IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0668

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICHOLAS WELLS,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Did the district court correctly impose three special conditions recommended in the Presentence Investigation Report that were reasonably related to the Appellant's rehabilitation and the protection of the victim and society based on the Appellant's recent and chronic domestic violence offenses?

STATEMENT OF THE CASE

On April 6, 2022, the State charged the Appellant, Nicholas Wells, by Information with felony strangulation of a partner or family member, in violation of Mont. Code Ann. § 45-5-215(1)(a), and felony partner or family member assault (PFMA), third or subsequent offense, in violation of Mont. Code Ann. § 45-5-206(1)(a). (District Court Documents (Docs.) 1-3.)

On August 4, 2022, the district court accepted Wells's change of plea to guilty by *Alford*[1] of the felony PFMA charge. (Docs. 16-18, 20-21.) In exchange for Wells's plea, the State agreed to dismiss the strangulation charge and recommend a suspended five-year sentence at the Montana State Prison (MSP), that Wells have no contact with the victim, and that Wells be obligated to complete

[1] Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), a court may accept a defendant's knowing, voluntary, and intelligent guilty plea, even if the defendant maintains his innocence. *Lawrence v. Guyer*, 2019 MT 74, ¶ 10, 395 Mont. 222, 440 P.3d 1. Defendants who enter *Alford* pleas have the same legal status as defendants who admit their guilt. *Id*.

the Montana Department of Corrections (DOC) "Batterers Intervention Program under a Duluth Model Program." (Doc. 18 at 4.)

On September 21, 2022, the district court sentenced Wells to MSP for five years, all suspended, ordered Wells to have no contact with the victim, ordered him to successfully complete the "Duluth Model batterer's intervention program," and imposed various conditions as recommended in the Presentence Investigation Report (PSI). (Docs. 23, 25 at 2; 9/21/22 Tr. at 43-46.) During the sentencing hearing, Wells objected to three of the recommended special conditions in the PSI that the district court imposed, and Wells has challenged those conditions on appeal. (9/21/22 Tr. at 23-26; Appellant's Brief (Br.) at 14-32.)

STATEMENT OF THE FACTS

I. The offense

On April 1, 2022, Great Falls City Police Officer Adam Olson responded to a call from a person who reported having seen a photograph of a woman who had injuries to her face caused by the woman's partner.[2] (Docs. 1 at 5, 4 at Affidavit in Support of Complaint.)[3] Officer Olson went to the address reported and knocked

[2] Because Wells pleaded guilty, these facts are based on the State's allegations in the affidavit in support of its motion for leave to file a Complaint and, subsequently, an Information. (*See* Docs. 1, 4 (affidavit in support), 16-18, 20-21.)

[3] The documents related to the initial complaint are attached to the district court's order upon initial appearance. (Doc. 4.)

on the door several times, but no one answered. (*Id*.) Officer Olson looked through a window and made eye contact with a man inside. (*Id*.) Officer Olson motioned for the man to answer the door. (*Id*.)

Wells answered the door. (*Id*.) He had blood all over his hands and clothing and scratches on his face and neck. (*Id*.) Officer Olson observed that Wells was intoxicated. (*Id*.) Wells refused to give Officer Olson a statement. (*Id*.) Dispatch had previously informed Officer Olson that Wells had warrants for his arrest, so Officer Olson arrested him. (*Id*.)

Officer Olson shouted for Wells's girlfriend, who shared three children with Wells. (*Id*.) No one responded, so Officer Olson entered the home to check on the woman's welfare. (*Id*.) Officer Olson found the woman in the shower. (*Id*.) He waited at the entry of the home until the woman contacted him. (*Id*.) The woman initially told Officer Olson that she was not injured, and then said she had fallen down the stairs. (*Id*.) Officer Olson observed that the woman had various injuries, including a swollen left cheek near her eye, a bruised left ear, a bloody mark on the back of her neck, and several other marks and scratches. (*Id*.) While Officer Olson spoke with the woman, her nose started to bleed on three different occasions. (*Id*.) The woman cried off and on, was visibly shaking, and said she did not want anything to happen to her family or to lose her children. (*Id*.) She did not allow Officer Olson to take pictures of her injuries. (*Id*.)

