

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NELDIA MARIE PUCCINELLI,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Twenty-First Judicial District Court,  
Ravalli County, the Honorable Howard F. Recht, Presiding

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## **STATEMENT OF THE ISSUES**

1. Neldia Puccinelli used her sole source of income—Social Security retirement benefits—to make regular monthly restitution payments. Neither the operative judgment nor her probation officer imposed a minimum monthly payment, and the judgment did not require payment in full before her sentence discharged. The district court nevertheless revoked her suspended sentence based on her failure to pay restitution in full and found that she failed to make a good faith effort to pay restitution. Did the district court err by revoking Neldia’s suspended sentence?
2. Montana law permits a defendant who owes restitution to file a petition to waive or modify her restitution obligation “at any time[.]” Mont. Code Ann. § 46-18-246. Did the district court err by denying Neldia’s meritorious motion to waive or modify restitution solely because it was, in the court’s view, “a bit too late”?
3. Upon revocation of a suspended sentence, defendants are statutorily entitled to credit for elapsed time served without violations. To deny credit for a particular time period of elapsed time served on a suspended custodial sentence, the district court must identify specific

violations during that period. The district court denied Neldia credit for all of her time served—more than four years of a five-year sentence—because the court was concerned that granting the credit required by the statute would enable a defendant to avoid paying restitution altogether. Did the district court err by denying Neldia credit for elapsed time served?

### **STATEMENT OF THE CASE**

Pursuant to a plea agreement, Neldia pleaded guilty to one count of theft by embezzlement, in violation of Mont. Code Ann. § 45-6-301(7). (D.C. Doc. 34 at 2, attached as Appendix C.) The district court rejected the parties' agreed-upon disposition of a fully suspended sentence and instead committed Neldia to the Montana Women's Prison for a period of ten years and suspended the execution of the last five years of that sentence on various conditions, including a condition requiring her to pay restitution. (App. C.) Neldia was paroled on July 31, 2014, and she successfully discharged parole and began serving her suspended sentence on May 13, 2017. (D.C. Doc. 44 at 2.)

On January 14, 2022, the State filed a petition to revoke Neldia's suspended sentence, alleging that she violated the restitution condition

because she had not yet paid restitution in full. (D.C. Doc. 45.) While the petition was pending, Neldia filed a motion to modify or waive restitution, which the district court never expressly ruled on. (D.C. Doc. 51.)

At an adjudicatory hearing, Neldia did not dispute that she had not paid restitution in full, but she argued that she had made a good-faith effort to pay restitution. (*See generally* 5/3/22 Tr.) The district court found her in violation of the terms and conditions of her suspended sentence. (5/3/22 Tr. at 90, attached as Appendix D.)

At the initial setting for the dispositional hearing, the district court found that Neldia had not made a good-faith effort to pay restitution. (6/1/22 Tr. at 7, attached as Appendix E.) The court continued the dispositional hearing and ordered briefing on the issue of credit for street time, in which Neldia contended she was entitled to five years of credit. (6/1/22 Tr. at 9–10; D.C. Doc. 65.) At the final dispositional hearing, the district court revoked the suspension of Neldia’s prison sentence and committed her to DOC’s custody for five years, but suspended the execution of that commitment on the same conditions and restitution imposed in the original judgment. (7/20/22

Tr. at 3–4, attached as Appendix A; D.C. Doc. 70, attached as Appendix B.) The district court denied credit for any elapsed time served. (App. A at 3–4.)

Neldia timely appealed. (D.C. Doc. 68.)

### **STATEMENT OF THE FACTS**

The amended information to which Neldia pleaded guilty alleged she diverted more than \$30,000 from her then-employer, ProMark, Inc., to her personal accounts. (D.C. Doc. 28.) Neldia agreed to pay restitution, and the plea agreement recommended a fully suspended sentence of commitment to the Montana Department of Corrections. (D.C. Doc. 26.) The district court, the Honorable Jeffrey H. Langton presiding,<sup>1</sup> rejected the plea agreement for several reasons, including:

The Defendant is currently making restitution payments, which she could potentially continue to do, but the Court has a strong suspicion that the Defendant will stop paying restitution if given a probationary sentence as recommended by the parties. The Court is also concerned that if the Defendant does stop paying restitution, the Court will not be able to revoke the Defendant's probation because the Supreme Court has made it very clear that a court cannot

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<sup>1</sup> The Honorable Jeffrey H. Langton presided over this case, including Neldia's sentencing, until sometime between July 2021 and January 2022. (D.C. ROA at 1–2.) The Honorable Howard F. Recht presided over this case since at least January 14, 2022, including Neldia's revocation proceedings. (D.C. ROA at 2–3.)



revoke someone's probation for nonpayment of costs or restitution if their only source of income is Social Security disability.

