

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0614

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER I. TOULOUSE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUE

Whether the district court lawfully sentenced the Appellant to the Montana State Prison after the Appellant admitted to violating the conditions of his suspended sentences and the revocation sentences were the same duration as the original sentences to the Department of Corrections, as allowed by statute.

STATEMENT OF THE CASE

On April 28, 2020, the State charged the Appellant, Christopher Toulouse (Toulouse), with misdemeanor partner or family member assault (PFMA), felony intimidation, felony stalking, and misdemeanor violation of a no contact order. (District Court Documents (Docs.) 1, 3-4.) On August 13, 2020, Toulouse pleaded guilty to misdemeanor PFMA, felony intimidation, and felony stalking. (Docs. 29-31.)

On October 15, 2020,¹ the district court sentenced Toulouse to 1 year at the Missoula County Detention Center (MCDC) with all but 24 hours suspended for the PFMA conviction, imposed a 10-year commitment to the Department of Corrections (DOC) with 5 years suspended for the felony intimidation conviction,

¹ The district court minute entry indicates that the sentencing hearing occurred on October 14, 2020. (Doc. 36.) The order scheduling the hearing, judgment, and transcript of the sentencing hearing indicate it occurred on October 15, 2020. (Docs. 35, 38 at 2, 24-33.)

and imposed a 5-year DOC commitment, all suspended, for the felony stalking conviction, to be served consecutively to the intimidation sentence. (Docs. 36, 38.)² In the conditions of Toulouse's release, the district court referenced that the victim had a 75-year order of protection against Toulouse that included the children until they reached the age of 18. (Doc. 38 at 6.)

On April 2, 2021, the State filed a petition to revoke. (Doc. 46.) The State alleged nine violations that were all new criminal offenses: two counts of felony stalking, one count of misdemeanor violation of order of protection, and six counts of felony violation of order of protection. (*Id.* at 3-4.) On August 31, 2021, Toulouse entered admissions to two violations: misdemeanor violation of order of protection and felony violation of order of protection. (Docs. 56-57.)

On September 30, 2021, the district court revoked Toulouse's sentences and imposed consecutive sentences of ten years at the Montana State Prison (MSP) for the felony intimidation conviction, and five years at MSP for the felony stalking conviction. (Docs. 59-60.)

² The district court attached to the judgment transcripts of the sentencing hearings that occurred on October 1, 2020, and October 15, 2020. (Doc. 38 at 11-43.) During the October 15, 2020, hearing, the district court said it included the transcripts so Toulouse's reaction would be clear to anyone dealing with him during his sentence. (Doc. 38 at 39-40; 10/15/20 Tr. at 29-30.) The State's citations to these transcripts will include both Doc. 38 and a parallel citation to the standalone transcripts.

STATEMENT OF THE FACTS

I. The offenses

On January 21, 2020, law enforcement contacted Lauren Johns (Johns) in response to a disturbance report. (Docs. 1 at 2, 38 at 6 (victim's name).)³ Johns told authorities that earlier in the night, Toulouse, who was her boyfriend at the time, began yelling at her. (Doc. 1 at 2.) She lay down on the bed, and Toulouse hit her near the left hip. (*Id.*) Johns got up, and Toulouse grabbed her neck and shoved her backwards. (*Id.*) Johns told authorities that “she was scared of what [Toulouse] would do to her during this interaction.” (*Id.*) Law enforcement arrested Toulouse, and the State charged him with PFMA in Missoula Municipal Court (Cause No. TK-2020-388). The municipal court prohibited Toulouse from contacting Johns as a condition of his release in that case. (*Id.*)

On April 17, 2020, law enforcement contacted Johns based on her report that Toulouse had violated the no contact order. (*Id.*) Johns told the officer that since Toulouse's January release in the municipal court case, “he continuously contacted [her] via text message, Facebook Messenger, phone calls, and showing up at her residence unannounced and uninvited.” (*Id.* at 3.)

[Johns] explained that shortly after Toulouse's release, someone broke into her home and wrote “I love you” and “Daddy loves you” on her bathroom mirror. [Johns] suspected that Toulouse was the culprit and

³ Toulouse pleaded guilty, so the facts of the offenses are based primarily on the State's affidavit in support of the Information.

told Officer Harvey that the incident frightened her so much that she had her locks changed and security locks installed. [Johns] also provided Officer Harvey with copies of text messages and Facebook messages sent by Toulouse from her phone.

(Id.)