Officer Olson offered to call a victim advocate. (*Id*.) The woman requested that Officer Olson call Officer Brinka. (*Id*.) The woman told Officer Brinka that Wells had struck her several times, banged her head off the floor, bitten her right arm, and choked her. (*Id*.) She said she had lost consciousness when Wells choked her. (*Id*.) The woman said Wells was highly intoxicated during the assault. (*Id*.) Officer Brinka called medical staff to check on the woman's injuries. (*Id*.)

II. Procedural history

On April 4, 2022, the State filed an initial complaint, affidavit in support, and motion to determine probable cause and set bond. (Doc. 4.) The State alleged felony strangulation of a partner or family member and felony PFMA, third or subsequent offense. (*Id*.) The State requested a $50,000 bond due to the victim's injuries and Wells's criminal history, which included three convictions for domestic battery. (*Id*.) The district court found probable cause supported the charges, and after an initial appearance, imposed a $100,000 bond and various conditions of release. (Doc. 4.)

On April 6, 2022, the State charged Wells with the same offenses by Information. (Docs. 1-3.) On August 4, 2022, the district court accepted Wells's change of plea to guilty by *Alford* of the felony PFMA charge. (Docs. 16-18, 20-21.)

During the change of plea hearing, Wells confirmed that his plea was in exchange for the State's dismissal of the strangulation charge and sentence recommendation of "a five-year Montana State Prison term with all time suspended except for time served, with the condition that you have no contact with the victim, and successfully complete a Duluth Model Batterer's Intervention Course within the first two years of the sentence." (8/4/22 Tr. at 6.) During a discussion regarding Wells's release pending sentencing, Wells's counsel acknowledged the requirement that Wells would have no contact with the victim pursuant to his impending sentence. (*Id*. at 13.) The State did not oppose Wells's request for a recognizance release, and said, "I think that there are significant assurances that [Wells] will not have any contact with this victim." (*Id*. at 14.) The district court granted Wells's request for OR release but repeatedly reminded Wells that he could not have any contact with the victim, which included staying at least 1,500 feet away from her, her residence, her car, and her workplace. (*Id*. at 15-16.)

In the plea agreement, the State agreed to dismiss the strangulation charge and recommend a five-year sentence at MSP with all time, except the days previously served, suspended. (Doc. 18 at 4.) But the agreement specified, "The State will further recommend that the Defendant have NO contact with the victim and that the Defendant enter and successfully complete the Batterers Intervention Program under a Duluth Model Program operated by or approved by the Montana

Department of Corrections within the first two years of sentence." (*Id*. (emphasis in original).)

The district court ordered a PSI. (Docs. 16, 20; 8/4/22 Tr. at 11, 17.) The PSI author recommended various conditions, including the following three 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 an Offensive Contact Contract provided by his/her Probation and Parole Officer if required by his supervising Officer.

(Doc. 22 at 10.)

The district court sentenced Wells on September 21, 2022. (Docs. 23, 25; 9/21/22 Tr. at 18-46.) During the hearing, Wells objected to conditions 26, 27, and 28 in the PSI.[4] (9/21/22 Tr. at 23-26.) The State argued that the reviewing probation officer included these conditions based on the interviews with Wells, and

[4] Conditions 26 and 27 in the PSI are also included in the judgment under the same numbers. (Docs. 22 at 10, 25 at 7.) Condition 28 in the PSI is not included in the judgment, but the district court imposed that condition in its oral pronouncement of sentence along with all other conditions in the PSI. (*Id*.; 9/21/22 Tr. at 44.)

that the challenged conditions "are programming requirements that are part of the Duluth Model rehabilitation program for partner/family member assaults." (*Id*. at 27.) The district court imposed all three conditions over Wells's objections. (*Id*. at 23-35.) After the district court overruled Wells's objections to these conditions, Wells's counsel explained that "[Wells] agrees with the Duluth Model. That is something that he stipulated as part of our agreement. We are asking that the Court impose that as a condition, Your Honor." (*Id*. at 40.)