(App. C at 8.) Accordingly, the court committed Neldia to the Montana Women's Prison for a period of ten years and suspended the execution of the last five years of that sentence on various conditions, including condition 2(n):

The Defendant will pay Court-ordered victim restitution in a timely fashion in the amount of **\$67,235.00**, plus a 10% restitution supervision fee as allowed by law. The Defendant's supervising officer will determine the amount of payments if the Defendant is on supervision; otherwise, the DOC will take a portion of the Defendant's inmate account if the Defendant is incarcerated. . . . The Defendant will continue to make monthly restitution payments until he/she has paid full restitution, even after incarceration or supervision has ended[.]

(App. C at 4 (emphasis in original).) Neldia was paroled on July 31, 2014, and she discharged her prison sentence and began serving the suspended portion of her sentence on May 13, 2017. (D.C. Doc. 44 at 2.)

For years, Neldia made regular monthly payments toward her restitution obligation. (Df.'s Ex. C at 1–23 (DOC Payment History Report), *offered at* 5/3/22 Tr. at 12, *admitted at* 5/3/22 Tr. at 14.) Those payments were modest, as one might expect from a woman in her late 60s whose only income is Social Security retirement benefits, but by

April 1, 2022, she had paid \$7,329.17 through DOC. (Df.’s Ex. C at 1–23.) This total did not include \$9,100 in direct payments and asset transfers valued at \$35,792 from Neldia to ProMark and/or ProMark’s former owner, Merritt Rogers, which were made pursuant to a civil settlement that predated Neldia’s prosecution. (5/3/22 Tr. at 69, 73.)

From 2014 to 2021, Probation & Parole accepted Neldia’s monthly payments without objection, never setting a minimum payment or inquiring further about Neldia’s ability to pay. (5/3/22 Tr. at 7–14, 16–17.) Her probation officer, Officer Nate Martin, would later testify that her performance on probation was “exemplary” and “remarkable,” and that there had been no problems with her supervision “other than . . . completely paying her restitution[.]” (5/3/22 Tr. at 15–16, 18.) Officer Martin nevertheless filed a report of violation on July 14, 2021—when Neldia had less than one year left to serve on her suspended sentence—alleging that she “clearly will not be able to pay the total” still owing in restitution before discharging her sentence. (D.C. Doc. 44.) Six months later, the State filed a petition to revoke, alleging Neldia violated the restitution condition of her sentence because, “[a]s of January 12, 2022, Defendant still owes \$65,998.58.” (D.C. Doc. 45 at 1.)

Neldia filed a motion to waive or modify her restitution obligation based on her age, health, lack of assets, inability to work, and the fact that her sole source of income was Social Security benefits. (D.C. Doc. 51 at 1–3.) Alternatively, she moved to modify her restitution obligation to account for payments she made pursuant to the civil settlement agreement. (D.C. Doc. 51 at 1–3.) At the adjudicatory hearing, the district court remarked that the motion was “a bit too late.” (App. D at 92.) Neldia objected that the statute does not place a time limit on modification of restitution. (App. D at 94.) The State later conceded in its disposition memorandum that Neldia’s restitution obligation should be reduced to reflect credit for some of the civil settlement payments. (D.C. Doc. 63 at 2 (stating Neldia is entitled to reduction in restitution balance of up to \$11,180.25 for property transfers and \$4,550 for direct payments); *see also* D.C. Doc. 64 at 1–2 (stating Neldia paid \$23,059.42 in total).) But the district court did not expressly rule on Neldia’s motion and implicitly denied it by reimposing the previous restitution condition. (App. B at 2.)

At the adjudicatory hearing, Officer Martin testified that Neldia made regular restitution payments throughout her supervision, and the

only negative note in her supervision records “was a missed appointment in 2014” shortly after she was paroled. (5/3/2022 Tr. at 7, 16.) He testified that he never asked Neldia for financial documents and was not aware whether she had any assets other than her Social Security benefits. (5/3/22 Tr. at 16–17.) He did not set any minimum monthly payment, but rather “require[d] that she make regular payments to her ability.” (5/3/22 Tr. at 16–17.)

