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STATE OF MONTANA
Case Number: DA 21-0164

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0164

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD WAYNE PULST,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twelfth Judicial District Court,
Liberty County, The Honorable Kaydee Snipes-Ruiz, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MICHAEL P. DOUGHERTY
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Michael.dougherty2@mt.gov

ROBERT PADMOS
Liberty County Attorney
P.O. Box 683
Chester, MT 59522-0683

ATTORNEYS FOR PLAINTIFF AND APPELLEE

RYAN AIKIN
Aikin Law Office, PLLC
P.O. Box 7277
Missoula, MT 59807-7277

ATTORNEY FOR DEFENDANT AND APPELLANT

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STATEMENT OF THE ISSUE

Whether the district court lacked the statutory authority to revoke Pulst's suspended sentences.

STATEMENT OF THE CASE

In 2013, Appellant Donald Wayne Pulst was convicted by jury of multiple sexual crimes involving several young children. *State v. Pulst*, 2015 MT 184, ¶¶ 3-13, 379 Mont. 494, 351 P.3d 687 (stating the facts of Pulst's underlying crimes). Specifically, Pulst was found guilty of sexual intercourse without consent (SIWC), Mont. Code Ann. §§ 45-5-503(1), (3); two counts of sexual assault, Mont. Code Ann. §§ 45-5-502(1), (3); and indecent exposure, Mont. Code Ann. § 45-5-504. (Doc. 106.) Pursuant to his SIWC conviction, the district court sentenced Pulst to the Montana State Prison (MSP) for a period of 30 years with 20 years suspended. (*Id*. at 3.) The court also sentenced Pulst to 20 years MSP for each of his sexual assault convictions and suspended 10 years from each count. (*Id*. at 2, 4.) Per his indecent exposure conviction, the district court sentenced Pulst to 6 months in the county jail. (*Id*. at 3.) The court ordered Pulst's sentences to run concurrently. (*Id*. at 9.)

In 2017, the State petitioned to revoke Pulst's suspended sentences after he refused to participate in sexual offender treatment. (Doc. 138 at 2-3.) Following an

evidentiary hearing, the district court found that Pulst had violated the conditions of his sentence and revoked his suspended sentences. (*Id*. at 3-4.) Per his suspended SIWC sentence, the district court sentenced him to 20 years MSP and suspended 14 years. (*Id*. at 4.) The court also revoked both counts of sexual assault and sentenced Pulst to 10 years MSP for each count, all suspended, to run concurrently. (*Id*.)

On October 20, 2020, the State petitioned to revoke Pulst's suspended sentences again. (Doc. 141.) The State alleged that Pulst violated a condition requiring him to enter and successfully complete sexual offender treatment. (*Id*. at 3.) Specifically, the State alleged that Pulst was set to be released from custody on October 23, 2020, but he refused to engage in sexual offender treatment with an approved provider upon his release. (*Id.* at 4 (stating that "the moment the Defendant is discharged he will be in violation of . . . his release").)

On January 27, 2021, the district court held an evidentiary hearing. (Doc. 160.) Following witness testimony, the district court found that Pulst violated the conditions of his suspended sentences by failing to secure an approved sexual offender treatment provider. (Docs. 158 at 3-4; 159 at 2; 1/27/21 Tr. at 49-50.) The district court revoked Pulst's suspended sentences and committed him to MSP for the remainder of his three sentences. (Doc. 159 at 3; 2/5/21 Tr. at 21-22 (Count 1,

10 years; Count 2, 14 years; and Count 4, 10 years).) The court ran the sentences concurrently.

Pulst now argues that the district court lacked the statutory authority to revoke his suspended sentences.

STATEMENT OF THE FACTS

First revocation

Following Pulst's convictions in 2013 for SIWC and sexual assault against children, the district court imposed various conditions of his suspended sentences, including sexual offender treatment. (Doc. 106 at 7-9.) The district court ordered that Pulst would not be eligible for parole until he completed Phase 1, or its equivalent, of sex offender treatment. (*Id*. at 9.) The court found that this condition was "necessary for the protection of society because, if left untreated, Defendant would be a danger to the community given his continued denial of the acts which he has now been convicted." (*Id*.) Also, during the suspended portions of Pulst's sentences, the district court ordered that he enter and successfully complete a sexual offender treatment program with a Montana Sex Offender Treatment Association (MSOTA) provider that had been approved by his probation officer. (*Id*. at 4, 7.)