The officer found numerous concerning issues in the communications that

Johns provided:

- Toulouse repeatedly attempted to coerce Johns to engage in an intimate relationship, despite Johns's requests for him to leave her alone;
- On March 21, 2020, Toulouse threatened to have Johns put in jail if she refused an intimate relationship with him;
- On March 26, 2020, in response to Johns's refusal to engage in an intimate relationship, Toulouse threatened to make her "feel some pain;"
- The same day, Toulouse sent a message that said if he went to jail for this he would get out and find her;
- The same day, Toulouse sent a message saying "bet your ass you will stay single if you're not with me. I'll bury you and the guy you welcome into my home and to my family! Promises, not threats!;"
- On March 31, 2020, Toulouse threatened to "'bury' any man that he believes [Johns] is talking to, telling her that it is a 'promise;'"
- The same day, Toulouse showed up to Johns's house, Johns did not answer the door, and Toulouse sat in his vehicle outside for 15-20 minutes before leaving;
- On April 1, 2020, Toulouse sent a series of messages that informed Johns that he intended to come to her house and said he could do so "whenever the fuck [he] feel[s] like it;"

- In the messages, Toulouse said, “I will go to jail or hell before I see you with another man or see another man with MY KIDS! YOU BETTER BELIEVE THAT!;”
- On April 6, 2020, Toulouse said, “You don’t get to be without me [Johns]!” and he “will remove [Johns] from our family!” and “I’ll sit in prison for the rest of my life before I go without my family at your hands!;”
- On April 8, 2020, Toulouse told Johns that he took their children’s bikes from Johns’s garage, and he intended to come to her house; and
- In response, Johns told Toulouse that he could not come to her house, and Toulouse responded that Johns does not “get to live life without [him].”

(*Id.* at 3-4.)

Johns told the officer that Toulouse’s behavior and threats had escalated since April 12, 2020. (*Id.* at 4.) Toulouse sent Johns 14 Facebook messages between March 26, 2020, and April 10, 2020. (*Id.*) Between April 14, 2020, and April 17, 2020, Toulouse sent Johns 75 Facebook messages. (*Id.*) On April 14, 2020, Toulouse told Johns “you are mine and always will be,” and said he “will destroy [Johns] and everything [she] love[s] if [she] do[esn]’t give [their] family a chance. That is a threat and a promise!” (*Id.* at 5.) On the day of his arrest, Toulouse sent Johns 29 Facebook messages. (*Id.*)

Between April 13, 2020, and April 17, 2020, phone data showed 81 phone calls between Toulouse and Johns, and that Johns declined, missed, or blocked 60 of the calls. (*Id.* at 5.) On April 14, 2020, Toulouse called Johns and left a

message. (*Id.*) Toulouse accused Johns of talking to another man and said when he found out who it was, he was “going to fucking kill both you mother fuckers and put you in the fucking ground.” (*Id.*) Toulouse said he had considered throwing Johns and the fictional male in a hole and letting the animals get them. (*Id.*)

Johns told the officer that “she is very afraid of Toulouse because she has been a victim of physical abuse at the hand of Toulouse over a period of 7 years.” (*Id.*) She said, “she believes that Toulouse is capable of physically harming or even killing her and believes that he would follow through on the threats he has made.” (*Id.*) At the time of his arrest, Toulouse had one prior conviction for stalking within the prior 20 years. (*Id.*)

II. Procedural history

On April 28, 2020, the State charged Toulouse with misdemeanor PFMA (first offense), in violation of Mont. Code Ann. § 45-5-206 (count one), felony intimidation, in violation of Mont. Code Ann. § 45-5-203 (count two), felony stalking (second or subsequent offense), in violation of Mont. Code Ann. § 45-5-220(1), -220(4)(b) (count three), and misdemeanor violation of a no contact order, in violation of Mont. Code Ann. § 45-5-209 (count four). (Docs. 1, 3-4.)

On August 12, 2020, the State filed a plea agreement and acknowledgement of rights signed by Toulouse. (Docs. 29-30.) Toulouse agreed to plead guilty to the

first three counts: misdemeanor PFMA, felony intimidation, and felony stalking. (Doc. 30.) The State agreed to dismiss count four and make a joint sentencing recommendation. (*Id.* at 1-3.) The parties agreed to recommend 1 year of jail time with all but 24 hours suspended for count one, a 10-year DOC commitment with 5 years suspended for count two, and a 5-year DOC commitment with no time suspended for count three. (*Id.* at 2-3.) The parties agreed to recommend that the sentences be imposed concurrently. (*Id.*) The parties also agreed to recommend that Toulouse be screened for placement in a prerelease center followed by the intensive supervision program. (*Id.* at 3.) Both the plea agreement and the acknowledgement of rights stated that the district court was not bound by the joint sentencing recommendation. (Docs. 29 at 5, 30 at 9-10.)

