IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0430

STATE OF MONTANA

Plaintiff and Appellee,

v.

JEFFREY SCOTT ANDERSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman Presiding

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STATEMENT OF THE ISSUES

Did the District Court abuse its discretion in sentencing the Appellant as a persistent felony offender (PFO), when the State did not follow Montana statutory law and/or local procedure in giving notice of its intention to have the District Court sentence the Appellant under the PFO statutes?

Did the District Court commit plain error or abuse its discretion in not having an Omnibus hearing in this case?

STATEMENT OF THE CASE

The Court has an opportunity to address and correct the repeated failures of the State and District Court to follow the law concerning the State's notice of its intent to have the District Court sentence the

Appellant under the PFO statutes. The Appellant makes this opportunity available to the Court by seeking to have it (1) vacate the change of plea and sentence the District Court imposed in this case and (2) remand the case back to the District Court for proceedings consistent with the Court's ruling. The Appellant claims that, in imposing its sentence, the District Court (1) imposed a PFO sentence on the Appellant, even though the State had not given sufficient and timely notice of its intention to seek a PFO sentence under Montana statutory law and/or local procedure, and (2) failed to conduct an actual Omnibus hearing, which could have gone a long way toward avoiding the abuse of discretion it committed in sentencing the Appellant under the PFO statutes.

STATEMENT OF THE FACTS

On June 10, 2022, Jeffrey Scott Anderson ("Appellant") appeared on a warrant before the Montana Eighth Judicial District Court, Cascade County ("District Court") and pled not guilty to several charges in this case, ultimately designated as CDC 22-346:

Counts I-II: Violation of Order of Protection, misdemeanors in violation of M.C.A. § 45-5-626; and

COUNTS III-XVII: Violation of Order of Protection, felonies in violation of M.C.A. § 45-5-626.[1]

On June 13, 2022, the District Court set an arraignment in this case for June 30, 2022.[2]

On June 30, 2022, the Appellant appeared for arraignment in this case[3]. While the District Court set an initial trial date of October 24, 2022, it did not set a date for an Omnibus hearing per Mont. Code Annotated § 46-13-110, nor did it provide any explanation under Montana statutory or case law for not ordering an Omnibus hearing.[4] Rather, the District Court ordered: "Omnibus Orders will be emailed from the Prosecutor to Defense Counsel to be completed and then emailed to chambers at sarah.kersch@mt.gov on or before Wednesday, August 31, 2022 at 5:00 p.m."[5] Within the "four corners" of its order,

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[1] District Court Document (hereafter D.C. Doc.) 5.
[2] D.C. Doc. 8.
[3] D.C. Doc. 13.
[4] D.C. Doc. 13.
[5] D.C. Doc. 14.

the District Court did not grant the State permission to inform the Appellant of its intention to have the Court treat him under the PFO statutes by e-mail or sheriff's service.[6]

On August 11, 2022, the Appellant appeared before the District Court to plead not guilty to a new charge, Count XVIII Stalking, a misdemeanor in violation, of M.C.A. § 45-5- 220(1)(b).[7]

On August 31, 2022, the State gave notice to the District Court of its intention to seek treatment of the Appellant as a persistent felony offender.[8] However, contrary to the mandate of Mont. Code Ann. § 46-13-108(2), the State did not "specify the alleged prior convictions" of the Appellant that it believed would empower the District Court to treat the Appellant under the PFO statutes.[9]

On September 1, 2022, in lieu of an actual Omnibus hearing explicitly mandated under Mont. Code Ann. § 46-13-110, the parties in this case filled out and filed an Omnibus hearing memorandum and

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[6] D.C. Doc. 14.
[7] D.C. Docs. 19 & 20.
[8] D.C. Doc. 24.
[9] D.C. Doc. 24.

order.[10] Relevant to this case, the State submitted the following answers regarding the potential treatment of the Appellant under the laws governing PFO sentencing:

> NOTICE: Pursuant to Mont. Code Ann. §§ 46-13-108 and 109, the State provides notice as, follows: 1. The State (x) will ( ) will not seek treatment of the Defendant as a persistent felony offender. If yes: The State ( ) has previously filed written notice specifying the alleged prior convictions which support such treatment, or (x) provides such notice in Addendum A to this Order.[11]

The Omnibus hearing memorandum and order, however, did not include an "Addendum A" "specifying the alleged prior convictions which support such treatment."[12]

Also, the Omnibus order does not contain any language wherein the Appellant explicitly agreed to waive an Omnibus hearing as mandated under Mont. Code Ann.§ 46-13-110. Furthermore, the Omnibus order does not contain any language explaining how the District Court was able to order the parties to this case to fill out and

[10] D.C. Doc. 25.
[11] D.C. Doc. 25 at 4.
[12] D.C. Doc. 25.

file the order, instead of conducting an Omnibus hearing as Mont. Code Ann. § 46-13-110 mandates.