Wells argued condition 26 was unconstitutionally overbroad because it allowed a probation officer to search electronic devices based on a reasonable suspicion that he was contacting the victim. (*Id*. at 23-24.) The district court considered the compromised rights of a probationer, including a probation officer's ability to search based on a lower reasonable suspicion standard, and the impact in this case on the victim of both the felony PFMA, third offense, which Wells pleaded guilty to, and the dismissed strangulation charge. (*Id*. at 33-35.) The district court found the condition was not overbroad because any search still needed to be supported by a reasonable suspicion, the condition provided Wells notice of specific electronic items subject to search, and the specified items "are often the tools that are used to initiate contact." (*Id*. at 33-35.)

Wells challenged condition 27 on various grounds. (*Id*. at 24-25.) He argued it was overbroad because it did not tie the specified programming to a domestic

violence offense and there was no proof of rehabilitative function for his compliance with this requirement. (*Id*.) Wells argued that there was no statutory authority for the condition because it was not specifically referenced in the Montana Incentives and Interventions Grid (MIIG) and that it could work as a shaming mechanism in violation of the Eighth Amendment. (*Id*.)

The district court found the Victim Impact Listen and Learn Programming and the Victim Impact Panel were related to rehabilitation. (*Id*. at 35; Doc. 25 at 7.) The district court said, "I think that any person who's committed a crime, especially a crime of violence, in domestic violence, would benefit, and actually learn something listening to how violence impacts victims, or how other crimes impact victims." (9/21/22 Tr. at 35.) The district court broadly rejected Wells's constitutional objections and arguments that a condition should not be imposed if it is not specifically included in the MIIG. (*Id*. at 33-35.) The district court explained that the MIIG is not a comprehensive list of all sentencing conditions that may be imposed, and rejected Wells's Eighth Amendment argument based on the violent nature of his offenses. (*Id*.)

Wells argued there was no statutory authority in the MIIG for condition 28, which required him to enter into a contract to report sexual interactions and social media contacts regarding sexual encounters. (9/21/22 Tr. at 25-26.) Wells's counsel argued he could not advise his client on the condition because the contract

terms were not disclosed at the time of sentencing, and generally asserted "it could potentially be a violation of any number of constitutional provisions related to the First Amendment regarding association and free speech." (*Id*. at 26.)

In addition to its broad rejection of Wells's objections based on the MIIG and the constitution, the district court found condition 28 was appropriate in this case. (*Id*. at 35.) The district court explained:

> [T]he intimate partner disclosure, I think that is relevant, and it's a tool that—that can be used by the folks at adult probation and parole, given this is the third offense of a domestic violence offense, a tool to prevent any further victimization in the Defendant's future, and certainly a tool that protect[s] the public, and keep[s] the Defendant out of trouble.

(*Id*.)

The district court sentenced Wells to MSP for five years, all suspended. (Docs. 23, 25; 9/21/22 Tr. at 43-46.) The district court ordered Wells to have no contact with the victim directly or by third party, including staying 1,500 feet away from her residence, workplace, and vehicle. (9/21/22 Tr. at 44; Doc. 25 at 2.) The district court ordered Wells to "enter and successfully complete the batterer's intervention program under the Duluth Model Program," which is "operated by or approved by the Montana Department of Corrections within the first two years of [his] sentence." (9/21/22 Tr. at 44; *see also* Doc. 25 at 2.) The district court expressly adopted all the conditions in the PSI except a few noted financial conditions. (9/21/22 Tr. at 44; Doc. 25 at 2-7.) The district court's written

sentencing order, however, omitted condition 28 in the PSI. (Docs. 22 at 10, 25 at 7.)

Wells appealed and challenged the district court's imposition of conditions 26, 27, and 28 in the PSI. (Doc. 26; Appellant's Brief (Br.) at 16-32.)

SUMMARY OF THE ARGUMENT

The district court had statutory authority to impose the special conditions recommended in the PSI and correctly exercised its discretion to impose them.

The three conditions that Wells has challenged were part of the DOC's Duluth Model batterers intervention programming, which Wells agreed to complete as part of his plea agreement, and Wells cannot escape the obligations of his plea bargain after accepting its benefits.

