

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0471

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER MICHAEL KEPLER,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Third Judicial District Court,  
Powell County, The Honorable Ray J. Dayton, Presiding

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## **STATEMENT OF THE ISSUE**

Whether the district court correctly revoked the Appellant's suspended sentences and community release from his guilty but mentally ill commitment when he repeatedly failed to abide by the terms of his community treatment plan and conditions of release.

## **STATEMENT OF THE CASE**

On September 6, 2013, the Appellant, Christopher Kepler (Kepler), pleaded guilty to one count of felony negligent homicide, in violation of Mont. Code Ann. § 45-5-104, and two counts of felony criminal endangerment, in violation of Mont. Code Ann. § 45-5-207. (District Court Documents (Docs.) 53-55, 57.) Pursuant to a plea agreement, the State dismissed the counts of felony deliberate homicide, felony assault with a weapon, and misdemeanor driving with a suspended license. (*Id.*) The State agreed to recommend Kepler be committed to the Department of Public Health and Human Services (DPHHS) based on Kepler's inability at the time of the offense to understand the criminality of his behavior or to conform it to the requirements of the law. (*Id.*) The authority for this joint

recommendation was provided in the statutory scheme that applied to guilty but mentally ill defendants in Mont. Code Ann. §§ 46-14-311 to -313.<sup>1</sup>

On February 21, 2014, the district court committed Kepler to DPHHS for 20 years with 10 years suspended for negligent homicide, 10 years all suspended for the first count of criminal endangerment, and 10 years all suspended for the second count of criminal endangerment. (Docs. 79, 84.) The district court imposed the sentences consecutively. (*Id.*) On May 1, 2014, DPHHS notified the court that they placed Kepler at the Montana State Prison (MSP). (Doc. 86.)

On January 9, 2017, the DPHHS director filed a petition to review Kepler's sentence. (Docs. 88-89.) The director incorporated into its petition various conditions of release to ensure Kepler's mental disorder or disease did not cause a danger to himself or others while he was in the community. (*Id.*) Pursuant to the parties' stipulation, the district court granted the petition and issued an amended judgment that suspended the entirety of Kepler's sentence and released him under community supervision, which included the conditions of release recommended by the DPHHS director. (Docs. 96, 98-99.)

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<sup>1</sup> A defendant committed pursuant to Mont. Code Ann. §§ 46-14-311 to -313 is broadly referred to as guilty but mentally ill, because the defendant is convicted but allowed to seek a DPHHS commitment during sentencing due to a mental disease or disorder. In contrast, a not guilty but mentally ill defendant is not convicted, and any associated DPHHS commitment is governed by the statutory procedures outlined in Mont. Code Ann. §§ 46-14-301 to -304.

On February 22, 2021, the State filed a petition to revoke Kepler's suspended sentence and community release based on Kepler absconding to Arizona after he failed to comply with his treatment plan and decompensated into a psychotic state. (Docs. 102-03.) After an evidentiary hearing, the district court revoked Kepler's suspended sentences and recommitted him to DPHHS for the remainder of his 40-year term. (Docs. 120, 150, 153.)

## **STATEMENT OF THE FACTS**

### **I. The offense**

On January 8, 2013, Kepler entered I-90 going the wrong direction. (Docs. 1 at 1-2, 22 at 1-2.)<sup>2</sup> Kepler drove west in the eastbound lane for at least 4 to 5 miles at approximately 90-95 miles per hour. (*Id.*) Multiple vehicles avoided being hit by Kepler, but he eventually collided head-on with a pickup towing a horse trailer that was occupied by Benjamin and Patricia Graves. (Docs. 1 at 2, 22 at 2.) Damages caused by the impact of Kepler's vehicle pinned that passenger, Patricia, in the pickup for several hours. (Docs. 1 at 3, 22 at 3.) The coroner pronounced Patricia dead at the scene. (*Id.*) The driver, Benjamin, suffered injuries but survived. (*Id.*) Benjamin told law enforcement that he tried to avoid Kepler's vehicle as it sped

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<sup>2</sup> Kepler pleaded guilty, so the facts of the offense are based on the affidavit in support of the State's Information. (Docs. 1, 22, 53-55, 57.)



toward him, but it seemed like Kepler had repeatedly mirrored Benjamin's evasive actions. (Docs. 1 at 2-3, 22 at 2-3.) Based on the evidence at the scene, it did not appear that Kepler had made any attempt to slow down or avoid the collision with the Graves's vehicle. (Docs. 1 at 3, 22 at 3.)

Kepler told law enforcement that he had been driving home to Sandpoint, Idaho, he had not slept for days, and he did not know why he had been traveling in the wrong lane of the interstate. (Docs. 1 at 3-4, 22 at 3-4.) Kepler's Idaho driver's license was suspended at the time of the crash. (Docs. 1 at 4, 22 at 4.) Two officers who spoke to Kepler at the scene of the accident said he smelled like marijuana. (Docs. 1 at 3-4, 22 at 3-4.) Kepler admitted that he had smoked marijuana two or three weeks before the crash. (*Id.*) Law enforcement transported Kepler to the hospital for a blood draw, which revealed the presence of THC and methamphetamine. (Docs. 1 at 4, 22 at 4.)

## **II. Procedural history**

### **A. Kepler's conviction and sentence**

On January 10, 2013, the State charged Kepler in justice court and later filed an Information in district court that amended the charges. (Docs. .5, 1-3, 23, 27-28, 51-53.) On January 31, 2013, the district court committed Kepler to the Montana State Hospital (MSH) for a fitness evaluation. (Doc. 9.) The MSH staff diagnosed

Kepler with Schizoaffective Disorder, Bipolar Type, found him fit to proceed, and found his ability to appreciate the criminality of his behavior at the time of the alleged crimes was “likely impaired by a number of factors, including psychosis, substance abuse, and sleep deprivation.” (Doc. 32 at 8-9.)