On September 7, 2022, six days after the deadline Mont. Code Ann. §§ 46-13-108 (1) & (2) mandate, the State filed a notice of its intention to seek treatment of the Appellant as a persistent felony offender.[13] D.C. Doc. 26. In support of its notice, the State argued that the Appellant's record contained two felony convictions, Assault and Battery Aggravated/Attempt to Injure with Weapon from January 15, 2015 and Failure to Register from April 27, 2018.[14]

However, the document containing the State's PFO notice did not show, let alone mention, what "good cause" it had under Mont. Code Ann. § 46-13-108 (1) to file the notice after the statutory deadline.[15]

On October 13, 2022, the Appellant pled not guilty to another charge the State had filed against him: COUNT XIX: Violation of Order of Protection, a felony in violation of M.C.A. § 45-5-626.[16]

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[13] D.C. Doc. 26.
[14] D.C. Doc. 26 at 4.
[15] D.C. Doc. 26.
[16] D.C. Docs. 31 & 32.

On November 1, 2022, the Appellant appeared before the District Court and pled guilty to some of this case's charges under the terms of a plea agreement and waiver of rights.[17] The plea agreement included language concerning any potential breach of the agreement:

> The foregoing sentencing recommendation is contingent upon the defendant not being arrested for, being charged with, or there being probable cause to believe he committed any additional crime(s), making all court appearances, cooperating with adult probation and parole in the preparation of the pre-sentence investigative report process, having no additional probation violations, not violating his bail conditions, and not violating or' attempting to violate any other term of this agreement or any other agreements between the parties. In the event the defendant violates this paragraph, the state may make any sentencing recommendation allowed by law and/or may refile any dismissed charges or cases. However, the defendant shall not be entitled to withdraw the guilty or pleas entered in this matter barring a ruling from the court allowing withdrawal.[18]

Under the plea agreement's terms, the State agreed not to ask the District Court to sentence the Appellant as a persistent felony offender pursuant to M.C.A. §§ 46-18-501 and 46-18-502.[19] The State

[17] D.C. Docs. 33 & 34.
[18] D.C. Doc. 34 at 6-7.
[19] D.C. Doc. 34 at 6.

also agreed to dismiss eleven counts of felony Violation of an Order of Protection and recommend that the sentences for the remaining felony charges run consecutively to each other for a total sentence for the felonies of ten (10) years to the Department of Corrections with six (6) years suspended.[20]

On April 25, 2023, the State filed a brief alleging that the Appellant had violated the terms of the plea agreement and seeking leave to make a sentencing recommendation different from that reported in the plea agreement: "Defendant breached the plea agreement in this case when he repeatedly contacted the victim in the case against his bail conditions. Defendant repeatedly sent Facebook messages to the victim on April 4, 2023, and April 5, 2023."[21]

The State thus proposed a new sentence:

> The State advised of its intent to depart from the plea agreement in so much that instead of as called for in the plea agreement asking for ten (10) years to the Department of Corrections with six (6) years suspended the State will be asking for PFO to be imposed and the Court sentence

[20] D.C. Doc. 34 at 6.
[21] D.C. Doc. 54 at 5.

Defendant to ten (10) years to the Department of Corrections with five (5) years suspended.[22]

In support of its proposed new sentence, the State argued:

> The State previously, in accordance with the law, filed notice of intent to seek sentencing as a persistent felony offender (PFO). Notice was previously filed on September 1, 2022, and was served on the Defendant on September 6, 2022. The State has included in all discussions with Defense since the inception of the case that PFO sentencing, should Defendant accept responsibility by pleading guilty, would be waived by the State. As the State appropriately filed and noticed up that Defendant is a PFO it is within the legal sentencing and allowable by the Plea Agreement for the State not to withdraw noticing up Defendant as a PFO.[23]

The State further argued in support of a sentence for the Appellant as a PFO, "[T]the State is not asking for PFO sentencing on all the felonies Defendant plead to but only one. Defendant is still retaining a vast benefit despite that he is the breaching party. Defendant has received benefit from the plea agreement that he bargained for."[24]

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[22] D.C. Doc. 54 at 2.
[23] D.C. Doc. 54 at 7.
[24] D.C. Doc. 54 at 8.

