

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 21-0548

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRYAN HUGH HINDMAN,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, The Honorable Jason Marks, Presiding

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## **STATEMENT OF THE ISSUES**

1. Whether this Court should invoke the plain error doctrine to review Hindman's unpreserved claim that his sex offender treatment provider and probation officer violated his right to due process by failing to utilize stricter methods to ensure his compliance.

2. Whether the district court correctly denied Hindman elapsed-time credit for the 668 days he was not in compliance with his probation due to constant unexcused absences and his failure to remain current on payments despite having his rent paid and full-time employment.

## **STATEMENT OF THE CASE**

The district court originally sentenced Appellant Bryan Hugh Hindman on June 3, 2008, to 20 years at the Montana State Prison (MSP), with 18 suspended, for the charge of sexual assault of a victim less than 16 years of age when Hindman was more than 3 years older than the victim. (Doc. 64.) Hindman's suspended portion of the sentence was revoked in 2009, and the district court sentenced him to 18 years with the Department of Corrections (DOC), with 14 years and 6 months suspended. (Doc. 76.)

Following additional violations, the district court revoked Hindman's suspended sentence again on April 22, 2013, and sentenced him to 14 years and 6 months with the DOC, with 12 years suspended. (Doc. 92.)

On October 8, 2020, the State filed a third Petition to Revoke (PTR) and Report of Violations (ROV) detailing five compliance violations and one noncompliance violation. (Doc. 96.) The ROV stated that, following Hindman's most recent release from MSP in 2015, he remained compliant with his probation conditions, including his sex offender treatment program (SOP) requirements, until the end of 2018. (*Id.*) The ROV noted that Hindman's unexcused absences from SOP, lack of engagement in group and individual treatment, and failure to remain current on payments even though he was employed full-time and had his rent paid began around December 1, 2018. (*Id.*)

On September 1, 2021, Hindman entered admissions that he had been terminated from SOP for numerous violations, that he had visited prohibited websites, that he had an application on his phone that blocked data and activity, that he had a police scanner application on his phone, and that he had failed to download probation's monitoring software. (Doc. 119; 9/1/21 Tr. at 8-15.) The State submitted evidence establishing Hindman had also violated pornography and media restrictions, but dismissed the compliance violation for Hindman failing to report his change in employment. (*Id.*; 9/1/21 Tr. at 8-15.)

Hindman's probation officer recommended that Hindman receive 1,254 days of credit for the period from his release from MSP on June 26, 2015, until his noncompliance with his SOP provider began on December 1, 2018. (Ex. A, ROV [ROV], attached to Doc. 96.)<sup>1</sup> The district court sentenced Hindman to 12 years at MSP, with credit for 337 days of time served and 1,254 days of elapsed-time credit, in accordance with the probation officer's recommendation. (Doc. 120; 9/1/21 Tr. at 18.)

On appeal, Hindman argues that his SOP provider and probation officer violated his due process rights by not addressing his failures in SOP sooner and with harsher management responses and, therefore, this Court should grant Hindman full credit for all elapsed time. In the alternative, Hindman argues that the record was insufficient to show he was noncompliant from December 1, 2018,

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<sup>1</sup> In the ROV's summary of Hindman's history, his probation officer noted that Hindman was released from MSP on June 26, 2015. (ROV at 2.) This date is supported by other documents in the record as well. (Doc. 94.) However, during the dispositional phase of the hearing, and in one instance in the ROV, the date appears to be incorrectly listed as June 26, 2013. (ROV at 4; 9/1/21 Tr. at 18.) Similarly, the ROV states that Hindman's noncompliance with sex offender treatment began on December 1, 2018; however, during the hearing, his probation officer mistakenly stated it began on December 21, 2018. (ROV at 4; 9/1/21 Tr. at 18.) The probation officer consistently recommended 1,254 days of elapsed-time credit based upon Hindman's release from MSP date until his noncompliance with sex offender treatment began. June 26, 2015, to December 1, 2018, represents a span of 1,254 days.

until his revocation and that this Court should remand the matter to the district court to address the 668 days of elapsed-time credit Hindman was denied.