While at MSP, Pulst continued to deny his crimes and refused to enter sexual offender treatment. (Doc. 120 at 2.) Pulst told prison officials that requiring

him to complete sexual offender treatment was "illegal" and that he could not be forced to participate. (*Id*. ("It is medical treatment and it cannot be forced on me.").) Because he refused to engage in sexual offender treatment, Pulst was never granted a parole hearing or considered for parole. (*Id*.)

Pulst was set to be released to his suspended sentence on October 25, 2017. (Doc. 120 at 3.) Anticipating Pulst's release to his suspended sentences, his Probation and Parole Officer at the time, Robyn Tuttle (Officer Tuttle), contacted multiple MSOTA providers to see if they would accept Pulst into treatment upon his release. (*Id*.) However, based on Pulst's continued denial of his crimes and his refusal to engage in treatment, none of the providers contacted by Officer Tuttle would accept him into their treatment programs. (Doc. 120 at 2-3.)

On September 26, 2017, prior to the start of Pulst's suspended sentence, the State filed its first petition for revocation. (Doc. 120.) The petition alleged that Pulst would be in violation of his suspended sentences the moment he was discharged from custody given his refusal to participate in sexual offender treatment. (*Id*. at 3-4.)

On February 21, 2018, the district court held an evidentiary hearing on the petition. (Doc. 136.1) Officer Tuttle testified about her attempts to arrange a treatment provider upon Pulst's discharge to his suspended sentences and his refusal to enter treatment. (*Id*.) At the hearing, Pulst argued that Dr. Donna Zook

would serve as his provider. (Docs. 141 at 2; 136.1.) Dr. Zook testified and stated that she would treat Pulst as a client. (Doc. 136.1.) However, Dr. Zook was not an MSOTA provider and the State argued that entering into treatment with her would not satisfy the conditions of Pulst's suspended sentence. (Doc. 136.1; *see also* Doc. 106 at 7 (condition "30" requiring Pulst to enter and successfully complete a sexual offender program with an "MSOTA clinical member, or associate member with supervision, or equivalent, who is approved by the State and the Probation & Parole Officer").)

The district court found that Pulst had failed to enter and successfully complete an approved sexual offender treatment program. (Doc. 138 at 3.) The court also found that Pulst had violated a condition requiring him to obtain his probation officer's approval before moving into a residence. (*Id*. at 2-3.) The court revoked Pulst's suspended sentences and he returned to MSP. (Docs. 138; 139.)

Second revocation

On April 24, 2019, Pulst became eligible for parole. (1/27/21 Tr. at 6.) Probation and Parole Officer Abby Martin (Officer Martin) was assigned to Pulst following his parole eligibility. (*Id*. at 4.) However, Pulst was never paroled as he refused to engage in treatment with an approved provider. (*See id*. at 6-7.) Officer Martin assisted Pulst in locating an approved MSOTA provider,

Charmaine Nicholson (Nicholson), and she agreed to engage in treatment with Pulst, despite his denial of his underlying crimes. (*See id*. at 6-7, 21 (Officer Martin stating Nicholson sent a November 5, 2019 email stating that she would work with Pulst individually "but he will persist in denial").) Nicholson sent Pulst a contract for treatment which contained her conditions for providing treatment, but he refused to sign it or otherwise agree to her terms for treatment. (*Id*. at 7.) Specifically, Probation and Parole reported that Pulst mistakenly believed that Nicholson was a "sexual deviant and want[ed] to watch him masturbate." (1/27/21 Tr. at 22 (quoting a 11/20/19 email).) Pulst also believed that allowing his probation officer and his provider to discuss his therapy would violate "HIPAA." (*Id*.) Additionally, Pulst refused to engage in group therapy or undergo a polygraph. (*Id*.) Consequently, Pulst's "parole was halted." (1/27/21 Tr. at 7.)

