IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0478

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSIAH BRACKETT,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUES

Through Appellant's knowing, voluntary, and intelligent guilty plea—including his bargain with the State to expressly waive his right to appeal his conviction and to plead guilty in exchange for the State's recommendation for dismissal of three felony counts of stalking—has Appellant waived his right to bring constitutional challenges to his conviction on appeal?

If not, has Appellant met his burden to show that, in light of *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), Montana's stalking statute is unconstitutional facially and as applied to him?

STATEMENT OF THE CASE

The State charged Appellant Josiah Brackett with seven counts of stalking, all against the same victim, A.L., and covering discrete monthly periods of time from July-December 2020, and March-April 2021. (Doc. 40, Second Amended Inform.) The State alleged that Brackett's conduct was calling A.L., sending her multiple direct messages, posting on social media, and creating other means of communications to stalk her. (*Id.*) The State alleged that Brackett acted with knowledge to cause substantial emotional distress. (*Id.*)

Brackett and the State entered into a Mont. Code Ann. § 46-12-211(1)(c) plea agreement,[1] whereby the State agreed to move to dismiss Counts I, II, and IV at sentencing in exchange for Brackett's guilty pleas to Counts III, V, VI, and VII. (State's Ex. 1 at 1, 3, 2/28/22 plea agreement, *offered and admitted at* 3/4/22 Tr. at 4.) The State further agreed to recommend commitment to the Department of Public Health and Human Services (DPHHS) for 5 years for each of the 4 counts, all consecutive, for a total recommended 20-year sentence as follows: 10 years in DPHHS custody, followed by 10 years suspended.[2] (*Id*. at 3.)

Brackett signed an Acknowledgement and Waiver of Rights by Plea of Guilty, affirming, among other waived rights, he was giving up his "right to appeal [his] conviction" without reservation. (Doc. 95 at 2.) He also agreed he was waiving "any factual dispute" as to his guilt. (*Id*. at 1.) He further agreed to waive "[t]he right to have the State prove each element of the offense(s) beyond a reasonable doubt." (*Id*.)

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[1] Under the (1)(c) plea agreement, even if the court does not accept the agreement, the defendant has no right to withdraw his plea. Mont. Code Ann. § 46-12-211(1)(c) (". . . the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea[.]"); *see State v. Olson*, 2014 MT 8, ¶¶ 14-16, 373 Mont. 262, 317 P.3d 159; *see also* Change of Plea Tr. at 7-8 (district court here explaining the effect of a (1)(c) agreement).

[2] Under this recommended DPHHS sentence, incorporating credit for time served, Brackett could be paroled back to California in a year if he successfully completed his mental health treatment at MSH. (6/29/22 Tr. at 82-83.)

At his change of plea hearing, Brackett confirmed: (1) all the rights he was giving up as detailed in his Acknowledgement; (2) his knowledge as to all the consequences of his guilty plea; and (3) his satisfaction with his attorney. (3/4/22 Tr. at 7-10.) The district court confirmed that defense counsel discussed all of Brackett's rights with him and that they had not had communication problems. (*Id*. at 18.) Finally, the court specifically inquired:

> [COURT]: Do you believe [your client] understands the constitutional rights he's waiving today by pleading guilty to those four counts?
>
> [DEFENSE COUNSEL]: I believe he does. We've had some lengthy discussions about them and discussed them at length multiple times, and I do believe that he understands the rights he is waiving today.
>
> [COURT]: And do you believe he makes that waiver knowingly and voluntarily?
>
> [DEFENSE COUNSEL]: I do.

(*Id*. at 18-19.)

Brackett pleaded guilty to Counts III, V, VI and VII. (*Id*. at 11-12.) He admitted he possessed the subjective *mens rea* for each count—that is, that he "knows or should know" that his conduct would cause substantial emotional distress—and further admitted that he committed the other elements of stalking. (*Id*. at 12-19.)

Accordingly, the district court found "that Mr. Brackett has knowingly and voluntarily waived his rights[,]" and he had "knowingly and voluntarily entered pleas of guilty." (*Id*. at 19.) The court accepted his guilty pleas. (*Id*.)

At the June 29, 2022 sentencing, the State abided by its agreed-upon recommendation in full. (6/29/22 Tr. at 81-82.) Under the 1(c) plea agreement, Brackett was allowed to recommend any legal sentence, and he recommended a 12-year deferred sentence. (*Id*. at 112.)

Departing downward from the State's recommendation, the district court sentenced Brackett to DPHHS for a total of 18 years, with 10 years suspended, with a recommended placement at Montana State Hospital.[3] (Doc. 125; 6/30/22 Tr. at 22-24.) In accordance with the plea agreement, the court dismissed Counts I, II, and IV. (Doc. 126; 6/30/22 Tr. at 34-35.)

Over a year after Brackett's change of plea, on June 27, 2023, the U.S. Supreme Court decided *Counterman*, analyzing true threats under Colorado's stalking statute and determining that the First Amendment required a minimum *mens rea* of recklessness for statements that are categorized as "true threats." *Counterman*, 143 S. Ct. at 2111-12. The Supreme Court held that Counterman's stalking judgment could not be upheld because Colorado's stalking statute did not

[3] Count III, 5 years, none suspended; Count V, 3 years, none suspended; Count VI, 5 years, all suspended; Count VII, 5 years, all suspended; all counts consecutive.

require the prosecution to show "any awareness on [Counterman's] part that the statements could be understood [as threats]" but rather only contemplated "whether a reasonable person would understand ["Counterman's] statements as threats." *Id*. at 2119.

Brackett appeals, alleging that Montana's stalking statute is like Colorado's stalking statute, arguing that Montana's stalking statute has an objective, not subjective *mens rea*, or, alternatively, the subjective *mens rea* does not meet the minimum standard of recklessness. (Appellant's Br. at 13.)

STATEMENT OF THE FACTS

I. The offenses

In the summer of 2019, the victim, A.L., met Brackett briefly while she was working on a fire crew in Lake Tahoe, California. (Doc. 38 at 5; 6/30/22 Tr. at 6-7.) After working the job, A.L. returned home to Bozeman. (6/30/22 Tr. at 6-7.)