On September 6, 2013, Kepler pleaded guilty to one count of felony negligent homicide and two counts of felony criminal endangerment. (Docs. 53-55, 57.) Pursuant to a plea agreement, the State dismissed the counts of felony deliberate homicide (alternatively charged as felony vehicular homicide), felony assault with a weapon, and misdemeanor driving with a suspended license. (*Id.*) The State agreed to recommend Kepler be committed to DPHHS, pursuant to Mont. Code Ann. §§ 46-14-311 and -312(2) based on Kepler’s inability at the time of the offense to understand the criminality of his behavior or to conform it to the requirements of the law. (*Id.*)

On February 20, 2014, Kepler filed a letter to the district court explaining his history of mental illness. (Doc. 78 at 3-6.) Kepler said he learned through many years of trial and error that his “use of marijuana led to deepening psychosis.” (*Id.* at 4.) Kepler explained that the psychosis he experienced during the accident that killed Patricia Graves was caused by not taking his medication and furthered by his marijuana use. (*Id.* at 5.) Kepler said he intended to remain sober the rest of his life, and “I take full responsibility over what happened due to my mental condition

at the time of the accident which I could have more appropriately controlled if I had been taking my prescribed medication instead of self-medicating with marijuana.” (*Id.* at 6.)

On February 21, 2014, the district court committed Kepler to DPHHS for 20 years with 10 years suspended for negligent homicide, 10 years all suspended for the first count of criminal endangerment, and 10 years all suspended for the second count of criminal endangerment. (Docs. 79, 84.) The district court imposed the sentences consecutively, and imposed various conditions for Kepler’s suspended sentences, including a prohibition of use or possession of alcohol, marijuana, and other intoxicating substances. (Docs. 79, 84 at 6-9.)

On May 1, 2014, DPHHS notified the court that they placed Kepler at MSP. (Doc. 86.)

#### **B. Kepler’s supervised release**

On January 9, 2017, DPHHS filed a petition to review Kepler’s sentence, pursuant to Mont. Code Ann. § 46-14-312(3)(c). (Docs. 88-89.) In the petition, DPHHS said:

The [Forensic Review Board (FRB)] concluded that Defendant suffers from a mental disease or defect but is no longer a danger to the defendant or others with continued treatment in a community setting, as long as Defendant complies with specific conditions of release including mandatory mental health treatment, under the supervision of

the Adult Probation and Parole Division of the Montana Department of Corrections.

(Doc. 89 at 2.) The DPHHS director asked the district court to amend the judgment to suspend the remainder of Kepler's sentence, place him under DOC supervision, and impose all the standard probation conditions, the conditions in the original judgment, and various other "special" conditions. (Doc. 89 at 2-4.) The director also requested that the district court "Order that if the Defendant violates any of the conditional release terms above, the State may petition for revocation of the suspension of sentence and the court may immediately return the Defendant to the custody of the Director pending revocation proceedings." (*Id.* at 4.)

In response, the State did not object to Kepler's release but expressed concerns of both the State and the surviving victim, Ben Graves, about Kepler's long history of exacerbating his mental illness with illegal drug use. (Doc. 92.) The State asked the district court to restrict Kepler's vehicle use if the petition was granted to account for the death, injury, and property damage Kepler caused while driving in a "drug induced psychosis episode." (*Id.*)

On February 27, 2017, the parties filed a joint stipulation that included a description of facts and legal basis to support Kepler's supervised release.

(Doc. 96.) The parties jointly requested the district court to:

Suspend the remaining portion of Mr. Kepler's sentence to the Director of Health and Human Services so that the Director may release Mr. Kepler into the community to be supervised by Montana

Department of Corrections Probation and Parole, upon normal and special conditions as set forth in the Director's Petition for Sentence Review.

(*Id.* at 8.) Pursuant to the stipulation, the district court granted the petition on March 3, 2017, and issued an amended judgment that suspended the entirety of Kepler's sentence, which allowed DPHHS to release him under community supervision. (Docs. 96, 98-99.)

In the amended judgment, the district court suspended the remainder of Kepler's custodial sentence, imposed all the prior release conditions, and imposed various "special" release conditions related to Kepler's mental health treatment. (Doc. 99 at 5-9.) The district court specified, "Failure to comply with the conditions may result in a revocation of Defendant's suspended sentence and a return to custody of the Department of Health and Human Services for appropriate placement to prevent decompensation and prevent harm to himself or the community." (*Id.* at 8.)

### **C. Kepler's revocation proceedings**

On February 22, 2021, the State filed a petition to revoke Kepler's suspended sentence. (Docs. 102-03.) The State alleged Kepler committed four violations of his supervised release. (Doc. 103 at 3-4.) The State alleged Kepler had absconded to Arizona, Kepler no longer resided at his approved residence, Kepler left his assigned district without permission, and Kepler failed to maintain

contact with his probation officer as required. (*Id.*) Kepler's probation officer noted in his affidavit that Kepler had "numerous substance abuse violations while on community supervision." (Doc. 103 at 8, 11.)

To support the absconding violation, the State specified that Kepler had been admitted to and subsequently discharged from a facility in Peoria, Arizona, called Recovery Innovations. (*Id.* at 3.) The State explained:

On March 10, 2021, Officer Daly reported contact with the Defendant's mother, Zaydee Rule. Ms. Rule told the Officer that she had personal contact with the Defendant last week outside Phoenix; while driving down the interstate with him as a passenger, the Defendant woke up, threw his coat at her and attempted to grab the wheel of the car. This incident caused the Defendant to be placed at the facility in Peoria. This incident is substantially similar to the original offense.

(*Id.*)

The State requested a warrant for Kepler's arrest "due to the substantial risk of serious harm that could be caused by the Defendant to other persons or property, due to his mental health," which the district court issued on March 14, 2021.

(Docs. 103 at 4, 104.) Authorities in Flagstaff, Arizona, arrested Kepler on July 10, 2021. (Doc. 105.) Due to the transport of Kepler from Arizona to Montana, he did not make his initial appearance on the warrant until December 8, 2021. (Doc. 106.)

On December 21, 2021, Kepler made his initial appearance on the revocation petition and denied the alleged violations. (Doc. 112.) The district court ordered Kepler to remain in custody during the revocation proceedings except for a limited

release to his mother's custody for transportation related to a mental health evaluation. (Docs. 112-14; 12/21/21 Tr. at 25-28.)

Dr. Bowman Smelko evaluated Kepler on January 6, 2022, and filed a psychological risk assessment with the district court. (Doc. 115.) Kepler's mother, Zaydee Rule, filed two affidavits. (Docs. 111, 119.) Rule requested the district court release Kepler to her care and supervision. (*Id.*) In her second affidavit, Rule clarified the facts about her driving incident with Kepler in Arizona. (Doc. 119 at 7.)

