
STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL LEE DECELLES,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable David Grubich, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that the Appellant, Michael Decelles, has no non-frivolous basis for an appeal of his revocation of his suspended sentences. Undersigned counsel, therefore, moves this Court to allow counsel to withdraw from representing the Appellant in this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967). If this Court deems there to be issues meriting briefing, counsel requests this Court to specify the issues to be briefed and to deny the motion without discharging undersigned counsel.

STATEMENT OF THE ISSUE

Should undersigned counsel and ADD be permitted to withdraw from representing Mr. Decelles in accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE CASE

The State filed a petition to revoke Michael Decelles's suspended sentences, alleging that Mr. Decelles admitted to drug use, failed to notify the probation officer about his change in employment and change in addresses, failed to meet with his probation officer as required and

failed to complete an inpatient chemical dependency treatment program. (District Court document (DC) 78, 92, 108.) At sentencing, the State recommended a sentence of five years to the Department of Corrections for each offense, to run consecutive, for a total of fifteen years to the Department of Corrections. (6/22/22 Transcript (Tr.) 51.) Mr. Decelles argued all his violations were compliance violations and for a total sentence of fifteen years to the Department of Corrections, with twelve suspended. (6/22/22 Tr. 53, 56.) The district court nonetheless revoked the suspended sentences and imposed a total sentence of fifteen years to the Department of Corrections. (6/22/22 Tr. 60.) Mr. Decelles filed a timely appeal. (DC 137.)

STATEMENT OF THE FACTS

At just fourteen-years-old, bad choices had already sealed a fate for Mr. Decelles. (DC 52; 3/10/22 Transcript (Tr.) 26, 35; 6/22/22 Tr. 46, 55.) After pleading guilty to three counts of criminal endangerment, the court sentenced him to a total of thirty-five years in prison, with fifteen years suspended.¹ (DC 69.) (A copy of the original Sentence is attached

¹ This included a five-years weapons enhancement. (DC 69.)

as Appendix (App.) A.) Mr. Decelles made the most of his time in prison and obtained his GED and became a certified carpenter. (6/22/22 Tr. 43.) Nonetheless, by the time he was released, in 2021, he was thirty-five years old and trying to start a new life. (DC 78, 92; 3/10/22 Tr. 26, 35.)

Mr. Decelles made progress adjusting to life outside of an institution, such as working toward obtaining his driver's license and employment. (6/22/22 Tr. 43, 47.) Nevertheless, his probation compliance was bumpy. (DC 78, 92; 3/10/22 Tr. 26.) The State moved to revoke Mr. Decelles suspended sentences and alleged Mr. Decelles had tested positive for methamphetamine use, failed to maintain employment, failed to check in as assigned with his probation officer, and failed to keep his probation officer updated with his address. (DC 78, 92.) Despite these struggles, Mr. Decelles recognized he would self-medicate with drugs when his mental health needs were unmet. (6/22/22 Tr. 44.) Therefore, Mr. Decelles followed through and obtained a chemical dependency evaluation, which recommended intensive treatment. (DC 108.) The court continued the revocation proceedings to

allow Mr. Decelles to attend treatment through the Montana Chemical Dependency Center (MCDC). (DC 103.)

Mr. Decelles struggled at MCDC, after MCDC put him on the wrong medication. Thus, Mr. Decelles chose to leave rather than have a confrontation with its employees. (6/22/22 Tr. 45.) Based on this, the State filed a fourth amended petition to revoke which included a violation for Mr. Decelles leaving MCDC, testing positive for methamphetamine and failing to report to his probation officer. (DC 108.)

The State served the fourth amended petition on Mr. Decelles's public defender the day before his revocation hearing. Mr. Decelles objected and requested a continuance. (3/9/22 Tr. 9.) The court only provided a one-day continuance. (DC 109.) The next day at the revocation hearing, the court discussed the continuance motion with Mr. Decelles, and Mr. Decelles agreed to proceed with the hearing. Mr. Decelles then admitted to most of the violations. (DC 110.)

The court wanted to proceed directly to a disposition hearing. (3/10/22 Tr. 25.) However, Mr. Decelles's attorney argued for a later date, given that the violations were only compliance violations, and he

needed additional time to interview and procure witnesses. (3/10/22 Tr. 26-27.) Mr. Decelles explained since he had left MCDC, he had been receiving mental health counseling, had stabilized his medication, and had been participating in outpatient chemical dependency treatment. (3/10/22 Tr. 33-34; 6/22/22 Tr. 44.)