Neldia testified that her last employment was at ProMark in 2009, and afterward, her income consisted of Social Security disability insurance until she turned 65, when she began receiving \$1,800 per month in Social Security retirement benefits. (5/3/22 Tr. at 52, 55.) From that income, she made her monthly restitution payments; her most recent payments had been \$100 per month, and she anticipated being able to make larger payments within six to eight months. (5/3/22 Tr. at 57, 76.) She otherwise used her Social Security benefits to pay for utilities, Medicare, car payments, car insurance, fuel, housing, and groceries. (5/3/22 Tr. at 55–60.) She testified that the house she shared with her husband had gone into foreclosure the previous year, which made it difficult for them to obtain financing of any kind, and they had

recently had to take out a loan with a 35% interest rate to pay for a septic tank repair, which cost \$250 to \$300 per month. (5/3/22 Tr. at 56–62.) She testified she purchased a car to replace an older car that was no longer functional and that her loan payment was \$500 per month because of her poor credit score. (5/3/22 Tr. at 60, 88–89.)

The district court found that Neldia violated the terms and conditions of her sentence: “Clearly the Defendant has not completely paid restitution. The Court finds that by the Defendant’s own admission she has the ability to make some payments. . . . So the Court will set a dispositional hearing.” (App. D at 90.) Neldia’s counsel objected:

Your Honor, I think that the Court has to make a finding -- and I don’t know if your Honor is prepared to do that -- as to whether or not Miss Puccinelli has made a good faith effort to make payments on this restitution. So that’s what’s required by the statute. That’s what’s required prior to revoking a suspended portion of the sentence. And if Your Honor finds that Miss Puccinelli was compliant with all the other terms of her probation, which I expect it will, that the inquiry is whether or not she’s making a good faith effort to comply. So I don’t -- and as Your Honor is aware, I provided some cites the last time, but you cannot -- this Court cannot revoke a suspended portion of a sentence based on failure to pay restitution alone in the event that the Defendant has shown a good faith effort to make those payments.

Miss Puccinelli has provided un rebutted testimony that not

only has she made monthly payments, that there were things -- and at least the cash payments, I think, that were not included in the Court's original order of \$9,100, plus the property value and all of those things. I think she has shown by more than a preponderance of the evidence that she's made not only a good faith effort, she continued to make those payments, and that the Court mistakenly imposed too large of a restitution fee as well.

I would leave it to Your Honor's discretion whether or not you want to go forward with a disposition [today] at this point. But I would suggest that the Court make a determination as to whether or not a good faith effort has been made.

(App. D at 91–92.) The court responded: “Well, I do want to go forward with disposition. . . . But not today[,]” and set a dispositional hearing.

(App. D at 92.)

At the first dispositional hearing, Neldia's trial counsel reiterated this objection, and the district court ruled:

I heard her testimony that she is capable of paying more in the future, and I believe that she was telling me the truth. But I also heard her testimony that she had incurred a loan of \$500 per month for a vehicle, and in my view, that's pretty strong evidence that she could have paid more, but chose to use her discretionary income to incur a loan for a vehicle rather than to pay restitution.

So based upon those two issues, I find that the Defendant has not made a bona fide effort to pay the restitution that was required.

(App. E at 5–7.) The court requested briefing regarding whether Neldia

was entitled to credit for street time (*i.e.*, elapsed time served) and continued the hearing. (6/1/22 Tr. at 10–11.)

At the second dispositional hearing, the court and the parties resumed discussing the issue of street time credit and the court’s sentencing options, and the State acknowledged that the restitution obligation could be transferred to a civil judgment. (6/29/22 Tr. at 13.) The court observed that option would be “simpler,” but “[t]he remedies are not as good[.]” (6/29/22 Tr. at 13.) The court continued the hearing and asked the parties to confer regarding potential resolutions, but made clear: “[M]y objective is to have the Defendant continue to make restitution payments for at least five years.” (6/29/22 Tr. at 13–14.)

At the final dispositional hearing, the court found that Neldia was not entitled to street-time credit. My observation with regards to that is that if the Defendant was entitled to street-time credit, the Defendant could comply with all the conditions of the sentence except paying restitution, and at the end of the suspended sentence claim to be entitled to street-time credit without ever having to pay restitution even if the sentence was revoked.

(App. A at 3–4.) The court revoked Neldia’s suspended sentence, committed her to DOC for five years, all suspended, and imposed “the same conditions and restitution requirements as was in the original

Judgment with no credit for street time.” (App. A at 4.)

The written revocation judgment did not contain any written findings or conclusions regarding elapsed time credit. (App. B.)

### **STANDARD OF REVIEW**

Whether a court followed the statutory requirements applicable to revocation proceedings is a question of law, over which this Court’s review is plenary. *State v. Pulst*, 2023 MT 162, ¶ 7, 413 Mont. 197, 534 P.3d 128; *State v. Beam*, 2020 MT 156, ¶ 6, 400 Mont. 278, 465 P.3d 1178. This Court reviews revocation of a suspended sentence to determine whether the court abused its discretion and reviews factual findings for clear error, which exists if the findings “are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite firm conviction that a mistake has been made.” *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108.