Despite only being acquaintances, Brackett became obsessed with A.L. and began to follow her on social media. (Doc. 38 at 5.) He found pictures of her on social media dating back years before the two met in 2019. (*Id*.) He sent unwanted calls, texts, emails, and posts. In response, A.L. tried to block Brackett on her social media accounts at least nine times. (*Id*.)

On April 3, 2020, A.L. secured a temporary order of protection against Brackett. (Doc. 38 at 1.) A few weeks later, when Brackett failed to attend the subsequent hearing, a permanent order of protection was issued, prohibiting Brackett from contacting A.L. through any means, including third parties. (*Id*. at 2.) The order also prohibited Brackett from "harassing, threatening, abusing, following, stalking, annoying, or disturbing the peace" of A.L. (*Id*.)

Brackett did not abide by the protection order. He made numerous Facebook "comments" and "likes" on photos depicting A.L., posting comments such as "I SEE [A.L]" and "I got my eyes on [A.L.]!" (Doc. 38 at 2.) When A.L. blocked his social media accounts, he would create new accounts, tailored exclusively to A.L. (*Id*. at 3.) His accounts would be named "i_got_my_eyes_on_you" and "Josiah_loves_[A.L.]" (*Id*.) On the accounts themselves, Bracket would post "memes" about stalking—with stock images of a person looking through binoculars and language underneath—professing, "I'M NOT A STALKER, I'M JUST VERY INTERESTED IN YOU" and "BACK IN MY DAY WE STALKED WITH BINOCULARS, NOT FACEBOOK" and "YEAH TAKE IT OFF." (*Id*.)

Brackett started alluding to his own awareness of his criminal conduct, and began posting on Facebook:

- I'm not a criminal for liking every single picture of [A.L.] on Facebook! I can't help that she's gorgeous okay! !!

- I'd liked just about every single picture of [A.L.] that I could find and the total of photos liked would be to infinity and beyond! And liking pictures on Facebook and Instagram is not a crime.

- Send me to jail already.

- HEADED TO THE SLAMMER

- So apparently, I'm a "Creeper"

(Doc. 38 at 4.)

In August 2020, A.L. received a phone call from an "unknown caller" and a disguised voice said "I love you" twice before ending the call. (*Id*.)

Brackett's behavior still escalated. Brackett began posting on social media and directly messaging A.L., explaining his intent to move from Lake Tahoe to Bozeman to be with A.L.:

- I need to see [A.L.] already[.] I'm going to resign soon and head on Over to Montana early[.] I can always reapply or find a fire job elsewhere[.]

- I love you. Unblock me on everything and get in contact with me again. And if you don't I think I'll die. I got a job with CAL FIRE & I'm raking up money before I come to Bozeman.

- It's a rough life and I'm so ready for the off season so I can meet up with [A.L.]! I'm coming for [A.L.].

(Doc. 38 at 5.) A.L. distributed flyers around Bozeman, giving information about Brackett and the protective order, and also expressing fear that Brackett intended to harm her if he came to Bozeman. (6/29/22 Tr. at 67; State's Ex. 2.)

Brackett started threatening A.L.'s boyfriend. Brackett initially obtained his phone number and left him a "warning" to "be with [A.L.] no longer." (Doc. 38 at 6.) In a later escalation, Brackett told A.L., "So I think I'll actually kill [your boyfriend] if you don't break up with him." (*Id*. at 8.) Brackett followed that up with a "jk" for just kidding. (*Id*.) Brackett also told A.L., "No more boyfriends for you [A.L.] because my plan is to take you home." (*Id*.)

Brackett also began sending A.L. curated song playlists, under the account names such as "Josiah + [A.L.] = [heart shape emoji]" and with playlists such as "Love Letter," and "Rise up, my darling!" and "Come away with me, my fair one!" and "Dreaming of you" and "[A.L.], you are always on my mind." (Doc. 38 at 7.) Brackett also sent escalatory and aggressive playlists entitled "unblock me" and "Ghosted, blocked & a restraining order [sad face, broken heart emoji]" and finally "No more boyfriends for you [A.L.] because I'm here no[w] & we're going home." (*Id*.) In total, Brackett created over 125 playlists for A.L. (6/29/22 Tr. at 70.)

In November 2020, Brackett's language escalated to sexual advances toward A.L. (Doc. 38 at 7.) He stated in a message, "The average joe watches porn. I choose to not be like the average Joe in the year 2020. If I'm going to masturbate, I only the [sic, think] about [A.L.] since she's the only woman that I choose to pursue . . . I hope it makes her feel real good inside knowing that I only think of her and picture her in my mind." (*Id*. at 6-7.) He sent A.L. photos of him holding

personal lubricant and a sex toy, along with handwritten notes such as "Josiah loves [A.L.]" (*Id*. at 7.) He sent unrelenting sexual text messages to A.L.:

- [A.L.]! I've been buying masturbation toys and I only think about you when I use them.
- I wanna be your pussy monster [A.L.]! I want to park my limo in your garage.
- So when I think about you I touch myself and I'm getting tired of only using my hand so I've been using toys with my hand and I'm good at going for a long time because I relax before I cum . . . I want you to play with me [A.L.] so be my friend.

(*Id*.)

In November and December 2020, just prior to being arrested on stalking charges, Brackett's obsession continued. He found A.L. on TikTok and commented three separate times:

- I love everything about you and you are so much cooler than me and I wish that I was as good at TikTok like you are
- I love your pretty face
- OMG!! You're so adorable

(Doc. 38 at 8.)

