In the Supreme Court of the State of Montana

Supreme Court No. DA 22-0054

SHANDOR S. BADARUDDIN,

Appellant,

-vs-

STATE OF MONTANA and the NINETEENTH JUDICIAL DISTRICT COURT, HONORABLE MATTHEW CUFFE, Presiding,

Appellees.

Reply Brief

On Appeal from the Montana Nineteenth Judicial District Court, Lincoln County, The Hon. Matthew J. Cuffe, Presiding

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A. Introduction.

Badaruddin and the Appellee, State of Montana (hereinafter "State") agree on very little except for the large affect the COVID pandemic played – and continues to play – on this matter. For the State, the pandemic put "pressures on the Nineteenth Judicial District," that seemingly warrant the sanctions imposed. For Badaruddin the pandemic and the pressures felt by the court placed unreasonable and seemingly arbitrary restrictions on his ability to fulfill his functions as contemplated by the *Sixth Amendment* of the United States Constitution and *Article II, section 24* of the Montana Constitution.

Further, throughout the course of the sanctions proceedings there has been conflict in the various analyses used to review Badaruddin's performance at trial, i.e., whether it is analyzed through a lens of subjective reasonableness or objective reasonableness.

One such example appears in the State's Answering Brief. The State asserts, "[t]he Court recognizes defense's counsel's 'overarching duty to advocate the defendant's case,' but limits that duty to 'legitimate,

lawful conduct compatible with the very nature of trial …'" (Answering Br. at 18) (citing and quoting *Strickland v. Washington*, 466 U.S. 668 (1984) and *Nix v. Whiteside*, [475] U.S. 157 (1986)). *Strickland* examines counsel's performance through an "objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, *see also Whitlow v. State*, 2008 MT 140, ¶14, 343 Mont. 90, 183 P.3d 861.

In *Nix*, the Court explained "counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix*, 475 U.S. at 166. Such behavior is far more suggestive of the subjective bad faith, which would warrant sanctions. (*See* Amicus Br. at 12-13). Neither the State here, nor the district court below, have suggested Badaruddin assisted his client in presenting false evidence or otherwise violating the law.

In that vein, while the parties agree on the appropriate standard of review, this Court must not simply defer to the district court but recognize that an exercise of discretion must be analyzed looking at not only both the facts of the trial and counsel's performance, but also by the applicable law. "It is not inconsistent with the discretion standard for an

appellate court to decline to honor a purported exercise of discretion which was infected by an error of law." *Abrams v. Interco, Inc.,* 719 F.2d 23, 28 (2d Cir. 1983). The error is addressed further below.

Similarly, given the State's concession "the Montana criminal defense bar has yet to trigger sanctions under § 421" (Answering Br. at 18), this Court should carefully scrutinize the lower court's exercise of discretion given the absence of legal precedent on the question presented by this case. In *Pierce v. Underwood*, 487 U.S. 552 (1988), the United States Supreme Court suggested something of a general analysis to attempt to decide when a procedural or evidentiary decision would receive abuse deference. The Court conceded that when "neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer." *Id.* at 558.

Again, the parties agree on the standard of review, but given the absence of a historical application of § 421 to the performance of criminal defense counsel, Badaruddin urges this Court to heighten that review. "After all, even a deferential abuse yardstick does not insulate the judge

from accountability." Steven Alan Childress and Martha S. Davis, "Federal Standards of Review" § 4.21, 3d ed. pg. 4-135 (Lexis 1999).

B. Error in Imposition of Sanctions.

The State argues, while "the circumstances of this case were extraordinary" "defense counsel went beyond vigorous-but-legitimate advocacy." The heart of this argument faults Badaruddin for failing to alert the court of his client's "desire to testify until only minutes remained in a two-week trial." (Answering Br. at 17-19). The State argues "Badaruddin was familiar with his client and had ample opportunity to ascertain whether Hartman wanted to exercise his *Sixth Amendment* right to testify at trial." (*Id.* at 20). It is difficult to gauge what level of familiarity qualifies defense counsel to know whether his client wishes to testify in advance, but the State's argument belies the realities of a criminal trial. Further, because the decision to exercise a right to testify or not belongs solely to the defendant, even the most intimate of attorney-client relationships cannot ultimately sway a decision which is solely the client's.

