

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0668

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STATE OF MONTANA,  
Plaintiff and Appellee,

v.

NICHOLOS ADAMS WELLS,  
Defendant and Appellant.

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**BRIEF OF APPELLANT**

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

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## STATEMENT OF ISSUES

**ISSUE: 1.** Is the Court's adoption of condition #26, as written, allowing for "the search of electronic devices, to include cell phone, personal computer and social media, if reasonable suspicion exists to believe that the Appellant has contacted his victim is an overboard and unconstitutional violation of the Appellant's rights against unreasonable searches and seizures.

**ISSUE: 2.** Does ordering the Appellant in condition number 27 to participate in a specifically named program that may or may not be available to the Appellant subject the Appellant to a condition that is over broad and lacking a specific nexus to the Appellant.

**ISSUE: 3.** Does the adoption by the Court of condition number 28 that requires the Appellant to sign an Intimate Partner Disclosure and a n Offensive Contact Contract disclosure violate the Appellant's constitutional right to freedom of association and by its very nature is overbroad and illegal and for its lack of nexus as required by state law?

## STATEMENT OF THE CASE

Prior to the entry of a plea agreement, the Appellant was charged by Information, with one count Strangulation of a Partner or Family Member, a felony and one count of Partner or Family Member Assault (3rd or Subsequent Offense, a felony, (D.C. Doc. 3)

The appellant entered into a plea agreement and subsequently plead guilty to PARTNER OR FAMILY MEMBER ASSAULT (3<sup>rd</sup> or SUBSEQUENT OFFENSE), Felony. (D.C. Doc. 18)

A sentencing hearing was held where defense counsel objected to 4 conditions of the suspended sentence that was pronounced by the court. (Sent. Hrg. Trn. At 23, 24, 25 and 26). Additional objections were made to Condition 13 and its subsections that concern certain financial obligations of the Appellant. These financial obligation objections were grant by the Court. All other conditions were objected to base upon being over broad and constitutionally impaired. The sentence pronounced by the Court was a five-year sentence to Montana State Prison with all of that time suspended. (Sen. Hrg. Trn. At 44). The Court modified various aspects of Condition 13 and its financial aspects and adopted over the

objections of the Appellant's attorney "Conditions #26,27 and 28. (Sent. Hrg. Trn. At at 33, 34 and 35. The appellant remains on community supervision as of the time and appeals the decision of the Court.

### STATEMENT OF FACTS

In April of 2022, the Cascade County Attorney's office charged the appellant, Nicholas Adams Wells, in a filed information with Count 1: STRANGULATION OF A PARTNER OR FAMILY MEMBER and Count 2: PARTNER OR FAMILY MEMBER ASSUALT ( 3<sup>rd</sup> or SUBSEQUENT OFFENSE) a Felony.(D.C. Doc 3) All of which were the result of an altercation with the appellant's significant other and who is the mother of his children. All of the alleged events occurred in Cascade County, Montana.

A plea agreement was executed by the relevant parties, which by its terms and conditions the appellant would plead guilty to one count of PARTNER OR FAMILY MEMBER ASSUALT (3<sup>rd</sup> or SUBSEQUENT OFFENSE) A felony. (D.C. Doc. 18)

As consideration for the dismissal of Count 1 of the information, the appellant agreed to plead guilty to Count 2 (*supra*) of the information and understood that the State would recommend the maximum amount of

time provided by statute for this offense but would not ask that the appellant be designated a persistent felony offender.

A change of plea hearing was held, with the Court accepting the plea of guilty of the appellant and set a sentencing hearing date. The Court also, ordered a Presentence Investigation Report be completed by the Department of Corrections. Said report was completed, which include a list of standard and specific conditions for the Court to order as part of any suspended sentence. (D.C. Doc. 21)

The PSI included statements made by its author that the Appellant had fail to take responsibility for his actions and blamed the victim. (D.C. Doc. 21, PSI report, at 3). At the sentencing hearing, Appellant's attorney argued that the Appellant misunderstood the question and has taken responsibility for his actions. Further that his response was to identify the cause of the altercation. The Appellant stated that he felt bad about the incident and should have left the home. (Sent. Hrg. Trn, 20 and 21.)

