

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0042

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHNATHAN ALBERT BERTSCH,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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

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## **STATEMENT OF THE ISSUE**

Did the district court correctly impose restitution for the undisputed medical and funeral expenses incurred by three of the Appellant's shooting victims without considering the waiver standard in Mont. Code Ann. § 46-18-246 when the Appellant failed to meet his burden to request a waiver or support it with evidence or argument that showed restitution would be unjust?

## **STATEMENT OF THE CASE**

On March 26, 2019, the State charged the Appellant, Johnathan Bertsch (Bertsch), with one count of deliberate homicide and three counts of attempted deliberate homicide. (District Court Documents (Docs.) 1-3.) The State alleged Bertsch shot at a vehicle, killed one passenger, and injured two others. (Doc. 1.) Later, Bertsch shot and seriously injured a highway patrol officer who had pursued him. (*Id.*) The State amended the Information on December 31, 2019, because one of the injured victims in the first shooting died of complications from her injuries. (Docs. 25-27.)

On June 25, 2020, Bertsch pleaded guilty to the four counts in the original Information without a plea agreement. (Docs. 67.1, 68.) The district court sentenced Bertsch to four consecutive life sentences without the possibility of parole. (Doc. 163 at 3.) It also ordered Bertsch to pay \$34,728.14 in restitution.

This payment was to reimburse the Crime Victim Compensation Program (CVCP), which paid medical and funeral expenses for victims Shelley Hays (deceased), Julie Blanchard (deceased), and Casey Blanchard. (Docs. 158 at 25, Exs. 4-6, 163 at 10-11.) The only issue Bertsch has raised on appeal is a challenge to the restitution based on this Court's opinion in *State v. Lodahl*, 2021 MT 156, 404 Mont. 362, 491 P.3d 661. (Appellant's Brief (Br.) at 1-6.)

## **STATEMENT OF THE FACTS**

### **I. The offense**

In the late evening hours of March 14, 2019, Julie Blanchard, Casey Blanchard, and Shelley Hays drove out of the parking lot of Marvin's Tavern at the Wye near Missoula. (Docs. 1, 25, 158;<sup>1</sup> State's Sent. Ex. 1 (Ex. 1) at 0:01-3:00; 11/16/21 Tr. at 25-27, 30-38, 42; 11/17/21 Tr. at 235.) As they were leaving, Julie Blanchard, who was driving the pickup, blew a large cloud of dark diesel exhaust near the front door of the bar. (Ex. 1 at 3:00-3:30; 11/16/21 Tr. at 37.) Moments before, Johnathan Bertsch had exited the bar and entered his white Cadillac Escalade, which was parked just outside the front door. (*Id.*) As the black cloud hung around Bertsch's vehicle, he sped after the pickup. (*Id.*)

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<sup>1</sup> Bertsch pleaded guilty, so these facts are based in part on the affidavits in support of the two Informations filed in this case. (*See* Docs. 1, 25.)

Bertsch quickly caught up to the pickup and flashed his headlights several times. (Ex. 1 at 3:00-9:30; 11/16/21 Tr. at 37-39.) Julie detoured to another street, but Bertsch continued to follow. (*Id.*) Bertsch passed the pickup at high speed then quickly turned his vehicle onto a side street in front of the pickup. (*Id.*) Julie did not stop. (*Id.*) Bertsch again pursued them at high speed, drove up behind them, and flashed his headlights. (*Id.*)

After Bertsch's pursuit had persisted for more than three miles, Julie pulled the pickup to the side of the road. (*Id.*) Casey exited the pickup and approached the front of Bertsch's Escalade. (State's Ex. 1 at 9:30-13:30; 11/16/21 Tr. at 28-29, 39-40.) As Casey approached, Bertsch shot him multiple times with a .45 caliber handgun. (*Id.*) Casey immediately fell to the ground and put his hands in the air. (*Id.*) Bertsch stopped firing momentarily, switched to an AR style rifle, and repeatedly fired .223 caliber rounds at the vehicle. (*Id.*) Casey remained on the ground. (*Id.*) Bertsch shot him again with the rifle. (*Id.*)