Pulst was subsequently scheduled for release to his suspended sentences on October 23, 2020. (1/27/21 Tr. at 7; Doc. 141 at 3.) Three days before Pulst's release from MSP, the State filed a petition to revoke on October 23, 2020. (Doc. 141.) The petition alleged that despite Officer Martin's attempts to locate a sexual offender treatment provider for Pulst, he continued to refuse to engage in treatment. (*Id*. at 3; *see also* State's Ex. B, 10/16/20 Letter (attached to Petition).) Like his previous revocation proceeding, Pulst made no effort to locate an approved treatment provider, and instead told Officer Martin that he would be

receiving treatment from Dr. Zook. (*See id*. (stating Pulst "clings to his desire to use Dr. Zook, who is neither MSOTA or Probation and Parole approved"); State's Ex. B, 10/16/20 Letter (Officer Martin stating that Pulst "has not made any effort to secure another SOP provider and states he will be using Dr. Zook, who has been denied as his therapist before").) The petition specifically alleged that "the moment" of Pulst's release on October 23, he would be in violation of condition "10(dd)" of his suspended sentences,[1] which provided that:

> The Defendant shall enter and successfully complete sexual offender treatment at least through Phase II (or the equivalent) with an MSOTA clinical member or associate member with supervision, or equivalent, who is approved by the state and the Probation & Parole Officer, at the Defendant's expense and within three years of his release onto community supervision. The Defendant shall abide by all treatment rules and recommendations of the treatment provider.

(Doc. 138 at 8.) The petition also highlighted that numerous conditions of Pulst's 2018 Judgment required approval from his "MSOTA treatment provider." (Doc. 138 at 8-9 ("If deemed appropriate by the Defendant's MSOTA treatment provider"); *see also id*. at 8 ("the Defendant shall obtain an updated psychosexual evaluation by an MSOTA-certified or Department-approved treatment provider"); 141 at 4.)

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[1]The petition slightly misquoted condition 10(dd) of Pulst's suspended sentences, and erroneously included the word "Program" when quoting the 2018 Judgment. (*Compare* Doc. 141 at 3 ("Sexual Offender Treatment Program") *with* Doc. 138 at 8 ("sexual offender treatment").) However, Pulst does not argue that the slight difference in wording between the two documents has any bearing on his appeal.

The petition also specifically noted that it was requesting that the district court commence revocation proceedings prior to Pulst's release. (*See* Doc. 141 at 4.) In support of this request, the State cited to *State v. Cook*, 2012 MT 34, 364 Mont. 161, 272 P.3d 50. (*Id.*) There, this Court determined that the district court did not exceed its statutory authority, or abuse its discretion, when it granted a petition to revoke that was filed two days prior to the commencement of the defendant's suspended sentence. *Cook*, ¶¶, 19-20, 30; *see also* Mont. Code Ann. § 46-18-203(2) (providing that a revocation petition may be filed "before the period of suspension or deferral has begun"). Based on this authority, the State requested a warrant for Pulst's arrest, which the court issued. (Docs. 141 at 5; 142 at 3; *see also* Doc. 146 (noting that Pulst was arrested in Powell County and appeared on October 23, 2020, for his initial appearance).)

On November 18, 2020, Pulst appeared before the district court and denied the allegation in the petition to revoke. (11/18/20 Tr. at 11.) At the hearing, Pulst orally moved to dismiss the petition and argued that revoking his suspended sentences was not lawful given that he had three years to enroll and complete sexual offender treatment. (*See* 11/18/20 Tr. at 14 (stating it was "not right" and Pulst "should be allowed further time to begin treatment").) Pulst moved to be released on his own recognizance so he could try to enter treatment with Dr. Zook. (*Id*. at 14.) The State objected to Pulst being released on his own recognizance and

stated that Pulst was a danger to the community given the nature of his crimes and his pattern of refusing to enter sexual offender treatment. (*Id*. at 16 ("This is the second round for the same thing, unwillingness to go through treatment.").)