Had Badaruddin relied on his familiarity with Hartman to notify the court in advance that his client would testify, Badaruddin likely would have been violating his *Sixth Amendment* duty of efficacy. Again, the decision to testify is one of the few decisions that ultimately belong to the defendant in a criminal case and "it is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence." *People v. Kliner*, 185 Ill.2d 81, 127, 705 N.E.2d 850 (Ill. 1998); *See also People v. Briones*, 352 Ill. App. 3d 913, 918, 816 N.E.2d 1120 (Ill. 2004) (finding counsel ineffective for "promising the jury that the defendant would testify to the truth and, inexplicably, failing to call him").

It was Hartman's right to testify or not testify at the last minute based on advice from counsel, his gut, his perception of how the evidence was presented at trial, a dream he had, or a conversation with his spouse. "Clearly, a defendant is entitled to make a last minute decision not to testify or to put on a defense case." *Simms v. State*, 194 Md.App. 285, 315, 4 A.3d 72 (2010). The converse is equally true, a defendant is entitled to make a last minute decision to testify.

This Court has recognized a defendant's decision to testify is often a last-minute decision. *State v. Abel*, 2021 MT 293, ¶6, 406 Mont. 250, 498 P.3d 199. In *Abel*, this Court noted it had "squarely adopted the generally accepted federal rule that the constitutional requirement for a knowing, voluntary, and intelligent waiver of the right to testify … neither necessarily requires the trial court to explicitly advise defendants of their right to testify, nor necessarily requires a record inquiry and determination as to whether he or she knowingly, voluntarily, and intelligently waived that right." *Abel*, ¶7. The waiver is implied by the defendant's failure to either invoke the right or failing to notify the court that he wishes to do so.

Under *Abel*, even if Badaruddin knew Hartman was going to testify and explained that position to the court on day one, Hartman could have waived the right by not asserting the right and not testifying. Conversely, had Badaruddin known Hartman was not going to testify but, at the last minute, Hartman asserted the right, no court could infer Hartman had waived or forfeited his right based on this Court's holding in *Abel.* Given this clear law and the reality that trials are fluid and evolve over time,

the State's argument that Badaruddin's familiarity with Hartman in any way factors into the propriety of the sanctions imposed or is a reflection of Badaruddin's performance is contrary to fact and law.

The State argues sanctions against Badaruddin are appropriate based on the trial court's observations that Badaruddin's actions were "strategic, tactical, calculated, consistent and considered conduct resulting in his client's inability to testify, a right he weaponized against the judge's control of his own docket and the rights of other criminal defendants awaiting precious court time." (Answering Br. at 24) (internal quotations and citations omitted). Absent from the adjectives used to describe Badaruddin's conduct are "vexatious and unreasonable."

Mont. Code Ann. § 37-61-421 is a plain and unambiguous statute. It requires a conjunctive finding that counsel's actions were both vexatious and unreasonable. The statute does not allow for the imposition of sanctions for strategic conduct, tactical conduct, or even conduct that weaponizes a defendant's constitutional rights. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert

what has been omitted or to omit what has been inserted." *Mont. Code Ann. § 1-2-101.* Just as the placing of one exception in the statute excludes all others, under the familiar doctrine "expressio unius, exclusio alterius," the expression of only two necessary findings, unreasonably and vexatiously," in the statute before sanctions can be imposed necessarily excludes any other instance justifies sanctions.