During a hearing on August 13, 2020, Toulouse pleaded guilty to misdemeanor PFMA, felony intimidation, and felony stalking. (Docs. 29-31.) Toulouse again acknowledged that the district court was not bound by the terms of the plea agreement. (Doc. 31.)

The district court held the first sentencing hearing on October 1, 2020. (Doc. 33.) The district court began the hearing by informing the parties that it was not inclined to run the last five-year sentence concurrently, but consecutively. (Doc. 38 at 15; 10/1/20 Tr. at 5.) Toulouse informed the district court that his attorney had spoken to the State had been assured this would not happen, so he

intended to “declare my attorney as ineffective counsel and take this to trial.” (Doc. 38 at 16; 10/1/20 Tr. at 6.) The district court advised Toulouse that a departure from the recommended sentence allowed him to withdraw his plea and he should discuss that with his current counsel. (Doc. 38 at 16-17; 10/1/20 Tr. at 6-7.)

In response, Toulouse had the following exchange with the district court:

THE DEFENDANT: I don’t want to discuss anything. If we’re not going to go with the plea deal, I want to withdraw my plea and go to trial.

THE COURT: So based on that statement, I’m at least going to continue it for two weeks to the 15th.

THE DEFENDANT: That’s a violation of my rights. If we’re not going to continue today with the plea deal, I want to withdraw my plea and proceed to trial. I’m going to exercise my speedy trial right.

THE COURT: And you may.

THE DEFENDANT: It’s a violation of my civil rights by continuing this and continuing this and continuing this. My victim is standing in court ready to give her statement. She’s already agreed to the sentence. The prosecutor has already agreed to the sentence. If you refuse the plea deal, then I’m withdrawing my plea and requesting that we set a trial date today. And I am exercising my speedy trial rights.

THE COURT: I will allow you—

THE DEFENDANT: I’m not going to continue this anymore. If you continue it, I’m going to press suit against you.

THE COURT: I will allow you to withdraw your plea. And we will set this matter for trial. The trial scheduling date will be on

October 15th at 10:30, or maybe we will do it on the Wednesday before.

THE DEFENDANT: And I'm exercising my speedy trial rights, as well.

THE COURT: So October 14th is a Wednesday. It gives us a little more flexibility. But I want to check in with counsel and make sure that works for counsel.

MR. KALMBACH: It does, Your Honor.

MR. LOWNEY: Yes, Your Honor.

THE COURT: So October 14th at 1:30 will be the day we set the matter for trial. It's not set for trial that date. That is the trial scheduling date. And the victim can participate by Zoom or be present in the courtroom as she is today.

....

THE DEFENDANT: There's also rights. And rights to a speedy trial is one of my civil rights, and I will be exercising that.

THE COURT: I think that's clear on the record, sir. You have said that four times now.

THE DEFENDANT: And what you're doing is dancing and trying [sic] make reasons as to why I won't have a speedy trial. And I will be exercising my right to a speedy trial. You will be held accountable as a judge, as a civil servant, an elected servant. You will be held accountable. My rights will be recognized.

THE COURT: So the next hearing is October 14th at 1:30. The T.O.P. is continued in effect.

(Doc. 38 at 19-22; 10/1/20 Tr. at 9-12.)

On October 5, 2020, Toulouse filed an unopposed motion to set a sentencing hearing. (Doc. 34.) The district court granted Toulouse's motion and set the sentencing hearing for October 15, 2020. (Doc. 35.)

At the beginning of the October 15, 2020 hearing, the district court acknowledged that Toulouse had withdrawn his pleas at the prior hearing. (Doc. 38 at 25-26; 10/15/20 Tr. at 15-16.) The district court had the following exchange with Toulouse:

THE COURT: So, Mr. Toulouse, again at our last appearance you did withdraw your guilty pleas. I wanted you to have some time to think about things. And by your attorney's statement, you have. So are you returning to your guilty pleas to Counts I, II, and III?

THE DEFENDANT: Yes.

THE COURT: And you're doing so of your own free will?

THE DEFENDANT: Yes.

THE COURT: And no one has made any threats or promises to you or tried to coerce it in any way?

THE DEFENDANT: No.

THE COURT: You're satisfied with the services of your attorney?

THE DEFENDANT: Yes.

THE COURT: And you're not exercising your right to be physically present in the courtroom for sentencing? You're willing to do it over the Zoom connection we have with the jail?

THE DEFENDANT: Yes.

THE COURT: And you're hearing everything that we are saying this morning?

THE DEFENDANT: Yes.

THE COURT: And you're understanding the sentence that I announced last appearance is the sentence that I am likely to impose?

THE DEFENDANT: I would like to hear it again.

THE COURT: Well, you will get to hear it, but I'm indicating that that is the sentence that I'm likely to impose. I haven't heard yet from the victim. I haven't heard yet from you, but that's what I gave indication of at the last appearance. So are you ready to proceed?

