revoke, but the parties' briefs explain that it was and that the officer determined the alleged violations were non-compliance violations. *State v. Howard*, DA 19-0305, Appellant's Brief at 7 (04/06/2020), Appellee's Brief at 2 – 3 (07/20/2020).

In the past, this Court has said, "The standard for revocation of a suspended or deferred sentence is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty." *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715 (citation omitted). *Accord State v. Cook*, 2012 MT 34, ¶ 12, 364 Mont. 161, 272 P.3d 50 (same, *citing Goff*). Additionally, the Court has ruled that Mont. Code Ann. § 46-18-203(2) allows "a suspended sentence to be revoked for violations of the conditions of suspension before the period of suspension has begun." *Graves*, ¶ 15 (interpreting the 2011 amendments to Mont. Code Ann. § 46-18-203(2)).

Following enactment of the 2017 modifications to the revocation statute, a sentencing judge must determine first whether the alleged violation is a compliance or non-compliance violation before revoking a sentence. This *a priori* determination is necessary regardless of whether revocation proceedings occur before or during the period of supervision and even if a probationer's conduct has been other than what they agreed it would be when granted probation. But Mr.

Sullivan's 2021 revocation proceedings occurred as though the 2017 amendments did not exist.

There were no reports of violations from Mr. Sullivan's probation officer – he only recently had been sentenced to MSP for ten years, with an eight-year parole restriction, in DC 18-321. Apparently, Mr. Sullivan had no supervising officer in DC 19-829, even though his suspended sentences in that matter were running concurrently to the prison sentence in DC 18-321. Thus, there was no explanation of the incentives or interventions that had been or could have been conducted. Nor was there an explanation, like the one in *Howard*, that incentives or interventions were inappropriate in light of the conduct at issue. *Howard*, ¶¶ 6, 7, 16 – 17. Indeed, the MIIG establishes a host of interventions that might be appropriate when a supervised offender contacts a victim, such as software and electronics monitoring[11] or an intensive supervision program. *See* MIIG at 4.

[11] Although software and electronics monitoring are specifically targeted in the MIIG toward sex offenders, there is no apparent reason in this case why DOC could not use such measures to monitor compliance with no-contact conditions of probation.

Here, there was no fact-based evidence from a supervising officer about Mr. Sullivan's conduct or whether he had been or could be responsive to incentives or interventions under the MIIG. Instead, two prosecutors determined on their own that Mr. Sullivan was "unredeemable" and had "cosmically" violated his probation, which as a practical matter would not commence for many years (even though as a matter of law Mr. Sullivan's suspended sentences were running in DC 19-829), by committing a criminal offense, which they later dismissed. Then, the District Court proceeded as though the new-offense violation alleged by the State was irrelevant to whether Mr. Sullivan's sentences could be revoked, finding Mr. Sullivan had committed "a substantial violation" of a no-contact condition that was not imposed in either judgment.

The District Court did not find, and the State did not aver, the Happy Birthday text was a non-compliance violation. Nor could they have done so: Even if Mr. Sullivan instigated the Happy Birthday message, as the District Court determined, there are no facts indicating the message encompassed behavior that could be considered stalking, harassing, or threatening to M.A., pursuant to Mont. Code Ann. § 46-

18-203(11)(b)(iii). M.A. did not testify at the March 26 revocation hearing to claim she felt stalked, harassed, or threatened by the text. Further, the investigator who testified at the hearing did not indicate the birthday text amounted to stalking, harassing, or threatening M.A. Contact with a victim that does not involve stalking, harassing, or threatening behavior is necessarily a compliance violation to which the MIIG applies.

Trying to keep an offender like Mr. Sullivan out of Montana's prison system through targeted incentives and interventions while serving a probationary sentence was one of the Legislature's primary objectives when it revamped statutory revocation procedures "to reduce incarceration, statewide pressure on detention facilities, and the accompanying burden on taxpayers." *Oropeza*, ¶ 4. The District Court did not follow, and did not require the State to follow, statutory mandates before revoking Mr. Sullivan's sentences in DC 18-321 and DC 19-829 in 2021. The revocations are reviewable under *Lenihan* because they fall outside of the parameters set forth in § 46-18-203(6), (7) or (8), and thus are illegal.

This Court should reverse and vacate Mr. Sullivan's second revocation in DC 18-321 and the revocation in DC 19-829 and remand with instructions for the District Court to dismiss both petitions to revoke.

III. Alternatively, the second order of revocation in DC 18-321 and the order of revocation in DC 19-829 conflict with the District Court's oral disposition in each of these cases. The orders must be remanded for conforming amendments.

A. The written revocation orders fail to grant Mr. Sullivan statutorily mandated credit for time served that was correctly included in the oral dispositions in DC 18-321 and DC 19-829.