On May 9, 2023, in response to the State's argument for a PFO sentence, the Appellant filed a brief in support of specific performance of the original plea agreement.[25] The Appellant argued:

> The Court should not be bound by any sentencing enhancements. The State did not properly provide notice for a persistent felony offender designation to be applied under §46-13-108, because the State's first notice was deficient, and the State's second notice was untimely.[26]

Regarding the deficiency of the State's PFO notice and why specific performance of the original plea agreement was necessary, the Appellant offered as evidence:

> [T]he record shows the State initially filed a Notice of Intent to Seek PFO on September 1, 2022, at 10:53AM, marked as Defense's Exhibit "B." (Doc. #24). That notice, filed just hours before the Omnibus, was a single sentence, and neither articulated the dates or convictions that the State would rely on for the PFO designation.[27]

In support of its claim that the State's PFO notice was untimely, the Appellant offered:

> The Omnibus Hearing Memorandum and Order was filed on September 1, 2022, after review by both parties. (Doc. #25). The following week, on September 6th, 2022, the

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[25] D.C. Doc. 57.
[26] D.C. Doc. 57 at 5.
[27] D.C. Doc. 57 at 3.

> State again filed a Notice of Intent to Seek as PFO (marked Defense Exhibit "C"), this time adhering to the statutory requirements (albeit still untimely) of listing dates and convictions to satisfy §46-13-108, MCA. (Document #26).[28]

On May 11, 2023, the State filed a reply to the Defendant's response.[29] In support of its position that the District Court should sentence the Appellant under the PFO statutes, the State argued that the Appellant's criminal history had been brought up during a June 14, 2022 bail hearing, if not in the context of a PFO notice.[30] Specifically, the State informed the District Court and the Appellant that the Appellant had felony convictions for Assault and Battery – Aggravated/Attempt to Injure with Weapon in Wyoming on January 15, 2015, and a Failure to Register felony in Montana on April 27, 2018.[31]

The State added: "The notice was timely given at the Omnibus hearing and then filed with the underlying felony convictions on

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[28] D.C. Doc. 57 at 3.
[29] D.C. Doc. 60.
[30] D.C. Doc. 60 at 1.
[31] D.C. Doc. 60 at 1.

September 6, 2022, after being served on Defendant and again on September 9, 2022, after being served on Defense Counsel."[32]

The State also cited rulings from the Court that it claimed upheld the propriety of its late PFO notice filing: *Shults, Scheffelman, Ramsey, Seitzinger, and Johnson.*[33]

On May 16, 2023, the District Court sentenced the Appellant under the PFO statutes to ten years in prison with five years suspended on Count XIX, Violation of an Order of Protection.[34] It imposed suspended sentences for the other charges to which the Appellant had pled guilty, all of which would run concurrently with Count XIX.[35]

The District Court imposed the sentence after hearing protracted arguments from the Appellant and State regarding whether it had the authority to sentence the Appellant under the PFO statutes or had to order specific performance of the original plea agreement. During the

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[32] D. C. Doc.60 at 5.
[33] D.C. Doc. 60 at 5-6.
[34] D.C. Doc. at 61, Appendix A.
[35] D.C. Doc. at 61, Appendix A.

arguments, an exchange occurred between the District Court and the State's attorney:

> THE COURT: Okay. So, your position is, although you didn't have it in the court file by the end of the day on August 31, you had sent e-mails to your adversaries' e-mail address before dinner time?
>
> MS. LOFINK: Correct.[36]

Another exchange then occurred between the Appellant's attorney and the District Court:

> MR. FRIES: And I leave at 5:00, Your Honor. So, I get that it comes at 5:02 but this is irrelevant, Your Honor because the notice provided in the Montana Code Annotated gives zero wiggle room, Your Honor, zero. It needs to be done and, in the file, and Your Honor.
>
> THE COURT: Really?
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> MR. FRIES: Yes, Your Honor because things don't happen until they are in the file. I've been told that as a Public Defender for years, in many different courts. E-mails don't do things, texts don't do things, that's why we have files, that's why we have dates, that's why we have time stamps because they mean something and they should mean something on both sides, Your Honor.[37]

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[36] May 16, 2023 Sentencing Transcript (hereafter "Sent. Tr.) at 9.
[37] May 16, 2023 Sent. Tr. at 11.