THE DEFENDANT: Yes, sir.

THE COURT: So I am adjudicating him guilty of those Counts I, II, and III as previously entered. I find the pleas to be entered voluntarily, intelligently and knowingly.

Further inquiry, Mr. Lowney?

MR. LOWNEY: No, Your Honor. I think I would just note that I think Mr. Toulouse needs to acknowledge that he is entering the pleas without the benefit of a plea agreement at this point since he withdrew from the prior plea agreement.

THE COURT: Do you understand that? You are entering without benefit of the plea agreement because you withdrew from the prior plea agreement?

THE DEFENDANT: No, sir.

THE COURT: So you want to stand by the prior plea agreement?

THE DEFENDANT: That's what my understanding was.

THE COURT: And you understand further that I am likely to go beyond that?

THE DEFENDANT: My understanding was that you were going [sic] impose a 15-year with ten years suspended. And the other stipulations of the plea agreement were going to stand.

THE COURT: So that's a significant change.

THE DEFENDANT: I don't understand if that was a question or—

THE COURT: Well, is it a significant change? Because I think the plea agreement called for ten years.

THE DEFENDANT: Yes, I believe it was ten years and five suspended. And what you were going to impose was 15 years with ten suspended.

THE COURT: Right. So you're willing to go forward with that?

THE DEFENDANT: Yes, sir.

(Doc. 38 at 26-29; 10/15/20 Tr. at 16-19.)

Johns provided an extensive victim impact statement that detailed years of physical, verbal, and emotional abuse by Toulouse during the years before he was arrested for PFMA, and his conduct that resulted in the underlying offenses. (Doc. 38 at 29-35; 10/15/20 Tr. at 19-25.) Johns asked the district court to grant a 75-year order of protection for her and the two children that she shared with Toulouse. (Doc. 38 at 34-35; 10/15/20 Tr. at 24-25.) The district court asked Toulouse if he

wanted to make a statement, and Toulouse said, “I don’t have a statement.”

(Doc. 38 at 36; 10/15/20 Tr. at 26.)

The district court specifically addressed the proposed condition Number 28 in the presentence investigation report, which prohibited contact with Johns or her immediate family. (Doc. 38 at 36; 10/15/20 Tr. at 26.) Toulouse said he was OK with that so long as he could maintain contact with his children. (*Id.*) The district court had the following exchange with Toulouse:

THE COURT: Well, this says no contact with the victim or their immediate family members.

THE DEFENDANT: No. Those are my children, and by law I can contact my children.

THE COURT: Well—

MS. JOHNS: Your Honor, I would be fine with phone calls on Sundays between 6:00 and 8:00, like I had told his lawyer previously.

THE DEFENDANT: And I’m going to speak with my children more than ten minutes a week.

THE COURT: Well, I just want to let you know—

THE DEFENDANT: I would be okay with two calls a week with my children.

THE COURT: We are beyond the point of negotiation, Mr. Toulouse. We also have pending a permanent Order of Protection request by Ms. Johns for both her and her children for at least until the children — It can only be maintained until the children are 18, and then they could determine whether or not they want to continue it. But she has requested here in the separate proceeding—it’s [a] 75-year Order of Protection. Are you contesting that? And that would also

apply to your children at least until their 18th birthday. Again, it's subject to her control. She can open it up or she can close it off.

MS. JOHNS: Your Honor—

THE DEFENDANT: She will be arrested before long anyway because of the numerous violations of probation. So I'm okay with whatever the Court's rule is on that Order of Protection, as long as I can speak with my children.

THE COURT: Sir, I just want you to hear again that if she determines that you can't, her determination controls.

THE DEFENDANT: Like I said, she will be in prison before long for her numerous probation violations anyway. So I'm okay with whatever the Court recommends, as long as I can speak to my children once a week.

Ms. Johns has had more than a dozen probation violations. She is facing prison time as it stands. So whenever that happens, I will retain custody of my children. So as long as I can have a once-a-week conversation with my children, I'm okay with whatever the Court rules.

THE COURT: Well, I'm not guaranteeing you that. I'm just recognizing her right to control that.

THE DEFENDANT: And she's stated, Your Honor, that she's okay with me speaking with my children on Sundays. So like I said, I'm okay with that and what the Court rules.

THE COURT: And I'm further ruling, just so you hear it, if she says there will be no contact, whatever week that is, that's the rule. No contact.

THE DEFENDANT: She will be in prison before long anyway, so that's fine by me.

THE COURT: I heard you say that you understand it. And I hear you say that it's fine by you.

THE DEFENDANT: Yes, sir.