## **STATEMENT OF THE FACTS**

### **I. Hindman's original sentence and first two revocation dispositions**

In 2006, the State charged Hindman with incest. (Doc. 3.) On June 3, 2008, Hindman entered a guilty plea to the amended charge of sexual assault in violation of Mont. Code Ann. § 45-5-502(3) for knowingly subjecting an individual under 16 years of age and more than 3 years younger than Hindman to sexual contact without her consent. (Docs. 61, 63, 64.)

The district court sentenced Hindman to 20 years at MSP with 18 years suspended in accordance with the plea agreement between the parties. (Docs. 62, 64.) Hindman's sentence also contained numerous probation conditions, including prohibitions on changing employment without permission, using or possessing any electronic device or scanner capable of listening to law enforcement communications, accessing or possessing any material depicting human nudity, and viewing media geared toward his sex offending cycle or as a stimulus to arouse deviant thoughts or fantasies. (Doc. 64 at 4-8.) Hindman's sentence also required him to complete sexual offender treatment and abide by all rules and recommendations of the provider. (*Id.* at 7.)

On October 28, 2008, the State filed a petition to revoke Hindman's sentence based on Hindman's change of residency without prior notification or approval. (Doc. 67.) Following Hindman's admission to the violation, the district court sentenced him to 18 years, with 14 years and 6 months suspended. (Docs. 66.1, 76.) The district court incorporated the terms and conditions of the suspended portion of Hindman's original June 3, 2008 sentence. (*Id.* at 2.)

Hindman was released from MSP on April 16, 2012. (Doc. 81.) On January 23, 2013, the State filed a second petition to revoke after Hindman was terminated from SOP. (Doc. 82.) The district court found that Hindman had violated his probation terms, and revoked his suspended sentence. (Doc. 91.) The district court sentenced Hindman to 14 years and 6 months with the DOC, with 12 years suspended. (Doc. 92.) The district court incorporated the terms and conditions of his previous suspended sentence. (*Id.*) Hindman was placed at MSP on May 8, 2013. (ROV.) Hindman was released from MSP to begin the suspended portion of his sentence on June 26, 2015. (Doc. 94.)

## **II. Hindman's third revocation**

On October 8, 2020, the State filed a third petition to revoke Hindman's sentence. (Doc. 96.) The ROV attached to the petition alleged six violations that had occurred since Hindman's release from MSP in 2015:

**COUNT I:** Court/Parole Condition Other: Complete Sex Offender Treatment NON-COMPLIANCE Violation

**SUPPORTING EVIDENCE:** On September 29, 2020, the defendant was terminated from Sex Offender Programming with Brenda Erdelyi for some of the following reasons:

- Unauthorized internet usage by being on Instagram, TikTok, Replika, SecretBenefits, Backpage, Bedpage, and accessing pornography
- Failure to pay for services
- Lying and manipulating
- Inconsistent attendance to group and individual therapy
- Unexcused absences
- Excessive community supervision violations

**COUNT II:** Court/Parole Condition #3 Employment or program COMPLIANCE Violation

**SUPPORTING EVIDENCE:** On September 29, 2020, the defendant's employer informed me she had fired the defendant from two (2) of the hotels she owns for multiple sexual harassment claims from female employees. The defendant was only allowed to work at Motel 6 University per this employer, because there were cameras everywhere.

The defendant failed to report this to his officer.

**COUNT III:** Court/Parole Condition Other: Internet Restrictions COMPLIANCE Violation

**SUPPORTING EVIDENCE:** Upon search of the defendant's phone on September 29, 2020, the following violations were found:

- Had downloaded two (2) VPN applications, which is intended for hiding data
- Failed to download Accountable2You, Missoula P&P's monitoring software
- Visited backpage.com
- Visited bedpage.com

**COUNT IV:** Court/Parole Condition Other: No Pornography COMPLIANCE Violation

**SUPPORTING EVIDENCE:** Upon search of the defendant's phone on September 29, 2020, the following violations were found:

- Visited pornhub.com

- Searched for nude photos of celebrities
- Searched “midget porn”
- Searched “viscious [sic] midget porn”
- Searched “3 foot 8 teen midget gets her pussy drilled”
- Had a 6 second video of a vagina saved on his phone
- Had a 22 second video of an erect male penis and a female saved on his phone

**COUNT V: Court/Parole Condition Other: Media Restrictions  
COMPLIANCE Violation**

**SUPPORTING EVIDENCE:** Upon search of the defendant’s phone on September 29, 2020, the following violations were found relating to his specific victim class:

- Searched “3 foot 8 teen midget gets her pussy drilled”

**COUNT VI: Court/Parole Condition Other: No Scanners  
COMPLIANCE Violation**

**SUPPORTING EVIDENCE:** Upon search of the defendant’s phone on September 29, 2020, the following violation was found:

- Had a police scanner application

(ROV at 2.)

In the ROV, sex offender specialist and Probation and Parole Officer Kate Darnell (Officer Darnell) explained that this had been Hindman’s “longest attempt at community supervision since his original sentencing” on June 3, 2008. (*Id.* at 3.) Officer Darnell acknowledged that for the first few years after his release from MSP in 2015, “[t]o [Hindman’s] credit, it appear[s] he was remaining compliant” with his probation conditions. (*Id.*) “He obtained full-time employment as a hotel manager, relocated to Anaconda, and seemed valued by his employers.” (*Id.*) However, around

December 1, 2018, after Hindman had returned to Missoula, he began violating numerous SOP requirements. (*Id.* at 3-4.)

His lack of compliance with SOP requirements was “based around mismanagement of money, lack of participation in group and individual counseling, and constant unexcused absences[.]” (*Id.* at 3.) For about two years, “[t]hese issues were dealt with by collaborating with [Hindman’s] SOP [provider] Brenda Erdyli [sic] to take a community treatment approach, but only so much could be done due to his inconsistent attendance and disruptive behaviors while in group sessions.” (*Id.*) Verbal reprimands and directives were given as well as reminders that he needed to pay for his treatment services. (*Id.*) Hindman did not keep up on payments for treatment “despite having his rent paid for and working full-time.” (*Id.*)

On September 29, 2020, Officer Darnell searched Hindman’s phone and discovered that Hindman had conducted several internet searches for specific types of pornography, including pornography of teenage females, and that he had two video clips depicting sexual content saved to his phone. (ROV at 2; 9/1/21 Tr. at 11.) Hindman had also visited unauthorized social media sites and sexual escort websites. (ROV at 2; 9/1/21 Tr. at 12-14.) Additionally, Officer Darnell discovered that Hindman had a police scanner application on his phone and two virtual private network (VPN) applications, which are intended for hiding data and activity, and

noted that he had failed to download phone monitoring software as required by his probation. (ROV at 2; 9/1/21 Tr. at 9.)

Officer Darnell spoke with Hindman's employer the same day she searched Hindman's phone, and learned that his employer was no longer permitting Hindman to work at two of the three hotels she owned because there had been numerous sexual harassment claims from female employees. (ROV at 2.) Hindman's employer explained that due to the sexual harassment claims, she only permitted him to work at one hotel because it had cameras everywhere. (*Id.*)

Following these discoveries, that the same day, September 29, 2020, Hindman was terminated from SOP. (*Id.* at 2-3.) Hindman's termination was based on his failure to pay for treatment, lying and manipulating, inconsistent attendance at group and individual therapy, unexcused absences, and excessive community supervision violations. (*Id.*) In the ROV, Officer Darnell explained that Hindman's "behavior, lack of participation in group, inability and refusal to attend group, coupled with his egregious probation, internet and media violations, evidence[d] he [wa]s no longer suitable" for management in the community given the risk to community safety. (*Id.* at 3.) Officer Darnell recommended the district court sentence Hindman to 12 years at MSP. (*Id.* at 4.) Officer Darnell also recommended 1,254 days of elapsed-time credit for the period from Hindman's

release from MSP on June 26, 2015, until his noncompliance with his SOP began on December 1, 2018. (*Id.*)

At the September 1, 2021 hearing on the third petition to revoke, Hindman entered admissions to Counts I, III, and VI, acknowledging that he had been terminated from SOP due to the various violations, that he had failed to download the required monitoring software and had two applications on his phone used to hide data and activity, and that he had a prohibited police scanner application on his cellular phone. (Doc. 119; 9/1/21 Tr. at 8-15.)