The District Court then suggested what may have happened: "We didn't have an Omnibus hearing. It was -- so under the procedures in Department C, we exchange the form, the due date was August 31, and she e-mailed, it appears the actual -- we need to be careful here because there were two notice documents."[38]

The Appellant's attorney in turn suggested a theory to explain why the State filed the supplemental notice (D.C. Doc. 26) of its intention to have the Appellant sentenced under the PFO law: "It did not adhere to the statute and you can see in the State's own actions when they followed up with the supplement, that they were doing that as well. It didn't need to be done if their position was correct."[39]

Notwithstanding the theory the Appellant's attorney had suggested, the Court ruled:

> So, I would have had no trouble saying if you wait until September 7th to get him the specifics that is too late but, on these facts, I do not have a principal basis for finding that that was late and I'm finding that it complied, which means that this is going to be a PFO sentence. Do you need time to react to that?"[40]

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[38] May 16, 2023 Sent Tr. at 11-12.
[39] May 16, 2023 Sent. Tr. at 15.
[40] May 16, 2023 Sent. Tr. at 26.

Having been invited to do so by the District Court, the Appellant's attorney reacted:

> You have to abide by the statute of Montana Code Annotated as attorneys. When we file something by a deadline, it needs to be filed by that deadline. So, I am making an argument that they deviated from that and that deviation was insufficient. So, Your Honor, oftentimes as a Public Defender, I am on the other end of this where there is zero wiggle room, zero grace (inaudible), whatever, it doesn't matter, you are late. So, I'm making an argument that two-seconds late, two-minutes late, two-hours late, two-weeks late, two-months late is late. So, I want to make sure that I am just putting all of that out there, Your Honor. I understand the Court's decision, but I want to make sure that when I do this, it is done correctly with the most support that I have, Your Honor. And I will leave it at that, Your Honor.[41]

After hearing from the State regarding the law concerning mandatory minimum sentences under the PFO statutes, the District Court declared to the Appellant:

> I 100-percent believe your lawyer's going to appeal and you probably won't (inaudible) write the brief, it will probably be somebody else. But I'm now going to say on the record that I don't appreciate having my hands tied on this. You and your client should feel free to tell the Supreme Court. But my hands are tied and they are tied in significant

[41] May 16, 2023 Sent. Tr. at 27-28.

part because he kept contacting her after being repeatedly told not to do it.[42]

On June 13, 2023, the District Court issued a sentencing order, judgment, bond exoneration and order to close.[43] The document's reported sentence did not deviate from that the District Court had orally pronounced at the sentencing hearing.[44]

On August 8, 2023, the Appellant filed his notice of appeal, which the Court ultimately designated as DA 23-0486.[45]

STANDARDS OF REVIEW

I. Abuse of Discretion

The Court in *Passmore* held, "A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. In exercising its discretion, however, the court is bound by the Rules of Evidence or applicable statutes."[46]

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[42] May 16, 2023 Sent. Trans at 44-45.
[43] D.C. Doc. 64, Appendix B.
[44] D.C. Doc. 64 at 10.
[45] D.C. Doc. at 66.
[46] *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 208, 225 P.3d 1229, 1246 (internal citations omitted).

II. Plain Error

While the Court generally does not consider issues raised for the first time on appeal, plain error review is an exception to this rule, according to its ruling in *Akers*: "[C]ourts invoke plain error review to correct error not objected to at trial but that affects the fairness, integrity, and public reputation of judicial proceedings."[47] In *Akers,* the Court reviewed the requirements for plain error review:

> To reverse a decision for plain error, the appellant must: (1) demonstrate that the claimed error implicates a fundamental right; and (2) firmly convince this Court that a failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.[48]

SUMMARY OF ARGUMENT

The Appellant asked the District Court to deny the State's proposed PFO designation of the Appellant (and thus have specific performance of the original plea agreement), and the District Court refused to do so. The Appellant argued that the State had not fulfilled

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[47] *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont 531, 534, 408 P.3d 142, 145 (internal citations omitted).
[48] *Akers*, *Id.* at ¶ 10.

the filing requirements for a PFO designation. Also, the District Court did not hold an Omnibus hearing in the manner mandated under the law.

The Appellant thus moves the Court to vacate the change of plea and sentence in this case and remand it back to the District Court for proceedings consistent with the Court's ruling.

ARGUMENT

The Court should vacate the change of plea and sentence the District Court imposed in this case and remand it back to the District Court for proceedings consistent with the Court's ruling because the District Court did not follow the law in (1) denying the Appellant's motion to preclude it from sentencing the Appellant as a persistent felony offender and (2) failing to have an Omnibus hearing in this case.

I. The District Court abused its discretion in sentencing the Appellant as a persistent felony offender, as the State had not followed statutory law and local procedure when giving notice of its intention to have the Appellant sentenced as a persistent felony offender.