This Court reviews a district court’s decision on a petition to modify or waive restitution for abuse of discretion. *State v. Passmore*, 2014 MT 249, ¶¶ 12–14, 376 Mont. 334, 334 P.3d 378. “A court abuses its discretion if it acts arbitrarily without the employment of



conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. To the extent a court’s discretionary ruling is based on an interpretation of law, this Court’s review is de novo. *Derbyshire*, ¶ 19; *see also Wohl v. City of Missoula*, 2013 MT 46, ¶ 28, 369 Mont. 108, 300 P.3d 1119 (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”).

This Court exercises de novo review over a court’s determination of credit for time served because “[c]alculating credit for time served is not a discretionary act, but a legal mandate.” *State v. Pennington*, 2022 MT 180, ¶ 18, 410 Mont. 104, 517 P.3d 894.

### **SUMMARY OF THE ARGUMENT**

The district court erred in revoking Neldia’s suspended sentence. The State presented insufficient evidence to carry its burden of proof that Neldia violated condition 2(n) of her suspended sentence, which required her to pay restitution “in a timely fashion” rather than imposing a specific deadline for payment in full. *See* Mont. Code Ann. § 46-18-203(6)(a)(i). Even if condition 2(n) could be interpreted to

require payment in full before sentence discharge, the evidence clearly established that Neldia's inability to pay restitution in full before discharging her sentence was not attributable to a lack of good faith effort to obtain sufficient means to pay restitution as ordered. Accordingly, any violation should have been excused pursuant to Montana Code Annotated § 46-18-203(6)(b).

The district court erred by denying Neldia's pending motion to modify or waive restitution solely because the court found the motion "a bit too late." (App. D at 92.) Montana Code Annotated § 46-18-246 permits such a motion to be filed "at any time[.]" On the merits, the court abused its discretion by not waiving Neldia's remaining restitution balance. Neldia proved that it would be unjust to require payment of restitution as imposed because her sole income is Social Security retirement benefits, she is unable to work, she faces significant other financial hardships, and the corporate victim to whom restitution is owed has not existed since December 2012. Neldia also demonstrated that the victim's pecuniary loss had changed significantly; even the State agreed that her restitution obligation should be reduced by at least \$15,730.25. (D.C. Doc. 63 at 2.) The erroneous denial of the

motion was material to the outcome of the revocation proceedings because the State could not have proven the violation it alleged if Neldia's remaining restitution balance had been waived. Accordingly, the revocation must be reversed.

Finally, the district court entirely disregarded the requirements of Montana Code Annotated § 46-18-203(7)(b) and this Court's precedents, and thereby acted outside of its statutory authority, by denying Neldia credit for any of her elapsed time served. The court based its denial of credit on a general policy concern that granting credit in this case would enable a defendant owing restitution to receive credit despite failing to make *any* payments. The court ignored that Neldia *had* made restitution payments and made no case-specific findings of fact, let alone any findings of specific violations by Neldia during any particular time period as required to deny her credit for elapsed time served.

The judgment of the district court should be reversed.

### **ARGUMENT**

#### **I. The district court erred in revoking Neldia's suspended sentence.**

The district court erred in revoking Neldia's sentence because the State presented insufficient evidence that Neldia violated the terms and

conditions of her sentence, Mont. Code Ann. § 46-18-203(6)(a)(i), and Neldia established that any failure to pay restitution was not attributable to a lack of good faith effort to obtain sufficient means to pay restitution as ordered, Mont. Code Ann. § 46-18-203(6)(b).

The original sentencing court did not order Neldia to pay restitution in full before discharging her sentence. Rather, condition 2(n) required that Neldia pay “in a timely fashion” and that she “will continue to make monthly restitution payments until he/she has paid full restitution, *even after incarceration or supervision has ended[.]*” (App. C at 4 (emphasis added).) The judgment expressly contemplated the possibility of payments continuing beyond sentence discharge. Because condition 2(n) of her suspended sentence did not require her to pay full restitution before the completion of her sentence, Neldia’s acknowledgement that she had not yet paid restitution in full did not establish that she violated the condition. The court clearly erred when it found otherwise. (App. D at 90.)

Condition 2(n) also stated that Neldia’s supervising officer will determine the amount of payments. (App. C at 4.) Although her probation and parole officer was directed by the judgment to determine

the amount of payments, in addition to being required by statute to set a monthly restitution payment “by dividing the total amount of unpaid restitution by the number of remaining months of probation or parole,” subject to a 10% adjustment up or down depending on Neldia’s circumstances, Mont. Code Ann. § 46-18-244(6)(c), he testified that he did not do so. (5/3/22 Tr. at 16–17.) Perhaps unsurprisingly.