Brackett soon started posting pictures of A.L. and referencing her on Snapchat. (Doc. 38 at 8.) One was a picture of a deer with the caption, "I got a spotting Scope to find [A.L.] in Montana so I can spot her from far distance! #RestrainingOrder #BirdWatching." (*Id*.) Another post is a picture of Brackett's

smart watch screen where he had put as his cover picture a photo of A.L., with the caption, "Obsessed." (*Id*.) Another post is pictures of railroad tracks with the captions, "If you don't love me I'll go crazy!" and "If you don't invite me back into your life I'll go crazy." (*Id*.) Brackett also made some new playlists for A.L. with titles like:

- [A.L.] you can't run and hide [A.L.]
- [Your boyfriend] will prob make more money than me cuz he's smart so I don't blame you
- Woman is the root of all evil
- [A.L.] you make my life hard [A.L.]

(*Id*.)

In December 2020, Brackett was arrested in California and extradited to Montana. (6/29/22 Tr. at 68-69.) But even after Brackett was charged with multiple stalking offenses, he still attempted to contact A.L. from jail in March/April 2021. (Doc. 38 at 9.) First, he attempted to call A.L. directly, but the jail had blocked her number. (*Id*.) Undeterred, Brackett found a workaround by using a jail kiosk called "Inmate Canteen" whereupon inmates can request friends and family to buy commissary and phone cards. (*Id*.) Thus, two automated texts were sent to A.L. which read, "Josiah Brackett wishes to inform you that they are in custody at Gallatin County, MT. Go to http://www.inmatecanteen.com to see way you can interact." (*Id*.)

Based on Brackett's aggressive and disturbing stalking behavior, A.L. was "extraordinarily concerned for her wellbeing and safety." (Doc. 38 at 6.) And because of the escalating behavior of Brackett threatening to come to Bozeman and not stopping until he was in jail, A.L. became "afraid for her life." (*Id*.)

II. The change of plea

Brackett allocuted to the elements of each offense subject to his guilty plea.

A. Count III

Count III alleged that, in September 2020, Brackett repeatedly directly and indirectly contacted A.L. through messages, calls, and posts on various social media, causing her substantial emotional distress. (Doc. 40.) Brackett confirmed that, by September 2020, an order of protection was already in place prohibiting his contact with A.L. and affirmed he purposely or knowingly contacted A.L. more than one time. (3/4/22 Tr. at 12-13.) Defense counsel asked:

> [DEFENSE COUNSEL]: And would you agree that by texting [A.L.] or calling her or trying to communicate with her through the means in September, that you knew or should have known that that would cause her substantial emotional distress?
>
> [BRACKETT]: I concur. I agree.

(*Id*. at 13.)

B. Count V

Count V alleged that, in November 2020, Brackett repeatedly contacted A.L. in the same manner. (Doc. 40.) Brackett additionally confirmed that he "called and left voicemails at least two times to [A.L]." (3/4/22 Tr. at 13-14.) He understood the order of protection was taken out against him. (*Id*. at 14.) Brackett again agreed it was "correct" that he knew or should have known his conduct would cause substantial emotional distress. (*Id*.) Defense counsel also confirmed:

> [DEFENSE COUNSEL]: You purposely or knowingly tried to call her or text her; is that true?
>
> [BRACKETT]: That's correct.

(*Id*.)

C. Count VI

Count VI alleged similar conduct in December 2020. (Doc. 40.) Brackett confirmed the same information as above, including that he purposely or knowingly attempted to contact A.L. through messages and social media in December. (3/4/22 Tr. at 15.) Defense counsel asked:

> [DEFENSE COUNSEL]: Do you agree that your contacting [A.L.], that you knew or you should have known it would cause her substantial emotional distress?
>
> [BRACKETT]: I agree I should have known.

(*Id*.)

D. Count VII

Count VII alleged that, after Brackett was arrested for the other 2020 stalking offenses, in March/April 2021, Brackett repeatedly texted and called A.L. from jail. (Doc. 40.) Brackett confirmed he engaged in that conduct "through inmate canteen" at least two times, and that he did so "knowingly." (3/4/22 Tr. at 16.) He lastly agreed that, given the existence of the order of protection, he knew or should have known such conduct would cause substantial emotional distress. (*Id*. at 17.)

E. Conclusion

Finally, after Brackett confirmed he met all the elements of each offense, the district court inquired:

> [COURT]: Thank you, [counsel] All right. Mr. Brackett, just so we're clear for the record then, you've now pled guilty to Counts 3, 5, 6, and 7. Each of those is a count of stalking, a felony. You agree sir, at the end of the day, there is no doubt you are guilty of Counts 3, 5, 6, and 7?
>
> [BRACKETT]: There is no doubt, I agree, Your Honor.

(3/4/22 Tr. at 18.)

III. The sentencing

A. Mental Disease and Disorder Evaluations

Dr. Bowman Smelko conducted a mental disease or disorder evaluation. While concluding that Brackett had a "delusional disorder, erotomanic type,"[4] Dr. Smelko determined that Brackett "had knowledge of his actions and clear purpose with regard to the actions held despite them being driven by an obsession for the alleged victim through the delusional process noted above." (Smelko Eval. at 5, 9.)

What was concerning to Dr. Smelko was Brackett's minimization of his criminal conduct. Dr. Smelko recalled Brackett's interview statements that Brackett acknowledged the protective order against him was real but he believed it contained "false statements" and "bullshit." (Smelko Eval. at 7.) Dr. Smelko nonetheless explained, "In the current evaluation, Mr. Brackett demonstrated that he appreciated the fact that if a no-contact order was in place, he was not to have contact with the alleged victim and that this was against the law." (Smelko Eval. at 10-11.)

[4] The delusional "Erotomanic subtype" is the "presence of one or more delusions involving situations that persist at least one month. This subtype applies when the central theme of the delusion is that another person is in love with the individual." (Michael J. Scolatti Mental State Eval. at 15) (reaching the same diagnosis as Dr. Smelko.)

In a separate evaluation, Dr. Scolatti largely concurred with Dr. Smelko's opinions. Dr. Scolatti noted that Brackett was "extremely immature for his age and has a fantasy perception of life and romantic relationships." (Scolatti Eval. at 16.) Dr. Scolatti nonetheless explained that "[a]t the time of the commission of the offenses, Mr. Brackett acted knowingly and purposely." (*Id*. at 21.)

