

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHNATHAN ALBERT BERTSCH,

Defendant and Appellant.

---

**BRIEF OF APPELLANT**

---

On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, the Honorable Shane Vannatta, Presiding

---

APPEARANCES:

CHAD WRIGHT  
Appellate Defender  
GREGORY HOOD  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147  
Gregory.Hood@mt.gov  
(406) 444-9505

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

AUSTIN KNUDSEN  
Montana Attorney General  
TAMMY K PLUBELL  
Bureau Chief  
Appellate Services Bureau  
P.O. Box 201401  
Helena, MT 59620-1401

KIRSTEN PABST  
Missoula County Attorney  
JORDAN KILBY  
Deputy County Attorney  
200 West Broadway Street  
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUE..... 1

STATEMENT OF THE CASE ..... 1

FACTS OF THE CASE .....2

STANDARD OF REVIEW.....3

SUMMARY OF THE ARGUMENT .....3

ARGUMENT .....3

CONCLUSION.....6

CERTIFICATE OF COMPLIANCE.....7

APPENDIX.....8

**TABLE OF AUTHORITIES**

*Cases*

*State v. Lodahl*,  
2021 MT 156, 404 Mont. 362, 491 P.3d 661 ..... 3, 4, 5, 6

*Montana Code Annotated*

§ 46-18-101 ..... 3  
§ 46-18-246 ..... 4, 5

## **STATEMENT OF THE ISSUE**

Jonathan Bertsch was receiving full Social Security Disability payments, lived with his father his entire life, and had no assets before being sentenced to four consecutive life sentences without the possibility of parole. Did the district court err when it ordered Mr. Bertsch to pay \$34,728.14 in restitution?

## **STATEMENT OF THE CASE**

On June 26, 2020, Mr. Bertsch pled guilty, without any plea agreement, to one count of deliberate homicide and three counts of attempted deliberate homicide. D.C. Docs. 67.1, 68.

At the sentencing hearing, Mr. Bertsch objected to the amount of restitution imposed on the basis that Mr. Bertsch was indigent.

11/17/21 Sentencing Hearing Transcript at 236.

The district court sentenced Mr. Bertch to four consecutive life terms without the possibility of parole and ordered him to pay \$34,728.14 in restitution. 11/17/21 Sentencing Hearing Transcript at 242 (attached as Appendix A); D.C. Doc. 163 (attached as Appendix B).

## **FACTS OF THE CASE**

On March 14, 2019, Mr. Bertsch shot four individuals, killing one, at two locations in Missoula County. Mr. Bertsch was arrested early the next morning and was held on \$2,000,000 bail which he never posted.

On June 6, 2020, Mr. Bertsch pled guilty to one count of deliberate homicide and three counts of attempted deliberate homicide. D.C. Doc. 67.1. Mr. Bertsch pled guilty as charged without a plea agreement. D.C. Docs. 67.1, 68. Mr. Bertch was sentenced to four consecutive life terms without the possibility of parole and ordered to pay \$34,728.14 in restitution over objection from defense counsel. 11/17/21 Sentencing Hearing Transcript at 236; D.C. Doc. 163.

By the time of his sentencing, Mr. Bertsch had long been adjudicated unable to work. D.C. Doc. 154. In 2011, because of a suicide attempt where Mr. Bertsch doused himself in gasoline and attempted to light himself on fire, Mr. Bertsch was seen by mental health professionals and diagnosed with autism spectrum disorder for the first time at the age of 20. D.C. Doc. 154. At that time, although he had somehow graduated from high school after repeating the twelfth

grade, he was deemed unable to work and awarded full Social Security Disability Insurance benefits. Despite multiple attempts at full-time employment, Mr. Bertsch continued to live unemployed with his father for the next nine years using the disability proceeds to survive. D.C. Doc. 154. The PSI completed prior to sentencing reported that Mr. Bertsch had no assets, no employment, no income, and unknown debts. D.C. Doc. 139.

### **STANDARD OF REVIEW**

This Court reviews restitution awards *de novo*. *State v. Lodahl*, 2021 MT 156, ¶ 11, 404 Mont. 362, 491 P.3d 661.