Moreover, the district court explained how all three conditions were reasonably related to Wells's rehabilitation and the protection of society and the victim based on Wells's recent and chronic domestic violence. The limited and specific search provision for electronic devices in condition 26 served to protect the vital sentencing purpose of preventing any contact with the victim. The specifically named programming mandates in condition 27 provided Wells an opportunity to understand the impact his chronic violence has had on his victims. The intimate partner and offensive contact disclosures in condition 28 of the PSI

provided probation officers a tool to prevent Wells from entering into new violent domestic relationships and to protect potential victims from his chronic domestic abuse.

This Court should affirm these sentencing conditions. The district court correctly exercised its broad sentencing authority to impose them because they have a sufficient nexus to Wells and his domestic violence offenses.

ARGUMENT

The district court correctly denied Wells's challenges to his sentencing conditions because they do not exceed statutory or regulatory parameters and have a nexus to the offense and rehabilitation.

A. Standard of review

This Court first reviews "sentencing conditions for legality to determine whether the conditions fall within statutory parameters . . . then review[s] the reasonableness of the conditions imposed under §§ 46-18-201(4) and -202(1), MCA, for an abuse of discretion." *State v. Parkhill*, 2018 MT 69, ¶ 9, 391 Mont. 114, 414 P.3d 1244.

B. Applicable law

A sentencing court has broad discretion to impose a sentence within statutory range. *State v. Garrymore*, 2006 MT 245, ¶ 29, 334 Mont. 1, 145 P.3d 946 (citing *United States v. Booker*, 543 U.S. 220 (2005)). Due to this discretion,

this Court's review is correspondingly deferential. *State v. Bullplume*, 2013 MT 169, ¶ 18, 370 Mont. 453, 305 P.3d 753.

Upon conviction, a sentencing court may suspend execution of sentence for a period up to the maximum sentence allowed. Mont. Code Ann. § 46-18-201(2)(a) (2021). The court may impose "any reasonable restrictions or conditions" during the suspension period. Mont. Code Ann. § 46-18-201(4) (2021). Those conditions include "any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society," Mont. Code Ann. §§ 46-18-201(4)(p), -202(1)(g) (2021), and standard conditions authorized by administrative rule. Mont. Code Ann. § 46-23-1002(3) (2021); Mont. Admin. R. 20.7.1101(9). In addition to these acceptable conditions, the district court has authority to "include restrictions on the offender's freedom of association and freedom of movement." *Bullplume*, ¶ 18; *see also* Mont. Code Ann. § 46-18-202(1)(c)-(d).

The judge's discretion is not unlimited, however, and the conditions "must relate to rehabilitation or protection of society within the particular context of an offender's crime or the unique background, characteristics, or conduct of the offender." *State v. Zimmerman*, 2010 MT 44, ¶ 17, 355 Mont. 286, 228 P.3d 1109. A district court "may impose offender-related conditions only in those cases in which the history or pattern of conduct to be restricted is recent, and significant or

chronic." *State v. Ashby*, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.3d 1164. This Court will affirm a statutorily authorized condition if it "has some correlation or connection—i.e., nexus—to the underlying offense or to the offender." *Bullplume*, ¶ 18. This Court will reverse the imposition of a condition if it "is 'overly broad or unduly punitive,' or if the required nexus is 'absent or exceedingly tenuous.'" *Id.* (quoting *State v. Melton*, 2012 MT 84, ¶ 18, 364 Mont. 482, 276 P.3d 900; *Zimmerman*, ¶ 17).

1. All of Wells's objections are undermined by his express agreement to complete a DOC batterers intervention program based on the Duluth Model.

Wells ignores that in his plea agreement he agreed to "successfully complete the Batterers Intervention Program under a Duluth Model Program operated by or approved by the Montana Department of Corrections within the first two years of sentence." (Doc. 18 at 4.) Wells acknowledged during the change of plea hearing that in exchange for his guilty plea by *Alford* the State would recommend a condition that Wells "successfully complete a Duluth Model Batterer's Intervention Course within the first two years of the sentence." (8/4/22 Tr. at 6.) During the sentencing hearing, Wells's counsel explained that "[Wells] agrees with the Duluth Model. That is something that he stipulated as part of our agreement. We are asking that the Court impose that as a condition, Your Honor." (*Id*. at 40.)