Bertsch shot at least 37 rounds at the pickup and Casey. (11/16/21 Tr. at 28-29; State's Ex. 1 at 9:30-13:30.) Missoula Police Sergeant Sean Manraksa (Sgt. Manraksa) testified:

The vehicle had sustained multiple, multiple bullet holes and damage from being fired upon. We had difficulty noting several trajectories from the bullets and which bullets had impacted the victims because of the amount of holes and where they had been deflected by components of the vehicle: the window, the snowmobile rack, the metal frames, the glass. Due to the bullet and the makeup

and the constitution of the bullets, it made it very difficult to track the trajectory of bullets that injured the victims.

(11/16/21 Tr. at 33.) One shot hit Shelley in the head and killed him. (*Id.* at 28-29, 31, 39, 49-50; State's Ex. 1 at 9:30-13:30.) Several bullets and fragments hit Julie. (11/16/21 Tr. at 36, 39, 42; State's Ex. 1 at 9:30-13:30.) Emergency responders transported Julie and Casey to the hospital. (11/16/21 Tr. at 29.) Julie survived that night, but she died a few months later from complications with her injuries. (*Id.* at 51.) Casey survived, but he is paralyzed from the waist down. (*Id.* at 50-51, 95-96, 106.)

After Bertsch finished shooting, he got into his Escalade and drove away. (Ex. 1 at 10:45-13:30; 11/16/21 Tr. at 41-44.) Bertsch went to his home in Arlee and retrieved tactical equipment, including firearm bags and body armor. (11/16/21 Tr. at 41-44.) Officers began a search for Bertsch that lasted for several hours. (*Id.* at 41-53; State's Sent. Exhibit 2 (Ex. 2) at 00:01-28:48; State's Sent. Exhibit 3 (Ex. 3) at 00:01-24:50; 11/17/21 Tr. at 235.)

Just after midnight, Montana Highway Patrol Trooper Wade Palmer spotted a white Cadillac Escalade traveling north on Highway 93. (Ex. 2 at 8:45-10:00.) The Escalade turned off the highway at Evaro. (*Id.*) Trooper Palmer followed. (*Id.*) As soon as Trooper Palmer entered the approach, Bertsch started shooting. (*Id.*) Bertsch shot at Trooper Palmer 20 times, and the bullets he fired hit Trooper Palmer multiple times in the head and upper body. (11/16/21 Tr. at 43, 57, 98-106; Ex. 2 at

8:45-10:00.) As the bullets began to hit Trooper Palmer's vehicle, he shouted on the radio that he was "under fire." (Ex. 2 at 8:45-10:00.) Then everything went silent except his labored breathing. (*Id.* at 8:45-15:30.) Trooper Palmer survived but his injuries were extensive, including brain injuries that inhibit him from speaking. (11/16/21 Tr. at 98-106, 109-13, 117-29.)

While Trooper Palmer struggled to stay alive, Bertsch drove away and continued to elude law enforcement until the early morning hours of March 15, 2019. (11/16/21 Tr. at 45-49; Ex. 2 at 8:45-28.48; Ex. 3 at 00:01-24:50.) During that time, Bertsch called his father, who officers had detained at a checkpoint. (Ex. 3 at 00:01-7:30; 11/16/21 Tr. at 46-49.) Bertsch spoke with officers and admitted to the shootings. (Ex. 3 at 00:01-24:50; 11/16/21 Tr. at 46-49.) Officers eventually apprehended Bertsch, who was armed, on a remote road near Evaro. (Docs. 1, 25; 11/16/21 Tr. at 49.)

## **II. Procedural history**

On June 25, 2020, Bertsch pleaded guilty to one count of deliberate homicide, and three counts of attempted deliberate homicide. (Docs. 25-27, 67.1, 68.)