The Petition for Revocation alleges that Chris threw a coat at me while I was driving, and that he took the steering wheel from me. Neither one of these statements is accurate. Chris splashed his Coca-Cola drink at me upon suddenly waking up in the car and thinking I had deceived him and was taking him somewhere other than Phoenix. Although he immediately realized he was wrong in his suspicion of me, by that time he had become extremely agitated and wanted me to immediately stop the car so he could get out and smoke a cigarette. He kept insisting that I immediately stop the car, so much so that I became **concerned** he might take the wheel while I was driving so that he could get out of the car. I got off at the next exit, which was less than a mile away and he got out to smoke his cigarette.

(*Id.* (emphasis in original).)

On February 22, 2022, the district court held an evidentiary hearing. (Doc. 120.) At the outset of the hearing, the district court explained the State's allegations, and Kepler admitted to the violations with one qualification. (2/22/22 Tr. at 4-8.) Kepler said:

MR. KEPLER: Yes, however the, the statement that I grabbed the wheel with my mother in the car is incorrect and she, and she will testify to that. I did not grab the wheel and did not have—we, we did have an, an altercation in the car, but I did not grab the wheel at any time.

THE COURT: Alright.

MR. KEPLER: Besides that, the rest is absolutely yes.

(*Id.* at 8.) Based on Kepler’s admissions, the district court immediately moved to disposition. (*Id.* at 8.)

The State called two witnesses. Probation Officer Sean Daly testified that Kepler stopped communicating with him and absconded in July 2020, but he said Kepler “had extensive issues and violations prior to that um, some of which caused him to have to live in the Bozeman area instead of being allowed to, to living [sic] in Big Sky.” (*Id.* at 9-10.) The violations included drug use, alcohol use, running numerous unapproved businesses, and an unverified report from law enforcement that Kepler made threats to the school in Big Sky. (*Id.* at 10.) The DOC placed Kepler in a prerelease center in Bozeman until he completed programming to address the issues. (*Id.*) Daly said Kepler committed these violations while he was taking his prescribed medications and prior to the time Kepler decompensated and absconded. (*Id.* at 11, 14.)

Daly was skeptical of Kepler’s suggestion to release him to the supervision of his mother. (*Id.* at 12.) Daly said Kepler made numerous statements to him that



Kepler “disliked . . . his mother on an extreme level,” and “I feel like there’s a lot of friction there that only seems to go away when he’s in custody.” (*Id.*) Daly said the allegation regarding Kepler attempting to take the wheel while driving with his mother on an Arizona interstate was based on Daly’s conversation with Kepler’s mother shortly after the incident. (*Id.* at 14-15.)

The State called Dr. Smelko who evaluated Kepler at the time he was released and again for purposes of the revocation proceedings. (*Id.* at 17-18, 22.) Dr. Smelko testified that Kepler was stable at the time of the hearing because he had been taking his medications for an extended period and had not been using drugs or alcohol. (*Id.* at 19-20.) He said Kepler could continue to be stable with ongoing medication, treatment, and sobriety. (*Id.* at 20-22.) But this required Kepler to take his prescribed medicine and not use “marijuana or other substances.” (*Id.*) Dr. Smelko testified that Kepler was a low risk to the community if he met those requirements. (*Id.*)

Kepler called his mother, Rule, who testified that she could supervise Kepler if he was released to live with her in Missoula. (*Id.* at 27-30.) Rule said she had arranged services through Western Montana Mental Health in Missoula to address Kepler’s mental health and sobriety issues. (*Id.*) Rule also testified that she had initiated guardianship proceedings for Kepler to allow her to legally act on his behalf. (*Id.* at 29-30.)

After the parties presented evidence, the district court expressed apprehension about its ability to impose a sentence without more information. (*Id.* at 31-35.) The court instructed the parties to file sentencing memorandums that detailed conditions of release to fit Kepler's unique circumstance. (*Id.*)

The State filed its sentencing memorandum on March 1, 2022. (Doc. 121.) Kepler filed a proposed judgment that questioned the district court's authority to revoke his sentence. (3/8/22 Tr. at 5-9.)<sup>3</sup> During a hearing on March 8, 2022, the district court ordered the parties to brief the jurisdictional issue that Kepler raised and rescheduled the hearing for March 21, 2022. (*Id.* at 9-13; Doc. 123.)

On March 14, 2022, Kepler's counsel filed a motion to withdraw that attached a pro se filing drafted by Kepler notifying the district court that he had terminated his counsel. (Doc. 124.) On March 17, 2022, the State filed its supplemental briefing on the authority of the district court to revoke Kepler's sentence. (Doc. 128.) The State argued Mont. Code Ann. § 46-18-304 applied to Kepler's revocation proceedings. (*Id.* at 4-5.) Kepler later filed a sentencing memorandum and agreed with the State that Mont. Code Ann. § 46-18-304 applied. (Doc. 148.)

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<sup>3</sup> The proposed judgment referenced during the March 8, 2022 hearing does not appear to have been filed in the record.

On March 21, 2022, the district court held a hearing to address Kepler's representation and bond. (Doc. 130.) The district court informed Kepler's mother that she could not act as Kepler's attorney and expressed its apprehension about allowing Kepler to proceed pro se given his mental health history. (3/21/22 Tr. at 9-19.) Kepler said he intended to hire another attorney but agreed that the district court should appoint an attorney from the Office of the Public Defender during the interim. (*Id.*) The district court ordered OPD to appoint counsel and continued the hearing. (Doc. 130.)

Kepler's appointed counsel immediately moved for a bond hearing, which the district court held on March 29, 2022. (Docs. 131-33.) The State requested the district court maintain its prior order denying bond during the revocation proceedings, but the district court granted Kepler's request for release on his own recognizance. (Docs. 134-35.)<sup>4</sup> The district court ordered Kepler to remain in his mother's custody and adopted the supervision conditions that Kepler previously recommended. (Doc. 135.)

On April 6, 2022, the State moved to revoke Kepler's release and requested an arrest warrant. (Doc. 136.) The State alleged Kepler left his mother's home without his phone on April 3, 2022, and had not returned. (*Id.*) Kepler failed to appear at a scheduled appointment on April 6, 2022, and the probation officer

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<sup>4</sup> Kepler did not provide a transcript of the March 29, 2022 bond hearing.

placed Kepler in absconder status. (*Id.*) The district court issued a bench warrant. (Docs. 137, 141.) On April 8, 2022, Kepler failed to appear for a drug patch appointment. (Doc. 138.)