In response to Wells's objections during the sentencing hearing, the State explained that conditions 26, 27, and 28 were part of the Duluth Model programming offered by the DOC. (9/21/22 Tr at 27.) This Court has long held that it will not lend its assistance to an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. *See, e.g.*, S*tate v. Bowley*, 282 Mont. 298, 310, 938 P.2d 592, 599 (1997); *State v. Sattler*, 170 Mont. 35, 37, 549 P.2d 1080, 1081 (1976); *State v. Nance*, 120 Mont. 152, 166, 184 P.2d 554, 561 (1947). This Court should affirm the district court's imposition of conditions 26, 27, and 28 because Wells agreed to complete a Duluth Model Batterers Intervention Course in exchange for the State's dismissal of the strangulation charge and a wholly suspended five-year sentence recommendation. *See id*.

2. The district court correctly imposed condition 26 over Wells's objection because it is not unconstitutionally overbroad.

The district court had statutory authority to impose any reasonable condition necessary for Wells's rehabilitation or the protection of the victim and society. *See* Mont. Code Ann. §§ 46-18-201(4), -202(1)(g). The foundation for condition 26 is the district court's order that Wells have no contact with the victim,[5] which was imperative to the plea agreement and the sentence imposed. Wells entered into

[5] The district court, pursuant to Wells's request, included an exception to the no contact order for efforts necessary to negotiate a parenting plan. (9/21/22 Tr. at 45; Doc. 25 at 2.)

a plea agreement with the express understanding that he would not contact the victim. The district court consistently expressed the importance of this promise during both the change of plea hearing when it released Wells on his own recognizance and the sentencing hearing when it imposed condition 26 in conjunction with a wholly suspended five-year sentence.

Crafting condition 26 around this imperative sentencing purpose served to both protect the victim and rehabilitate Wells because it helped prevent future incidents. *See Zimmerman*, ¶ 17. The search provision reasonably allowed a probation officer a means to address any offensive contact with the victim before it resulted in a potentially violent encounter. It was a reasonable condition for Wells due to his recent, significant, and chronic history of violence against the victim and his previous partners. *See Ashby*, ¶ 15. To support its conclusion, the district court correctly considered Wells's history of domestic violence and the impact on the victim of both the felony PFMA, third offense, which Wells pleaded guilty to, and the strangulation charge against Wells that the State dismissed pursuant to the plea agreement. *See State v. Hill*, 2009 MT 134, ¶ 31, 350 Mont. 296, 207 P.3d 307 (a sentencing court may consider any relevant evidence in a defendant's background, including conduct underlying charges dismissed pursuant to a plea agreement).

Wells has based his argument on constitutional authority that explains the reasonable suspicion standard for warrantless probation searches. (Br. at 16-23.)

But the constitutional search standard alone does not show condition 26 is overly broad. As the district court correctly explained, any search pursuant to the condition still has to be supported by a reasonable suspicion that Wells attempted to contact the victim in violation of his sentence and conditions. (*Id*. at 33-35.) To the extent the condition could violate this constitutional standard as it relates to Wells, this Court has affirmed conditions that compromise constitutional rights if the condition was reasonably related to the objectives of rehabilitation or the protection of the victim or society based on the offense, the offender, and the totality of the circumstances. *See, e.g., Melton*, ¶¶ 23-28 (rejecting an argument that a condition that prohibited a sex offender from being unsupervised in places where children congregated even if he was with his own children was overly broad because it violated his freedom of movement and right to parent).

Moreover, condition 26 is limited by its specific terms, which undermines Wells's argument. As the district court explained, the condition is premised solely on any attempt by Wells to contact the victim in violation of his sentence, it provides Wells notice of specific electronic items subject to search, and the specified items "are often the tools that are used to initiate contact." (*Id*. at 33-35.) These limitations distinguish condition 26 from those that this Court has found unconstitutionally broad, harsh, or severe. *See, e.g.*, S*tate v. Muhammad*, 2002 MT 47, ¶ 28, 309 Mont. 1, 43 P.3d 318 (concluding that the banishment condition was

unnecessarily broad and severe); *State v. Herd*, 2004 MT 85, ¶¶ 24-25, 320 Mont. 490, 87 P.3d 1017 (concluding that the 40-year driving prohibition was unreasonable in terms of its harshness and duration); *State v. Hotchkiss*, 2020 MT 269, ¶ 18, 402 Mont. 1, 474 P.3d 1273 (concluding conditions prohibiting possession of all electronic devices without probation approval was overly broad when offense did not involve an electronic device).