Accounting for the 10% supervision fee and payments made while imprisoned, the statutory formula would have set Neldia’s minimum monthly payment between \$704.39 and \$860.88—nearly half of her monthly income—over the course of her 94 total months on parole and probation. (See App. C at 4; Df.’s Ex. C at 1–8.) Instead, her supervising officer accepted her monthly payments of \$25 to \$300 without objection until he filed the ROV in July 2021. Neldia made payments *as ordered* until her supervising officer effectively ordered her to pay more than \$60,000 within her ten remaining months of supervision. (D.C. Doc. 44.)

The original judgment provided no notice to Neldia that the vague requirement that she pay restitution “in a timely fashion” later would be interpreted to require payment in full by a date certain. The facts of

this case illustrate the danger of imposing such an ambiguous condition and delegating its interpretation and enforcement to future decisionmakers. The State presented insufficient evidence to establish that Neldia violated the express terms and conditions of her suspended sentence, and the judgment should be reversed on that basis.

Even if the State's interpretive gloss on Neldia's restitution condition could be countenanced, she clearly established that any violation should be excused pursuant to Mont. Code Ann. § 46-18-203(6)(b) because any failure to pay restitution "was not attributable to a failure on [her] part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered." Neldia's un rebutted testimony established that she is unable to work, and her only source of income while serving her sentence was Social Security benefits, which are legally protected under 42 U.S.C. § 407(a). (5/3/22 Tr. at 52–55.) Under this Court's precedents, and as the original sentencing court acknowledged (App. C at 8), a district court cannot order a defendant to pay restitution from protected federal benefits, nor can it revoke a suspended sentence for failure to pay unless the failure is attributable to the defendant's lack of good faith effort to obtain funds

from non-protected sources. *State v. Corriher*, 2021 MT 275, ¶ 10, 406 Mont. 120, 497 P.3d 579; *State v. Eaton*, 2004 MT 283, ¶¶ 19–23, 323 Mont. 287, 99 P.3d 661.

Neldia nevertheless made regular restitution payments from her protected income and testified that she would continue to do so. The district court erroneously counted that fact *against* Neldia, concluding, inexplicably, she had not been making a good-faith effort to pay restitution in part because she had been making payments. (App. E at 7.) The court likewise erroneously faulted her for purchasing a car (App. E at 7), which this Court has described as a “minimal requirement[]” rather than a discretionary luxury, even in a city with some public transportation options. *State v. Lodahl*, 2021 MT 156, ¶ 27, 404 Mont. 362, 491 P.3d 661. Like in *Lodahl*, Neldia’s “desperate financial situation”—including foreclosure, emergency home repairs, and resulting poor credit (5/3/22 Tr. at 57–58, 61, 88–89)—“resulted in [her] having to pay more for the vehicle than the vehicle would otherwise be worth, as she had to finance it over time.” *Lodahl*, ¶ 27; *see also State v. Dowd*, 2023 MT 170, ¶ 14, --- Mont. ---, 535 P.3d 645

(describing defendant’s “home and means of transportation” as “basic needs” in context of ability-to-pay analysis).

This Court’s precedents illustrate a spectrum of good-faith to bad-faith failures to obtain the means to pay restitution and make clear that Neldia does not belong in the latter category. There is no evidence in the record that Neldia was capable of maintaining regular work but refused to do so. *See State v. Johnson*, 2018 MT 277, ¶¶ 5–6, 15, 393 Mont. 320, 430 P.3d 494 (describing defendant’s sporadic work and refusal to “settle” for jobs that were not high-paying and managerial). To the contrary, her receipt of disability income before retirement indicated that she was *not* capable of working. (5/3/22 Tr. at 52–55.) Despite the fact that her sole source of income is legally exempt from collection efforts, she has paid several thousand dollars in restitution in addition to her previous significant cash payments and asset transfers directly to ProMark and/or Ms. Rogers pursuant to the related civil settlement. *Compare* Df.’s Ex. C at 1–23 (DOC Payment History Report), *and* D.C. Doc. 64 at 1–2 (State representing that Neldia paid \$23,059.42 in total), *with Johnson*, ¶ 5 (noting payment of only \$3,799 toward \$87,339.50 restitution debt over six years). She has made



regular payments and “has otherwise been a model probationer.” *State v. Welling*, 2002 MT 308, ¶ 14, 313 Mont. 67, 59 P.3d 1146. Neldia amply satisfied her burden of proof to excuse any violation based upon failure to pay restitution, Mont. Code Ann. § 46-18-203(6)(b), and the district court erred by revoking her suspended sentence.