On April 28, 2022, authorities arrested Kepler in Tempe, Arizona. (Doc. 141.) On June 7, 2022, Kepler made his initial appearance on the bench warrant, and the district court ordered Kepler detained without bond. (Docs. 146-47.)<sup>5</sup>

During the disposition hearing on August 2, 2022, neither party introduced additional evidence. (8/2/22 Tr. at 7.) Benjamin Graves—the husband of the woman who Kepler killed—provided a victim impact statement:

Um, this individual has to me, has shown no remorse [sic] what he's done. He's absconded I think twice now. Uh, when the Court has let him go out and try he has (INAUDIBLE-BROKE UP) . . . Uh, he's killed—uh, he killed my wife, and no one seems to be able to keep him on his drugs and keep him in a somewhat normal situation and because of that I feel that you should be more strict in your decision as to what to do with him and try to monitor him closely. And then probably the best way to do that for a period of time would be to put him back in jail. And I don't—I appreciate you allowing me to speak on my behalf and uh, hope you can make that reasonable decision. Thank you.

(*Id.* at 8-9.) The district court explained to Graves that it could not change the prior sentence in a DPHHS revocation proceeding. (*Id.* at 9-10.) Graves said he understood that and clarified, “I’m just saying from what I’ve observed, I’ve

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<sup>5</sup> Kepler did not provide a transcript of the initial appearance for the bench warrant on June 7, 2022.

observed at least five of [sic] six of these hearings and they've all failed. He's a danger. He's a danger not only to himself, but to other people when he gets out on the street." (*Id.* at 10.)

The State recommended the district court commit Kepler to DPHHS for the remainder of his sentence with no time suspended. (*Id.* at 11.) The State argued Kepler was a danger to the community because of his repeated failures to comply with the conditions of his community release, including his mental health treatment plan—he twice absconded out of state, he routinely used illegal drugs, and he consistently chose not to take his psychiatric medication. (*Id.* at 11-14.) The State said the only appropriate placement for Kepler to maintain the safety of the community was back with DPHHS. (*Id.*)

Kepler's counsel argued Kepler should be released from his sentence because the district court could not support a finding that Kepler was a danger to the community, which is necessary to revoke conditional release pursuant to Mont. Code Ann. § 46-14-304(1). (*Id.* at 19-20.) He based his argument on Dr. Smelko's "unrefuted" report that he argued showed Kepler was not a danger to the community when he had adequate community support. (*Id.* at 19.)

Kepler's counsel acknowledged that Kepler "made some bad choices," but argued some of the things had "been really blown out of proportion." (*Id.*) He said Kepler had a "long running dispute" with his mother that required him to get away

from her, which included getting out of the car on the Arizona interstate to smoke a cigarette and leaving her house when he was under her charge by court order. (*Id.*) He said, “Those choices don’t mean he’s a substantial risk to the community of the kind of danger that posed before.” (*Id.*) In the alternative, he argued if the district court made the threshold finding that Kepler was a danger to himself or the community, a significant period should be suspended with a recommendation for placement in a prerelease. (*Id.* at 20.)

Kepler personally addressed the district court. (*Id.* at 21-22.)

The reason that I felt comfortable leaving uh, this last, the second absconding charge that occurred in March was because I knew the statute said that at, at five years of conditional release I was actually free to go and so, I figured that that would come up. That this would—if, if I ever did have to come back to Montana and face these charges I would come to court, and you would have to admit the fact that Dr. Smelko’s report shows that I’m not a danger to myself or others and therefore I’m well and since the five year limit is up you have to release me.

(*Id.* at 22.) Kepler said if the district court released him, he would go to Missoula and find temporary homeless housing until he could find permanent housing. (*Id.* at 22-23.) He added:

Um, most likely I’m, if I’m set free, I will smoke marijuana and, and I don’t have—meth has never been a real issue for me. I’ve used it a few times, but it’s not, I’m not a meth addict. I’m, I’m not, I’m not a meth person and I’m not going to use meth again. But I, I probably will use marijuana because it does help me with my anxiety and insomnia which are solutions for me.

(*Id.* at 23.)

The district court found Kepler was a danger to himself or others and revoked the suspended portions of Kepler's sentences. (*Id.* at 23-27.) The district court addressed Kepler's reliance on Dr. Smelko's report and explained that Dr. Smelko's opinion that Kepler was not a danger to the community was conditioned on Kepler abiding by the release conditions. (*Id.* at 25-26.) The district court said:

The problem is is [sic] he hasn't abided by all of the conditions of the court order. He absconded. Uh, he was using illegal drugs. And uh, I believe the admission was at the time that he was not on his appropriate medication. He certainly wasn't following all the recommendation of mental health because none of them said he can treat with marijuana. Uh, I don't know that we have—I don't think we've had any testimony about it here, but I haven't heard the mental health professional come in and say, well, yeah, I got him on these uh, psychoactive drugs, but marijuana will work too. You know, no, that's not an appropriate substitute for prescribed mental health medication.

So, if I need to make a specific finding, is he a danger to himself or others? Absolutely he is, because he's not following treatment recommendations. He's not staying on his meds. He's not avoiding the use of illegal drugs. He's not doing what his probation officer says. He's absconded from his probation and that makes him a dangerous individual because he becomes an untreated, mentally ill person and that's what we had back prior to 2014 which resulted in the death of Mrs. Graves. So, yes, he's a danger.

(*Id.* at 26.)

The district court issued its revocation judgment on August 11, 2022.

(Doc. 153.) Kepler appealed. (Docs. 154-55.)

## **SUMMARY OF THE ARGUMENT**

The district court correctly revoked Kepler's suspended sentences and community release under the guilty but mentally ill statutes because Kepler failed to comply with his treatment plan while on community release, decompensated into a psychotic state, and twice absconded to Arizona. Kepler's noncompliance created the same circumstances that resulted in Kepler's underlying conviction—Kepler killed a woman and caused a substantial risk of death or serious injury to others while in a psychotic state.

The district court suspended Kepler's sentences and released him into the community pursuant to the DPHHS director's petition that asserted Kepler would not be a danger to himself or others during community release as long as he complied with his treatment plan and the conditions of release. Kepler does not dispute that he consistently and repeatedly failed to comply with his treatment plan, decompensated into a psychotic state, and twice absconded to Arizona. By the terms of his release, Kepler became a danger to himself or others when he failed to comply, because he no longer met the commitment exception in Mont. Code Ann. § 46-14-312(3)(c) or any other statutory basis to support his community release.