"A trial court abuses its discretion when it 'acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *City of Billings v. Nolan*, 2016 MT 266, ¶6, 385 Mont. 190, 383 P.3d 219 (citing and quoting *State v. Hicks*, 2013 MT 50, ¶14, 369 Mont. 165, 296 P.3d 1149). Further, an abuse of discretion occurs when the lower court "exercises its discretion based on a mistake of law …" *Larson v. State*, 2019 MT 28, ¶16, 394 Mont. 167, 434 P.3d 241. Here, the district court's ten-page, single-spaced order imposing sanctions does not conclude that Badaruddin acted "unreasonably and vexatiously." The only reference the court gives to the terms is when it quotes from the statute, but the court does not close the circle and conclude the conduct met the criteria. The court had a variety

of descriptions for Badaruddin's performance, but it fails to find the two necessary factors justifying sanctions under the statute. Absent a finding that the district court concluded Badaruddin's behavior was both unreasonable **and** vexatious, the imposition of sanctions is a mistake of law; therefore, it is an abuse of discretion.

Seeming to recognize this omission by the district court, the State argues "Badaruddin was sanctioned for his strategic, considered conduct to intentionally delay trial, not for his advocacy of his client's right to testify." (Answering Br. at 26). Notably absent from the argument is an assertion Badaruddin was sanctioned for his unreasonable and vexatious conduct that intentionally delayed the trial.

Even under the most liberal application of the doctrine of plain meaning construction, "strategic and considered conduct" that "intentionally delay[s] trial" is not the equivalent to actions that "unreasonably and vexatiously" multiply the proceedings. An "absent provision [in a statute] cannot be supplied by the courts. What the legislature 'would have wanted' it did not provide, and that is the end of the matter." Antonin Scalia, Brian A. Garner, "Reading Law: The

Interpretation of Texts," pg. 94 (West 2012). Contrary to the State's argument, Badaruddin does not "invite a review of the record that ignores the express findings of the trial court …" (Answering Br. at 32). To the contrary, he urges this Court to examine the entire record and note the absence of the statutory criteria justifying sanctions.

The State cannot have it both ways. They cannot argue *Mont. Code Ann. § 37-61-421* is unambiguous, (Answering Br. at 27), but also that conduct that is not specifically deemed "unreasonable and vexatious" justifies financial sanction against counsel. Therefore, when the State directs this Court to "the express findings of the trial court," (*Id.* at 32) and notes "'the record' [in this case] is more than the transcript of questions answered: it is the oral and written findings of the trial court judge as to his observations having personally overseen two weeks of trial" (*Id.* at 28-29), this Court should also be cognizant of what is not included in even this broader record. What is not included is a finding that Badaruddin's actions were "unreasonable and vexatious," as required by the statue.

The State cites two cases they believe support their position sanctions were appropriate in this matter: *United States v. Romero-Lobato*, No. 3:18-cr-00047-LRH-CBC, 2020 U.S. Dist. LEXIS 18332, 2020 WL 557523 (D. Nev. Feb. 4, 2020), and *United States v. Elliot*, 463 F.3d 858 (9th Cir. 2006).

In *Romero-Lobato*, the case had been pending for approximately twenty months. *Romero-Lobato*, *1. After two more complex trials resulting in multiple felony convictions for the Defendant, the Government pressed a third trial on immigration charges. The district court, relying on an impression from counsel by both parties, altered its normal trial deadlines believing "the trial would be straightforward and without controversy as to proposed jury instructions or evidentiary matters." *Id*. The court's new deadline for jury instructions was noon the Friday before trial. "But at approximately 3:30 p.m. that Friday afternoon, in violation of the Court's pretrial and bench orders, defense counsel filed three additional jury instructions ex parte and under seal," which were critical to a new but yet-undisclosed defense theory. *Id*. Then, "[a]t 4:23 pm, defense counsel filed a motion in limine to preclude the

government from referencing the defendant's prior criminal convictions" in violation of both Fed. R. Crim. Pro. 47(c) and the court's own order. *Id.* "Finally, at approximately 5:42 pm, defense counsel filed an untimely new exhibit list." *Id.* "As is evident by their filing times, all these filings were untimely and in violation of court order." *Id.*

In *Romero-Lobato*, the court's "pretrial order also note[d] that pursuant to this district court's local rules, the Court will consider the imposition of sanctions[1] against any attorney who fails to timely comply with the provisions of [the pretrial order] or who fails to timely comply with any other order than [*sic*][2] schedules deadlines for trial preparation." *Id.* *2 (citations and quotations omitted) (brackets in original). Despite the court's ire at defense counsel's intentional flouting of the scheduling order and its ability to sanction counsel for their actions, the court did not impose sanctions on defense counsel. In fact, a review of the PACER[3] docket of the *Romero-Lobato* case indicates the court did not impose sanctions on defense counsel at any point.