## **II. The district court erred when it failed to waive or modify the restitution award.**

Montana Code Annotated § 46-18-246 provides that a motion to modify or waive restitution may be filed “at any time” and that the court “shall schedule a hearing” on the motion.<sup>2</sup> Neldia filed such a motion while the instant revocation proceedings were pending, well before the first setting for the adjudicatory hearing. (D.C. Docs. 50.2, 51.) She also moved to hold the hearing on the motion to modify before the revocation proceedings progressed and argued that a ruling on the motion could moot the revocation, but the district court rejected that request, describing the motion as “a dispositional issue.” (D.C. Docs. 53, 56; App. D at 4.)

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<sup>2</sup> The statute also requires the court to give the victim to whom restitution was ordered notice of the hearing and an opportunity to be heard. Mont. Code Ann. § 46-18-246. Ms. Rogers, ProMark’s former owner, testified extensively at the adjudication hearing. (5/3/22 Tr. at 20–49.)

Although the district court did not issue an express ruling on the motion to modify restitution, the court explained its intent regarding the motion during the adjudication hearing:

Well, I intended to deal with that at the disposition. Frankly, I find it a bit too late. I mean, at this particular point in time to ask the Court to modify the restitution amount that was set forth in a Judgment that was imposed back in, what, 2012, yeah, I'm not inclined to do that.

(App. D at 92–93.)

The district court's only statement of reasoning for denying the motion, based solely on timeliness, was contrary to the plain language of Mont. Code Ann. § 46-18-246. That statute expressly states that a motion to modify or waive restitution may be filed "at any time[.]" Mont. Code Ann. § 46-18-246. The district court incorrectly applied the law and thus abused its discretion by refusing to entertain the motion on this basis. *Derbyshire*, ¶ 19.

Even if timeliness is an appropriate factor, the facts of this case do not show undue delay. Neldia's un rebutted hearing testimony established her significant informal and pro se efforts to seek modification or waiver of her restitution obligation throughout her time on supervision: she attempted to seek relief pro se from this Court via

an out-of-time appeal, she presented evidence of prior payments to Probation & Parole, and she tried but failed to find an attorney to prepare and file a motion before the district court. (5/3/22 Tr. at 86–88.) Once she was appointed counsel for her revocation proceedings, the motion was filed promptly. (5/3/22 Tr. at 88; D.C. Doc. 51.)

To the extent the district court’s denial of the motion could be construed as a ruling on the motion’s merits, such denial was an abuse of discretion because it “exceeds the bounds of reason, resulting in substantial injustice.” *Derbyshire*, ¶ 19. The statute enables a court to adjust or waive unpaid restitution “[i]f the court finds that the circumstances upon which it based the imposition of restitution, amount of the victim’s pecuniary loss, or method or time of payment no longer exist or that it otherwise would be unjust to require payment as imposed[.]” Mont. Code Ann. § 46-18-246. The evidence before the district court amply satisfied the second and fourth categories.

Neldia established that it would be unjust to require payment of restitution as imposed. Most importantly, Neldia’s personal circumstances demand waiver of the remaining restitution balance. She turns 70 this year; she is unable to work, having received Social

Security disability benefits before reaching retirement age; and her only current income is Social Security retirement benefits. (5/3/22 Tr. at 52–55.) Federal law generally prohibits any entity, including courts, from subjecting moneys paid under the Social Security Act to any legal process, including compelling a recipient to pay court-ordered restitution from Social Security benefits. 42 U.S.C. § 407(a); *Eaton*, ¶¶ 19–23. Although this prohibition theoretically allows a court to impose a restitution obligation on a person whose only income is Social Security benefits, so long as they are not punished for failure to pay restitution from those benefits, *see Corriher*, ¶ 10, Neldia’s revocation illustrates that, in reality, these ostensibly unenforceable orders *are* enforced. Where, as here, there is no realistic possibility of a defendant regaining the ability to derive income from unprotected sources, waiver of restitution is appropriate and necessary. *See Corriher*, ¶ 11.

Neldia’s testimony at the adjudication hearing also showed that she and her husband were dealing with additional significant financial hardships during and following her incarceration, including foreclosure proceedings on their home and septic tank failure. (5/3/22 Tr. at 51–77.) Her un rebutted testimony established that her living expenses and

a payment of \$50–100 in restitution consumed all of her Social Security income each month, and she depended in significant part on her husband’s income as a disabled veteran to keep their home. (5/3/22 Tr. at 55–64.) The evidence before the district court demonstrated that Neldia was not indulging in “discretionary luxuries” with disposable unprotected income, but rather was maintaining “minimal requirements” of housing and transportation, which “cannot reasonably be considered discretionary.” *Lodahl*, ¶ 27.