At the sentencing hearing the State followed the terms of the plea agreement and asked for the stated sentence, which was 5 years, to the Montana State Prison with all of that time suspended and with the conditions outlined in the Presentence Report.

The Defense argued for a 6-year deferred imposition of sentence to facilitate the rehabilitation of the Appellant. Further arguing the higher possibility for achieving a change in the Appellant, with the longer term and bigger reward, if he achieves the objections of the treatment programs and community supervision. (Sen. Hr. Trn. At 37)

The terms of community supervision were discussed by both parties, with the defense counsel making numerous objections to conditions numbers: 13, 26, 27 and 28 as outlined in the Presentence Investigation Report These “Conditions covered the financial obligation of the appellant, searches of electronic devices, completion of certain not yet existent but named programs and disclosure of intimate partner relationships by the Appellant to his supervising officer. The objections include concerns for their constitutionality, over broadness and vagueness as to the consequences of a violation and relationship to the adopted MIIG.

Condition 26 of the PSI: “26. Probation officer may conduct a search of electronic devices, to include cell phone, personal computer, and social media, if reasonable suspicion exists that the Defendant is attempting to

contract the victim in violation of the Defendants conditions of supervision.” (PSI. at 10, D.C. Doc.20 at10.)

Appellant’s attorney argued that the condition is over broad in that even with reasonable suspicion the condition allows for the search of Appellant’s electronic devices that are not involved in the bases for the reasonable suspicion. The attorney argued that the best course of action would for a warrant should be obtained in which the officer would be obligated to identify which devices were involved. He further argued that “contact with a victim” is not in itself a crime and at best it could be a violation of a no contact order. The officer will more than likely know how if any contact was made and allowing to explore all devices is constitutional over broad and reasonable warrantless search.

Condition 27 of the PSI. “27. The Defendant must enter and complete a Victim Impact Listen and Learn Programming and Victim Impact Panel.” (PSI at 10, D.C. Doc 20 at 10).

At the sentencing hearing the Appellant’s attorney argue for his objection by indicating the 8<sup>th</sup>. Amendment of the United States Constitution would be violated in that without a showing that the program ordered is in fact rehabilitative and focused on the specific needs

of the Appellant it would be a cruel and unusual punishment in violation of the rights of the Appellant. It could very well be a shaming mechanism. The failure by the State to offer evidentiary support for the program makes it ordering a violation of the Appellant's rights. (Sent. Hrg. Tr. At 25.

The State in its rebuttal of the Defendant's objection goes further than the Appellant's attorney in downgrading the program by indicating that all to support the named program is the fact that it is part of a known program, the "Duluth Model". The prosecution goes on to defend the condition by indicating that the Department of Corrections may not even adopt the "Duluth Model" and create its own. This is based upon potential financial costs to the State. (Sent. Hrg. Tr. At 29 and 30.)

Condition 28 of the PSI. "28. The Defendant shall sign and abide by an Intimate Partner Disclosure and an Offensive Contact Contract provided by his/her Probation and Parole Officer if required by his supervising Officer." PSI at 10, D.C. Doc. 20 at 10.

The Appellant's attorney argued at sentencing that condition 28 interfered with the Appellant's right of freedom of speech and association as guaranteed under the 1<sup>st</sup>. Amendment of the United States

Constitution. It allows for a third party to chill that right as the condition expects that all intimate association, one night stands etc. be reported to the probation officer. A failure to do so could result in a violation of this term and condition. (Sent. Hrg. Tr. At 26.)

The attorney at sentencing as to all of the conditions objected to above argues that the failure of MIIG to cover these specific conditions makes this judgment vague. This is so because the Appellant does not know if any violation of these 3 conditions “compliance or noncompliance violation” is. He further argued that the lack of being part of the specific conditions under the MIIG leaves these conditions without statutory authority. (Sent. Hrg. Tr. At 26)

The Court, after hearing arguments from both the State and the Defense, granted the Defenses objection to certain financial obligations out lined in the paragraphs of “Condition 13”. Said approval being done without the objection of the State.