THE COURT: There will be a zero tolerance on this judgment.

THE DEFENDANT: Fantastic. It should be that with her probation, as well.

THE COURT: And there will be a transcript of everything you said here and a transcript of everything you said at our last appearance. So—

THE DEFENDANT: Fantastic.

THE COURT: —so the full extent of your reaction to being told no or being told things are different is clear to your probation officer and clear to the Department of Corrections, who will be making a placement for you. There's no guarantee under this plea agreement or my sentence that they're going to put you in any particular program. They've got the final call as to whether you go to ISP or some other program or the Montana State Prison.

Do you have anything you want to add, Mr. Toulouse?

THE DEFENDANT: No, sir.

(Doc. 38 at 37-40; 10/15/20 Tr. at 27-30.)

The district court sentenced Toulouse to 1 year at MCDC with all but 24 hours suspended for the PFMA conviction, imposed a 10-year DOC commitment with 5 years suspended for the felony intimidation conviction, and imposed a 5-year DOC commitment, all suspended, for the felony stalking conviction. (Doc. 38 at 2, 40-42; 10/15/20 Tr. at 30-32.) The district court specified that it imposed the 5-year sentence consecutively to the 10-year sentence.

(*Id.*) The district court reduced Toulouse’s sentence by 181 days for credit for time served. (*Id.*) The district court imposed the 75-year order of protection requested by Johns. (*Id.*)

On October 16, 2020, Toulouse filed a petition for writ of habeas corpus with this Court. (*Toulouse v. Capt. Kowalski*, OP 20-0503 (10/16/20 Petition for Writ of Habeas Corpus).) Toulouse raised various claims, including excessive bail and ineffective assistance of counsel. (*Id.*) Toulouse asked for his immediate release, reimbursement for illegal incarceration, and dismissal of the charges. (*Id.*) This Court denied Toulouse’s petition on October 27, 2020, without a response from the State. (*Toulouse v. Capt. Kowalski*, OP 20-0503 (10/27/20 Order).)

On November 5, 2020, the district court issued its judgment, titled “**ZERO TOLERANCE JUDGMENT**,” and attached a transcript of the sentencing hearings that occurred on October 1, 2020, and October 15, 2020. (Doc. 38 (emphasis in original).) The district court included a general condition restricting contact with the victim, but added, “**The Defendant is granted telephone contact with his children. Lauren Johns has an Order of Protection for 75 years that applies to the children until they reach the age of 18.**” (Doc. 38 at 6 (emphasis in original).)

On December 21, 2020, Toulouse filed a notice of appeal. (Doc. 43.) Toulouse's appellate counsel filed an *Anders*⁴ brief and motion to withdraw, and Toulouse objected. (*State v. Toulouse*, Mont. Sup. Ct. No. DA 20-0606 (12/30/21 *Anders* Brief of Appellant; 2/25/22 Objection to *Anders* Brief).) On March 8, 2022, this Court granted appellate counsel's motion to withdraw and dismissed Toulouse's appeal. (*State v. Toulouse*, Mont. Sup. Ct. No. DA 20-0606 (3/8/22 Order).)

III. The revocation

On April 2, 2021, the State filed a petition to revoke Toulouse's suspended sentences. (Doc. 46.) The State alleged nine violations that were all new criminal offenses: two counts of felony stalking, in violation of Mont. Code Ann. §§ 45-5-220(1), -220(4)(b), one count of misdemeanor violation of order of protection (second offense), in violation of Mont. Code Ann. § 45-5-626(3), and six counts of felony violation of order of protection (third or subsequent offense), in violation of Mont. Code Ann. § 45-5-626(3). (*Id.* at 3-4.)

The State alleged that on March 29, 2021, Johns reported to law enforcement that Toulouse had been contacting her by posting comments on

⁴ Filed pursuant to Mont. Code Ann. § 46-8-103(2) and *Anders v. California*, 386 U.S. 738 (1967).

photos on a Google account that Johns had previously shared access to with Toulouse. (Doc. 46 at 4.) Johns understood the messages were directed at her because only she and Toulouse had access to the photos. (*Id.*) The officer reviewed the account and found 63 separate messages posted by Toulouse between March 25, 2021, and March 30, 2021. (*Id.*) Toulouse's comments included:

- "I just needed one more chance;"
- "I will never give up on this;"
- "I will do everything I can to get it back;" and
- "I am broken and just need to hear your voice even if it's just one last time."

(*Id.*) The State also filed new criminal charges against Toulouse for his conduct in Missoula County Cause No. DC-21-190. (Docs. 47-48, 57; 9/30/21 Tr. at 19.)