The State dismissed Count II—changing employment without prior approval—and proceeded to an evidentiary hearing on Counts IV and V. (9/1/21 Tr. at 8.) The district court found that the State had established by a preponderance of the evidence that Hindman had violated his probation conditions that prohibited pornography and media related to his victim class as alleged in Counts IV and V. (*Id.* at 15.)

During the hearing, Officer Darnell echoed her recommendation in the ROV that the district court sentence Hindman to 12 years at MSP and grant him 1,254 days of elapsed credit. (*Id.* at 16, 18.) Conversely, Hindman recommended that the district court reinstate his suspended sentence with credit for time served. (*Id.* at 26.) Hindman asserted that he had made a good-faith effort to pay for his treatment before he was terminated and that his failure to pay should not keep him from

being in the community. (*Id.* at 26-27.) Hindman also claimed he had already completed SOP phases one and two twice. (*Id.* at 29-33.) When the district court asked Hindman why he was still misbehaving on the internet if he had completed treatment twice, Hindman responded by minimalizing and justifying the conduct that he had admitted to during the adjudication phase of the hearing. (*Id.* at 33-34.) Hindman did not challenge the 1,254 days elapsed-time credit.

The district court revoked Hindman's 12-year suspended sentence and imposed a 12-year commitment to MSP with credit for 337 days of time served. (*Id.* at 35; Doc. 120 at 2.) The district court also adopted Officer Darnell's recommendation of 1,254 days of elapsed-time credit. (9/1/21 Tr. at 35.)

Addressing the reasons for the sentence, the district court said it would be more sympathetic to Hindman's arguments if he had been terminated from SOP solely for failing to stay current on payments. (*Id.*) However, the district court noted that "there [was] a plethora of issues" beyond Hindman's failure to keep current on payments. (*Id.*)

### **SUMMARY OF THE ARGUMENT**

This Court should decline to review Hindman's unpreserved claim that his probation officer and SOP provider violated his right to due process and that, as a remedy, he should receive an additional 668 days of elapsed-time credit. Hindman

has failed to establish that his claim implicates a fundamental right because he has not established that the right to due process includes the right for probationers to be swiftly deprived of their liberty through specific probation management responses. Even if this Court finds that the right to due process includes a right to specific probation management responses for noncompliant behavior, Hindman has not established that failure to review his claim would result in a fundamental miscarriage of justice. The record establishes that Hindman's SOP provider and probation officer collaboratively addressed his noncompliance by issuing verbal reprimands and reminders. Hindman has not established that he would have returned to compliance if his probation officer had utilized different probation management responses.

The district court did not impose an illegal sentence when it denied 668 days of elapsed-time credit because the record established that ongoing violations occurred during that period. The ROV and Officer Darnell noted that Hindman constantly missed his SOP group and individual treatment meetings without excused absences. He also failed to remain current on payments for SOP despite having his rent paid for and being employed full-time. The ROV additionally noted that Hindman had been verbally reprimanded during those 668 days. The district court correctly granted Hindman 1,254 days of elapsed-time credit for the period of

his probation in which he had no documented violations and properly denied him 668 days of elapsed-time credit for the period he was not in compliance.

## ARGUMENT

### **I. Standard of review**

This Court’s review of preserved constitutional errors is plenary. *State v. Stock*, 2011 MT 131, ¶ 16, 361 Mont. 1, 256 P.3d 899. However, this Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g., State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79; Mont. Code Ann. § 46-20-104(2) (“[f]ailure to make a timely objection during trial constitutes a waiver of the objection” for purposes of appeal).

This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court’s inherent authority and establishes that failing to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one “firmly convinced” that some aspect of the proceeding, if not addressed, would result in a manifest miscarriage of justice, call into question the

fairness of the trial or proceeding, or compromise the integrity of the judicial process. *Id.* at ¶ 17.