As to “PSI Conditions” 26, 27, and 28, the Court chooses to adopt and order them as part of his sentence. The oral pronouncement by the Court from the bench is not fully enumerated in the final written

judgment that is signed by the Court, as to PSI condition number 28, even though all of the conditions were adopted by reference.

The adopted PSI conditions that are contested as part of this appeal are as follows:

Department of Corrections Presentence Report Dated: 9-13-2022  
provided on Page 8: “RECOMMENDED SPECIAL CONDITIONS:

“.....

26. Probation and Parole Officer may conduct a search of electronic devices to include, cell phone, personal computer, and social media, if reasonable suspicion exists that the Defendant is attempting to contact the victim in violation of the Defendants conditions of supervision.

27. The Defendant must enter and complete a Victim Impact Listen and Learn Programming and Victim Impact Panel.

28. The Defendant shall sign and abide by an Intimate Partner Disclosure and Offensive Contact Contract provided by his/her Probation and Parole Officer if required by his supervising officer.”

### STANDARDS OF REVIEW

The Court reviews probation conditions “under a dual standard of review: we first review de novo the legality of the probation conditions; we then review the conditions’ reasonableness for abuse of discretion.” *State v. Bonacorsi*, 2022 MT 86N, 409 Mont. 554 (citing *State v. Stiles*, 2008 MT 390, 347 Mont. 95).

The Bonacorsi Court stated that may reverse a statutorily authorized sentencing condition if it lacks some “nexus” to the underlying offense or offender or it is ‘overly broad or unduly punitive, citing *State V. Bullplume, 2013 MT 169 Paragraph 18, 370 Mont 453.*

### SUMMARY OF ARGUMENT

**Issue 1:** Condition # 26 allows for an unconstitutional search and seizure of the Appellant’s electronic devices by allowing additional searching of non-contacted electronic devices based upon an allegation of contact via one electronic device. The overboard language of the condition opens the Appellant to searches for which there has been no articulated suspension for any wrongdoing as to the use of that other device.

**Issue 2:** The language of condition #27 of the PSI as ordered by the sentencing Court, fails to meet the statutory sentencing policy of this State in that all sentences must be “timely, consistent and understandable”. The program being ordered may or may not be available to the Appellant at the time of sentencing and leaves to the probation officer/department of corrections the courts statutory obligation to sentence the Appellant. The lack of specific disclosure of a

program that is in place violates the law of this State that requires that be a nexus between the condition and the Appellant. This requirement cannot be determined if there is no specific program to be evaluated by the Court at the time of sentencing.

Issue3: The terms of Condition #28 of the PSI allows for the direct infringement of the fundamental right of freedom of association. This infringement is permissible when there is some articulable nexus between the condition and the case or the Appellant. The information before the sentencing Court indicated that it that condition #28 requiring the Appellant sign on to the Intimate Partner Disclosure and an Offensive Contact Contract was for sex offenders and their management. The condition lacks nexus to the case and this defendant in that there was no criminal history or facts of this case that contacted the Appellant to any sexual misconduct either by act or criminal conviction. The lack of nexus and the lack of clarity as to the rehabilitation affects for the Appellant make it a statutory as well as a constitutional violation of the Appellant's rights.

## ARGUMENT

**ISSUE: 1. Is the Court’s adoption of condition #26, as written, allowing for “the search of electronic devices, to include cell phone, personal computer and social media, if reasonable suspicion exists to believe that the Appellant has contacted his victim is an overboard and unconstitutional violation of the Appellant’s rights against unreasonable searches and seizures.**

It is well settled law that the Fourth Amendment of the United States Constitution and Article II, section 11 of the Montana State Constitution guarantees the people of this State to right to be free from all unreasonable searches and seizures of their person, houses, and personal items. For which they have a reasonable expectation of privacy. *U.S. Const. Amend. IV; Mont. Const. Art. II, Sec.11.* Additionally, *Article II, section 10 of the Montana Constitution* affords broader as well as greater protections one’s privacy by guaranteeing the right to “individual privacy.” *Mont. Const. Art.II section10*; see also *State v. Solis* 214 Mont. (Mont310, 319, 693 P.12d. 518, 533 (1984). *Const. art. II Sec.10 right to privacy.* “is the cornerstone of (the) protection [ ] against unreasonable searches and seizures” under *Mont. Const. art. II Sec. 11*).