A. If the District Court legally sentenced the Appellant as a persistent felony offender, then the State had properly given notice of its intention to have the Appellant sentenced as a persistent felony offender at or before the Omnibus hearing in this case.

The Montana and United States Constitutions guarantee against depriving a person of liberty without due process of law.[49]

To help fulfill this guarantee, the State has enacted laws mandating how courts are to conduct their cases. One of the laws governs how the State is to make known its intention to have defendants subjected to "treatment" as persistent felony offenders (PFO). Mont. Code Ann. § 46-13-108 thus mandates:

> (1) Except for good cause shown, if the prosecution seeks *treatment* of the accused as a persistent felony offender or a persistent felony offender under supervision, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.
>
> (2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.
>
> (3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.
>
> (4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

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[49] U.S. Const. Amend. XIV, § 1; Mont. Const. Art. II, § 17.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant. (emphasis added).

Mont. Code Ann. § 46-13-110 mandates concerning PFO designations:

(1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial, the court shall hold an omnibus hearing.

(2) The purpose of the hearing is to expedite the procedures leading up to the trial of the defendant.

(3) The presence of the defendant is not required, unless ordered by the court. The prosecutor and the defendant's counsel shall attend the hearing. The prosecutor and the defendant or defendant's counsel may attend the hearing by two-way electronic audio or video communication if neither party objects and the court agrees to its use. The parties must be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:…

(g) notice of seeking persistent felony offender status, 46-13-108;

The Cascade County District Court also has a procedure set out in its Omnibus hearing memorandum and order that the State must follow when giving notice of its intention to have a defendant treated under the PFO statutes:

NOTICE: Pursuant to Mont. Code Ann. §§ 46-13-108 and 109, the State provides notice as, follows:

i. The State (x) will ( ) will not seek treatment of the Defendant as a persistent felony offender.

If yes: The State ( ) has previously filed written notice specifying the alleged prior convictions which support such treatment, or (x) provides such notice in Addendum A to this Order. The notice shall be filed and sealed until the time of trial or until a plea of guilty is given by the Defendant.[50]

B. The State did not properly give notice of its intention to have the Appellant treated as a persistent felony offender before or at the Omnibus hearing in this case.

The plain language of Mont. Code Ann. § 46-13-108(1) mandates that the State had to give notice of its intention to have the Appellant treated under the PFO laws "at or before the Omnibus hearing," with the notice specifying the Appellant's "prior convictions" that made the Appellant eligible for PFO treatment.

However, the State did not give such notice as mandated under Mont. Code Ann. § 46-13-108(2) before or at the Omnibus hearing. The State did not specify the Appellant's prior offenses as mandated under

[50] D.C. Doc. 25 at 4.

Mont. Code Ann. § 46-13-108(2) that qualified the Appellant for treatment under the PFO statutes.[51]

When the State finally filed a document specifying the Appellant's prior offenses that it claimed qualified the Appellant for treatment under the PFO laws, it failed to do so until September 6, 2022, six days after the deadline Mont. Code Ann. § 46-13-108(1) mandates.[52] The belated document also did not explicitly mention or even show "good cause" for the State's filing delay, as Mont. Code Ann. § 46-13-108 (1) also mandates.[53]

In filling out the District Court's Omnibus hearing memorandum and order, when the State checked the box to indicate that it would seek PFO treatment for the Appellant, it also checked the box indicating that it would provide notice of its intent to have the Appellant treated as a PFO "in Addendum A to this Order."[54]

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[51] D.C. Doc. 25 at 4.
[52] D.C. Doc. 26.
[53] D.C. Doc. 26.
[54] D.C. Doc. 25 at 4.

However, the District Court's Omnibus hearing memorandum and order did not include an "Addendum A" specifying the Appellant's prior convictions that qualified him for PFO "treatment."[55]

In defense of its late and incomplete filing regarding the Appellant's treatment as a PFO, the State argues that it had provided notice of Defendant's prior convictions multiple times throughout the history of this case, both verbally and in writing beginning on at least June 14, 2022, and through the drafting and filing of its reply brief of May 11, 2023.[56]

This would be a valid defense, if Mont. Code Ann. § 46-13-108 included language stating that merely providing a defendant with prior notice of the defendant's past violations without any reference to their role in supporting PFO treatment was sufficient for fulfilling the demands of the statute. However, the statute does not include such forgiving language.[57]

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[55] D.C. Doc. 25
[56] D.C. Doc. 60 at 4.
[57] Mont. Code Ann. § 46-13-108

The State also argues that it had properly provided notice of its intention to subject the Appellant to PFO treatment based on its response to the Omnibus hearing memorandum and order:

> The form included that the State noted the intent to seek treatment of Defendant as a persistent felony offender (PFO) and the State's intent to use evidence of other crimes, wrongs, or acts. At that same time the State also emailed Defense Counsel the Notice of Intent to Seek Treatment of Defendant as a Persistent Felony Offender.[58]

This would be a valid argument, had the State attached the e-mail as "Exhibit A" to the Omnibus hearing and memorandum form, based on its obligation to do so according to the form the District Court had provided.[59] However, it did not. Thus, the State's argument concerning the sufficiency of its late e-mail for the purpose of providing notice of its intention to subject the Appellant to PFO "treatment" is not valid.