Both Drs. Scolatti and Smelko recommended that Bracket be placed in the custody of DPHHS. (Scolatti Eval. at 22; Smelko Eval. at 11.)

B. The PSI

In the Defendant's PSI statement, Brackett admitted he contacted A.L. through social media and by phone after being ordered by the court not to. (Doc. 116, PSI at 4.) Brackett further admitted, "I was in the wrong to contact her after being ordered not to." (*Id*.)

At sentencing, Brackett would explain, "I do have regrets for the things that I did say." Brackett explained that he recognized that his terminology "was offensive, and I do have remorse, and I am very sorry that [A.L.] feels the way that she does . . . ." (6/29/22 Tr. at 122.)

C. Victim impact

A.L. wrote to the court that "[t]he experience of being stalked was the most horrifying and humiliating thing I've ever experienced." (6/29/22 Letter at 1.)

For half a year in 2020, A.L. was "on high alert at all times" because she "was terrified." (*Id*.) She distributed flyers around town alerting her "neighbors, boss, and [an organization] at MSU to warn them to call the police if [Brackett] was ever seen in Montana." (*Id*.) She practiced with mace and her father added extra locks and installed security cameras around her house. (*Id*.) She took self-defense classes and handgun classes. (*Id*. at 2.) She went to therapy. (*Id*.) She had multiple physical conditions from stress. (*Id*.) She suffered from insomnia, nightmares, and persistent fear. (*Id*.) She still has nightmares. (*Id*.) She quit her job because she "couldn't get through a shift without crying." She explained, [t]he emotional weight of this crime impacted every area of my life." (*Id*. at 2-3.)

In essence, she explained, Brackett "stole [her] happiness" and "sense of safety." (*Id*. at 3.) She explained that Brackett "stole most of the characteristics about myself that I liked: being fun, free-spirited, care-free, optimistic." (*Id*.) Because of Brackett's actions, she was "in a deep dark pit of hopelessness and depression." (*Id*.)

After summarizing the substantial changes in her life and the stress and fear she experienced from Brackett's predatory behavior, A.L. said:

> My loved ones and I should not have to live secretive lives and carry weapons and be on edge. When [Brackett] is eventually released from custody I do not know what I will do, but I will not risk this happening again by assuming that I can live my life normally. I

> fear being raped or kidnapped by [Brackett]. I am also afraid he will try to kill me or one of my loved ones out of revenge. All I want is to be left alone. Thank you for all you have done to help protect me.

(*Id*. at 3.)

D. The sentencing

In pronouncing the sentence, the district court explained that Brackett's repeated and obsessive contacts—even after his incarceration, along with the two psychological evaluations, showed that Brackett was suffering from a "serious mental health disorder" that needed to be addressed now. (6/30/22 Tr. at 14.) To ensure treatment, the district court opted for a custodial DPHHS commitment. (*Id*. at 15-16.) However, the district court diverted from the State's recommendation by subtracting two years from the State's recommended custodial sentence. (*Id*. at 16.)

As a result, the district court advised Brackett that, if he cooperated with his treatment at MSH, he would be soon eligible for parole and, "at that time, that he would be able to return to California and continue to receive treatment there." (6/30/22 Tr. at 16-17.) The Court noted that his sentence "protects [A.L.]," and "protects the public," and "that's how we can change the course of Mr. Brackett's life and get him back on the right track. It's going to be up to him to do it [by engaging in treatment]." (*Id*.)

SUMMARY OF THE ARGUMENT

Brackett waived his right to challenge the constitutionality of Montana's stalking statute by his entry of a knowing and voluntary guilty plea after negotiating a favorable plea agreement. As this Court held in *State v. Andrews*, 2010 MT 154, 357 Mont. 52, 236 P.3d 574 and *State v. Ferris*, 2010 MT 252, 358 Mont. 244, 244 P.3d 732, a guilty plea is made based on the law applicable at the time the plea is accepted by the district court, and such a plea cannot be withdrawn even if a later judicial decision changes the law. And pursuant to this Court's long-standing precedent as explained in *State v. Watts*, 2016 MT 331, 386 Mont. 8, 385 P.3d 960, a knowing, voluntary, and intelligent waiver of the right to appeal is binding and includes a waiver of constitutional claims. Here, Brackett does not address his appellate waivers at all, much less argue that his plea was somehow involuntary, which is the only argument he is legally permitted to make on appeal after his guilty plea. By pleading guilty under the law known at the time, without reserving any appellate remedies, Brackett bore the risk that the law could change. This Court should accordingly decline to consider Brackett's facial and as-applied constitutional challenges to Montana's stalking statute.

Even if this Court further considered Brackett's claim that *Counterman* has any effect on Montana's stalking statute, Brackett's cursory arguments fail to meet his heavy burden to show that the stalking statute is unconstitutional beyond a

reasonable doubt. Brackett is mistaken in his argument that, like Colorado's stalking statute, Montana's stalking statute does not have a subjective *mens rea*. Unlike Colorado's statute which had no subjective knowledge directed toward the recipient of the threats, Montana's statute specifically requires that the offender has subjective knowledge that his conduct is causing substantial emotional distress. Knowledge is a higher and more demanding *mens rea* than the minimum standard of "recklessness" the Supreme Court approved in *Counterman*. Brackett's argument that Montana's stalking statute is deficient because the statute includes an objective reasonable person standard fails because Montana has adopted a subjective *mens rea*. And, as Brackett himself appears to concede, "should know" as used in the stalking statute is simply a mirror standard of recklessness, or the equivalent standard of negligence in Montana.

Finally, if this Court reaches Brackett's as-applied challenge, Brackett cannot show he is entitled to withdraw his plea. Brackett repeatedly affirmed he knew about the order of protection A.L. took out against him, repeatedly contacted A.L. anyway, and conceded at the change of plea that he met the subjective knowledge element of stalking. This Court should affirm.