Mr. Decelles's probation officer did not testify at his sentencing hearing. (DC 108, 6/22/22 Tr. 39.) Rather, another probation officer testified. (6/22/22 Tr. 39.) She recommended a long-term commitment to the Department of Corrections. (6/22/22 Tr. 41.) In support of this recommendation, the probation officer testified, without objection from defense counsel, that Mr. Decelles made threats to her when she arrested him. (6/22/22 Tr. 40.) Mr. Decelles's attorney did not call any witnesses on Mr. Decelles's behalf. (6/22/22 Tr. 50.)

Appearing via video, Mr. Decelles personally addressed the court. (6/22/22 Tr. 38, 42-50.) Mr. Decelles admitted he needed structure and additional chemical dependency treatment but described how the mental health provider he had found after he left MCDC worked with him to stabilize his medication and conducted weekly therapy sessions with him. (6/22/22 Tr. 48-49.) Defense counsel emphasized to the court

that the violations were all compliance violations. (6/22/22 Tr. 53.) He requested the court to sentence Mr. Decelles to a total sentence of fifteen years to the Department of Corrections, with twelve suspended. (6/22/22 Tr. 56.)

Nevertheless, the court found the probation officer's testimony persuasive and sentenced Mr. Decelles to a total sentence of fifteen years to the Department of Corrections. (6/22/22 Tr. 57, 60.) The court ordered 326 days of "street time" credit and 121 days credit for time served. (6/22/22 Tr. 61.) (A copy of the Dispositional Order, Order to Close File and Order Exonerating Bond (DC 131) is attached as App. B.)

STANDARDS OF REVIEW

In reviewing a district court's revocation of a suspended sentence, the Court applies an abuse of discretion standard. *State v. Pennington*, 2022 MT 180, ¶16, 410, Mont. 104, 517 P.3d 894. When the issue presented in a revocation case is whether the district court had statutory authority to take a specific action, the question is one of law and this Court's review is de novo. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769.

This Court reviews a district court's imposition of sentence for legality only. *State v. Megard*, 2006 MT 84, ¶ 16, 332 Mont. 27, 134 P.2d 90 (citation omitted).

Claims of ineffective assistance of counsel are mixed questions of law and fact that this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

Whether a defendant's right of due process has been violated is a question of constitutional law over which this Court exercises plenary review. *State v. Ferguson*, 2005 MT 343, ¶ 99, 330 Mont. 103, 126 P.3d 463 (citations omitted); *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193. A ruling on a motion to continue is subject to the district court's discretion and is reviewed for an abuse of discretion. *State v. Webber*, 2019 MT 216, ¶8, 397 Mont. 239, 448 P. 3d 1091 *citing* *State v. Glead*, 2014 MT 151, ¶ 10, 375 Mont. 286, 326 P.3d 1095. When a continuance is requested and is reasonable, if it is in the interests of justice and protects the defendant's rights, a district court abuses its discretion in denying the request. *Webber*, ¶20 *citing* *State v. Sotelo*, 209 Mont. 86, 92, 679 P. 2d 779, 782 (1984).

DISCUSSION

I. The undersigned counsel should be permitted to withdraw from Mr. Decelles’s appeal in accord with *Anders*.

As set forth in *Anders*, if counsel on appeal “finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Anders*, 386 U.S. at 744. The request to withdraw must be “accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744. The attorney must give a copy of the brief to the client, who must be afforded time to raise any point he chooses. Mont. Code Ann. § 46-8-103(2) (codifying the *Anders* requirements). “[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.” *Anders*, 386 U.S. at 744.

Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that, after a review of the entire record and diligent research of the applicable statutes, case law, and rules, there are no non-frivolous issues in this appeal. Without arguing against her client, counsel submits this brief which, in accord with *Anders* and Mont. Code Ann.

§ 46-8-103(2), discusses any issues that might arguably support an appeal. If this Court deems there are issues that merit briefing, counsel requests this Court specify the issues to be briefed.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel has advised Mr. Decelles of her decision regarding the merits of this appeal and informed him that he will have the right to file a response to this motion directly with the Court. Counsel also sent him a draft of this *Anders* brief in advance of filing.

