

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHNATHAN ALBERT BERTSCH,

REPLY 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
BRAD FJELDHEIM
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401

MATT JENNINGS
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
CERTIFICATE OF COMPLIANCE.....	4

TABLE OF AUTHORITIES

Cases

State v. Lodahl,
2021 MT 156, 404 Mont. 362, 491 P.3d 661 1, 2

Montana Code Annotated

§ 46-18-101 1, 3

The State suggests Mr. Bertsch's inability to pay restitution is irrelevant, arguing that Mr. Bertsch overstates *Lodahl's* holding and misconstrues the restitution statutes. Response Brief at 7, 9; *State v. Lodahl*, 2021 MT 156, 404 Mont. 362, 491 P.3d 661. Mr. Bertsch is not arguing that the mere mention of indigence should waive restitution. Response Brief at 10. Ordering Mr. Bertsch to pay an amount that the court knows he will not be able to pay violates the plain language of Mont. Code Ann. § 46-18-101(2)(h)'s mandate that all offenders be "financially able to do so." Mr. Bertsch is simply unable to pay restitution because he is unable to work to earn money and owns nothing.

Although Mr. Bertsch attempted employment several times in his life, including an attempt to join the military, he was unable to do so because he is autistic. Mr. Bertsch was adjudicated disabled and granted full social security disability support because of his inability to work for money. D.C. Doc. 154. Mr. Bertsch had no assets or way to earn income during the nine years he lived on disability with his father. D.C. Docs. 139, 154.

Lodahl holds that defendants can request an adjustment or waiver of restitution, and upon request of a waiver, courts must determine the restitution amount and then determine the propriety of adjusting or waiving the payment of the restitution ordered. *Lodahl*, ¶ 26. Mr. Bertsch requested a waiver based upon his indigence at sentencing, with the facts established that he owned nothing and had been adjudicated unable to work to earn money. 11/17/21 Sentencing Hearing Transcript at 236; D.C. Docs. 139, 154. The State seems to argue that the fact that he is going to prison rather than living in the community on a suspended sentence as Ms. Lodahl did means he is able to pay restitution because he can work at the prison for prison wages. The fact of Mr. Bertsch spending the rest of his life in prison does not change his disability or render him somehow able to work for money.

The district court cited no new information indicating Mr. Bertsch would have the ability to pay the \$34,728.14 in restitution he was ordered to pay. There was no evidence presented to rebut the fact that Mr. Bertsch owned nothing when he was incarcerated, or to rebut the fact that he was adjudicated unable to work. The State could have rebutted the fact that Mr. Bertsch is 100% disabled and owns nothing

by introducing evidence that he had been successfully employed at some point in his life, or that he actually did have some assets, or alternately showing that the prison can put people to work who are unable to do so otherwise. No such evidence was presented.

Mr. Bertsch has no assets and is not able to work to earn money. That Mr. Bertsch is incarcerated for the rest of his life does not change these facts. The district court violated Mont. Code Ann. § 46-18-101(2)(h) when it ordered Mr. Bertsch to pay restitution when he is unable to do so. This Court should reverse the award of restitution and remand to waive the \$34,728.14 assessed.

Respectfully submitted this 14th day of June, 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 reply 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 561, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
GREGORY HOOD
Assistant Appellant Defender

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-14-2024:

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

Brad Fjeldheim (Govt Attorney)
215 N. Sanders
PO Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Matthew C. Jennings (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Gregory Nelson Hood
Dated: 06-14-2024