Prior to the sentencing hearing, the State filed a sentencing memorandum that included a request for \$34,728.14 in restitution to reimburse the Montana



Crime Victim Compensation Program (CVCP), as established in Mont. Code Ann. §§ 53-9-101 to -133. (Doc. 158 at 25.) The State attached as exhibits to their memorandum three affidavits of payments made by the CVCP. (Doc. 159 at Exs. 4-6.) The program paid \$3,500 for funeral expenses of Shelley Hays. (Doc. 159 at Ex. 4.) The program paid \$6,228.14 for medical expenses incurred by Julie Blanchard. (Doc. 159 at Ex. 5.) The program paid \$25,000 for medical expenses incurred by Casey Blanchard. (Doc. 159 at Ex. 6.) The payments totaled the amount of restitution reimbursement requested by the State. (Docs. 158 at 25, 159 at Exs. 4-6.) The State specifically requested a portion of any future prison wages to be garnished, pursuant to Mont. Code Ann. § 46-18-237. (*Id.* at 25-26.)

The district court sentenced Bertsch on November 17, 2021. (Docs. 160-61.) It imposed four consecutive life sentences without the possibility of parole. (Doc. 163 at 3; 11/17/21 Tr. at 237-44.) It ordered Bertsch to pay \$34,728.14 in restitution, as requested by the State, and ordered Bertsch's future wages be garnished to pay the restitution and other fees. (Docs. 158 at 25, Exs. 4-6, 163 at 3, 10-11; 11/17/21 Tr. at 237-44.)

The only issue Bertsch raises on appeal is a challenge to the restitution based on this Court's opinion in *Lodahl*, ¶¶ 23-28. (Br. at 1-6.)

## **SUMMARY OF THE ARGUMENT**

This Court should affirm the district court's imposition of restitution based on undisputed medical and funeral expenses incurred by three of the four victims who Bertsch shot.

Nothing in the law supports Bertsch's attempt to invalidate the restitution imposed. A sentencing court is mandated to impose restitution regardless of an offender's ability to pay. In *Lodahl*, this Court opened a small window for offenders to assert their right under Mont. Code Ann. § 46-18-246 and to request waiver of restitution as unjust contemporaneous to its imposition. But the offender must meet his burden to both adequately assert his right to petition and adequately show that the restitution imposed is unjust. Bertsch's mere use of the word indigence in response to the district court's question does not meet either of these burdens.

Bertsch now claims indigence based on his history of autism and his present imprisonment for consecutive life sentences without parole. Neither show restitution is unjust as required by Mont. Code Ann. § 46-18-246. Bertsch's imprisonment is irrelevant because he may obtain future employment in prison and those wages could be garnished, as contemplated by the district court. Bertsch has provided nothing to show that his autism, which the district court found Bertsch exaggerated, would prevent him from obtaining prison employment. Whether

Bertsch ever pays the restitution or not, a long prison sentence cannot be used by a defendant as a shield from the imposition of restitution for undisputed losses.

The district court's order imposing restitution should be affirmed.

## **ARGUMENT**

### **I. Standard of review**

This court reviews criminal restitution orders for compliance with Mont. Code Ann. §§ 46-18-241 through -249. *State v. Cole*, 2020 MT 259, ¶ 9, 401 Mont. 502, 474 P.3d 323. Because restitution awards present a mixed question of law and fact, this Court employs de novo review. *State v. Arthun*, 2023 MT 214, ¶ 11, 414 Mont. 54, 538 P.3d 858. This Court reviews a district court's application of the law for correctness. *Cole*, ¶ 9. It reviews a district court's finding of fact as to the amount of restitution under the clearly erroneous standard. *State v. Aragon*, 2014 MT 89, ¶ 9, 379 Mont. 391, 321 P.3d 841.

### **II. The district court correctly imposed restitution to reimburse CVCP for its payment of the undisputed medical and funeral expenses incurred by three of Bertsch's shooting victims.**

"Montana law requires a sentencing court to order restitution when a defendant's crime results in pecuniary loss to a victim." *State v. Hill*, 2016 MT 219, ¶ 10, 348 Mont. 486, 380 P.3d 768; *see also* Mont. Code Ann. §§ 46-18-201(5), -241(1). A "pecuniary loss" includes "without limitation out-of-pocket losses, such

as medical expenses . . . and reasonable expenses related to funeral and burial or crematory services.” Mont. Code Ann. § 46-18-243(1)(a). The State provided detailed affidavits that specified the pecuniary losses of three of Bertsch’s shooting victims. The losses included funeral expenses and medical expenses paid by CVCP. The CVCP is entitled to subrogation for these payments from any restitution imposed. Mont. Code Ann. § 46-18-248. Bertsch does not challenge the basis for the restitution, the amount imposed, or the reimbursement of CVCP.