While the ability to review an unpreserved error under the plain error doctrine is inherent in this Court’s constitutional power of appellate review and cannot be curtailed by the legislative branch, “given the legislature’s obvious intention to restrict the use of plain error review,” this Court invokes the doctrine “sparingly, on a case-by-case basis[.]” *State v. Finley*, 276 Mont. 126, 134-35, 138, 915 P.2d 208, 214-15 (1996).

This Court has determined that calculating credit for elapsed time is a legal mandate. *State v. Gudmundsen*, 2022 MT 178, ¶ 8, 410 Mont. 67, 517 P.3d 146. This Court reviews a district court’s determination of elapsed-time credit for legality. *Id.*

**II. This Court should decline to exercise plain error review of Hindman’s unpreserved claim that his probation officer and SOP provider violated his right to due process by failing to use stricter compliance methods because Hindman has not established that his claim implicates a fundamental right or that he received a manifest miscarriage of justice.**

Hindman claims that the district court committed plain error by failing to credit him an additional 668 days of elapsed time because his probation officer and SOP provider violated his due process right by failing to do more to address his noncompliance and because Hindman’s SOP provider did not notify probation of

his noncompliance for nearly two years. Because Hindman did not request that the district court credit him for the 668 days he was noncompliant as a remedy for their allegedly insufficient violation responses, he cannot obtain review of this claim unless he demonstrates that he is entitled to plain error review. Hindman has not met his burden of establishing that his claim implicates a fundamental right because he has not established that the right to due process includes the right for probationers to receive specific probation management responses. Hindman has also failed to demonstrate that failing to review this claim under the plain error doctrine would call into question the fundamental fairness of his revocation proceeding or result in a manifest miscarriage of justice because Hindman's SOP provider and probation officer collaboratively addressed his noncompliance prior to his revocation.

**A. Hindman has not met his burden to show that his claim implicates a fundamental right because he has not established that due process includes the right to specific, harsher probation management responses.**

For the first time, on appeal, Hindman argues that his probation officer and SOP provider should have deprived him of more of his liberty sooner in response to his repeated unexcused absences in group and individual treatment, his lack of engagement with SOP, and his failure to remain current on treatment payments.

(Appellant's Br. at 15-18.) Hindman does not claim he was denied any of the procedural due process rights a probationer retains at a revocation hearing—the

right to written notice of the alleged violation, the right to disclosure of the evidence against him, the opportunity to be heard, the right to confront witnesses, the right to a neutral arbiter, or the right to receive a written statement of the evidence relied upon and the reason for revocation. (*Id.*) Instead, Hindman posits that fundamental fairness must include a due process right for probationers to have their liberty restricted sooner when they are not in compliance. (*Id.* at 15-18.)

The crux of Hindman’s argument is that he should receive credit for his lack of compliance because his failure to return to compliance was due to his probation officer permitting him to have too much liberty once he became noncompliant. Hindman fails to identify any legal authority supporting any such fundamental right. This Court has repeatedly held that it is not this Court’s obligation to conduct legal research on behalf of a party or to develop a legal analysis that may support a party’s position. *State v. Torgerson*, 2008 MT 303, ¶ 36, 345 Mont. 532, 192 P.3d 695.

In regards to probation management requirements, Hindman cites to Mont. Code Ann. § 46-23-1011(4) which provides that a probation officer “shall regularly advise and consult with the probationer using effective communication strategies and other evidence-based practices to encourage the probationer to improve the probationer’s condition and conduct[.]” However, Hindman does not argue that his probation officer did not effectively explain his noncompliance or

that verbal reprimands are not evidence-based responses for noncompliance.

Hindman merely notes that different probation management responses may have been available to Hindman's probation officer.

Hindman has not met his burden to establish that his claim implicates a fundamental right because he has not established that probationers have a due process right to specific, harsher probation responses. Even if this Court finds that Hindman has established that his claim implicates a fundamental right, Hindman has not met his burden to show that failure to review his claim will result in a manifest miscarriage of justice.