This Court should affirm the district court's imposition of condition 26 because it is reasonably related to the objectives of rehabilitation and the protection of society and is not overbroad or unduly punitive. *See Zimmerman*, ¶ 17; *Bullplume*, ¶ 18.

3. The district court correctly imposed condition 27 over Wells's objections.

Wells objected to condition 27 on multiple grounds below, but the only preserved argument he has pursued on appeal is that the condition is unconstitutionally overbroad because it does not have a sufficient nexus to the offense. (9/21/22 Tr at 24-27; Br. at 23-26.) The entirety of Wells's argument on appeal is rooted in "vagueness" based on his assertion that the condition does not sufficiently specify the programming required. (Br. at 25.) Condition 27 is not vague. It plainly states that Wells "must enter and complete a Victim Impact Listen and Learn Programming and Victim Impact Panel." (Doc. 25 at 7.)

The district court had statutory authority to impose any reasonable condition necessary for Wells's rehabilitation or the protection of the victim and society. *See* Mont. Code Ann. §§ 46-18-201(4), -202(1)(g). Wells ignores the district court's reasoning, which supports the nexus between Wells's violent offenses and the programming specified in condition 27. The district court explained, "I think that any person who's committed a crime, especially a crime of violence, in domestic violence, would benefit, and actually learn something listening to how violence impacts victims, or how other crimes impact victims." (9/21/22 Tr. at 35.) The district court relied on Wells's unique background, characteristics, and conduct to show that the specific programming in condition 27 was objectively related to both Wells's rehabilitation and the protection of society and the victim. *See Zimmerman*, ¶ 17.

Wells has repeatedly argued that the "Duluth Model" programming is uncertain or may be nonexistent in Montana. (Br. at 23-31.) The record shows these programs do exist. Wells's plea agreement was premised on the State's recommendation that Wells complete this programming—the State will recommend that Wells "successfully complete the Batterers Intervention Program under a Duluth Model Program operated by or approved by the Montana department of Corrections within the first two years of sentence." (Doc. 18 at 4.) Wells's trial counsel specifically informed the district court that "[Wells] agrees

with the Duluth Model." (9/21/22 Tr. at 40.) The probation officers who drafted and reviewed the PSI specifically recommended the DOC programming in conditions 27 and 28. (Doc. 22 at 10.) Wells's asserted ignorance of the DOC programs is not grounds for him to avoid his obligation under the plea agreement. *See Bowley*, 282 Mont. at 310, 938 P.2d at 599 (this Court "will not lend its assistance to an accused criminal in escaping his or her obligations of a plea bargain after accepting its benefits").

Wells has provided nothing to support his argument that condition 27 violates Mont. Code Ann. § 46-18-101(3)(a), which requires a punishment to be "certain."[6] Wells misinterprets the State's sentencing argument. (*See* Br. at 23-24.) The State explained that the "Victim Impact Listen and Learn" and "Victim Impact Panel" programs are part of the DOC Duluth Model programs, which Wells agreed to in the plea agreement, and that the DOC has renamed the programs to avoid licensing problems. (9/21/22 Tr. at 29-30.) The State did not say the DOC may rename the programs in the future. (*Id*.) The simple directive in condition 27 does not allow the DOC "to substitute something in the future" or place the district court "in the position of delegating its authority to the probation officer." (Br. at 25-26.) Wells cannot show condition 27 is uncertain or impossible to perform, which

[6] Wells did not object on this ground below. (9/21/22 Tr. at 24-27.) But the State has addressed it to the extent it may be considered in support of his preserved argument that condition 27 was unconstitutionally overbroad. (*Id*.)

would be necessary to support his argument. *See* Mont. Code Ann. § 46-18-101(3)(a); *State v. Cook*, 2012 MT 34, ¶ 13, 364 Mont. 161, 272 P.3d 50 (a sentencing condition that is impossible to complete is illegal and should be struck from the sentence).