Toulouse initially denied the allegations. (Doc. 50.) On August 26, 2021, Toulouse filed an unopposed motion to set a hearing for entry of admissions, which the district court granted. (Docs. 54-55.) On August 31, 2021, Toulouse filed an entry of admissions and waiver of rights that specified he admitted to two violations: misdemeanor violation of order of protection and felony violation of order of protection (third or subsequent offense). (Docs. 56-57.) During a hearing on September 2, 2021, Toulouse informed the district court that he understood his rights, he waived his right to a hearing on the alleged violations, and he was

satisfied with his legal services. (Doc. 57.)⁵ Toulouse entered his admissions, and the district court scheduled a sentencing hearing. (*Id.*)

During the sentencing hearing on September 30, 2021, Johns reiterated the severe physical abuse that Toulouse inflicted on her during their relationship.

(9/30/21 Tr. at 6-9.) Johns explained Toulouse's comments to her on the Google account:

It wasn't even one week after being sent to [the prerelease center in] Great Falls that [Toulouse] started messaging me through a private Google account that we had shared in the past for photo sharing. He knew that I was attached to those photos, and I was the only one that could see the messages. I knew then that this will never stop. He will never leave me alone. It's an obsession that he has with me, and it's terrifying. The things that he stated in the messages made me very uncomfortable and afraid. Given the chance, he will find me and cause extreme harm and pain to me. He has told me multiple times that he would kill me or bury me in the ground, and no one will ever find me. I 100 percent believe it.

(*Id.* at 6.) Johns continued:

I allowed [Toulouse] to have weekly phone calls with the kids. He even abused that privilege and used it as a way to get messages to me through the kids. Had said inappropriate, upsetting adult things to them that he directed at me. The times I'd not answer the phone in order to protect them, he called repeatedly at least seven times in a row. When he is given any leeway, he takes advantage and uses every opportunity to exert control over me. Every chance he has, he finds a way to give me the message that he will always be watching me and I am not safe from him.

⁵ Toulouse did not provide a transcript of the September 2, 2021, hearing.

(*Id.* at 8-9.) Johns said Toulouse’s abuse “will only stop when he is sent to the Montana State Prison for the remainder of his full sentence.” (*Id.* at 7-8.)

The State recommended the district court revoke both of Toulouse’s sentences and impose ten years of incarceration at MSP for the intimidation conviction and five years of incarceration at MSP for the stalking conviction. (*Id.* at 12.) Toulouse recommended the district court continue the original sentences. (*Id.* at 15.) The district court revoked both sentences and imposed ten years at MSP, none suspended, for the intimidation conviction and five years in MSP, none suspended, for the stalking conviction. (*Id.* at 18-19.) The State informed the district court that it would dismiss the new charges against Toulouse in DC-21-190. (*Id.* at 19.) On October 12, 2021, the district court filed the written judgment that specified the sentences were imposed consecutively and reduced Toulouse’s sentence by 531 days of credit for time served. (Doc. 60.)

Toulouse appealed. (Docs. 64-66.)

SUMMARY OF THE ARGUMENT

The district court lawfully sentenced Toulouse to MSP after he admitted to violating the conditions of his original suspended sentences. The district court originally imposed consecutive ten-year and five-year DOC sentences for Toulouse’s underlying convictions. On revocation, the district court imposed

consecutive ten-year and five-year MSP sentences. The district court did not exceed its sentencing authority because the plain language of Mont. Code Ann. § 46-18-203(7)(a)(iii) allowed it to impose any sentence on revocation that did “not include a longer imprisonment or commitment term.” Neither Toulouse nor this Court can insert a distinction between DOC and MSP sentences that is not included in the plain statutory language.

To the extent that the MSP revocation sentences implicated due process, the sentences do not violate Toulouse’s rights. A court can impose a more burdensome sentence if it is based on conduct that occurred after the original sentencing. A defendant’s due process rights are protected by the revocation statutes, which only allow a court to impose a revocation sentence if the State proves that a defendant violated the terms of a suspended or deferred sentence. Here, Toulouse admitted to violating the conditions of his suspended sentences, and he does not challenge the district court’s decision to revoke them. The district court’s decision to sentence Toulouse to MSP does not violate due process because the record shows that the district court imposed the sentences based on Toulouse’s admitted violations, which was conduct that occurred after the original sentencing.

This Court should affirm Toulouse’s revocation sentences.

ARGUMENT

I. Standard of review

This Court generally reviews criminal sentences for legality. *State v. Keefe*, 2022 MT 121, ¶ 12, 409 Mont. 86, 512 P.3d 741. Claims that a sentence violates the constitution are reviewed de novo. *Id.*

Statutory interpretation is a question of law that this Court reviews de novo. *State v. Howard*, 2020 MT 279, ¶ 8, 402 Mont. 54, 475 P.3d 392. “Whether a district court was authorized to take a specific action is a question of law subject to de novo review.” *Id.*

II. The district court lawfully imposed an MSP sentence on revocation because the plain statutory language allows it and the sentences were based on Toulouse’s conduct after the original sentencing.