STANDARD OF REVIEW

This Court may permit a defendant to withdraw a guilty plea upon a showing of "good cause." *Andrews*, ¶ 11 (citations omitted). The constitutionality of a statute is a question of law, which this Court reviews for correctness. *Watts*, ¶ 7.

ARGUMENT

I. Brackett's challenge to the constitutionality of the stalking statute is waived.

"[D]efendants waive fundamental state and federal constitutional rights when they are induced to plead guilty by reason of a plea agreement." *State v. Collins*, 2023 MT 78, ¶ 14, 412 Mont. 77, 528 P.3d 1106 (citing *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); *State v. Rardon*, 2002 MT 345, ¶ 16, 313 Mont. 321, 61 P.3d 132). "Montana's long standing jurisprudence holds that 'where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea.'" *Watts*, ¶ 9; *citing State v. Lindsey*, 2011 MT 46, ¶ 19, 359 Mont. 362, 249 P.3d 491; *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104; *State v. Kelsch*, 2008 MT 339, ¶ 8, 346 Mont. 260, 194 P.3d 670; *State v. Rytky*, 2006 MT 134, ¶ 7, 332 Mont. 364, 137 P.3d 530; *State v. Gordon*, 1999 MT 169, ¶ 23, 295 Mont. 183, 983 P.2d 377; *State v. Turcotte*, 164 Mont.

426, 524 P.2d 787 (1974). Thereafter, "[a] defendant may only attack the voluntary and intelligent character of the guilty plea and may not raise independent claims relating to prior deprivations of constitutional rights." *Watts*, ¶ 9 (collecting cases).

For example, in *Watts*, the defendant entered into a plea agreement which contained "no language reserving the right to appeal after his guilty plea" and, in fact, the agreement specified that Watts had waived his right to all appeals, reserving only the right to challenge his counsel's effectiveness on appeal. *Watts*, ¶ 10. On appeal, Watts asked this Court "to declare a former statute unconstitutional, apply that determination retroactively to his case, and then reduce his conviction to a misdemeanor." *Id*. ¶ 13. This Court declined, reasoning that Watts pleaded guilty, thus waived the right to "appeal the constitutionality of the prior PFMA statute." *Id*. ¶ 14. The Court concluded that because Watts pleaded guilty without reservation, he could "only challenge the voluntariness and intelligent character of his guilty plea." *Id*.

Here, the record shows that Brackett expressly agreed that "[b]y pleading guilty I give up my right to appeal my conviction." (Doc. 95 at 2.) This waiver was given without any reservation. Moreover, Brackett received the benefit of the bargain—in exchange for his guilty plea and his appellate waiver—the dismissal of three felony counts of stalking. On appeal, Brackett does not argue that his

appellate waiver could be unenforceable for any reason, nor does he argue that his plea was not knowing, intelligent, or voluntary—which is the only argument he would be legally permitted to make on appeal. *Watts*, ¶ 9. Indeed, he does not address his appellate waiver at all. Accordingly, Brackett has not met his burden to show any basis for this Court to divert from long-standing precedent on appellate waivers as detailed in plea agreements, as this Court detailed in *Watts*.

Even assuming for argument's sake Brackett *had* endeavored on appeal to make some connection between his guilty plea and an intervening change in law, such a claim would still fail. Against the backdrop of this Court's well-settled appellate waiver precedent, this Court has additionally held in *Andrews* that a guilty plea is made based on the law applicable at the time the plea is accepted by the district court, and that a guilty plea may not be withdrawn if a later judicial decision changes the law. *Andrews*, ¶ 12.

In *Andrews*, pursuant to a drug buy occurring in Lake County in March 2007, agents "monitored and recorded" an informant's conversations with Andrews via a hidden transmitter, without a warrant. *Id*. ¶ 4. Like here, the defendant entered into a plea agreement with the State whereby the State agreed to dismiss another charge and Andrews agreed that there was "a factual basis to support the plea." *Id*. ¶ 6. His plea agreement acknowledged an understanding and waiver of his rights, including an express waiver of his right to make a suppression challenge. *Id*. ¶ 7.

At the change of plea hearing, Andrews affirmed "that the State had enough evidence to prove his guilt beyond a reasonable doubt." *Id.* ¶ 8. The district court accepted his plea, but prior to Andrews' sentencing, this Court announced *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489, holding that electronic monitoring and recording of a defendant's conversations in his home with an informant constituted a search subject to warrant requirements under the Montana Constitution. *Id* ¶ 9. Andrews argued his plea was involuntary because, if he had had knowledge of the *Goetz* decision, he would have never entered into his plea. *Id*. ¶ 10.

On appeal, this Court adopted the holding of *Brady v. United States*, 397 U.S. 742, 757 (1970), that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." This Court also adopted the holding of *McMann v. Richardson*, 397 U.S. 759, 774 (1970) that a defendant who waives his state court remedies and enters a plea to the charges against him "does so under the law then existing." Finally, this Court surveyed the landscape of state and federal law, explaining that other jurisdictions "follow the rule of the *Brady* case and hold that a post-plea change in the law does not invalidate the plea." *Andrews*, ¶¶ 12, 14 (*citing, e.g., United States v. Cortez-Arias*, 425 F.3d 547, 548 (9th Cir. 2005); *United States v. Johnson*, 67 F.3d 200, 202 (9th Cir. 1995);

United States v. Quinlan, 473 F.3d 273, 279 (6th Cir. 2007); *People v. Trank*, 58 A.D.3d 1076, 872 N.Y.S.2d 595, 596-97 (N.Y. App. 2009); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619, 630 (Neb. 2008)).

Courts are in wide agreement with this Court's precedent. As here, "where developments in the law later expand a right that a defendant has waived in a plea agreement, the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature." *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005); *accord Cortez-Arias*, 425 F.3d at 548 (Ninth Circuit citing *Brady* for the proposition that "a favorable change in the law does not entitle a defendant to renege on a knowing and voluntary guilty plea"). A plea agreement, like any contract, allocates risk. *See United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993). "And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea." *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005).