Mont. Code Ann. 46-13-108 also does not mention that the State can give a defendant notice of its intent to have a defendant treated

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[58] D.C. Doc. 60 at 2.
[59] D.C. Doc. 25 at 4.

under the PFO statutes by e-mail before the Omnibus or by having a sheriff's deputy simply deliver it to a defendant.

The State then cited several cases it claimed supported its position, but all of them are inapplicable to this case for one reason or another.

For example, it relies on *Schiffelman* for the proposition:

> "[T]he State's notice of intent to seek increased punishment under the PFO statute was filed timely when notice was filed four days after the Omnibus hearing and the Omnibus order form did not contain a place to record where notice was intended to be given. In the case at hand, the Omnibus order form did contain a place to record that notice was intended to be given and the State marked that intent. The State did immediately file Notice of Intent to seek PFO status on September 1, 2022, and filed the written notice with the convictions noted after obtaining a copy of the return of service on September 6, 2022.[60]

Such reliance would be probative, if the Court in *Scheffelman* had ruled on the applicability of a PFO statute that was the same as the PFO statute the District Court sentenced the Appellant under in this case. However, it did not. In *Scheffelman*, the Court ruled on the applicability of a PFO notice statute that read, "If the state seeks

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[60] D.C. Doc 60 at 5-6.

treatment of the accused as a persistent felony offender under 46-18-502, notice of that fact must be given in writing to the accused or his attorney *before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty*."[61]

Whereas the PFO notification statute that the Court ruled on in *Scheffelman* required the State to provide PFO notification to the accused or the accused's attorney "before entry of a plea of guilty by the accused or before the case is called for trial," the current version of the PFO notification statute requires earlier notification that "must be given at or before the Omnibus hearing pursuant to 46-13-110."[62]

The State's reliance on *Schiffelman* would also be probative, if "the Omnibus order form did not contain a place to record where [PFO]notice was intended to be given."[63] However, the Omnibus form in this case had a place where the State could mark whether it would be seeking to have the Appellant treated as a persistent felony offender

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[61] *State v. Scheffelman*, 225 Mont. 408, 411, 733 P.2d 348, 350 (1986)(emphasis added).
[62] Mont. Code Ann. § 46-13-108 (1).
[63] D.C. Doc 60 at 5-6.

and instructed the State to include the offenses it was citing in support of PFO treatment as "Attachment A" to the Omnibus order.[64]

Johnson and *Seitzinger* are similarly inapplicable to this case. In *Johnson,* the Court ruled on the applicability of a PFO notification statute that also read, "'When the state seeks increased punishment of the accused as a prior convicted felon under section 94-4713, notice of that fact must be given in writing to the accused or his attorney *before the entry of a plea of guilty by the accused, or before the case is called for trial upon a plea of not guilty.*'"[65]

Therefore, as in *Scheffelman,* the Court in *Johnson* ruled on the applicability of a PFO notification statute that had a different deadline than that of the current statute, thus making *Johnson* inapplicable to this case.

The State also cited the Court's decision in *Seitzinger* for its holding that giving PFO notice twelve days before trial was sufficient.[66]

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[64] D.C. Doc. 25 at 4.
[65] *State v. Johnson*, 179 Mont. 61, 70, 585 P.2d 1328, 1333 (emphasis added).
[66] D.C. Doc. 60 at 7.

However, In *Seitzinger,* the Court also ruled on the applicability of the same PFO notification statute as it ruled on in *Scheffelman* and *Johnson.*[67] As such, the State's reliance on *Seitzinger* is also misplaced, because the Court in *Seitzinger* addressed the applicability of a PFO statute that differs from its current version.