In addition to his oral motion, Pulst filed a written motion to dismiss. (Docs. 149, 153.) Pulst's motion acknowledged that the State moved to revoke his "suspended sentence because he was not enrolled in sex offender treatment when he was discharged from his incarceration," but argued that he should have been "given a reasonable amount of time to do so." (Doc. 149 at 1-2.) Pulst cited to *State v. Beam*, 2020 MT 156, 400 Mont. 278, 465 P.3d 1178, in support of his argument.[2]

The State filed a response to Pulst's motion and argued that *Beam* was factually inapposite to the case at bar. (Doc. 151 at 4-5.) In *Beam*, the State moved to revoke the defendant's suspended sentence because he failed to complete sexual offender treatment prior to release from prison, which was not a condition of the defendant's suspended sentence. *See Beam*, ¶¶ 5, 10-11 (Court finding that "there was no requirement that Beam complete sex offender treatment prior to his release

[2]Pulst's motion to dismiss also argued that because Probation & Parole would not approve Dr. Zook as his provider, his "federal and state due process rights" had been violated. (Doc. 149 at 2.) Because Pulst does not raise this argument on appeal, this Court should not consider it. *In re Estate of Bayers*, 1999 MT 154, ¶ 19, 295 Mont. 89, 983 P.2d 339 ("Under Rule 23, M.R.App.P., it is not this Court's obligation to conduct legal research on appellant's behalf, to guess as to his precise position, or to develop legal analysis that may lend support to his position.").

on probation"). In contrast, here, the State filed a petition to revoke Pulst's suspended sentences because he refused to enroll with an approved sexual offender treatment provider upon discharge to the suspended portion of his sentences, an express condition of Pulst's 2018 Judgment. (*Id*. at 4-6.)

The district court issued a written order denying Pulst's motion to dismiss without prejudice. (Doc. 155 at 4.) The district court found that the motion was premature and ruled the State's petition sufficiently established probable cause that Pulst had violated the condition of his suspended sentences requiring him to enroll with an MSOTA certified treatment provider. (*See id*. at 3.)

On January 27, 2020, the district court held a revocation adjudication hearing. (Doc. 158 at 1.) Officer Martin testified in support of the petition and affirmed that she had been a Montana probation and parole officer since 2017 and Pulst was assigned to her caseload in 2019. (1/27/21 Tr. at 4-5.) Officer Martin testified that she arranged treatment with Nicholson, who was MSOTA and "P&P" approved. (*Id*. at 6-7, 9.) However, Pulst refused to sign a contract with Nicholson or otherwise agree to her conditions for treatment. (*Id*.) Officer Martin testified that the other providers would not treat Pulst, primarily because he was in denial of his crimes. (*Id*. at 9-10.)

Instead, Officer Martin testified that Pulst again wanted to engage in treatment with Dr. Zook. (1/27/21 Tr. at 10.) Like Pulst's previous revocation

hearing, Officer Martin testified that Dr. Zook was not "P&P approved," nor a MSOTA member. (*Id*. at 10 (stating that Dr. Zook was not listed on the MSOTA membership website).) Despite this, Officer Martin testified that Pulst still wanted to use Dr. Zook as a provider. (*Id*. at 11, 25.) Officer Martin testified that without an approved sexual offender treatment provider, Pulst could not successfully be placed in the community. (*Id*. at 12.)

Pulst also testified at his revocation hearing. (1/27/21 Tr. at 29.) Pulst stated that he declined to use Nicholson as a provider because she would require him to "masturbate." (*Id*. at 29-30 (Pulst testifying that it was written in the contract).) In reality, Pulst testified that Nicholson's provider agreement mentioned "aversion therapy." (*Id*. at 29-30.)[3] Pulst also testified that Dr. Zook told him that she "was a member of a national organization relating to sex offenders," and that her qualifications were equivalent to MSOTA providers. (*Id*. at 31-32 ("Actually, I believe a little above what MSOTA had.").) Nevertheless, Pulst testified that he was aware that Probation & Parole had previously stated that Dr. Zook "was not an option." (*Id*. at 34.)

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[3]Additionally, Pulst initially refused to participate in a polygraph, an express requirement of his 2018 Judgment. (1/27/21 Tr. at. 37.) However, at the end of his revocation hearing Pulst stated that he was willing to participate in a polygraph. (*Id*. at 40.)