Even the "most basic rights of criminal defendants" are waivable, *Peretz v. United States*, 501 U.S. 923, 936 (1991), and courts cannot grant relief based on waived rights, *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Baked into the notion of plea bargaining is that both parties forgo potentially meritorious arguments to obtain a more certain, second-best result. The defendant gives up his chance at acquittal, but he gains the substantial likelihood of receiving a lower

sentence than the one he would have received had he been convicted at trial. *Brady*, 397 U.S. at 751-52. Thus, even assuming for argument's sake that Brackett raises a cognizable claim challenging his conviction based on *Counterman*, this avenue of appeal has been expressly waived via his plea agreement.

Courts routinely dismiss or deny relief on direct appeals—despite intervening changes in law—when the defendant has entered into a binding plea agreement waiving the right to appeal. For example, in *Bradley*, the Sixth Circuit dismissed an appeal, even when the defendant claimed a right to be resentenced pursuant to intervening change in Supreme Court law regarding the sentencing guidelines, because "changes in the law generally do not permit either the government or a criminal defendant to renege on a plea agreement" and the defendant "waived his right to appeal the resulting sentence[.]" *Bradley*, 400 F.3d at 460.

Similarly, in *United States v. Linder*, 174 F. App'x. 174, 175 (4th Cir. 2006) (*per curiam*) (*unpublished*), *cert. denied,* 127 S. Ct. 328 (2006), the Fourth Circuit rejected Linder's challenge on direct appeal to his guidelines sentence under *Blakely v. Washington*, 542 U.S. 296 (2004) (made retroactive by *United States v. Booker*, 543 U.S. 220 (2005)), concluding that Linder voluntarily waived his right to appeal in his plea agreement. Linder raised the same challenge collaterally, and the Fourth Circuit again denied it. *United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009). The Fourth Circuit further explained its prior decision on direct

appeal was consistent with *Shea v. Louisiana*, 470 U.S. 51 (1985), in which the Supreme Court explained that "if a case was pending on direct review at the time [a retroactive decision] was decided, the appellate court must give retroactive effect to [that decision], *subject, of course, to established principles of waiver*, harmless error, and the like." *Linder*, 552 F.3d at 396 (citing *Shea*, 470 U.S. at 58 n.4). Accordingly, the Fourth Circuit "refused [on direct appeal] to give effect to *Blakely* or *Booker* because Linder's challenges were within the scope of his plea agreement's knowing and voluntary direct appeal waiver." *Linder*, 552 F.3d at 396 (citing *Linder*, 174 F. App'x at 175).

But appellate courts *will* entertain claims involving an intervening favorable decision when an appellant expressly reserved that avenue of appeal in the plea agreement. *See, e.g., United States v. Taylor*, 413 F.3d 1146, 1152 (10th Cir. 2005) (entertaining a constitutional retroactivity sentencing claim when the parties had agreed that "[Defendant's] waiver of rights to appeal . . . shall not apply to appeals or challenges based on changes in the law reflected in Tenth Circuit or Supreme Court cases decided after the date of this agreement and that are held by the Tenth Circuit or Supreme Court to have retroactive effect"). Here, Brackett made no such reservation; thus, his claim is waived.

Despite wholly sidestepping his plea bargain on appeal and not even attempting to argue that he has "good cause" to withdraw his plea based on an

intervening change in law, Brackett might argue on reply that he could not have anticipated a change in law at the time of his plea. But Brackett was not required to be clairvoyant. As the Sixth Circuit explains, when parties enter into plea agreements, they are given "ample room to tailor plea agreements to different needs—whether they are the right to appeal, the right to benefit from future changes in the law or other concerns that the defendant (and his attorney) may have." *Bradley*, 400 F.3d at 466. And, prior to his plea, nothing precluded Brackett from raising a constitutional First Amendment claim that Montana's stalking statute did not have a subjective *mens rea* and required one (which is incorrect, as explained below), regardless of any subsequent change in law.

Here, Brackett instead argues that he can raise an intervening change of law for the first time on appeal pursuant to *State v. Reichmand*, 2010 MT 228, ¶ 6, 359 Mont. 68, 243 P.3d 423. But *Reichmand* did not consider the effect of a plea agreement at all; Reichmand went to trial.[5] Here, Brackett's alleged constitutional

[5] This Court explained in *Reichmand* that a post-verdict objection was made "during trial," in the context of preserving an issue for appeal under Mont. Code Ann. § 46-20-104(2), which encompassed "the entire proceeding in the lower court." *Reichmand*, ¶ 8. "This definition aided [the court] in analyzing whether defendants were 'similarly situated'—a retroactivity-specific requirement—in order to determine whether a new rule of criminal procedure should be retroactively applied." *State v. Hamilton*, 2018 MT 253, ¶ 29, 393 Mont. 102, 428 P.3d 849 (discussing *Reichmand*, ¶¶ 5-12). Thus, *Reichmand* only addressed a preserved claim based on an objection raising intervening law postconviction but presentencing, an issue not applicable here because Brackett never objected the intervening law arose *after* sentencing.

claim is barred as an effect of his voluntary appellate waiver of his right to appeal his conviction, *Watts*, ¶ 9, as well as this Court's adoption of the *Brady* standard for disallowing the benefit of intervening law after a voluntary plea agreement in *Andrews*. More to the point, there can be no question as to how this Court treats plea agreements in this circumstance because, even shortly after this Court decided *Reichmand*, it decided *Ferris*, reaffirming the principle announced in *Andrews* that plea agreements are not invalidated by intervening changes in law.[6]

Because Brackett knowingly, voluntarily, and intelligently entered into a plea agreement—abandoning his right to appeal and challenge his conviction—his constitutional claim challenging his conviction is not properly before this Court.

II. If this Court considers Brackett's constitutional claims, Brackett still cannot prevail on his facial and as-applied challenges.