“[A] sentence is not illegal if it falls within statutory parameters.” *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892. The revocation statutes provide a district court with the following authority:

If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence and the violation is not a compliance violation, the judge may . . . revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not

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include a longer imprisonment or commitment term than the original sentence[.]

Mont. Code Ann. § 46-18-203(7)(a)(iii) (2021).⁶

The revocation sentences that the district court imposed were within its sentencing authority because they did “not include a longer imprisonment or commitment term than the original sentence.” *See id.* The district court originally sentenced Toulouse to a 10-year DOC commitment with five years suspended for his intimidation conviction and a five-year DOC commitment for his stalking conviction, all suspended. On revocation, the district court imposed a ten-year MSP sentence for Toulouse’s intimidation conviction and a five-year MSP sentence for his stalking conviction. For both revocation sentences, the district court imposed the same duration as the original sentences, which was within its express statutory authority. *Id.*

Toulouse’s only argument is that the district court could not impose MSP sentences on revocation when the original sentences were DOC commitments. (Appellant’s Brief (Br.) at 4-6.) But the statute neither requires a DOC sentence on revocation in these circumstances nor prohibits the district court from imposing an MSP sentence. Mont. Code Ann. § 46-18-203(7)(a)(iii). Toulouse cannot convince this Court to read this requirement into the plain language of Mont. Code Ann.

⁶ The applicable version of Mont. Code Ann. § 46-18-203(7)(a)(iii) is the 2021 version, as cited throughout.

§ 46-18-203(7)(a)(iii). “A judge’s role in statutory interpretation is to ascertain and declare what is in terms or substance contained therein, not to insert what is omitted or to omit what has been inserted.” *State v. Johnson*, 2022 MT 216, ¶ 13, 410 Mont. 391, 519 P.3d 804 (citing Mont. Code Ann. § 1-2-101). The only statutory restriction is the duration of the sentence term, and the revocation sentences that the district court imposed here were within that restriction. *Id.*

Toulouse attempts to equate the MSP revocation sentences to “longer actual imprisonment” than the original DOC sentences, but he provides no authority that supports this assertion. (Br. at 6.) Any relief that Toulouse could obtain based on *State v. Jackson*, 2007 MT 186, ¶¶ 14-17, 338 Mont. 344, 165 P.3d 321, is limited to due process and it does not undermine the district court’s compliance with the plain statutory language of Mont. Code Ann. § 46-18-203(7)(a)(iii).

In *Jackson*, ¶¶ 2-3, the district court first imposed a six-year DOC commitment with no time suspended, which violated Mont. Code Ann. § 46-18-201(3)(d)(i) (2005). This Court reversed the conviction and remanded for resentencing. *Id.* ¶ 4. On remand, the district court resentedenced the defendant to six years at MSP and concluded that the MSP sentence was not more onerous than the DOC sentence. *Id.*

On appeal, this Court reversed on due process grounds. *Id.* ¶¶ 14-17. This Court explained:

Due process requires a court to base a more burdensome re-sentence on “objective information concerning identifiable conduct of the defendant after the original sentencing and the reasons for the longer sentence must affirmatively appear on the record.” A court denies a defendant’s due process rights by imposing a heavier sentence on the defendant as punishment for setting aside his original sentence.

Id. ¶ 14 (citing *State v. Redfern*, 2004 MT 277, ¶ 12, 323 Mont. 225, 99 P.3d 223; *North Carolina v. Pearce*, 395 U.S. 711, 722-24 (1969)) (internal citations omitted). This Court held that the MSP sentence in the circumstances presented in *Jackson*, ¶ 15, was a more burdensome sentence than a DOC commitment of the same term because an MSP sentence “necessarily require[d] incarceration in a detention facility.” The more burdensome sentence violated due process because the district court failed to justify it with “objective information concerning identifiable conduct of the defendant after the original sentencing.” *Id.* ¶ 16.