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[1] Badaruddin did not receive any similar notice that a failure to complete the defense case on time would result in a sanction.
[2]Should read "the schedules deadlines …"
[3]Public Access to Court Electronic Records.

The State then turns their argument to the deference that should be accorded the trial court. The analysis of this deference is part-and-parcel with the standard of review for this case in particular. Certainly, this Court gives deference to the district court. However, the deference given is cabined by the law applied. In *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), the Court of Appeals for the Tenth Circuit analyzed the imposition of attorneys' fees, an analysis typically viewed under an abuse of discretion standard. *See Id.* at 961. "Nevertheless, any statutory interpretation or other legal analysis which provides the basis for the award is reviewable *de novo*." *Id.* In this sense, this Court's exercise of the deference given to the lower court must be guided by the statue. A lower court's decision requires reversal regardless of the detail of its factual findings if the ultimate result of those findings is a violation or misapplication of the applicable statute.

At its best, the Answering Brief highlights both the totally unique circumstances in which Hartman's trial occurred and the bevy of case law in which sanctions have been awarded in civil cases. In the future, circumstances may arise in which *Mont. Code Ann. § 37-61-421* can be

properly applied to criminal defense counsel. However, the undisputed effect the pandemic had on Hartman's trial and the lower court's schedule, makes Badaruddin's a poor case in which to create new law applying *Mont. Code Ann. § 37-61-421* in a criminal context.

Finally, the district court's subjective analysis of Badaruddin's performance may warrant deference that analysis must be viewed objectively to ascertain whether Badaruddin's actions qualified as both unreasonable and vexatious and that those actions prolonged the proceeding. Reasonableness has been and will always remain a keystone of the law, and both precedent and logic dictate the reasonableness or unreasonableness of a particular action must be analyzed objectively. The State's citation to *Strickland* should guide this Court. In the context of *Strickland*, a review of counsel's performance requires a demonstration that "counsel's performance fell below an objective standard of reasonableness." *State v. St. Germain*, 2007 MT 28, ¶33, 336 Mont. 17, 153 P.3d 591.

While the Amicus Brief more than adequately addresses the subjective bad faith standard adopted by the Second, Ninth and D.C.

Circuits, applicable to sanctions against criminal defense attorneys, an alternative standard also exists. In *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), the Tenth Circuit articulated a different standard for imposing attorney's fees and costs personally against an attorney under 28 U.S.C. § 1927. *See Also, Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998). The Tenth Circuit rejected a subjective good faith inquiry and concluded, instead, that sanctions under Section 1927 are warranted only when the conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Miera*, *supra*, *quoting Braley*, 832 F.2d at 1512. "This standard is then used to decide whether 'by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law,' an attorney subjects himself to sanctions under § 1927." *Miera* 143 F.3d at 1342 *quoting In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985). As the Tenth Circuit summarized in *Miera*, sanctions are appropriate under Section 1927 "when an attorney is cavalier or 'bent on misleading the court;' intentionally acts without a plausible basis; when the entire course of the proceedings was unwarranted; or when certain discovery is

substantially unjustified and interposed for the improper purposes of harassment, unnecessary delay and to increase the costs of the litigation." *Id*. (citations omitted). Finally, because Section 1927 "is penal in nature, 'the award should be made "only in instances evidencing serious and standard disregard for the orderly process of justice."'" *Id*. (citations omitted).