The court abused its discretion by denying Neldia’s motion to waive or modify restitution under the totality of these circumstances. The court’s erroneous denial of the motion was prejudicial to this revocation proceeding because the State could not have proved the violation alleged in the petition—that Neldia owed a restitution balance (D.C. Doc. 45)—if the district court had properly considered the motion on its merits and waived that remaining balance. Accordingly, the revocation judgment must be reversed.

Alternatively, Neldia proved the amount of the victim’s pecuniary loss had changed. Thus, at a minimum, the district court abused its discretion by failing to reduce Neldia’s restitution obligation by at least

\$15,730.25, which the State conceded Neldia should receive as an offset for previous non-DOC payments and asset transfers to the victim. (D.C. Doc. 63 at 2.) But Neldia established that \$44,892 of the victim's claimed \$67,234.63 pecuniary loss was eliminated by virtue of payments and asset transfers made pursuant to a civil settlement agreement that pre-dated Neldia's prosecution. (D.C. Doc. 51 at 2–3.)<sup>3</sup> These facts established changes to the amount of the victim's pecuniary loss, which should have been accounted for before Neldia's sentence was revoked and restitution was re-imposed.

### **III. The district court's sentence is illegal based on the failure to credit Neldia's elapsed time served against the sentence.**

District courts must follow § 46-18-203(7)(b), the statute governing credit for elapsed time served, when revoking a deferred or

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<sup>3</sup> In addition to the well-documented reduction in the pecuniary loss amount, un rebutted evidence established the named victim, ProMark, Inc., was a corporation that was involuntarily dissolved on or about December 3, 2012. (D.C. Doc. 65 at 6–8 & Exs. A & B.) Ms. Rogers testified she was considering initiating bankruptcy proceedings for ProMark in 2012, but she “approached one of [her] competitors and they bought [her] out, so [she] was able to get rid of all [her] debt and be able to walk away.” (5/3/22 Tr. at 22–23.) It is unclear whether Ms. Rogers, the unnamed purchasing competitor, or anyone else is a proper successor-in-interest to receive restitution owed to ProMark. The questions whether there is *any* outstanding pecuniary loss amount and, if so, to whom restitution was owed could have been answered if the district court had properly considered Neldia's motion on its merits.

suspended sentence. *State v. Pennington*, 2022 MT 180, ¶¶ 26–27, 410 Mont. 104, 517 P.3d 894. The statute’s plain language requires the sentencing court to “allow all of the elapsed time without any record or recollection of violations as a credit against the sentence.” Mont. Code Ann. § 46-18-203(7)(b). It is “insufficient for a district court to base a denial of street time credit solely on a ‘pattern’ of criminal behavior.” *State v. Gudmundsen*, 2022 MT 178, ¶ 13, 410 Mont. 67, 517 P.3d 146, quoting *Jardee*, ¶ 11. “Rather, specific violations established upon ‘the record or recollection of the probation officer’ are necessary ‘to establish a basis for the denial of street time credit’ for the period claimed, and must be stated by the sentencing court.” *Gudmundsen*, ¶ 13, quoting *Jardee*, ¶ 11.

In this case, the district court found:

[T]he Defendant is not entitled to street-time credit. My observation with regards to that is that if the Defendant was entitled to street-time credit, the Defendant could comply with all the conditions of the sentence except paying restitution, and at the end of the suspended sentence claim to be entitled to street-time credit without ever having to pay restitution even if the sentence was revoked.

(App. A at 3–4.) There was no express finding regarding elapsed time credit in the written revocation judgment. (App. B.)

The court’s oral pronouncement plainly falls short of § 46-18-203(7)(b)’s minimum requirements. Here, the court did not provide even a “generalized ‘pattern of criminal behavior’ justification” for denying credit. *Gudmundsen*, ¶ 13, *quoting Jardee*, ¶ 11. Instead, the court offered a counterfactual policy-based rationale. The court did not make any factual findings specific to Neldia’s case, let alone any findings regarding specific violations or their timing. In the absence of such findings, the district court lacked authority to deny Neldia credit, and she therefore was entitled to credit for all elapsed time served. *Gudmundsen*, ¶ 13.

The district court could not have made the requisite findings on the record before it. For the reasons explained in Section I above, the district court erred in finding that Neldia violated the conditions of her sentence at any point, and she thus is entitled to credit for all five years of elapsed time served. But at a minimum, there is no evidence in the record that any supervising officer considered Neldia to be in violation of any sentence condition before the ROV was filed on July 14, 2021. (D.C. Doc. 44.) Indeed, at that point, Officer Martin represented that Neldia “has had no violations of her Court conditions during her time on



supervision, either as a parolee, or a probationer, other than failing to pay the balance of her restitution.” (D.C. Doc. 44 at 3.) And he later testified that she made regular monthly payments—as her sentence required—throughout her supervision. (5/3/22 Tr. at 7, 10–11.)