“Except under recognized and narrowly stated exceptions”, warrantless searches are per se unreasonable. *State v. Peoples*, 2022 MT. 4, 407 Mont. 84, 502 P3rd 129. Since about 1988 this court has cut out a special needs’ exception for a probation search. *State v. Burke*, 235 Mont. 165, 169 766 P2d 254, 256 (1988).

Given the state of the law at this time there is no disagreement that the right of privacy of a probationer is diminished while one is under supervision, **but it is not done away with.** (emphasize *added*). *State v. Moody*, 2006 MT 305 Paea. 27., 334 Mont. 517, 148P.3d. 662 This particularly true given that his Court has cut out a narrow exception to this right, when there is “reasonable cause to suspect under all articulated facts and given the totality of the situation that a violation of the conditions of probation has happened...” *Peoples*, Para. 17(*supra*) 407 Mont. At101: *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct.3164,3168, 97 L.ed.2d 709 (1987).

This is not the legal position the prosecution started from and from which the conditions in this case were adopted over the objections of Appellant’s Counsel at the sentencing hearing.

The prosecution in his opening gambit and discussion of the

objections by the defense to the proposed conditions sets out the boundaries of the constitutional rights of the Defendant and the tone of that discussion in the prosecution's mind by arguing to the Court, that he would have no constitutional rights if the Court sentenced him to prison. He states: "Okay. So, when Mr. Kuntz, (defendant's lower court attorney) argues that, "quote, these conditions would violate his constitutional rights, the Court could sentence him to the Montana State Prison for the entire term, which would prevent him from having any of those rights. ..." (Sen. Hr. Trn. At 27 at line 5)

And further the State's position is clearly stated, when discussing Condition #26 when he states "...is a condition of his probation a condition of **grace (*emphasis added*)** granted by the State, by this **court, can violate his constitutional right when he's basically - his constitutional rights are suspended and are abrogated by his conviction...**" (Sen. Hr. Trn. At 28 line 18).

The implication being that the Defendant should accept what ever is offered for conditions because he is a whole lot better off that if he was in prison. Further, that as a probationer he basically has no constitutional rights that are not suspended and done away with. This

is a thin and grandiose legal argument give this courts existing opinions and the opinions of the United State Supreme Court particularly in the area of searches.

In the non-published case of *State v. Woody*, 2021 MT 38N which cites the publish cases of *State v. Fisher*, 2014 MT 112 and *State Moody* 3006 Mt. 305 went out of its way to acknowledge the differences in expectations of the Defendant between one that is incarcerated and one on probation. The Court clearly distinguished the diminished expectation of one right for the probation from the “no expectation of the incarcerated.”

These Court’s found that even though diminished the rights of the probationer do exist and not simply at the level that the State and the prosecution wants to set, as to the opinion held by the prosecution in this matter. The *Moody*, (*supra*), court in its opinion summed up the issue up succinctly: at page 11 of the opinion when it stated: While supervised probationers necessarily have diminished expectation of privacy due the nature of probation and the compelling government interests involved, their probation **status does not completely deprive** (*emphasis added*)

them of any right to privacy.” It is to the level of diminishment that the objections raised by trial counsel really addresses.

As to the first issue in this matter, is the Court’s adoption of “special condition” # 26 of the Presentence Investigation Report, (herein after referred to as the *PSI*), which allows for the search of electronic devices, to include cell phone, personal computer and social media, if reasonable suspicion exists to believe that the Appellant has contracted his victim is an over board and unconstitutional violation of the Appellant’s rights against unreasonable searches and seizures, the Appellant argues that the extent of a search as allowed by the broad language of the condition is a violation of his rights as provided for under the constitutions of the State of Montana and the United States and relevant case law.