During closing arguments, the State argued that since the start of his suspended sentences, Pulst had still not yet enrolled in sexual offender treatment. (1/27/21 Tr. at 41.) In response, Pulst argued that Dr. Zook's credentials were the equivalent to a MSOTA member. (*Id*. at 44-45 ("Dr. Zook ha[s] the same or better credentials as [MSOTA] therapists").) The district court found that Pulst was in violation of condition "10(dd)" of his 2018 Judgment, and revoked and imposed the remainder of his suspended sentences, i.e., 14 years. (Docs. 158 at 3-4; 159 at 2; 160; 1/27/21 Tr. at 49-50; 2/5/21 Tr. at 21-22.)

SUMMARY OF THE ARGUMENT

The district court retained the authority to revoke Pulst's suspended sentences because he failed to enter sexual offender treatment upon discharge to his suspended sentence. In contrast to Pulst's argument, the plain wording of the condition requires Pulst to "enter and successfully complete sexual offender treatment . . . with an MSOTA clinical member or associate member with supervision, or equivalent, who is approved by the state and the Probation & Parole Officer, . . . within three years of his release onto community supervision." (Doc. 138 at 8.) In contrast to Pulst's argument regarding his 2018 Order on revocation, he was in violation of condition "10(dd)" the moment he was discharged to his suspended sentences, or community supervision, without being

accepted into a sexual offender treatment with an MSOTA member that was approved by Probation & Parole. In contrast to Pulst's argument, the State petitioned to revoke his suspended sentences because he expressly failed to enroll with a MSOTA provider that was approved by his probation and parole office upon discharge to his suspended sentences, although one had been arranged for him and was willing to treat him. Because of Pulst's refusal to engage in sexual offender treatment upon discharge to his suspended sentences, an express violation of condition "10(dd)," the district court retained the authority to revoke all three of Pulst's suspended sentences.

ARGUMENT

I. Standard of review

This Court has plenary review as to whether a district court followed the statutory requirements applicable to revocation proceedings. *State v. Nelson*, 1998 MT 227, ¶ 16, 291 Mont. 15, 966 P.2d 133; *Beam*, ¶ 6.[4]

[4]This Court reviews "a district court's decision to revoke a suspended sentence to determine whether the court abused its discretion and whether the court's decision was supported by a preponderance of the evidence in favor of the state." *Nelson*, ¶ 16. However, Pulst does not argue that the district court abused its discretion by revoking his suspended sentences and otherwise concedes the issue on appeal.

II. The district court correctly found that Pulst violated a condition of his suspended sentences requiring him to enroll with a sexual offender treatment provider approved by Montana Probation and Parole.

"It is well established that a district court's authority to impose sentences in criminal cases is defined and constrained by statute." *Beam*, ¶ 9; *State v. Wilson*, 279 Mont. 34, 37, 926 P.2d 712, 714 (1996). A court lacks "power to impose a sentence in the absence of specific statutory authority." *State v. Hatfield*, 256 Mont. 340, 346, 846 P.2d 1025, 1029 (1993). Here, upon Pulst's violation of his suspended sentences, the district court was authorized by statute to impose a sentence upon revocation:

> (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence . . . the judge may:
>
> > (iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence . . . .

Mont. Code Ann. § 46-18-203(7)(a)(iii). Pulst argues that the district court erred when it found that he violated a condition of his suspended sentences and asserts that he had three years to enter and successfully complete sexual offender treatment. (Appellant's Br. at 8-9, 11-13.) Pulst is incorrect as the district court retained the authority to revoke his suspended sentences.

Critically, the district court correctly found that Pulst had violated a condition of his suspended sentences by failing to enter sexual offender treatment

upon discharge to his suspended sentences. (Docs. 158 at 3-4; 159 at 2; 1/27/21 Tr. at 49-50.) Specifically, condition "10(dd)" of his 2018 Judgment required Pulst to:

> [E]nter and successfully complete sexual offender treatment . . . with an MSOTA clinical member or associate member with supervision, or equivalent, who is approved by the state and the Probation & Parole Officer, at the Defendant's expense and within three years of his release onto community supervision. The Defendant shall abide by all treatment rules and recommendations of the treatment provider.