Bertsch’s only argument is that the district court imposed restitution in error because he does not have the ability to pay it. To support his argument, Bertsch overstates this Court’s holding in *State v. Lodahl*, 2021 MT 156, 404 Mont. 362, 491 P.3d 661, and misconstrues the restitution statutes.

Pursuant to Mont. Code Ann. § 46-18-246, an offender can petition the district court to adjust or waive the restitution imposed if they can prove:

(1) the circumstances upon which the court based the imposition of restitution no longer exist; (2) the amount of the victim’s pecuniary loss no longer exists; (3) the method or time of payment no longer exists; or (4) that it otherwise would be unjust to require payment as imposed.

*Lodahl*, ¶ 25 (quoting *State v. Erickson*, 2018 MT 9, ¶ 16, 390 Mont. 146, 408 P.3d 1288). This Court’s limited holding in *Lodahl*, ¶¶ 23-28, merely allows a defendant to request adjustment or waiver of restitution contemporaneous to the imposition of the sentence. The offender, however, still “bears the burden to request and

factually demonstrate his eligibility for relief.” *Lodahl*, ¶ 25 (quoting *Erickson*, ¶ 17) (internal quotations omitted). Bertsch failed to make any showing below and now attempts to avoid restitution for undisputed losses based on his mere mention of indigence in response to the district court’s question during the sentencing hearing. He is not entitled to the relief he has requested.

In *Lodahl*, ¶¶ 4, 10, the defendant requested a restitution hearing with the primary purpose of showing that she did not have the ability to pay the undisputed amount of restitution during her six-month suspended sentence. During the hearing, *Lodahl* presented unrefuted testimony regarding her limited financial means and her financial demands, which included supporting her two young children—ages seven and ten—as a single mother. *Id.* ¶ 7. Detailed evidence showed *Lodahl*’s expenses exceeded her income, which consisted primarily of social security disability due to her various mental health problems. *Id.* The district court considered this information, but it was “not persuaded by the Defendant’s argument that she is unable to pay restitution.” *Id.* ¶ 9. The district court imposed \$6,152.49 in restitution and ordered *Lodahl* to pay the restitution, plus the \$100 administration fee, within five months. *Id.* ¶ 10.

This Court reversed and reasoned that the restitution statutes must be interpreted as a whole. *Id.* ¶¶ 23-28. Those statutes include Mont. Code Ann. § 46-18-246, which allows an offender to petition to waive restitution if the basis

for it no longer exists or it would be unjust to require it. *Id.* This Court explained that the un rebutted evidence Lodahl presented during her sentencing hearing showed her limited financial means and was sufficient to notify the district court and the parties of her challenge to the restitution based on her inability to pay. *Id.* The Court held the district court erred in imposing restitution because Lodahl had met her burden to show it was unjust in her circumstances. *Id.*

Here, Bertsch took no affirmative action to challenge the restitution and provided no evidence to support a petition for waiver as contemplated by Mont. Code Ann. § 46-18-246. Bertsch merely responded to the district court when it asked if he had any objection to the restitution. Bertsch’s counsel said, “The defense would lodge a general objection due to the defendant’s indigent status.” (11/17/21 Tr. at 236.)<sup>2</sup> This is not remotely close to the circumstances in *Lodahl*, ¶¶ 23-28, and it cannot be construed as filing the petition for waiver contemplated in Mont. Code Ann. § 46-18-246. Without any facts to support the application of Mont. Code Ann. § 46-18-246, the district court correctly imposed restitution for the medical and funeral expenses of Bertsch’s victims without consideration of his ability to pay. *See Lodahl*, ¶¶ 23-28.