The crux of the problem is that the language of the condition is focused on the contact not on the method of contact. The reasonable suspicion as outlined in the condition allows for all of the electronic devices of the Appellant to be searched regardless of whether or not that particular device might be the source of or method of contact.

The United States Supreme Court has on many occasions protected the Probationer from unreasonable searches, *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L.Ed. 2<sup>nd</sup> 709 (1987)

“In Montana there must be a factual foundation for any warrantless/probationary search and the search must not be used as an instrument of harassment or intimidation.” *State v. Fischer*, 2014 Mt 112 Para. 11, 374 Mont. 533, 323 P. ed. 891 (citing *State v. Burke*, 235 Mont. 165, 171, 766 P2. 254, 257 (1988) . *Fischer (supra)* sets the baseline for any search when the court states that whether reasonable grounds exist is a factual inquiry determined by the totality of the circumstances. *Fischer* Para11 (*supra*).

The way that condition #26 of the PSI is written the facts that lead to only one device should not automatically lead to all the devices own by the Appellant, for the purposes of a warrantless search. The Montana Supreme Court in *Peoples*, ((*supra*))(citing *Terry v. Ohio*, 392 U.S.1,17-21, 88 S. Ct. 1868, 1878-80, 20 L.Ed.2d 889 (1968) clearly state that the “scope and duration of a warrantless search or seizure “must be strictly tied to and justified by the circumstances which rendered... [it] permissible.”

The Montana Supreme Court in *State v. Zeimer*, 2022 MT 96, 510 P.3d.100 stated that, the scope of a search or seizure may only be lawfully expanded “upon development of a new or expanded particularized suspicion of criminal activity based on additional specific and articulable facts” [.]

Condition #26 as written allows for the probation officer to start with a device that he was told or knows was used by the Appellant to contact the victim in his case and leap frog that particularized suspicion into a search of all of the devices of the Appellant without being able to articular new and additional specific facts as required by this Court in *Zeimer*, ((*supra*)).

A condition that opens a door to a search without defining or limiting the devices available to be searched undermines the inquiry as whether the search was warranted or not is in violation of the Montana Supreme Court opinion in *Peoples* ((*supra*)) as an extension of *Terry*. ((*supra*))

Condition #26 needs to be struck and rewritten by the lower court to specify the limitations of any search device or their number based upon

articulated facts that leads to a reasonable suspicion that leads to the search.

**ISSUE: 2.** Does ordering the Appellant in condition number 27 to participate in a specifically named program that may or may not be available to the Appellant and allow for the substitution of other unnamed or existent program at the time of sentencing an a illegal delegation of authority to the probation officer and a violation of statute/sentencing policy that requires that all sentences be “timely, consistent and understandable.

The factual basis for the problem raised in condition #27 is found in the description of the bases for condition# 27 as outlined in the prosecution argument at the sentencing hearing.

The prosecution argued: “Again Condition 27 states that the Defendant must enter and complete a Victim Impact Listen and Learn programming and victim Impact. Those are part of the Duluth Model treatment programming for victim’s intervention.

So they’re basically putting it in their terminology. They can define that and the terms are going to change depending on who wrote the program, whether they are paying for the Duluth model, or whether the Department of Corrections develops their own model.

I’ve seen the Department of Corrections develop their own model for programing so that they don’t have to pay the people that developed

it in another state the licensing fees because those get expensive. And they don't want to have to then pass the costs onto the Defendant to pay for them.”

46-18-101(3)(a) MCA specifically states: “Sentencing and punishment **must be certain**, timely, consistent and understandable.” *(emphasis added)* As much as the Appellant may appreciate the concern of the Department of Corrections for the potential cost saving to the Appellant, the law of this State requires that the sentence be one that is certain...understandable at the time that it is handed down. There is no certainty in a condition that is not certain in itself whether as to what is now required of the Appellant or will be required in the future. Or in what form that condition may look like in the future.