II. Mr. Decelles might argue that his suspended sentences could not be revoked for compliance violations.

A. The State failed to prove that he will not be responsive to further efforts under the incentives and interventions grid.

“In 2017, based on the Commission’s findings, the Montana Legislature passed sweeping criminal justice reform legislation aimed at utilizing data driven decisions and evidence-based practices to reduce incarceration, statewide pressure on detention facilities, and the accompanying burden on taxpayers.”² *State v. Oropeza*, 2020 MT 16, ¶ 4, 398 Mont. 379, 456 P.3d 1023. Revocations of sentences accounted

² Significant changes were again made in 2023. *See*, HB 0689.

for 74% of prison admissions. *Oropeza*, ¶ 3, n.1. Under the old rules, any single violation of any condition was sufficient to revoke a suspended sentence. *See, e.g., State v. Gillingham*, 2008 MT 38, ¶ 28, 341 Mont. 325, 176 P.3d 1075.

The Legislature imposed two key changes. First, the Legislature required the DOC to adopt the Montana Incentives and Interventions Grid, or MIIG. *Oropeza*, ¶ 4. “The MIIG grid provides a consistent approach for Probation & Parole Officers to provide interventions to offenders for compliance and non-compliance violations with the goal of promoting accountability and long-term behavioral change.” *Oropeza*, ¶ 5. Based on the statutory changes in 2017, and the 2021 statutes in place during Mr. Decelles’s proceedings, responses to violations had to be handled in a swift, certain, and proportional manner. Mont. Code Ann. § 46-23-1028(1)(2021). Graduated violation responses had to be exhausted and documented before initiating the revocation process. Mont. Code Ann. § 46-23-1028(1)(e)(2021). The grid provided officers with a range of intervention responses depending on the category of the condition and level of intervention required. *Oropeza*, ¶ 5.

The second change by the Legislature was a new series of statutory restrictions for what kinds of sentences could result in sentence revocation. *Oropeza*, ¶ 4. The Legislature bifurcated probation condition violations into either compliance violations or non-compliance violations. Mont. Code Ann. § 46-18-203(11)(b)(2021); *Oropeza*, ¶ 6. Any violation of a condition of supervision was a compliance violation except for five exceptions provided by statute, which are non-compliance violations. *Oropeza*, ¶ 6. “Compliance violations no longer result in automatic revocation of a deferred or suspended sentence, instead, the offender is subject to the appropriate intervention or incentive response.” *Oropeza*, ¶ 6; Mont. Code Ann. § 46-18-203(8)(2021).

Pursuant to the statutory scheme at the time of Mr. Decelles’s violations, Montana had moved away from the expensive practice of revoking sentences for minor violations. The fact that a petition to revoke could be filed or was pending did not nullify a probation officer’s required statutory duties to apply the MIIG. Mont. Code Ann. §§ 46-18-203 (2021), 46-23-1028 (2021). Thus, only non-compliance violations and a limited class of compliance violations could result in sentence revocation. Mont. Code Ann. § 46-18-203(8)(2021). “Most violations are

categorized as compliance violations and cannot result in an automatic revocation of a deferred or suspended sentence but must be addressed utilizing the MIIG procedures.” *State v. Fjelsted*, 2020 MT 278, ¶ 11, 402 Mont. 46, 475 P.3d 387. Therefore, a defendant’s probation could only be revoked on a compliance violation alone if three criteria have been met. *See*, Mont. Code Ann. § 46-18-203(8)(2021); *Oropeza*, ¶ 6.

They were:

1.) The probation officer had documented appropriate and graduated violation responses. Mont. Code Ann. §§ 46-18-203(8)(a)(2021), 46-18-203(8)(b)(2021), *Oropeza*, ¶ 6. Responses under the MIIG were to be made in a “swift, certain, and proportional manner.” Mont. Code Ann. § 46-23-1028(1)(2021).

2.) The probation officer had exhausted the procedures in the MIIG. Mont. Code Ann. §§ 46-18-203(8)(a)(2021), 46-18-203(8)(b)(2021), *Oropeza*, ¶ 6. If the MIIG was exhausted, the district court was authorized to continue the sentence with additional conditions, which could include enhanced supervision or in-patient chemical dependency treatment. Mont. Code Ann. § 46-18-203(8)(b)(ii)(2021).