When arguing this case before the District Court, the State cited *Shults* for its holding "that the State's notice was sufficient when the State checked the box in the Omnibus order and presented written notice specifying the prior conviction at a plea hearing four months prior to sentencing."[68]

The holding in *Shults* would be applicable to this case, if the facts of *Shults* were sufficiently similar to this case. However, they are not. Whereas the district court in *Shults* held an Omnibus hearing, the District Court in this case did not.[69] Thus, the District Court in this

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[67] *State v. Seitzinger*, 180 Mont. 136, 143, 589 P.2d 655, 659 (1979).
[68] D.C. Doc. 60 at 7.)
[69] *State v. Shults*, 2006 MT 100, ¶ 10, 332 Mont. 130, 133, 136 P.3d 507, 510.

case was not in as good a position to assess the adequacy of the State's notice of the PFO as it was in *Shults*.

Furthermore, in *Shults,* the appellant conceded "that the State specified the alleged prior conviction at the change of plea hearing."[70] However, in this case, the State did not specify any prior convictions of the Appellant at the change of plea hearing.[71]

Therefore, given the differences between this case and *Shults*, the holding the State cited from *Shults* is not applicable to this case.

The State's reliance on *Ramsey* is as misplaced as is its reliance on *Shults*. The State cited *Ramsey* for its holding that "the State's PFO notice submitted five days after the court-imposed deadline was sufficient given that notice was received five months prior to sentencing."[72] Yet, in *Ramsey,* the Court dealt in part with the district court's order to the State at the Omnibus hearing:

> On June 16, 2005, at the Omnibus hearing, the District Court ordered the State to file notice by June 17, 2005, concerning what convictions it was relying on in seeking to have Ramsey sentenced as a PFO. The State failed to file the

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[70] *Id.* at ¶ 21, 332 Mont. at 136, 136 P.3d at 512.
[71] 11/1/22 Change of Plea Transcript.
[72] D.C. Doc. 60 at 7.

> PFO information until June 22, 2005. Ramsey, however, did not object to the underlying convictions and only objected to the State's late PFO notice at the sentencing hearing, almost five months later.[73]

These facts notwithstanding, the Court in *Ramsey* still held that the appellant in his case had received adequate notice of his PFO status:

> While the State was five days late in providing Ramsey with the predicate offenses, Ramsey had almost five months to file an objection to the alleged prior offenses before the court-imposed sentence. As the record indicates that Ramsey did not file an objection to the predicate offenses, despite having adequate time to do so, other than a general objection based on the State's late notice, we hold that the District Court correctly determined that the State provided adequate notice of its intention to seek PFO status.[74]

The Court's holding in *Ramsey* would be applicable to this case, if the facts of *Rasmey* were similar to this case. However, this is not the case. As noted *supra*, the District Court in this case did not conduct an Omnibus hearing. Rather, it had the parties fill out and file a form, which the State did incompletely when it failed to attach to the Omnibus order a list of the predicate offenses it would be relying on to

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[73] *State v. Ramsey*, 2007 MT 31,¶ 9, 336 Mont. 44, 46, 152 P.3d 710, 711.
[74] *Id.* ¶ 9, 336 Mont. at 48, 152 P.3d at 713.

support its argument that the District Court should be sentencing the Appellant under the PFO statutes. (D.C. Doc. 25 at 4.)

In *Ramsey*, the district court conducted an actual Omnibus hearing.[75] Thus, the State in *Ramsey* had a better opportunity to make known its intention to have the district court in that case treat the appellant as under the PFO statutes.

Also, the district court in *Ramsey* at the Omnibus hearing gave the State a deadline by which it had to file with the district court a list of the predicate offenses supporting the State's proposal to have the district court treat the appellant in that case as a PFO, a deadline the State did not follow.[76] However, the record for this case does not reflect that the District Court gave a similar order to the State at any Omnibus.

Finally, a trial occurred in *Ramsey*, which resulted in four convictions for the appellant in that case.[77] In contrast, no trial occurred in this case, which increases the importance of the plea agreement the

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[75] *Ramsey*, *Id.* ¶ 9.
[76] *Ramsey, Id.* ¶ 9.
[77] 2007 MT 31,¶ 11, 336 Mont. at 46, 152 P.3d 711.

Appellant entered (especially concerning PFO notification) and the State ultimately did not follow.

Thus, the rulings the State cited in arguing that it had properly informed the District Court that it had provided notice of its intention to ask the District Court to treat the Appellant as a PFO are not applicable to this case. The implication of such inapplicability is that if the District Court relied on any of these cases in deciding to treat the Appellant as a PFO, then it abused its discretion, in the sense of *Passmore, supra.* The use of such inapplicable cases supports the conclusion that the District Court acted "without the employment of conscientious judgment," which *Passmore* recognizes as an example of "abuse of discretion."