This Court’s holding in *Jackson*, ¶¶ 14-17, does not show the district court here exceeded the sentencing authority provided in Mont. Code Ann. § 46-18-203(7)(a)(iii). Nothing in *Jackson*, ¶¶ 14-17, supports Toulouse’s argument that his revocation sentences—a 15-year total commitment to MSP—resulted in “a longer actual imprisonment” (Br. at 6) than his original sentences—a 15-year total commitment to DOC. This Court reasoned in *Jackson*, ¶¶ 15-16, that an MSP sentence is more burdensome than a DOC sentence based on the nature of an MSP sentence, not its duration. This Court explained that the MSP sentence afforded the defendant “less flexibility than his original commitment to the DOC.” *Jackson*,

¶ 16. The State acknowledges that the nature of an MSP sentence may be more burdensome than a DOC sentence. *See Jackson*, ¶ 15 (changing a DOC sentence to an MSP sentence of fewer years may not be more burdensome). But *Jackson*, ¶¶ 14-17, does not cause an MSP revocation sentence of the exact same duration as the original DOC sentence to be “a longer imprisonment or commitment term.” *See Mont. Code Ann. § 46-18-203(7)(a)(iii)*.

Moreover, *Jackson*, ¶¶ 14-17, does not show that Toulouse’s revocation sentence violated due process. The facts in *Jackson*, ¶¶ 2-4, are distinguishable because the defendant was being resentenced to replace an unlawful original sentence. He was not being sentenced on revocation like Toulouse. *See id.* To the extent *Jackson*, ¶¶ 14-17, applies, this Court specified that a sentencing court may impose a more burdensome sentence if it complies with the due process requirements. Here, the statutory revocation procedures met those requirements, and Toulouse does not challenge the revocation of his suspended sentences on appeal. *See Jackson*, ¶ 14 (explaining the due process requirements that must be followed to impose a more burdensome resentence); *Mont. Code Ann. § 46-18-203*.

The revocation process provides a defendant with various due process protections, which the district court followed. *See Mont. Code Ann. § 46-18-203*. A district court cannot impose a revocation sentence without first revoking the

original sentence based on conduct that occurred after the original sentencing. Mont. Code Ann. § 46-18-203. During the revocation proceedings, Toulouse admitted he had committed two violations of the conditions of his suspended sentences after his original sentence was imposed. Toulouse’s violations allowed the district court to impose a more burdensome sentence because they were objective information of identifiable conduct that occurred after the original sentencing. *See Jackson*, ¶ 14.

Unlike the sentencing court in *Jackson*, ¶ 16, the district court’s comments to Toulouse—in addition to the record of Toulouse’s admitted violations—show the district court imposed the MSP revocation sentence based on his conduct after the original sentencing. (9/30/21 Tr. at 19 (the district court told Toulouse “you had an opportunity and you forfeited it”).) This complied with due process. *See Jackson*, ¶¶ 14-17. Once the district court revoked Toulouse’s sentences, it was statutorily authorized to impose MSP sentences of the same duration as the original DOC sentences. This complied with Mont. Code Ann. § 46-18-203(7)(a)(iii).

Collaterally, Toulouse argues that his plea was premised on a DOC sentence, and he would not have entered the plea if he had been properly informed. (Br. at 5-6.) The circumstances of Toulouse’s original pleas are irrelevant, and this Court should reject this untimely and unsupported argument. Toulouse has not supported this argument with any facts or authority. *See Johnston v. Palmer*, 2007 MT 99,

¶ 30, 337 Mont. 101, 158 P.3d 998 (“it is not this Court’s obligation to conduct legal research on behalf of a party, to guess at his or her precise position, or to develop legal analysis that may lend support to that position”). He did not challenge his guilty plea with a motion to withdraw or on direct appeal, and the time to challenge his underlying conviction has passed. *See* Mont. Code Ann. § 46-16-105(2) (a defendant may timely file a motion to withdraw a guilty plea); Mont. R. App. P. 4(5)(b)(i) (a defendant may timely file a direct appeal); *see also State v. Toulouse*, Mont. Sup. Ct. No. DA 20-0606 (if any fact in the record supported this argument, Toulouse had the opportunity to pursue it with counsel on direct appeal).

Moreover, the record contradicts Toulouse’s argument that he was not fully informed of the sentencing ramifications of his guilty pleas. The district court—in addition to the plea agreement—made it abundantly clear to Toulouse that a DOC sentence was not guaranteed by his plea agreement. During the initial sentencing hearing, the district court explained to Toulouse that it was not required and did not intend to follow the plea agreement. Toulouse objected, and the district court allowed him to withdraw his pleas. Two weeks later—pursuant to Toulouse’s request—the district court allowed him to renew the plea agreement and re-enter his guilty pleas. The district court ensured on the record that Toulouse made that choice voluntarily, knowingly, and intelligently.

The only issue properly before this Court is the legality of Toulouse's revocation sentences. This Court should affirm Toulouse's revocation sentences because the district court had express statutory authority to impose them and they did not violate Toulouse's due process rights.

CONCLUSION

The State respectfully requests this Court affirm Toulouse's revocation sentence.

Respectfully submitted this 4th day of January, 2024.

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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 6,739 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

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