The conflict really arises when the Court with its statutory authority to craft conditions that are rehabilitative in nature or for the protection of society and or the victim, as authorized under 46-18-202(1)(f) MCA is asked to make a determination, as he was here by the Appellant and his objections, as to the rehabilitative or protective nature of the condition. Without either a general statement of objective as to the type of program or a designation of a specific program, that exists at the time of sentencing, the Court is asked to do what former President Ronald Regan

described as the most frightening words in the English language. He reported that those words are: “I am from the government and here to help!” A paraphrase for this case might be, Trust us, we are the Department of Corrections!

This is the position that the Department of Corrections places the Court and the defense in when factual precision is replaced with the word salad of the prosecution, as in this case at the sentencing hearing.

It is important to note that the opinion of this Court in *State v. Ommundson*, 1999 MT 16, 293 Mont. 133, 974 P.2d 620 was cited by *State v. Greensweight* 2008 MT185 343 Mont. 474. 187P.3d 613 and stated that there must be some *nexus* between the objectives of rehabilitation and protection to the underlying offense of this defendant. In this case how can the Court make that determination, if the program ordered is some vague ideal or speculation yet to be made concrete or more importantly not passed through the statutory administrative process of approval.

By allowing the Department of Corrections to substitute something in the future for its present vagueness, places the District Court in the position of delegating its authority to the probation officer, when ordering

one program and allowing the probation officer/Department of Corrections to change the court's judgment. This delegation of the District Court's authority to the probation officer/Department of Corrections is not permitted in several sentencing areas. ie: restitution, term of long-term incarceration for violation of the conditions of probation and others. The authority to sentence and set conditions is strictly and "exclusively" by statute the sole authority of the District Court. *State v. Brotherton* 2008 MT 119, 342 Mont. 511, 182 P3.d 88 citing 46-18-103 MCA.

The present condition #27 must either be eliminated as it presently reads and rewritten naming a specific existing program that is presently operated by the Department of Corrections that the District Court can evaluate as meeting the nexus requirements of the statute and the stated purpose of rehabilitation or protection of society. The offered "word salad" by the prosecution at the sentencing hearing does not ensure that the statutory sentencing policies of this State are being carried out.

**ISSUE: 3.** Does the adoption by the Court of condition number 28 that requires that the Appellant sign a Intimate Partner Disclosure and Offensive Contract violate the Appellant's constitutional right to freedom

of association and by its very nature is overbroad and illegal and for its lack of nexus as required by State law?

The discussion on this condition Number 28 of the PSI, starts with the legal requirement as found in the Montana case of *State v. Ommundson*, 1999 MT 16, 293 Mont. 133, 974 P2d. 620 which the Court in that case articulated the requirement of a *nexus* between the probation condition and the facts of the case at bar. There must be some connection between the two. This nexus concept/requirement was expanded by *State v. Ashby*, 2008 Mt 83, 342 Mont. 187 which allowed that *nexus* to be found in a connection between the Defendant and his past or present with the required condition. The Ashby opinion went on to cite, *State v. Stiles*, 2008 MT 390, 347 Mont. 95, 197 P3d. 966.

The *Ashby* court, while citing to *Stiles, supra*, concluded that: “A district court abuses its discretion... if a *nexus (emphasis added)* does not exist between the condition and either the offense or characteristics of the of the offender.” At P6.

The only support for the prosecution’s objection to striking this condition in found starting at page 30 line 14:

“As to condition 28, that is, again, another part of the Duluth Model programming.” (Sent. Hrg. Tr. At 30, line 14).

The defense counsel in its argument against the condition provides more information than the prosecution. The sentencing attorney for the Appellant states:

“When Officer Moore testified in another case about this,( *the Intimate Partner Disclosure and an Offensive Contact Contract*) (*emphasis provided*) they identified that they’re expecting individuals who are using social media to make contact with potential intimate partners to report that. They are expecting people who might have a sexual encounter, a one-night stand to report that.” (Sent. Hrg. Tr. Line 13 at 25 and 26.)