The not guilty but mentally ill statutes, including the revocation procedures in Mont. Code Ann. § 46-14-304, do not apply to Kepler, who was convicted,



sentenced, and committed to DPHHS pursuant to Mont. Code Ann. §§ 46-14-311 to -313. The plain language of Mont. Code Ann. § 46-14-304 is specifically tailored for not guilty but mentally ill defendants who have not been convicted and any commitment is based solely on a mental disease or disorder. It contradicts the purpose and plain language of the guilty but mentally ill statutes, which apply only to defendants who have been convicted and incorporate the criminal sentencing statutes in Title 46, chapter 18.

The district court's revocation of Kepler's sentence complied with the statutory scheme specifically designed to address guilty but mentally ill defendants. This Court should affirm the district court's order revoking Kepler's suspended sentences and community release.

## **ARGUMENT**

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

This Court reviews a sentence for legality. *State v. Brendal*, 2009 MT 236, ¶ 11, 351 Mont. 395, 213 P.3d 448. Legality is determined “by considering only ‘whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes.’” *State v. Steger*, 2021 MT 321, ¶ 7, 406 Mont. 536, 501 P.3d 394 (quoting *State v. Ingram*,

2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799). A district court’s findings of fact are reviewed for clear error. *Brendal*, ¶ 11.

This Court reviews “a district court’s decision to revoke a suspended sentence to determine whether the court abused its discretion and whether the court’s decision was supported by a preponderance of the evidence in favor of the state.” *State v. Nelson*, 1998 MT 227, ¶ 16, 291 Mont. 15, 966 P.2d 133. However, when “the issue is whether the court followed the statutory requirements applicable to the revocation proceedings, the question is one of law over which our review is plenary.” *Id.*

## **II. The district court correctly revoked Kepler’s suspended sentences and conditional release from his DPHHS commitment.**

It is undisputed that Kepler pleaded guilty to three charged offenses, and the district court sentenced him pursuant to Mont. Code Ann. § 46-18-312(2) (2021)<sup>6</sup> as a guilty but mentally ill defendant. The procedures necessary to accommodate a sentence in these circumstances are specifically governed by Mont. Code Ann. §§ 46-14-311 through -313.

“Montana law provides that a defendant’s mental disease or disorder may be considered at all critical stages of a criminal proceeding: pretrial, trial, and

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<sup>6</sup> The 2021 version of these statutes applied when the district court imposed Kepler’s sentence and is cited throughout unless otherwise indicated.

sentencing.” *In re Capser*, 2019 MT 215, ¶ 8, 397 Mont. 227, 448 P.3d 1084 (citing Mont. Code Ann. § 46-14-101(1)). During sentencing, a defendant may offer evidence to show “that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or disorder or developmental disability that rendered the defendant unable to appreciate the criminality of the defendant’s behavior or to conform the defendant’s behavior to the requirements of law.” Mont. Code Ann. § 46-14-311(1).

If a defendant raises this claim, the district court must consider any relevant evidence, including a mental health evaluation, prior to imposing a sentence.

Mont. Code Ann. § 46-14-311. If the district court finds the defendant met the standard, the district court “shall sentence the defendant to be committed to the custody of the director of the department of public health and human services . . . for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under” Title 46, chapter 18. Mont. Code Ann. § 46-14-312(2). The statute specifies that “[t]he authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.” *Id.*<sup>7</sup>

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<sup>7</sup> A district court is not required to apply mandatory minimum sentences under Title 46, chapter 18, to determine the duration of the commitment. Mont. Code Ann. § 46-14-312(2).

Once the district court commits a defendant to DPHHS, the director has broad discretion to place the defendant in the treatment or correctional facility that will best “serve the defendant’s custody, care, and treatment needs.” *Id.* “Following imposition of sentence pursuant to § 46-14-312(2), MCA, either the director or the defendant may petition the sentencing court for review of the sentence.” *Capser*, ¶ 8. The petition for review must be supported by a professional person’s certification that certain criteria are met. Mont. Code Ann. § 46-14-312(3). The criteria in Mont. Code Ann. § 46-14-312(3)(c) applied here: “the defendant suffers from a mental disease or disorder or developmental disability but is not a danger to the defendant or others.”

“The sentencing court may then ‘make any order not inconsistent with its original sentencing authority, except that the length of the confinement or supervision must be equal to that of the original sentence.’” *Capser*, ¶ 8 (quoting Mont. Code Ann. § 46-14-312(4)). “If the court agrees to a sentence modification, the defendant will be subject to a yearly status review by a professional.” *Id.* “At the expiration of the period of commitment or period of treatment specified by the court under 46-14-312, the defendant must be discharged from custody and further supervision, subject only to the law regarding the civil commitment of persons suffering from serious mental illness.” Mont. Code Ann. § 46-14-313.

**A. The district court correctly followed the procedures in Mont. Code Ann. §§ 46-14-311 to -313 to revoke Kepler's suspended sentences and community release.**

The district court originally sentenced Kepler to DPHHS custody for a total of 40 years with 30 years suspended. Kepler's sentence complied with Mont. Code Ann. § 46-14-312(2) because the statute specifically incorporates the sentencing provisions of "Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for." *See State v. Ringewold*, 2001 MT 185, ¶ 21, 306 Mont. 229, 32 P.3d 729 (a district court's sentencing authority is defined and constrained by statute). The district court sentenced Kepler to "a definite period of time" that did not exceed the maximum term of imprisonment that could be imposed for the offenses pursuant to Title 46, chapter 18. Mont. Code Ann. § 46-14-312(2). Moreover, the district court had authority under Title 46, chapter 18, to suspend portions of Kepler's sentences and impose conditions during the suspended terms. Mont. Code Ann. §§ 46-14-312(2), 46-18-201(2), -201(4).

Pursuant to the DPHHS director's broad statutory authority to provide Kepler treatment in a setting that best served his custody, care, and treatment needs, the director filed a petition for the district court to review Kepler's sentence under Mont. Code Ann. § 46-14-312(3)(c). This allowed the sentencing court to review the sentence if "the defendant suffers from a mental disease or disorder or developmental disability but is not a danger to the defendant or others." *Id.* The

director specified in the petition that Kepler was not a danger to himself or others “with continued treatment in a community setting, as long as Defendant complies with specific conditions of release including mandatory mental health treatment.” (Doc. 89 at 2.) The director specifically contemplated the revocation of Kepler’s suspended sentence and recommitment to DPHHS custody if Kepler violated any of the release conditions. (*Id.* at 4.)