The *Miera* Court concluded, "…we cannot find [counsel's acts and omissions] rises to the level of intentional or reckless disregard of counsel's duties to the court under *Braley,* nor that it is tantamount to bad faith." *Id.* Similarly, Badaruddin's actions do not rise to the level of intentional or reckless disregard of counsel's duties to the court, nor were they tantamount to bad faith. The Seventh Circuit allows sanctions under Section 1927 with either a showing of subjective or objective bad faith, but a showing of bad faith is required. *See Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 120 (7th Cir. 1994); *See Also, Miera, supra.*

Bad faith was not demonstrated below, and a finding of bad faith is not supported by the record. Under either standard, the subjective bad faith standard or the intentional or reckless standard, the acts of

Badaruddin did not rise to the level required as a prerequisite to the imposition of § 421 sanctions.

Regardless of the standard of conduct necessary to justify sanctions against a criminal defense lawyer, is the "clear and convincing" standard of proof imposed upon the State to justify sanctions. To shift the cost of litigation to opposing counsel under Section 1927, "the claimant must prove, by clear and convincing evidence, that *every facet* of the litigation was patently meritless, *Nat'l Ass'n of Gov't Employees,* 844 F.2d [216 (5th Cir. 1988)] at 223, and counsel must have lacked a reason to file the suit and must wrongfully have persisted in its prosecution through discovery, pre-trial motions, and trial." *Proctor & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 526 (5th Cir. 2002) (citations omitted). The clear and convincing standard "generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." *United States v. Montague,* 40 F.3d 1251, 1255, (D.C. Cir. 1994) (citations omitted).

Badaruddin's actions do not amount to a "pile of evidence" that justifies a firm conviction that he intended to multiply the proceedings or

behave vexatiously or unreasonably. He made efforts to conserve time, (T.1261:17-1263:14), he trimmed his four day defense down to two and a half days, and the district court acknowledged he had not wasted any time during the first six days of trial. *See* T. 1280:1-1280:7.

In light of that objective standard, the unambiguous requirements of *Mont. Code Ann. § 37-61-421,* Badaruddin's *Sixth Amendment* duties, the standard of proof, and the unique circumstances of this case, Badaruddin requests this Court vacate the district court's order imposing sanctions.

C. Any Sanctions Imposed Should be Limited to Those Incurred by the Opposing Party.

1. This Court should construe § 201 as the limits on sanctions available under § 421.

The State insists Mont. Code Ann. § 37-61-421 (2021) is not limited by any other statute, and that "§ 421" justifies all sanctions imposed below. Badaruddin contends the Montana sanction statute "§ 421" should be limited by Mont. Code Ann. § 25-10-201. Meaning that only those costs outlined in § 201 can be imposed as a sanction award under § 421.

This would be analogous to the federal statutes on which the Montana Code sections are based, where Courts "have defined costs under § 1927 according to 28 U.S.C. § 1920, which enumerates the costs that ordinarily may be taxed to a losing party." *Roadway Express v. Piper*, 447 U.S. 752, 757 (1980). Further, "[b]ecause § 1927 is penal in nature, … it should be strictly construed, and we agree with the Seventh Circuit's determination [in *1507 Corp. v. Henderson*, 447 F.2d 540, 542 (7th Cir. 1971)] that 'costs' should be limited to taxable costs." *United States v. Ross*, 535 F.2d 346, 350 (6th Cir. 1976).

The State relies on a single district court case from Illinois to argue that the core holding of *Roadway Express* has been vitiated by a 1980 statutory amendment, and that now federal courts are free to impose any costs (not just those in § 1920) as a sanction award. *Dowe v. AMTRAK*, No. 01 C 5808, 2004 WL 1393603 (N.D. Ill. June 22, 2004). *Dowe* is correct that § 1927 was amended after *Roadway Express* to allow "expenses" and "attorney fees" as part of a sanction. Without citing any higher court or offering much reasoning, the *Dowe* district court summarily found that the term "expenses" need not be construed as narrowly as *Roadway*

Express construed the terms "costs," and justified a jury cost sanction on that basis. The *Dowe* decision is a one off and at odds with federal circuit court decisions still holding that § 1920 limits § 1927 even after the 1980 amendment. Last, *Dowe* held that sanctions were only appropriate if the conduct in question involved "objective bad faith" which could consist of "recklessness." *Id.* at *1.