**B. Hindman has not met his burden to establish that failure to review his claim will result in a manifest miscarriage of justice because the record demonstrates that Hindman's probation officer and SOP provider collaboratively worked to address his noncompliance.**

Hindman asserts that it was "fundamentally unfair" to deny him credit for the 668 days his probation officer said he was not in compliance with SOP because his SOP provider waited 668 days to inform his probation officer of his noncompliance and because his SOP provider and probation officer could have done more to ensure his compliance. (Appellant's Br. at 15-18.) However, the record indicates that Hindman's probation officer dealt with Hindman's noncompliance issues "by collaborating with [Hindman's] SOP Brenda Erdyli [sic] to take a community treatment approach[.]" (ROV at 3.) The ROV also notes that

“[v]erbal reprimands and directives were [] given to [Hindman] to participate in both group and individual SOP[.]” (*Id.*) The record does not support Hindman’s assertion that his SOP provider waited two years to inform probation that he was not engaged, was constantly missing treatment without an excused absence, and was behind on payments. As Hindman acknowledges, the ROV notes that he was given at least three verbal reprimands in addition to the referral to SOP.

(Appellant’s Br. at 5, 16.)

The record contradicts Hindman’s assertion that his SOP provider waited 668 days to tell his probation officer he was not compliant with treatment. Hindman also fails to establish that verbal reprimands for unexcused absences from SOP and failure to maintain payment for treatment are not effective or evidence-based responses to this deficient conduct. While probation officers must use effective evidence-based practices and communication, probationers ultimately have a responsibility to conform their conduct to the conditions of their probation. Hindman has not established that any of the different probation management responses that he identifies would have returned him to compliance with SOP. The record establishes that when Hindman was given verbal reprimands, rather than conforming his conduct, he committed more egregious probation violations and utilized applications on his phone to hide those violations from his probation officer.

Hindman has not established that utilizing different probation management responses would have conformed his conduct to the conditions of probation and prevented his termination from SOP. Hindman has not met his burden to establish that failing to review his due process claim would result in a manifest miscarriage of justice or call into question the fundamental fairness of his revocation proceeding.

**III. The ROV and Officer Darnell's testimony at the revocation hearing supported the district court's denial of partial elapsed-time credit.**

For the first time, on appeal, Hindman argues he was entitled to an additional 668 days of elapsed-time credit and presents two different theories in support of his assertion. On the one hand, Hindman argues that the district court should have credited him the 668 days from when his noncompliance began until his revocation because his probation officer and SOP provider violated his right to due process by failing to use more restrictive responses to his violations.

Conversely, Hindman argues that there was insufficient evidence in the record of those same violations to warrant denying him partial elapsed-time credit and that the court erred by relying solely on the probation officer's ROV and testimony without additional documentation. As Hindman acknowledges, the ROV and Officer Darnell's testimony at his revocation hearing noted Hindman's repeated

violations during these 668 days. The ROV and the probation officer's testimony met the statutory requirements for denying partial elapsed-time credit.

Montana Code Annotated § 46-18-203(7) governs elapsed-time credit in revocation proceedings. Pursuant to Mont. Code Ann. § 46-18-203(7)(b), if a court revokes an offender's suspended sentence:

the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order.

This Court has interpreted the statutory provision to require the State to “point to an actual violation by the defendant, in the relevant time period, found in the record or recollection of the probation officer, to establish a basis for denial of street time credit for that period.” *State v. Jardee*, 2020 MT 81, ¶ 11, 399 Mont. 459, 461 P.3d 108.

In *State v. Pennington*, 2022 MT 180, ¶¶ 25-29, 410 Mont. 104, 517 P.3d 894, this Court held that the district court erred in failing to grant Pennington elapsed-time credit for the 335 days from sentencing until her first recorded violation. The district court imposed a deferred imposition of sentence on January 4, 2018, placing Pennington on formal probation with numerous conditions and requirements. *Id.* at ¶ 4. Beginning on December 4, 2018, Pennington violated her probation numerous times. *Id.* at ¶¶ 5-12. The district court

revoked Pennington’s deferred sentence on November 12, 2020, sentencing her to ten years in prison, all suspended, without granting any elapsed-time credit. *Id.* at ¶¶ 14-15. This Court held that Pennington should have received elapsed-time credit for the period from her sentencing hearing until her first recorded violation because of “[t]he absence of any record of violations during the aforementioned 335-day period[.]” *Id.* at ¶ 29.