The district court granted the director’s petition, suspended Kepler’s remaining custodial time, and imposed the conditions of release that the director requested. The district court had authority to amend the judgment because it was an “order not inconsistent with its original sentencing authority.” Mont. Code Ann. § 46-14-312(4); *see also State v. Korell*, 222 Mont. 112, 116-17, 720 P.2d 688, 691 (1986) (holding a sentence amendment to change a DPHHS commitment to a prison sentence was consistent with original sentencing authority). The district court’s original sentencing authority was Mont. Code Ann. § 46-14-312(2), which incorporates Title 46, chapter 18. Like Kepler’s original sentence, the district court had authority to suspend his criminal sentence and impose release conditions under Mont. Code Ann. §§ 46-18-201(2) and -201(4).

Notably, the district court did not change the 40-year commitment term of Kepler’s sentence. The original sentence, which Kepler has never challenged, required DPHHS to supervise Kepler’s custody, care, and treatment needs for

40 years. *See* Mont. Code Ann. §§ 46-14-312(2), -312(4). Once the commitment duration was imposed, Mont. Code Ann. § 46-14-312(4) specifically prohibited any change to it—“the length of confinement or supervision must be equal to that of the original sentence.” Kepler cannot discharge his custody, commitment, or treatment until the sentence term expires. Mont. Code Ann. § 46-14-313.

During his time in the community, Kepler repeatedly failed to meet the conditions of his suspended sentence and the terms of his treatment plan. Kepler admitted every allegation in the report of violation except grabbing the steering wheel from his mother during an altercation that he acknowledged occurred while she was driving him down an Arizona interstate. Kepler’s substance abuse and general failure to comply with his treatment plan caused him to decompensate into psychosis—similar to the psychotic state he was in when he committed the underlying offenses of negligent homicide and criminal endangerment. Kepler absconded to Arizona where he was arrested, committed and released, and arrested again. Kepler again decompensated and absconded to Arizona during his OR release pending the disposition hearing.

Kepler’s actions illustrate his general defiance to his community treatment plan. Kepler’s probation officer said Kepler had numerous substance abuse violations during his time on community supervision that he addressed informally. During the initial phases of the underlying proceedings, Kepler acknowledged that

his marijuana use intensified his psychosis and asserted that he would never use marijuana again. However, during the revocation disposition hearing, Kepler informed the district court that he intended to continue his marijuana use if he returned to the community.<sup>8</sup> As the district court explained, this was contrary to the conditions of his release and the testimony of the professional person, Dr. Smelko, regarding the treatment measures necessary to safely maintain Kepler's community release.

Dr. Smelko testified Kepler was a low risk to the community only if he continued to take his medication, participated in his treatment plan, and maintained his sobriety. Kepler relies on Dr. Smelko's testimony to argue the evidence was insufficient to support the factual finding necessary under Mont. Code Ann. § 46-14-304. That provision does not apply, but Kepler's argument also mischaracterizes the significance of Dr. Smelko's testimony. As the district court explained, Dr. Smelko's testimony combined with Kepler's consistent and repeated decompensation into psychosis when he failed to comply with his community treatment plan created the same circumstances that resulted in Kepler's conviction,

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<sup>8</sup> To further support Kepler's defiance to his community treatment, Kepler informed the district court that he absconded to Arizona the second time only to take advantage of the five-year jurisdictional limit in Mont. Code Ann. § 46-14-304(2). Kepler said he believed that if he could stay out of Montana long enough, the five-year period would pass and leave the district court without recourse.



sentence, and DPHHS commitment. Every fact in the record supports that conclusion.

To conclude that Kepler was not a danger to himself or others while in a psychotic state on community release, this Court would have to ignore the death that he caused and the substantial risk of death or serious injury that he created when he committed the underlying offenses. It would ignore the gravity of his medical disease or disorder. It would ignore Kepler's utter failure to comply with the community treatment plan that was the sole basis of his release. Moreover, it would be inconsistent with the statutory provisions governing guilty but mentally ill defendants. *See* Mont. Code Ann. §§ 46-14-311 to -313.

In its order releasing Kepler, based on Mont. Code Ann. § 46-14-312(3)(c), the district court found Kepler was not a danger to himself or others so long as he met the supervision and treatment terms. Kepler's suspended sentence and release were specifically premised on his compliance. Once Kepler failed to comply with his supervision and treatment plan, he was a danger to himself or others by the terms of his release and no longer met a commitment exception under Mont. Code Ann. § 46-14-312(3). This supported the district court's revocation of Kepler's release—a result specifically contemplated by the DPHHS director in its petition to release Kepler into the community.

Although Kepler argues the district court’s factual findings are clearly erroneous for not meeting Mont. Code Ann. § 46-14-304, the district court did not support its decision with that statute.<sup>9</sup> The district court said:

So, if I need to make a specific finding, is he a danger to himself or others? Absolutely he is, because he’s not following treatment recommendations. He’s not staying on his meds. He’s not avoiding the use of illegal drugs. He’s not doing what his probation officer says. He’s absconded from his probation and that makes him a dangerous individual because he becomes an untreated, mentally ill person and that’s what we had back prior to 2014 which resulted in the death of Mrs. Graves. So, yes, he’s a danger.

(8/2/22 Tr. at 26.) The district court’s findings clearly support revocation because Kepler violated the terms of his release and treatment that were adopted pursuant to the DPHHS director’s request and incorporated as a premise for his release. *See* Mont. Code Ann. §§ 46-14-312(2), 46-18-201, -203.

The district court correctly revoked Kepler’s sentence based on Mont. Code Ann. §§ 46-14-311 to -313. Its order to revoke was consistent “with its original sentencing authority.” Mont. Code Ann. § 46-14-312(4); *see also Korell*, 222 Mont. at 116-17, 720 P.2d at 691. It had authority to revoke under Mont. Code Ann. § 46-18-203 because Mont. Code Ann. § 46-14-312(2) specifically

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<sup>9</sup> Although this Court will affirm a district court decision as right for the wrong reason, that is unnecessary here because the district court did not expressly rely on Mont. Code Ann. § 46-14-304. *See State v. Marcial*, 2013 MT 242, ¶ 10, 371 Mont. 348, 308 P.3d 69 (“We will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason.”).

incorporates “Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.” The district court appropriately considered Kepler’s treatment needs and the protection of the community and correctly found revocation and recommitment to DPHHS was necessary.