At the end of the combined revocation hearing in DC 18-321 and DC 19-829, the judge stated, "I'm going to reimpose the exact same sentence as I did on October 1, 2020, for all of the reasons that I did on October 1, 2020." (App. F at 71.) That sentence granted Mr. Sullivan credit for time served in DC 18-321 from March 5, 2018, through December 8, 2018, and August 1, 2019, through October 1, 2020. (App. D at 67 – 68.) Likewise, in DC 19-829, Mr. Sullivan received credit for time served from August 1, 2019, through October 1, 2020. (App. D at 66.) The written orders of revocation, however, inaccurately limit Mr. Sullivan's time-served credit to October 27, 2020, and March 26, 2021,

in DC 18-321, and to October 20, 2020, to March 26, 2021, in DC 19-829. (App. G at 2; App. I at 2.)

Mr. Sullivan's written orders of revocation are illegal because they are inconsistent with the oral dispositions. The orders refuse credit for time served for every day of incarceration prior to the new dispositions. *Hammer*, ¶ 27. This Court may review Mr. Sullivan's credit-for-time-served claims under *Lenihan*, notwithstanding the lack of an objection below. The orders of revocation deny Mr. Sullivan years-worth of credit for time served in violation of Mont. Code Ann. § 46-18-403(1).

If the Court does not reverse and vacate the orders of revocation, the Court should remand the DC 18-321 second order of revocation with instructions to strike "October 27, 2020, through March 26, 2021" in the first line of page two and insert "March 5, 2018, through December 8, 2018, and August 1, 2019, through March 26, 2021". Similarly, the Court should remand the DC 19-829 order of revocation with instructions to strike "October 20, 2020, through March 26, 2021", and insert "August 1, 2019, through March 26, 2021".

B. The written revocation orders in both cases impose conditions of probation that were stated as recommendations in the respective oral dispositions and declare that unspecified, previous orders and reasons from the respective revoked judgments, which were not mentioned in the oral dispositions, remain unchanged and are imposed.

The second revocation order in DC 18-321 contains the same non-conforming sentence as that contained in the first revocation order in DC 18-321: "In all other respects, the previous Orders, conditions, and reasons of this Court entered on November 14, 2018, remain unchanged and are imposed." (App. G at 1.) The revocation order in DC 19-829 contains a similar non-conforming sentence stating, "In all other respects, the previous Orders, conditions, and reasons of this Court entered on October 1, 2020, remain unchanged and are imposed." (App. I at 1.) For the reasons explained above, these sentences are illegal because they are inconsistent with the plain language in the respective oral dispositions and because they deny a significant amount of credit for time served in both of these cases prior to the commencement of the revocation proceedings. The illegal provisions can and should be corrected by this Court on appeal under *Lenihan*. *Hammer*, ¶ 27; *Heafner*, ¶¶ 11 – 12.

Each revocation order should be remanded with instructions to conform them with their respective oral disposition by: (1) striking the offending sentence; and (2) restating Conditions 1 – 27 from the original judgments (App. A at 2 – 5; App. C at 2 – 5) as recommendations for any period of community supervision on probation.

CONCLUSION

For the foregoing reasons, Mr. Sullivan respectfully requests the Court to:

- Remand the first order of revocation in DC 18-321 with instructions to (a) state the correct date range for which Mr. Sullivan must receive credit for time served, (b) strike the non-conforming sentence imposing previous orders, conditions, and reasons entered on November 14, 2018, and (c) restate the conditions imposed in the original judgment as recommendations for any period of community supervision on parole or probation.

- Reverse and vacate the second order of revocation in DC 18-321 and the order of revocation in DC 19-829 because (a) the District Court may not revoke a sentence for violation of a recommendation that was not an imposed condition of the suspended sentences, and (b) Mr.

Sullivan's alleged, third-party contact with M.A. would have been a compliance violation to which MIIG incentives and interventions would apply prior to revocation.

- Finally, if the Court declines to reverse and vacate the second order of revocation in DC 18-321 and the order of revocation in DC 19-829, remand both of these orders with instructions to (a) state the correct date range for which Mr. Sullivan must receive credit for time served, (b) strike the respective non-conforming sentences imposing previous orders, conditions, and reasons entered in the previous judgments that had been revoked, and (c) restate the conditions imposed in the original judgments as recommendations for any period of community supervision on probation.

Respectfully submitted this 4th day of May, 2022.

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By: /s/ Deborah S. Smith
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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 9,757, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Judgment (DC 18-321) .... App. A

Oral Pronouncement of Sentence (DC 18-321) .... App. B

Judgment (DC 19-829) .... App. C

Oral Pronouncement of Sentence (DC 19-829) .... App. D

October 13, 2020 Order of Revocation and Imposition of Sentence
(DC 18-321) .... App. E

Oral Pronouncement of Revocation (DC 18-321 and DC 19-829) ... App. F

April 14, 2021 Order of Revocation and Imposition of Sentence
(DC 18-321) .... App. G

Nunc Pro Tunc Order (DC 18-321) .... App. H

Order of Revocation and Imposition of Sentence
(DC 19-829) .... App. I

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-04-2022:

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