Similarly, in *Gudmundsen*, this Court held that the district court erred in failing to grant Gudmundsen elapsed-time credit for ten months when nothing in the record indicated Gudmundsen had violated her probation terms during that time period. *Gudmundsen*, ¶¶ 9-13. Although Gudmundsen violated her probation terms numerous times, the record contained no documentation of any violations during the contested ten-month timeframe. *Id.* at ¶¶ 3-7, 13.

Here, Hindman’s sentence required him to abide by the rules and recommendations of his SOP. (Doc. 64 at 7.) Unlike in *Gudmundsen* and *Pennington*, the record is not devoid of any documented violations during the contested 668 days. The ROV and Officer Darnell’s testimony at the revocation hearing noted repeated violations beginning December 1, 2018, until Hindman’s suspended sentence was revoked. In the ROV and at the hearing, Officer Darnell noted Hindman’s “lack of participation in group and individual counseling,” “constant unexcused absences” from his sexual offender group and individual

treatment, and his inability to “keep up on his payments to SOP despite having his rent paid for and working full-time” began on December 1, 2018. (ROV at 3-4; 9/1/21 Tr. at 16-18.) Hindman also admitted that these violations, in part, led to his ultimate termination from treatment on September 29, 2020. (9/1/21 Tr. at 9.)

Hindman references the statements from Officer Darnell in the ROV and at the hearing, but faults the district court for relying solely on the records and recollection of the probation officer. (Appellant’s Br. at 13.) (“The record shows that the date the court chose to end Mr. Hindman’s street time was based entirely on unsupported statements by Mr. Hindman’s PO in the ROV and at the disposition hearing.”) The district court relied on precisely what Mont. Code Ann. § 46-18-203(7)(b) requires: the records and recollection of the probation officer. Hindman provides no authority that requires the district court to have additional documentation of an offender’s noncompliance beyond the records or recollection of the probation officer, nor do the rules of evidence apply to a sentencing or revocation hearing. *State v. Passwater*, 2015 MT 159, ¶¶ 23-24, 379 Mont. 372, 250 P.3d 382 (hearsay properly considered at sentencing); *State v. Nelson*, 225 Mont. 215, 218, 731 P.2d 1299, 1301 (1987) (rules of evidence do not apply to probation revocation hearings); Mont. R. Evid. 101(c)(3).

The ROV and Officer Darnell’s testimony were sufficient to show that while Hindman was compliant with probation for the first three years following his

release from MSP, he was not compliant beginning December 1, 2018, and remained noncompliant until his suspended sentence was revoked. Hindman began constantly missing SOP and failed to remain current on his payments to SOP despite having his rent paid for and working full-time. While Hindman asserted that he could not remain current on SOP payments because he worked 20 hours per day and was only paid \$1,200 per month, Hindman never challenged or explained his constant unexcused absences from SOP. Even assuming Hindman's dubious assertions regarding his work hours and monthly income were true, he was still not compliant with SOP during the contested period due to his constant unexcused absences. Hindman admitted that these violations, in part, led to his termination from SOP. Hindman also admitted that he had been viewing pornography and visiting escort webpages, that he had a police scanner and two VPN applications on his phone prior to his revocation, and that he had failed to download probation monitoring software.

Hindman was granted elapsed-time credit for the portion of his suspended sentence he served without documented violations. The district court correctly relied upon the records and recollection of Officer Darnell in denying Hindman credit for the 668 days he was not in compliance with probation because of his repeated and constant violations of his SOP requirements.

## **CONCLUSION**

This Court should affirm Hindman's sentence.

Respectfully submitted this 17th day of May, 2023.

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## **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 5,281 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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## **CERTIFICATE OF SERVICE**

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-17-2023:

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