The district court’s order should be affirmed.

**B. The not guilty but mentally ill statutes, including Mont. Code Ann. § 46-14-304, do not apply to Kepler’s sentence or commitment.**

Kepler bases his argument on the wrong statute. Kepler argues that Mont. Code Ann. § 46-14-304 applied to the revocation proceedings. But that statute applies only to defendants found not guilty but mentally ill.<sup>10</sup> Mont. Code Ann. §§ 46-14-301 to -304. The plain language of the statutes that apply to the disposition of mentally ill defendants are divided into two separate schemes with different purposes, procedures, and standards for not guilty but mentally ill defendants, Mont. Code Ann. §§ 46-14-301 to -304, and defendants who are guilty but mentally ill, Mont. Code Ann. §§ 46-14-311 to -313.

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<sup>10</sup> Both Kepler and the State relied on Mont. Code Ann. § 46-14-304 below in the various sentencing briefs filed by the parties. The district court, however, did not specifically support its ruling with this statute.

**1. The statutory scheme for not guilty but mentally ill defendants only applies when there is not a conviction.**

Kepler's argument ignores the primary distinction between the two statutory schemes—a conviction. *See* Mont. Code Ann. §§ 46-14-301 to -304, -311 to -313. The conviction is the basis to incorporate the criminal sentencing statutes in Title 46, chapter 18, for guilty but mentally ill defendants. These provisions cannot be incorporated into the not guilty but mentally ill statutory scheme because the defendants are not convicted. They cannot be sentenced.

Not guilty but mentally ill defendants are either released or committed to DPHHS custody pursuant to the procedural requirements in Mont. Code Ann. §§ 46-14-301 to -304. A district court may commit a not guilty but mentally ill defendant if it determines “the defendant suffers from a mental disease or disorder that renders the defendant a danger to the defendant or others” because the offense “involved a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage.” Mont. Code Ann. § 46-14-301(2).

After a not guilty but mentally ill defendant is committed, either the DPHHS director or the committed person may petition the district court for discharge or conditional release. Mont. Code Ann. § 46-14-302, -303. To grant the petition, the district court must find the committed person “no longer suffers from a mental disease or disorder that causes the person to present a substantial risk of serious

bodily injury or death to the person or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage.” Mont. Code Ann. § 46-14-302(1); *see also* Mont. Code Ann. § 46-14-302(6) (same). If the State objects, it has the burden to prove otherwise by clear and convincing evidence. Mont. Code Ann. § 46-14-302(6)(b). Pursuant to the evidence presented, the district court may order the committed person to be discharged, recommitted to DPHHS custody, or released on conditions. Mont. Code Ann. § 46-14-302(6)(c).

If a not guilty but mentally ill defendant is released on conditions, the release can be revoked pursuant to the statute Kepler relies on—Mont. Code Ann. § 46-14-304. It is titled “Revocation of conditional release” and provides:

- (1) The court may order revocation of a person’s conditional release if the court determines after hearing evidence that:
  - (a) the conditions of release have not been fulfilled; and
  - (b) based on the violations of the conditions and the person’s past mental health history, there is a substantial likelihood that the person continues to suffer from a mental disease or disorder that causes the person to present a substantial risk of:
    - (i) serious bodily injury or death to the person or others;
    - (ii) an imminent threat of physical injury to the person or others; or
    - (iii) substantial property damage.
- (2) The court may retain jurisdiction to revoke a conditional release for no longer than 5 years.
- (3) If the court finds that the conditional release should be revoked, the court shall immediately order the person to be recommitted to the custody of the director of the department of public

health and human services, subject to discharge or release only in accordance with the procedures provided in 46-14-302 and 46-14-303.

Mont. Code Ann. § 46-14-304.

The revocation procedures outlined in Mont. Code Ann. § 46-14-304 are only necessary if a not guilty but mentally ill defendant is conditionally released because there is no other authority to support a revocation. The same procedures are not necessary for a guilty but mentally ill defendant because the statutory scheme expressly adopts Title 46, chapter 18, which includes the revocation procedures in Mont. Code Ann. § 46-18-203. *See* Mont. Code Ann. §§ 46-14-311 to -313. The cases Kepler relies on do not undermine this conclusion, because the defendants in those cases were found not guilty but mentally ill. *See State v. Edmundson*, 246 Mont. 241, 243, 805 P.2d 1289, 1290 (1990); *State v. Olson*, 181 Mont. 323, 324-25, 593 P.2d 724, 725 (1979).

**2. The structure and plain language of the two separate statutory schemes for the disposition of mentally ill defendants show Mont. Code Ann. § 46-14-304 does not apply to Kepler’s revocation.**

This Court interprets statutes “to give effect to the Legislature’s intent.” *Brendal*, ¶ 18. “The statute’s plain language controls our interpretation if we can discern the legislative intent from the plain meaning of the statute’s words.” *State v. Merry*, 2008 MT 288, ¶ 12, 345 Mont. 390, 191 P.3d 428. Statutes are read and construed “as a whole to avoid an absurd result and to give effect to a statute’s

purpose.” *Brendal*, ¶ 18. This Court must refuse to “insert ‘what has been omitted or to omit what has been inserted.’” *Merry*, ¶ 12 (quoting Mont. Code Ann. § 1-2-101). This Court “presumes that the Legislature acts with deliberation and full knowledge of all existing laws on a subject.” *Brendal*, ¶ 18. “In situations where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls.” *Id.*

The structure of the two statutory schemes that address mentally ill defendants shows the Legislature’s intent to address guilty but mentally ill defendants differently than not guilty but mentally ill defendants. *See Brendal*, ¶ 18; *Merry*, ¶ 12. Several reserved code sections separate the two statutory schemes. *See* Mont. Code Ann. §§ 46-14-301 to -304, -311 to -313. The statute Kepler asks this Court to apply—Mont. Code Ann. § 46-14-304—is the fourth sequential statute that addresses procedures for not guilty but mentally ill defendants. Mont. Code Ann. §§ 46-14-301 to -304. It is not referenced or incorporated by the guilty but mentally ill statutes. Mont. Code Ann. §§ 46-14-311 to -313.