3.) The probationer’s conduct indicated they would be unresponsive to further efforts under the MIIG. Mont. Code Ann. § 46-18-203(c)(2021); *Oropeza*, ¶ 6. A finding of non-responsiveness could not be made until the probation officer exhausted and documented appropriate graduated violation responses before filing a report of violation. Mont. Code Ann. § 46-23-1028(1)(e)(2021).

Pursuant to this statutory scheme, compliance violations were not revocable except for the limited class of compliance violations that met all the criteria listed above. *See, Fjelsted*, ¶ 11; *Oropeza*, ¶ 6. Conversely, non-compliance violations were not subject to these criteria and revocation could occur directly. *See, Oropeza*, ¶ 7.

Since Mr. Decelles's violations were compliance violations, the district court could not revoke Mr. Decelles's suspended sentences in order to issue a new sentence of commitment to the Department of Corrections without first finding that Mr. Decelles's conduct indicates that he would not be responsive to further efforts under the MIIG. Mr. Decelles had not been charged with a new offense, and there were no allegations that he had police contact. He testified, at the time of the sentencing hearing, he had been seeing a mental health counselor, had stabilized his medication and was willing to engage in chemical dependency treatment. The record does not support that Mr. Decelles could not be placed back in the community, with appropriate interventions.

B. The State failed to prove that Mr. Decelles absconded.

Although the violations included failing to report to his

probation officer and changing his residence without obtaining permission from this probation officer, these violations did not amount to absconding. “Absconding” constitutes a non-compliance violation that permits a court to revoke a sentence without exhausting the incentives and interventions. *Oropeza*, ¶ 17. “Absconding” is defined as “when an offender deliberately makes the offender’s whereabouts unknown to a probation and parole officer or fails to report for the purposes of avoiding supervision, and *reasonable* efforts by the probation and parole officer to locate the offender have been unsuccessful.” *Oropeza*, ¶ 17 *citing* Mont. Code Ann. §46-18-203(11)(a)(2017)(emphasis in original.)

In *Oropeza*, the court determined the defendant knew his obligation and made no effort to report, for the purpose of avoiding supervision. *Oropeza*, ¶18. The court also concluded that the defendant’s violations “fell directly within the statutory definition of absconding.” *Oropeza*, ¶18. In contrast, although Mr. Decelles admitted failing to report and changing residences, the court made no finding that these violations were done deliberately to avoid supervision. The court further made no finding on whether probation and parole made reasonable efforts to locate Mr. Decelles. Contrary to the court in

Oropeza, the district court in this matter made no finding that Mr. Decelles absconded. Thus, these violations cannot be considered non-compliance violations.

III. Mr. Decelles might argue that the record supports a claim the district court illegally sentenced him, in violation of Montana’s sentencing policy, by sentencing him to the maximum possible sentence of fifteen years to the Department of Corrections, because the sentence was unnecessary for Mr. Decelles’s rehabilitation and does not make Montana safer.

Mr. Decelles would like to argue that his five-year Department of Corrections sentence, for each offense, and consecutive to each other, is a substantial injustice. Mr. Decelles can be successfully treated, and his mental health and sobriety adequately monitored, with much less time in a secured setting. Mr. Decelles’s consecutive sentences to the Department of Corrections exceed the bounds of reason as punishment for someone struggling with addiction and mental health issues.

Article II, § 28 of the Montana Constitution provides that laws for the punishment of a crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims.

Montana’s codified correctional and sentencing policy is to:

- (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
- (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;
- (c) provide restitution, reparation, and restoration to the victim of the offense; and
- (d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

Mont. Code Ann. § 46-18-101(2). To achieve these sentencing policies,

Montana adopts the following principles:

- (b) sentences should be commensurate with the punishment imposed on other persons committing the same offenses; and
- (d) sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

Mont. Code Ann. § 46-18-101(3). When imposing sentence, the court may also consider any relevant evidence relating to the nature and circumstances of the crime, the character of the defendant, his background, mental and physical condition, and any evidence the court considers having probative force. *State v. Morris*, 2010 MT 259, ¶ 17, 358 Mont. 307, 245 P.3d 512. Although the consecutive sentences may be within statutory parameters, it is not commensurate with the nature and degree of harm from Mr. Decelles's compliance violations and does not adequately consider his mental health struggles.