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<sup>2</sup> Bertsch informed the district court that the restitution appeared to be accurate, and he did not challenge the basis for the restitution. (11/17/21 Tr. at 236.)

Even if this Court interprets Bertsch's lack of action as sufficient to exercise his petition rights under Mont. Code Ann. § 46-18-246, Bertsch cannot meet his burden to show a waiver was necessary in these circumstances. *See Lodahl*, ¶ 25. Bertsch does not contest the validity of the medical and funeral expenses incurred by his victims or the CVCP payment of those expenses, so he cannot show that the basis for restitution no longer exists. *See* Mont. Code Ann. § 46-18-246. He can only obtain relief if he shows it "would be unjust to require payment as imposed." Mont. Code Ann. § 46-18-246.

Bertsch claims indigence based on his autism and imprisonment, but these circumstances do not render the restitution unjust in these circumstances. Bertsch's prior indigence has no bearing on his future, which will be spent exclusively in prison serving consecutive life sentences. Although his father claimed Bertsch could not previously maintain employment due to his autism, nothing in the record shows that his autism will prohibit him from obtaining future employment of some sort in prison. Moreover, the district court found unpersuasive Bertsch's attempts to exaggerate the impacts of his autism throughout the trial court proceedings. It said, Bertsch "attempted to use his autism spectrum disorder to avoid responsibility for his homicidal acts. He has feigned a lack of knowledge and understanding of these proceedings and malingered. He has exaggerated the symptoms of his level 1 mild diagnosis of ASD." (11/17/21 Tr. at 241.)

The possibility that Bertsch may obtain future earnings while in prison supports the restitution imposed, because the restitution statutes contemplate the garnishment of wages earned by prison inmates. Mont. Code Ann. §§ 46-18-237, -244(6)(a). Consistent with this authority, the State raised garnishment of Bertsch's prison wages in its sentencing memorandum, and the district court considered Bertsch's potential prison employment to support the imposition of restitution.

As to restitution, the Court does impose restitution in the amount \$34,728.14, as well as restitution—the restitution administrative fee in the amount of 10 percent of \$3,472.81. All of those fees are payable to the clerk of court. And given that Mr.—or, Defendant Bertsch will have an opportunity for jail work and other opportunities within the prison system to earn funds, those funds should first be paid to restitution and then allocated to the fees set forth above.

(11/17/21 Tr. at 242-43.)

Bertsch's argument is an attempt to avoid undisputed restitution based on the severity of his prison sentences. This is contrary to logic and the law. As this Court has explained, since 1997, Mont. Code Ann. § 46-18-241(1) has clearly instructed courts to “require an offender to make *full* restitution. . . .” *State v. Ferre*, 2014 MT 96, ¶ 20, 374 Mont. 428, 322 P.3d 1047. By statute, “[t]he duty to pay full restitution under the sentence remains with the offender or the offender's estate until full restitution is paid, whether or not the offender is under state supervision.” Mont. Code Ann. § 46-18-241(1). Nothing in the law supports Bertsch's attempt to invalidate the undisputed restitution with a prison sentence. If Bertsch obtains



prison employment in the future, the State can garnish his wages to pay towards the restitution. *See* Mont. Code Ann. §§ 46-18-237, -244(6)(a). If he does not, the restitution will go unpaid unless Bertsch obtains something of value by other means. Either way, Bertsch has failed to meet his burden to show it would be unjust to require restitution as imposed. *See Lodahl*, ¶¶ 23-28; Mont. Code Ann. § 46-18-246.

Bertsch has provided no evidence to show that restitution is unjust, and the district court's imposition of restitution should be affirmed. If circumstances change in the future and Bertsch can make a showing that restitution is unjust, he can properly raise that challenge at any time by filing a petition with the district court pursuant to Mont. Code Ann. § 46-18-246.

### **CONCLUSION**

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

Respectfully submitted this 8th day of May, 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 3,258 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Brad Fjeldheim

BRAD FJELDHEIM

## **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 05-08-2024:

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