Appellate courts considering the issue after the 1980 amendment to § 1920 have uniformly held sanctions under § 1927 are limited to those costs one can recover under § 1920, and do not include general costs of running the court system. *United States v. Austin*, 749 F.2d 1407, 1409 (9th Cir. 1984) (holding costs in summoning a jury not recoverable because excess costs recoverable under § 1927 include only those taxable costs enumerated in § 1920); *Boettcher v. Hartford Ins. Grp.*, 927 F.2d 23 (1st Cir. 1991) (holding "[i]t is clear beyond peradventure that 28 U.S.C. § 1927 does not include jury costs."); *Prosser v. Prosser*, 186 F.3d 403, 407 (3d Cir. 1999) ("[S]ection 1927 only allows the court to award costs and attorney fees payable to the opposing party, not payable to the court."); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 560 (3d Cir. 1985) (holding

"Neither § 1920 nor § 1927 contains reference to the costs of impaneling a jury, costs which customarily are borne by the government. Only the opposing litigants' costs and expenses incurred by virtue of an attorney's misconduct are within the ambit of the statutes."); *Laitram Corp. v. Cambridge Wire Cloth Co.,* 919 F.2d 1579, 1584 (Fed. Cir. 1990) (recognizing it could not sanction vexatious appellate counsel for wasting the court's time under §1927, because "§ 1927 relates to payment of costs and attorney fees to the other side, rendering fruitless a sanction under § 1927 in this unusual case.")

Finally, and notably, after arguing the trial court was correct in its broad reading of § 421, the State then takes no position on whether costs incurred by the Court should be imposed. *See* Answering Br., at 46.

Even after the 1980 amendment federal courts have continued to limit the sanctions available under § 1927 only to those listed in § 1920. Because § 421 is penal in nature, this Court should similarly limit the type of sanctions under the Montana Code. *See Ross, supra.*

2. Sanctions under § 421 are not the same as Rule 11 sanctions.

The State's argument § 421 sanctions have no limits except the trial court's imagination equates § 421 sanctions with civil Rule 11 sanctions. This purported construction is dangerous, especially in a criminal case when applied to criminal defense counsel.

Fed.R.Civ.P. 11 was expressly *not* imported into the criminal rules because of concern that "the risk of sanctions could chill legitimate, indeed constitutionally required, advocacy…" such as a "frivolous plea of not guilty" or a "frivolous refusal to admit elements of a charged offense." *United States v. Aleo*, 681 F.3d 290, 308 (6th Cir. 2012). Otherwise, "district courts could sanction litigation stances that are utterly appropriate in criminal cases." *Id.* Mont.R.Civ.P. 11 was modeled after the Federal Rules of Civil Procedure, and federal interpretive decisions have persuasive application to the interpretation of the Montana Rules. *See United States Fidelity and Guaranty Company v. Rodgers*, 267 Mont. 178, 182, 882 P.2d 1037, 1039 (1994). The same concern federal courts

had of Rule 11 sanctions chilling criminal defense advocacy applies equally to state court cases.

The State points to *Cross Guns v. Eighth Judicial District Ct.,* 2017 MT 144, 387 Mont. 525, 396 P.3d 133, to suggest this Court has construed § 421 broadly enough to include those costs not incurred by the opposing party. However, *Cross Guns* was a case largely addressing the propriety of a contempt citation under Mont. Code Ann. § 3-1-511.

Cross Guns is silent on whether the costs imposed pursuant § 421 were incurred by the court or the adverse party (the State). If the costs incurred were not incurred by the State, it appears *Cross Guns* never challenged the scope of § 421 and § 201's logical limit on that statute like Badaruddin does here. *Cross Guns* is not controlling, or helpful, because of its procedural history and scant factual record.

Conclusion

For the foregoing reasons, and for those discussed in the Opening Brief, Badaruddin requests this Court reverse the district court's sanctions order.

Dated this 20th day of April, 2023.

STEPHENS & BROOKE,

By: /s/ Colin M. Stephens
Colin M. Stephens

DATSOPOULOS, MacDONALD & LIND, P.C.,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac version 16.47 is 4436 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11(4)(d).

So certified this 20th day of April, 2023.

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