Montana Code Annotated § 46-14-304(3) expressly provides that if conditional release is revoked, the committed person must be returned to DPHHS custody subject to the procedures in Mont. Code Ann. §§ 46-14-302 and -303. The procedures outlined in Mont. Code Ann. §§ 46-14-302 and -303 never apply to a guilty but mentally ill defendant like Kepler whose commitment is governed

expressly by Mont. Code Ann. §§ 46-14-311 to -313. To apply Mont. Code Ann. § 46-14-304 to guilty but mentally ill defendants would contradict the plain language of the two statutory schemes. *See Brendal*, ¶ 18; *Merry*, ¶ 12.

The revocation standard in Mont. Code Ann. § 46-14-304(1)(b) is wholly inconsistent with the guilty but mentally ill statutes. *See* Mont. Code Ann. §§ 46-14-311 to -313. The release standard in the not guilty but mentally ill statutes requires a showing that the committed person “no longer suffers from a mental disease or disorder that causes the person to present a substantial risk of serious bodily injury or death to the person or others . . . an imminent threat of physical injury to the person or others, or . . . substantial property damage.” Mont. Code Ann. § 46-14-302(1); *see also* Mont. Code Ann. § 46-14-302(6) (same). This differs substantially from the standards to support sentence review in Mont. Code Ann. § 46-14-312(3), including the provision that supported the DPHHS director’s petition to release Kepler—Mont. Code Ann. § 46-14-312(3)(c), provided: “the defendant suffers from a mental disease or disorder or developmental disability but is not a danger to the defendant or others.”

The standard in the not guilty but mentally ill statutes is substantially more demanding, and it is consistently applied at every procedural stage—commitment, conditional release, and revocation. Mont. Code Ann. §§ 46-14-301(2)(a), -302(1), -302(6), -303, -304(1). It is not referenced or applied in any of the guilty but



mentally ill statutes. *See* Mont. Code Ann. §§ 46-14-304(2), -311 to -313. It would be absurd to interpret these statutes to allow a guilty but mentally ill defendant, like Kepler, to be conditionally released based on the more benign standard in Mont. Code Ann. § 46-14-312(3)(c) while foreclosing revocation unless the State could meet the heightened standard in Mont. Code Ann. § 46-14-304(1). *See Merry*, ¶ 12.

Moreover, the revocation standard in Mont. Code Ann. § 46-14-304(1)(b) requires the court to find “a substantial likelihood that the person continues to suffer from a mental disease or disorder.” This accords with the release standard in the not guilty but mentally ill statutes, which requires a court to find the committed person no longer suffers from a mental disease or disorder prior to release. Mont. Code Ann. §§ 46-14-302(1), -302(6). If a committed person is released on this premise, it follows that a court must again establish the mental disease or disorder before the person can be recommitted. It does not accord, however, with Mont. Code Ann. § 46-14-312(3)(c), which allowed Kepler to be released while still suffering from a mental disease or disorder. The release standard for guilty but mentally ill defendants supports an entirely different analysis. As explained above, as soon as Kepler failed to meet the terms of his community treatment plan, he no longer met the statutory standard for release under Mont. Code Ann. § 46-14-312(3)(c).

The inconsistencies between the guilty but mentally ill statutes and Mont. Code Ann. § 46-14-304 are further supported by Kepler’s request that he be immediately released based on Mont. Code Ann. § 46-14-304(2), which restricts a district court’s revocation jurisdiction to “no longer than 5 years.”<sup>11</sup> This jurisdictional provision contradicts the plain language of the guilty but mentally ill statutes and Kepler’s criminal conviction. *See* Mont. Code Ann. §§ 46-14-311 to -313. Like any other defendant serving a criminal sentence, a guilty but mentally ill defendant does not discharge from custody or supervision until the imposed period expires, Mont. Code Ann. § 46-14-313, and the district court cannot change “the length of confinement or supervision” after it is imposed, Mont. Code Ann. § 46-14-312(4).

These inconsistencies arise because the two statutory schemes address an entirely different category of defendants. Montana Code Annotated § 46-14-304 is specifically tailored for not guilty but mentally ill defendants, and the specific standards are only necessary in those cases because a defendant’s custody is based solely on the commitment procedures in Mont. Code Ann. §§ 46-14-301 to -304. Guilty but mentally ill defendants, who are convicted and sentenced, are expressly governed by Mont. Code Ann. §§ 46-14-311 to -313, which specifically

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<sup>11</sup> The legislature removed this jurisdictional restriction from the 2023 version of the statute. Mont. Code Ann. § 46-14-304 (2023).

incorporate the criminal sentencing statutes in Title 46, chapter 18. This includes the authority to suspend sentences, impose conditions, and revoke those sentences when necessary. Mont. Code Ann. §§ 46-14-312, 46-18-201, -203. This Court cannot omit the express adoption of these provisions. *See Merry*, ¶ 12. To interpret the statutes otherwise would ignore Kepler's conviction and the plain language of the two wholly separate statutory schemes. *See Brendal*, ¶ 18; *Merry*, ¶ 12.

The district court did not need to make any factual findings to support the revocation standard in Mont. Code Ann. § 46-14-304 because it did not apply. The district court correctly revoked Kepler's sentence pursuant to Mont. Code Ann. §§ 46-14-311 to -313, and this Court should affirm Kepler's sentence.

**C. Even if this Court applied the heightened revocation standard for not guilty but mentally ill defendants in Mont. Code Ann. § 46-14-304 to Kepler's guilty but mentally ill commitment and sentence, the record supported the district court's revocation order.**

Kepler's argument that the record does not meet the revocation standard in Mont. Code Ann. § 46-14-304 ignores the facts that resulted in his underlying conviction. Kepler does not dispute that he failed to meet various conditions of his release, failed to comply with his community treatment plan, and decompensated into a psychotic state. *See* Mont. Code Ann. § 46-14-304(1)(a). Kepler does not dispute that he twice absconded to Arizona while in a psychotic state. As the district court explained, Kepler's actions placed himself and others in the same

circumstances that previously resulted in the death of a woman, the substantial risk of death or serious bodily injury to others, and the destruction of vehicles. Kepler's conduct while he was on community release meets multiple, if not all, of the heightened revocation requirements in Mont. Code Ann. § 46-14-304(1)(b).

The district court correctly revoked Kepler's suspended sentences and community release even if this Court applies the heightened revocation standards for not guilty but mentally ill defendants.

### **CONCLUSION**

The State respectfully requests this Court affirm Kepler's sentence.

Respectfully submitted this 14th day of December, 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 9,382 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Brad Fjeldheim

BRAD FJELDHEIM

## **CERTIFICATE OF SERVICE**

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-14-2023:

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