(Doc. 138 at 8.) Pulst cites to *Beam* in support of his argument. However, *Beam* is readily distinguishable from the case at bar.

Contrary to Pulst's argument on appeal, in *Beam*, this Court reversed after concluding the district court lacked jurisdiction to revoke the defendant's suspended sentence. *Beam*, ¶¶ 10-11. Specifically, the district court in *Beam* erroneously found that the defendant violated his suspended sentence by failing to complete sexual offender treatment while serving the custodial portion of his sentence. *Id.* However, contrary to the plain language of his judgment, completing sexual offender treatment while in custody was not an express condition of the defendant's suspended sentence. *Id.* Thus, the district court found the defendant in violation of a condition that was not imposed under the original judgment. *Id*. Because the condition was never imposed, the district court lacked the authority to revoke the suspended sentence. *Id*.

In contrast, here, the district court expressly found that Pulst was in violation of condition "10(dd)" of his 2018 Judgment. (Doc. 141 at 3.) The plain language of

this condition required Pulst to "*enter and successfully complete sexual offender treatment . . . with an MSOTA clinical member* or associate member with supervision, or equivalent, *who is approved by the state and the Probation & Parole Officer*, at the Defendant's expense and *within three years of his release onto community supervision*." (Doc. 138 at 8 (emphasis added).) Pulst takes the position that, under the plain language of this condition, he cannot be revoked prior to the expiration of the three-year period mentioned in condition 10(dd). Put another way, Pulst essentially argues that he must be given the full three-year period mentioned in the 2018 Judgment to enter and complete sexual offender treatment. Pulst's argument is contrary to the plain language of condition 10(dd).

Critically, this condition mandates that Pulst "enter and successfully complete sexual offender treatment . . . within three years of his release onto community supervision." *Id*. (emphasis added). Thus, because Pulst did not enter into a sexual offender treatment program upon discharge to his suspended sentence, and certainly did not complete treatment within three years, Pulst was in violation of his suspended sentence at the moment he discharged from custody.

In contrast to *Beam*, this case is more like *Cook*. There, the State preemptively revoked the defendant's suspended sentence because his residence was not approved by probation on the eve of his release, in violation of various conditions of his suspended sentence. *Cook*, ¶ 8. This Court found that the district court both retained

the authority and did not abuse its discretion under the plain language of Mont. Code Ann. § 46-18-203(7) by petitioning to revoke his suspended sentence before the commencement of the sentence because he did not get his residence preemptively approved by Probation & Parole. *Cook*, ¶¶ 19-20, 30.

Like the defendant in *Cook*, due to Pulst's refusal to enter sexual offender treatment upon discharge to his suspended sentences, he created a situation where he was in violation of his suspended sentences the moment he began serving his suspended sentences. Indeed, given the sentencing court's belief that Pulst needed to enter sexual offender treatment while on parole and while serving his suspended sentences because, if he was left untreated, he "would be a danger to the community given his continued denial of the acts for which he has now been convicted." (Docs. 106 at 9; 138 at 9; 141 at 2.) Thus, contrary to Pulst's argument, the district court gave him three years to *enter and complete* sexual offender treatment, not just simply enroll with treatment, because if he was "left untreated, [Pulst] would be a danger to the community." (*Id.*) Consequently, the moment Pulst discharged to his suspended sentences without arranging for sexual offender treatment, he violated condition "10(dd)" of his suspended sentences establishing jurisdiction to revoke his suspended sentences.

CONCLUSION

This Court should affirm the district court's October 2020 revocation of Pulst's suspended sentences.

Respectfully submitted this 2nd day of May, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: *__/s/ Michael P. Dougherty__*
MICHAEL P. DOUGHERTY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 4,160 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY

CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-02-2023:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Donald Wayne Pulst
Service Method: eService

Robert Scott Padmos (Govt Attorney)
Po Box 683
Chester MT 59522
Representing: State of Montana
Service Method: eService

Ryan Ward Aikin (Attorney)
PO Box 7277
Missoula MT 59807
Representing: Donald Wayne Pulst
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Michael Patrick Dougherty
Dated: 05-02-2023