On the record before the district court, there is no record or recollection of the probation officer upon which the district court could have based a finding of a specific violation before the report of violation was filed on July 14, 2021. By that day, 1,523 days of Neldia’s suspended sentence had elapsed, not including the time she was supervised on parole. (D.C. Doc. 44 at 2 (stating Neldia began probation supervision on May 13, 2017).) Neldia is entitled to credit for at least 1,523 days of street time, and her revocation sentence is illegal to the extent it fails to account for that credit. *See DeShields v. State*, 2006 MT 58, ¶ 11, 331 Mont. 329, 132 P.3d 540.

The district court expressed concern that granting credit for elapsed time would permit those owing restitution to refuse to pay without risking revocation and extension of their sentences. (App. A at 3–4.) Not so. There are numerous alternative courses of action that would permit a court to make the necessary findings to deny elapsed

time credit on the basis of non-compliance with restitution obligations; the court's inability to deny elapsed time credit in *this* case is because no one availed themselves of any of those options until Neldia's sentence had nearly discharged. For example, the sentencing court or the probation officer could set a minimum monthly payment, which would establish a clear metric for determining a specific start date of non-compliance; Neldia's original judgment authorized her supervising officer to do so, and Montana law ostensibly required him to do so, but he did not. (App. C at 4; 5/3/22 Tr. at 16–17.) Even absent a minimum payment, a supervising officer could take steps (and ultimately provide testimony) necessary to establish “specific violations during the [specific] times in question.” *Gudmundsen*, ¶ 14. Testimony or records of inquiry into a defendant's ability to pay, incentive and intervention efforts, and/or the filing of a report of violation all could provide bases for a court to find a specific start date of non-compliance. *See, e.g., Johnson*, ¶¶ 6–9 (describing testimony about defendant's ability and lack of effort to find work, sporadic employment, unreported income sources, and discretionary spending). The absence of such evidence

before July 2021 in this case is attributable to inaction by Probation & Parole, not any sort of restitution-specific legal loophole.

The district court's ruling effectively placed Neldia in violation and eliminated her eligibility for elapsed time credit from the moment she began serving her suspended sentence, long before she received any notice of an expectation that she would pay restitution in full before discharging her sentence, and even though she was never ordered to pay a specific monthly amount. This Court has reversed revocations where the plain language of a suspended sentence condition contemplated fulfillment of the condition over a period of time, but the district court effectively found the defendant in violation immediately before or upon commencement of the suspended portion of the sentence. *E.g., Pulst*, ¶¶ 11–14; *Beam*, ¶¶ 10–11. The logic of these precedents is straightforward: Absent evidence that compliance within a required time frame is impossible, a defendant cannot violate a condition of a suspended sentence before the deadline set forth in the condition has passed. *Pulst*, ¶¶ 12–13 & n.1. The same logic should apply to calculating elapsed time credit in cases in which a defendant owes restitution, *especially* in a case like Neldia's, where the express

language of the restitution condition establishes no concrete deadline for payment in full. The district court erred by denying Neldia elapsed time credit.

### **CONCLUSION**

The district court erred in revoking Neldia's suspended sentence because the State presented insufficient evidence to support a finding that Neldia violated the restitution condition of her suspended sentence, and Neldia established that any alleged violation was not attributable to a lack of good faith effort to obtain sufficient means to pay restitution as ordered. This Court should reverse the revocation and vacate the sentence imposed upon revocation.

Alternatively, the Court should reverse the revocation because the district court legally erred by denying as untimely Neldia's motion to waive or modify restitution. On remand, the motion should be granted to waive the entirety of Neldia's remaining restitution obligation or, at a minimum, to modify the restitution obligation to reflect credit for at least the \$15,730.25 to which the State agreed she was entitled.

Finally, even if the district court did not err in revoking Neldia's suspended sentence and denying the motion to waive or modify

restitution, this Court should reverse and remand for entry of an amended judgment to reflect credit for elapsed time served of five years, or, at a minimum, the 1,523 days between the commencement of her suspended sentence and the filing of the ROV.

Respectfully submitted this 30th 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 primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,946, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Charlotte Lawson  
Charlotte Lawson

## **APPENDIX**

Oral Imposition of Sentence Upon Revocation .....	App. A
Judgment on Revocation of Suspended Sentence .....	App. B
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June 1, 2022 Disposition Hearing Transcript Excerpt.....	App. E

## **CERTIFICATE OF SERVICE**

I, Charlotte Lawson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-30-2023:

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