It should be noted that the prosecution at the sentencing hearing did not in way contradict or offer any evidence to show that the condition was in fact directed towards the management of sexual predators, as stated by the attorney for the Appellant.

If the purpose of this condition/contract is to monitor sexual predators, where is the *nexus* with this Appellant? There is no allegation present or past of sexual misconduct on the part of the Appellant. The PSI does not report any convictions or charges of such conduct. (PSI dated: 09/22/2022 at page 2).

This Court in *State v. Greensweight*, 2008 MT 185, 17, 343 Mont 474 187P3d. 613 stated:

“This test allows a sentencing Court discretion to craft conditions of sentenced appropriate to the management of probationers generally but also requires the court to individualize its exercise of discretion so as to impose conditions that have some correlation or connection to the unique background and characteristics of the individual offender.”

The key words from the above quote are the *Greensweight* ((*supra*)) Court instructed the lower court to “individualize its exercise of discretion.” The wholesale adoption of the PSI “recommended Special Conditions” does not meet that “individualization” asked for by the *Greensweight* Court. (PSI dated 09/13/2022 page10.)

This restriction or requirement that the Appellant execute this contract, as argued at the sentencing hearing in the lower court, obviously infringes upon the Appellant’s right to freedom of Association as protected by the Constitution of the State of Montana, Article II. Section 6 and 7. It talks about the freedom of ‘peaceably assembly and ‘petition to redress’, when commonly read they incorporates the freedom of association. Its counterpart on the federal level is the First Amendment to the United States Constitution. Infringe might be the wrong description but it surely chills the Appellant right to associate. It

is easy to imagine a conversation between the Appellant and a potential intimate partner, as something like this: By the way I have to disclose your name etc. to my probation officer. You should be aware of that before we participate in whatever.”

It is well established that Section 46-18-202(1)(c) MCA allows for probation conditions to restrict this right of association. This Court in its opinion in *State v. Meyers*, 2007 MT 230, 15, 339 Mont.160, 168 P3d. 645 states:

“Accordingly, each restriction must be analyzed to determine whether it is reasonably related to the objectives of rehabilitation or protection of the victim and society.”

Who is being protected when the Appellant is told to disclose his intimate sexual partners? The victim is not, as the sentencing court ordered a permanent restraining/no contact order between the Appellant and his victim. How is society protected particularly, when the disclosure occurs after the fact and how does the probation officer effectively use the information. The sentencing hearing record is at best almost blank in its support for this restriction.

What makes it more difficult is that a copy of the Disclosure form and contact is not readily available to anyone. This raises the question that at the time of sentencing of the Appellant, did it even exist in a form that would be analysis by defense counsel, as it related to the specific charges that the Appellant was convicted. Or was this just another soon-to-happen event that may or may not be part of some Duluth Model that had yet to be created in this State.

The prosecution failed to present any testimony or evidence to this Court upon which it could meet its obligation to determine based upon facts that its obligation under *Meyers (supra)* was met and supported by the record.

### CONCLUSION

The respectfully requests this Court determine that Conditions # 26, #27 and #28 to be over broad or with without nexus to this Appellant. Condition #26 be remanded to the district court to be rewritten to narrow the scope of any search to just the device directly determined to by the device used to contact, if any, the victim. Further, that Conditions 27 and 28 be remanded to the District Court for specificity as to specific

program being ordered and a finding of its relationship to the either rehabilitation of the Appellant or protection of the victim or society.

Respectfully submitted this 22nd 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 primary brief is printed with proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows 365 is 5684, excluding Table of Authorities, certificate of Service, Certificate of Compliance and Appendices.

/s/ Gregory E. Paskell  
Gregory E. Paskell

January 22, 2024  
Date

**APPENDIX**

**Sentencing Order.....App.A**

## CERTIFICATE OF SERVICE

I, Gregory E. Paskell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-22-2024:

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