A. This Court should reject Brackett's facial constitutional challenge to the stalking statute.

Brackett argues that *Counterman* applies to invalidate Montana's stalking statute, alleging that, like Colorado's stalking statute, "[t]he defendants subjective understanding of the threatening nature of their speech is irrelevant" under

[6] This was true despite a dissent arguing the court should have applied *Reichmand* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), instead. *Ferris*, ¶¶ 16-19.

Montana's stalking statute. (Appellant's Br. at 13.) Brackett further argues that the "should know" portion in Montana's stalking statute is constitutionally deficient as it relates to the objective standard. (*Id*. at 14.) For the following reasons, even if this Court considers Brackett's constitutional claim, it fails.

1. Colorado and Montana stalking statutes

As explained in *Counterman*, the defendant was charged under a stalking statute that made it unlawful to "[r]epeatedly . . . make [] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." *Counterman*, 143 S. Ct. at 2112 (citing Colo. Rev. Stat. § 18-3-602(1)(c)). Thus, under the statute, prosecutors did not need to prove that Counterman had "any kind of 'subjective intent to threaten'" the victim. (*Id*. (citation omitted). Under Colorado's standard for true threats, the State only had to "show that a reasonable person would have viewed the [conduct] as threatening." (*Id*., citation omitted.)

By contrast, Montana's stalking statute has a subjective *mens rea*, that is the defendant's subjective awareness of his conduct, explicitly in the statute. It provides:

> (1) A person commits the offense of stalking if the person purposely or knowingly engages in a course of conduct directed at a specific person and *knows or should know* that the course of conduct would cause a reasonable person to:

(a) fear for the person's own safety or the safety of a third person; or

(b) suffer other substantial emotional distress.

Mont. Code Ann. § 45-5-220(1) (2019) (emphasis added).

2. Discussion

This Court exercises plenary review of constitutional issues. *State v. Jensen*, 2020 MT 309, ¶ 9, 402 Mont. 231, 477 P.3d 335 (citation omitted). "In reviewing constitutional challenges to legislative enactments, the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406 (citing *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517). Thus, the party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Sedler*, ¶ 5 (collecting cases). To prevail on a constitutional facial challenge, the party challenging the statute must show that "no set of circumstances exist under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications" or that the statute lacks any "plainly legitimate sweep." *Jensen*, ¶ 12 (citations omitted).

Brackett fails to meet his heavy burden to show that the stalking statute is unconstitutional beyond a reasonable doubt. First, Brackett argues that the statute should be invalidated because Montana's stalking statute incorporates a "reasonable person" objective standard, that is, whether a reasonable person would fear for her safety or suffer substantial emotional distress. (Appellant's Br. at 12-13.) But *Counterman* did not hold that incorporating an objective reasonable person standard was unconstitutional. Rather, it held that the First Amendment was violated because Colorado "only" required a showing "that a reasonable person would understand [Counterman's] statements as threats" without having to also show "any awareness on [Counterman's] part that the statements could be understood [as threatening]." *Counterman*, 143 S. Ct. at 2119. Here, there is no such concern because Montana has incorporated a subjective awareness *mens rea* into the stalking statute. Mont. Code Ann. § 45-5-220(1) (2019) (defendant "*knows or should know* that the course of conduct would cause a reasonable person to . . . suffer other substantial emotional distress.").[7] Thus, Brackett is incorrect in arguing that Montana's statute is similar to Colorado's statute, the latter of which

[7] The stalking offense statute was substantially amended in 2019, in which the subjective knowledge standard ("knows or should know") was then added. *See* SB 114 (2019). Brackett committed his offenses in 2020, thus the 2019 statute applies. Accordingly, Brackett's citations to *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 19 (1995) and *State v. Yuhas*, 2010 MT 223, ¶ 9, 358 Mont. 27, 243 P.3d 409 for the proposition that Montana *only* has an objective reasonable person standard is misplaced.

by its plain language clearly had no subjective intent of the offender in the statute at all. *See* Colo. Rev. Stat. § 18-3-602(1)(c).

Next, in Brackett's circular and paradoxical second argument, he conclusively fails to meet his heavy burden to show that the "should know" language in Montana's stalking statute is constitutionally deficient. Brackett first correctly notes that *Counterman* established a minimum standard of recklessness for true threats, which is defined as "a showing that a person consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another." (Appellant's Br. at 11.) Brackett then states that Montana does not have a recklessness standard, but that the "should know" language could be interpreted as under the negligence standard in Montana statutes. He explains that the "negligence" standard in Montana is comparable to the recklessness standard defined in *Counterman*. (Appellant's Br. at 12 (citing Mont. Code Ann. § 45-2-101(43)); Appellant's Br. at 11 (arguing Montana's "negligence" standard "roughly equates" to the approved "recklessness" standard in *Counterman*). Finally, the overall point of Brackett's argument is that "should know" goes toward whether "a reasonable person would have such knowledge. This again is an objective standard, barred by *Counterman*." (*Id*. at 14.)

As the totality of Brackett's argument shows, he has failed to meet his heavy burden to prove that the language "should know" in Montana's stalking statute is

unconstitutional beyond a reasonable doubt. Brackett's argument that Montana's "negligence" standard is the equivalent to the minimum "recklessness" standard the Supreme Court approved in *Counterman* would not serve to invalidate Montana's statute. And because the sole basis of Brackett's argument challenging the "should know" language is that it pertains to the "objective reasonable" person standard, the claim fails because "knows or should know" is the defendant's subjective awareness *mens rea* standard. As explained above, the fact that Montana's statute incorporates an objective reasonable person standard is not the reason that the Supreme Court in *Counterman* found First Amendment error. It was Colorado's absence of a subjective knowledge standard, which Montana has. Thus, Brackett's sole argument challenging Montana's statute fails, and this Court should hold that he has failed to meet his heavy burden to show that the statute is facially unconstitutional.