IV. Mr. Decelles might argue the record supports he received ineffective assistance of counsel when his attorney failed to call any witnesses on his behalf at his sentencing hearing.

Mr. Decelles would like to argue he received ineffective assistance of counsel when his attorney failed to call any witnesses on his behalf at his sentencing hearing. After the evidentiary hearing, Mr. Decelles's attorney explained he needed additional time before the dispositional hearing so that he could gather witnesses. (3/10/22 Tr. 30.) Specifically, counsel knew that Mr. Decelles had been seeing a chemical dependency counselor and a counselor at the Great Falls Clinic. (3/10/22 Tr. 30.) Mr. Decelles also told the court about his mental health counselor. (3/10/22 Tr. 33.) He further told the court about his participation in chemical dependency treatment and that his chemical dependency treatment provider had deemed him appropriate for community-based care. (3/10/22 Tr. 34.) Yet, even with this record of community-based support, at this sentencing hearing, defense counsel failed to call any witnesses on Mr. Decelles's behalf.

The Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel in criminal

prosecutions. *State v. Johnston*, 2010 MT 152, ¶ 15, 357 Mont. 46, 237 P.3d 70. This Court applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984) in evaluating ineffective assistance of counsel claims. *Johnston*, ¶ 15. A defendant must demonstrate that (1) his counsel's representation was deficient and (2) that counsel's deficiency was prejudicial by establishing that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Johnston*, ¶ 15 citing *Kougl*, ¶ 11.

At Mr. Decelles's evidentiary hearing, he told the court that he had "signed up and got through mental health through Alicia Hamilton" and he had had been attending aftercare an hour a day, four days a week. (3/10/22 Tr. 33-34.) Again, at sentencing, he testified about his continued treatment, "I've been meeting with Melody from Enlightening Minds conducting weekly sessions to address my chemical dependency problem." (6/22/22 Tr. 48.) Yet, Mr. Decelles's sentencing attorney failed to call any of these counselors as witnesses on his behalf. Mr. Decelles was prejudiced by his attorney's failure to call any witnesses because this void left the court without any basis to provide a community-based sentence.

V. Mr. Decelles might argue the district court violated his right to due process when it forced him to proceed with an evidentiary hearing, within days of the State filing its amended report of violation.

The State filed its final amended report of violation on March 7, 2022. (3/9/22 Tr. 9.) Based on a motion by the State for an expedited hearing, the court set the matter for an evidentiary hearing just two days later, on March 9, 2023. (3/9/22 Tr. 9.). Mr. Decelles objected that the accelerated timeline deprived him of due process, as it foreclosed his attorney's opportunity to meet with Mr. Decelles and to prepare for the hearing. (3/9/22 Tr. 10.) Defense counsel moved for a continuance of three to four weeks because Mr. Decelles had identified several witnesses that needed to be summoned on his behalf. (3/9/22 Tr. 10.)

Rather than allowing Mr. Decelles and his counsel time to prepare, the court only provided defense counsel with one day to prepare and set the hearing for the following day, March 10, 2022.

(3/9/22 Tr. 12.). Defense counsel objected:

[A]s a due process matter there has been categorically no time for me to review the State's most recent filing to prepare, to discuss it with my client, or to prepare rebuttal witnesses or evidence. It was filed two days ago.

(3/9/22 Tr. 12.) When asked to confirm his availability for a particular time, defense counsel continued to object, “Your Honor, I can physically be here, but I cannot prep this hearing by then.” (3/9/22 Tr. 12.) Mr. Decelles ultimately agreed to proceed on March 10, 2022 and admitted to many of the violations. (3/10/22 Tr. 16-17.)

The Due Process Clause of the Fourteenth Amendment and of Article II, Section 17 of the Montana Constitution prohibit the deprivation of liberty without due process of law. *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 983 P.2d 955. Due process requires fundamental fairness which, in turn, requires fair procedures. *State v. Finley*, 2003 MT 239, ¶ 29, 317 Mont. 268, 77 P.3d 193 (“[T]he foundation of the guarantee of due process is fairness, . . .”); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (“The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . .”). “Under the due process guarantee, every person must be given an opportunity to explain, argue and rebut any information that may lead to a deprivation of life, liberty, or property.” *Webber*, ¶9 quoting *State v. Webb*, 2005 MT 5, ¶ 19, 325 Mont. 317, 106 P.3d 521.