### **SUMMARY OF THE ARGUMENT**

The district court erred when it ordered Mr. Bertsch to pay \$34,728.14 in restitution as Mr. Bertsch has no financial ability to pay.

### **ARGUMENT**

The district court erred when it ordered Mr. Bertsch to pay \$34,728.14 in restitution.

District courts “must require an offender *who is financially able to do so to pay restitution.*” Mont. Code Ann. § 46-18-101(2)(h) (Emphasis supplied). Courts can waive restitution “at any time” when it

“otherwise would be unjust to require payment as imposed.” Mont. Code Ann. § 46-18-246. While district courts have no statutory mandate to consider ability to pay, they must comply with the law once they endeavor to order payment of restitution and they must only impose restitution upon those who are “financially able.” *Lodahl*, ¶ 23. Mr. Bertsch was and is financially unable to pay restitution, with no conceivable prospects of gaining the ability to do so.

In *Lodahl*, the defendant was ordered to pay restitution after pleading guilty to an assault on a police officer. *Lodahl*, ¶ 4. This Court reversed the imposition of restitution holding that the district court “ignored the uncontroverted evidence of Lodahl’s dire financial situation and then failed to appropriately apply § 46-18-246, MCA, to waive restitution, as unjust...” *Lodahl*, ¶ 27. Lodahl was mentally ill, qualified for food stamps and public defender services, her income was below the Federal poverty level, and she relied on her 10-year old son’s income to meet her monthly expenses. *Lodahl*, ¶ 27. Although Lodahl maintained a home, owned a vehicle, and owned a phone with internet service at home, this Court held that it would be “absurd” to require her to pay restitution. *Lodahl*, ¶ 27.

Montana Code Annotated § 46-18-246 requires district courts to adjust or waive the amount of restitution to be paid at any time if it would be unjust to require payment as ordered. District courts may not impose restitution on those financially unable to pay. *Lodahl*, ¶ 27.

Like *Lodahl*, Mr. Bertsch suffered from debilitating mental health problems, was clearly indigent, and lived primarily on Social Security Disability Insurance payments. In addition, unlike *Lodahl* who received a non-custodial sentence, Mr. Bertsch was ordered to spend the entirety of the rest of his life in prison with no possibility of parole. This Court reversed in *Lodahl* and should likewise reverse here.

Here, like in *Lodahl*, the uncontroverted evidence establishes Mr. Bertsch's dire financial situation at the time of sentencing, and in addition, the prospect of a lifetime in prison with no possibility of release, and yet the district court assessed \$34,728.14 in restitution to be paid to the Crime Victim Compensation Program of the Department of Justice. Here, like in *Lodahl*, the district court erred by ignoring and misapprehending the fact of Mr. Bertsch's past and future indigency. Although counsel for Mr. Bertsch at sentencing did not offer any additional evidence regarding Mr. Bertsch's finances, the PSI revealed

that Mr. Bertsch had no appreciable assets and no source of income and counsel objected to the restitution award on the basis of Mr. Bertsch's indigence. 11/17/21 Sentencing Hearing Transcript at 236.

### **CONCLUSION**

Mr. Bertsch was indigent before incarceration, unable to work, living with his father, and relying on social security disability as his only form of income. Once charged, Mr. Bertsch was held in custody in the Missoula County Detention Center and remains in custody until death at the Montana State Prison with no assets and no meaningful source of income. This Court must reverse and remand to waive the restitution imposed. *Lodahl*, ¶ 32.

Respectfully submitted this 16<sup>th</sup> day of February, 2024.

OFFICE OF STATE PUBLIC DEFENDER  
APPELLATE DEFENDER DIVISION  
P.O. Box 200147  
Helena, MT 59620-0147

By: /s/ Gregory Hood  
GREGORY HOOD  
Assistant Appellate Defender

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,059, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood  
GREGORY HOOD

**APPENDIX**

11/17/21 Sentencing Hearing Transcript.....App. A  
Judgment and Sentence .....App. B

## CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-16-2024:

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Kirsten H. Pabst (Govt Attorney)  
200 W. Broadway  
Missoula MT 59802  
Representing: State of Montana  
Service Method: eService

Electronically signed by Kim Harrison on behalf of Gregory Nelson Hood  
Dated: 02-16-2024