This Court should affirm the district court's imposition of condition 27 because the specific DOC programming is tailored to Wells and his offenses, and Wells has failed to show that it is unconstitutionally overbroad. *See Bullplume*, ¶ 18.

4. The district court correctly imposed condition 28 in the PSI over Wells's objections.

The district court had statutory authority to impose any reasonable condition necessary for Wells's rehabilitation or the protection of the victim and society. *See* Mont. Code Ann. §§ 46-18-201(4), -202(1)(g). The district court correctly relied on Wells's history of domestic violence and the violent acts against the victim in this case to support the imposition of condition 28. *See Hill*, ¶ 31; *Zimmerman*, ¶ 17; *Ashby*, ¶ 15.

As the district court explained, condition 28 provided a tool to probation officers that served both Wells's rehabilitation by preventing future domestic violence encounters that may lead to further criminal charges and the protection of society by informing probation and parole about any person who may be a victim of Wells's domestic abuse in the future. (9/21/22 Tr. at 35.) The district court

further explained that the condition was reasonable for Wells due to his recent, significant, and chronic history of violence against the victim and his previous partners. This meets the nexus standard for special conditions that must be reasonably related to an offender's rehabilitation or the protection of society and the victim. *See Zimmerman*, ¶ 17; *Ashby*, ¶ 15.

As the probation officers who drafted the PSI, the State, and the district court explained, the condition is designed for domestic violence offenders. Wells's argument that condition 28 is specifically designed for "sexual predators" has no support in the record. (Br. at 28.) His trial counsel explained that the DOC has used this condition to obligate an offender to disclose "sexual encounters" or "a one-night stand" with intimate partners, as the plain language of the condition provides. (9/21/22 Tr. at 25-26; Doc. 22 at 10.) But neither the comments of Wells's trial counsel nor the condition has anything to do with sexual predators. (*Id*.)

Moreover, the district court correctly rejected Wells's general assertion that condition 28 "could potentially be a violation of any number of constitutional provisions related to the First Amendment regarding association and free speach." (9/21/22 Tr. at 26.) As Wells has correctly acknowledged (Br. at 30), a sentencing court has express statutory authority to impose conditions that restrict an offender's rights of association and movement. *See* Mont. Code Ann. § 46-18-202(1)(c)-(d); *Bullplume*, ¶ 18. Wells's only argument to support his general allegation of error

below is that the record does not show that this condition protects anyone. (Br. at 30.) But he has failed to acknowledge that the district court explained that condition 28 served both to rehabilitate Wells by preventing future domestic violence encounters and to protect any future victims of his chronic domestic abuse.

As the district court explained, providing this tool to Wells's probation officers meets the nexus test based on Wells's chronic history of domestic violence. *See Zimmerman*, ¶ 17; *Ashby*, ¶ 15; *Bullplume*, ¶ 18. This Court should affirm the district court's imposition of condition 28. *Id.*

5. The written judgement should be amended to accurately reflect the oral pronouncement of sentence, which included condition 28 in the PSI.

As Wells has identified, the district court in its oral pronouncement of sentence imposed condition 28 of the PSI along with all other recommended conditions. (Br. at 12; Docs. 22 at 10, 25 at 7; 9/21/22 Tr. at 44.) "[I]n the event of a conflict between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement controls." *State v. Hamilton*, 2018 MT 253, ¶ 51, 393 Mont. 102, 428 P.3d 849 (quoting *State v. Lane*, 1998 MT 76, ¶ 48, 288 Mont. 286, 957 P.2d 9). Wells is subject to the sentence that the district court imposed in its oral pronouncement of sentence. *See id*. This matter should be remanded to the district court to conform the written judgment to the oral pronouncement of sentence. *Id*.

CONCLUSION

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

Respectfully submitted this 19th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

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/s/ Brad Fjeldheim
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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-19-2024:

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Service Method: eService

Electronically signed by LaRay Jenks on behalf of Brad Fjeldheim
Dated: 03-19-2024