In the context of a trial setting, this Court has held that all relevant factors, including the interests of justice and the defendant's right to a fair trial, must be considered in ruling on the reasonableness of a motion to continue. *State v. Fields*, 2002 MT 84, ¶26, 309 Mont. 300, 46 P. 3d 612 (Denial of a motion to recess trial until the next morning to allow presentation of the defendant's expert witness testimony was against the interest of justice and violated the defendant's right to a fair trial) (citation omitted). In situations in which the continuance is requested due to an unavailable witness, this Court should consider 1) whether there is a reasonable expectation or prospect of obtaining the presence of the absent witness; 2) whether the witness' testimony would help the defense and 3) whether the witness would testify. *Fields*, ¶20 citing *State v. Fife*, 187 Mont. 65, 69, 608 P. 2d 1069, 1071-1072 (1980.) Further, although not dispositive, the potential inconvenience to the State, or lack thereof, is a factor to be considered when determining the interest of justice. *See, State v. Borchert*, 291 Mont. 320, 236, 934 P. 2d 170, 174 (1997) (the State's concurrence to the defendant's motion to continue supported that, in the interests of justice, the motion should have been granted.)

In Mr. Decelles's situation, he sought a continuance so that his attorneys could interview and subpoena witnesses on his behalf. The State's only basis for insisting on the expedited hearing was because the matter had been previously continued. (3/9/22 Tr. 11.) Mr. Decelles was in jail, and thus, no additional work was needed by the probation office. Further, a continuance would not have interfered with the State's ability to call its witnesses. Nonetheless, the district court denied Mr. Decelles's continuance request. In doing so, the district court failed to consider the interest of justice or Mr. Decelles's due process right to a fair hearing.

VI. Mr. Decelles might argue he received ineffective assistance of counsel when his sentencing attorney failed to object to the testimony of Officer Moore.

Mr. Decelles' probation officer was Officer Stimac. Yet, without objection from defense counsel, Officer Moore, Stimac's partner, testified instead at Mr. Decelles's disposition hearing. (6/22/22 Tr. 39.) At no time did the State file formal notice that it intended to call Moore as a witness.

Moore further testified about alleged threats Mr. Decelles

made at the time of his arrest. (6/22/22 Tr. 40.) At the evidentiary hearing, counsel had argued:

And the record that the Court has doesn't demonstrate that in four different reports of violation dating back to November, but spanning allegations going back as far as August, *there's no indication of a threat to anybody.*

(3/10/22 Tr. 32) (emphasis added.) Yet, at the dispositional hearing, defense counsel failed to object to Moore's testimony regarding alleged threats made by Mr. Decelles. Counsel was deficient when he failed to object to the testimony of Officer Moore. This Court will consider ineffective assistance of counsel arguments when "no plausible justification" exists for defense counsel's actions or omissions. *State v. Quiroz*, 2022 MT 18, ¶22, 407 Mont. 263, 502 P. 3d 166 *citing State v. Larsen*, 2018 MT 211, ¶8, 392 Mont. 401, 425 P. 3d 694. In *Quiroz*, this Court found ineffective assistance of counsel when defense counsel failed to object to the introduction of improper statistical testimony. *Quiroz*, ¶¶24, 36.

Likewise, defense counsel was ineffective when he failed to object to Moore's testimony. Moore testified about alleged threats made by Mr. Decelles, about being in fear of Mr. Decelles, testified she did not find Mr. Decelles suitable for placement in the community and

recommended a long-term placement for Mr. Decelles. (6/22/22 Tr. 40-41.) No plausible justification could have existed to not object to Moore's testimony, when the State had not provided formal notice it would call Moore as a witness. Mr. Decelles was prejudiced by this testimony since the court subsequently sentenced him to the maximum sentence of fifteen years to the Department of Corrections. (6/22/22 Tr. 60.)

CONCLUSION

Undersigned counsel has concluded that this appeal presents no meritorious issues and therefore this Court should grant the undersigned's motion to withdraw as counsel on direct appeal. If the Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order and allow undersigned counsel to remain on the case and to proceed with briefing.

Respectfully submitted this 25th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,684, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
KRISTINA L. NEAL

APPENDIX

Sentence.....App. A

Dispositional Order, Order to Close File, and Order Exonerating
Bond.....App. B

CERTIFICATE OF SERVICE

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 10-25-2023:

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