Even if this Court further entertained the argument, it would likely fail. [8] First, Montana's stalking statute includes a more demanding subjective *mens rea* than recklessness based on knowledge, and Montana's statute appears to include an equivalent standard to recklessness through its "should know" language. Mont. Code Ann. § 45-2-102 provides, "When the law provides that negligence suffices to establish an element of an offense, such element also is established if the person acts purposely or knowingly." Further, there is little doubt the Legislature intended to incorporate a mental state in the "should know" language. *See* Mont. Code Ann. § 45-2-103(1) (providing that, for a person to be found guilty of any offense, a person must act with "one of the mental states of knowingly, negligently, or purposely"). Montana statute requires that a person act with a minimum mental state equating to recklessness, thus the requirement expressed in

[8] Montana's stalking statute is not unique. Other states have substantially similar statutes but have either not yet considered the effect of *Counterman* to their statutes or have applied appellate waiver rules to preclude *Counterman* challenges.

For example, Texas has a similar statute, but it has denied review of a facial *Counterman* challenge. Texas Penal Code § 42.072(a)(1) (requiring "the actor knows or reasonably should know the other person will regard" conduct as threatening); *Stanberry v. State*, 2023 Tex. App. LEXIS 9129 (Tex. Ct. App. 7th. Dist., Dec. 6, 2023) (unpublished) (refusing to entertain a constitutional challenge to the Texas stalking statute via *Counterman* because Appellant failed to preserve the issue for review). Utah and Illinois have almost identical statutes to Montana, but no precedent interpreting *Counterman* yet exists. *See* Utah Code Ann. § 76-5-106.5(2) (requiring the stalker "knows or should know that the course of conduct would cause a reasonable person . . . to suffer other emotional distress[.]"); Illinois Code 720 ILCS 5/12.73(a) (same).

Counterman is satisfied. Finally, the "purposely or knowingly" element is assumedly applied to all elements of the offense. Mont. Code Ann. § 45-2-103(4).

This Court must resolve any doubt in favor of the statute. *Sedler*, ¶ 5. But even if Brackett could show merit in his argument, he fails to argue that there are "no set of circumstances" that the statute could be validly applied, thus his facial challenge fails. *Jensen*, ¶ 12.

B. Brackett's as-applied constitutional challenge also fails.

Again, this Court should consider Brackett's appellate waivers in deciding whether to reach Brackett's as applied challenge for the first time on appeal. Not only did Brackett waive his right to appeal his conviction, thus precluding this instant appeal, but he also waived any factual dispute about his guilt, any challenge to the State's proof of the elements beyond a reasonable doubt, and his right to a trial by jury. As the U.S. Supreme Court has explained, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States v. Broce*, 488 U.S. 563, 570 (1989).

In his brief as-applied challenge, (*see* Appellant's Br. at 15), Brackett does not even suggest a remedy. Presumably he wishes to withdraw his guilty plea, despite his voluntary prior entry into a (1)(c) type of plea agreement, which does not allow withdrawal. The Ninth Circuit has declined "to hold as a matter of law

that courts must permit withdrawal . . . if a defendant can point to some court decision somewhere that offered him hope of escaping conviction or otherwise caused him to second-guess his prior decision to plead guilty." *United States v. Ensminger*, 567 F.3d 587 (9th Cir. 2009). The Ninth Circuit explained:

> The guilty plea is not a placeholder that reserves Ensminger's right to our criminal system's incentives for acceptance of responsibility unless or until a preferable alternative later arises. Rather, it is a 'grave and solemn act,' which is 'accepted only with care and discernment.'"

Ensminger, 567 F.3d at 593 (quoting *United States v. Hyde*, 520 U.S. 670, 677 (1997)).

While, as part of this Court's survey of other jurisdictions in *Andrews*, this Court recognized that "some courts," including the Fifth Circuit, allow plea withdrawal on appeal when the subsequent change in law makes the defendant's conduct no longer a crime, *Andrews*, ¶ 13, Brackett's claim would fail even if this Court chose to adopt the Fifth Circuit's reasoning. The Fifth Circuit held that if "intervening law has established that a defendant's actions do not constitute a crime and thus that the defendant is actually innocent of the charged offense[,]" an appellate court may permit withdrawal of a guilty plea. *United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996).

But Brackett does not even meet his burden to show that the stalking behavior he pleaded guilty to in Counts III, V, VI and VII qualified as "true

threats" to be within the constitutional ambit of *Counterman*, as opposed to general stalking conduct. *See Counterman* (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003) (explaining that true threats are "serious expression[s] conveying that a speaker means to commit an act of unlawful violence[.]''); *Saari v. Pugh*, 2023 U.S. Dist. LEXIS 220957 (USDC Minn, Nov. 1, 2023) ("It is unclear how *Counterman*'s holding bears at all on Saari's conviction for . . . a charge that does not involve communication of a true threat.").

Nor does Brackett establish that, through his pleas of guilty to Counts III, V, VI and VII, he was "actually innocent" of the offenses. Brackett must assumedly argue he did not know that his conduct could be construed as threatening. But Brackett repeatedly admitted during his plea colloquy that he had knowledge and understood that—prior to any of his repeated contacts subject to the stalking offenses—A.L. had taken out an order of protection that prohibited him from contacting her in any manner. *See, e.g.,* Mont. Code Ann. § 45-5-220(7) ("actual notice that the stalked person does not want to be contacted or followed" followed by subsequent attempts to contact that person "constitutes prima facie evidence" that the defendant "purposely or knowingly" committed stalking behavior). Brackett further admitted knowledge that he violated the order of protection in the PSI. Moreover, through his two psychological evaluations, doctors concluded that

Brackett acted with actual knowledge when he committed the offenses. (Scolatti Eval. at 21; Smelko Eval. at 9.)

At the plea colloquy, Brackett confirmed that he acted with overall knowledge pertaining to his actions. Brackett further confirmed that he met the subjective knowledge element for each offense. At the end of the colloquy, Brackett told the district court there was "no doubt" he was guilty of all the offenses he pleaded to. Thus, even assuming this Court adopted the Fifth Circuit's precedent, Brackett fails to meet his burden to show he was actually innocent of his stalking offenses.

CONCLUSION

The State respectfully requests that this Court affirm Brackett's stalking convictions.

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 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 8,710 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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