C. Therefore, the District Court did not legally sentence the Appellant as a persistent felony offender.

The State had to give timely and sufficient notice of its intention to have the District Court sentence the Appellant under the PFO statutes. Its notice was neither timely nor sufficient in under Mont. Code Ann. § 46-13-108. The District Court thus committed an abuse of

discretion under criteria *Passmore, supra* sets out because it acquiesced in the State's violation of the law.

The District Court compounded its abuse of discretion by citing a fact that was not relevant to whether the State had given the District Court and Appellant timely and sufficient notice of its intent to have the Appellant treated under the PFO statutes: "I don't appreciate having my hands tied on this. You and your client should feel free to tell the Supreme Court. But my hands are tied and they are tied in significant part because he kept contacting her after being repeatedly told not to do it."[78]

Thus noted, the District Court's reference to the Appellant's contact with the victim would have been relevant, if the illicit contact provided evidence that increased the likelihood that the State's PFO notification was timely and sufficient, which was the dispute the District Court was supposed to be adjudicating. Yet, the District Court did not explain how the Appellant's contact with the victim somehow

[78] 5/16/31 Sent. Trans. at 44-45.

increased the likelihood that the Appellant's PFO notification was timely and sufficient.

As such, the District Court relied on irrelevant evidence in finding that the State's PFO notification was timely and sufficient. In relying on the irrelevant evidence, the District Court therefore exceeded "the bounds of reason, resulting in substantial injustice" to the Appellant, which was an abuse of discretion, according to *Passmore, supra.*

Some may claim that the State's failure to file on time a complete notice of its intention to have the District Court sentence the Appellant under the PFO law was a "harmless error," its effect on the Appellant having not been prejudicial enough to warrant having the Court vacate the sentence and remand the case back to District Court. For example, the District Court argued:

> Transmitting the detailed notice (including the underlying PFO offenses) two minutes late inflicted no actual practical prejudice in terms of preparing for trial or ultimately negotiating the plea agreement. It is not as if the evening of August 31 was the defense team's last chance to consider a response to the State's PFO strategy. They could have done this any time between August 31 and the execution of the plea agreement six weeks later.[79]

[79] D.C. Doc. at 5, ¶ 14.

That said, by abusing its discretion when permitting the State to get away with violating state law and local procedure in its prosecution of the Appellant, the District Court inflicted "actual practical prejudice" on the Appellant. The infliction occurred because the District Court denied him the fairness of a regular, mandated procedure to which he was entitled under the respective due process clauses of the Montana and United States Constitutions.[80] Ironically, the District Court allowed the State to violate the law in its prosecution of the Appellant for violating the law. It allowed the "ends" of prosecution to justify the illegal "means" of violating the law in conducting the prosecution.

In his dissent in *Olmstead*, Justice Louis Brandeis warned of the dangers inherent in allowing courts to grant such allowances:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it

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[80] U.S. Const. Amend. XIV, § 1; Mont. Const. Art. II, § 17.

> teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[81]

Still, that the District Court sentenced the Appellant under the PFO statutes, even though the State had effectively become a "lawbreaker" as Justice Brandeis had warned against, is possibly understandable, as the District Court itself also violated the law in its conduct of this case, which will be discussed below.

II. The District Court abused its discretion and committed plain error when it did not have an actual Omnibus hearing in this case in a manner the law mandates.

A. The District Court's conduct of this case would have been lawful, if it had conducted an Omnibus hearing as the law mandates.

[81] *Olmstead v. United States*, 277 U.S. 438,485, 48 S. Ct. 564, 575 (1928).

The Montana and United States Constitutions guarantee against depriving a person of liberty without due process of law.[82] To help fulfill this guarantee, the State has enacted laws mandating how courts are to conduct the cases before them. One of them is Mont. Code Ann. § 46-13-110:

> (1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial, the court shall hold an omnibus hearing.
>
> (2) The purpose of the hearing is to expedite the procedures leading up to the trial of the defendant.
>
> (3) The presence of the defendant is not required, unless ordered by the court. The prosecutor and the defendant's counsel shall attend the hearing. The prosecutor and the defendant or defendant's counsel may attend the hearing by two-way electronic audio or video communication if neither party objects and the court agrees to its use. The parties must be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:… (g) notice of seeking persistent felony offender status, 46-13-108;…

An examination of the plain language of Mont. Code Ann. § 46-13-110 rewards one with the recognition that it: (1) does not set out any

[82] U.S. Const. Amend. XIV, § 1; Mont. Const. Art. II, § 17.

circumstances under which a district court can waive an Omnibus hearing; (2) does not make any cross-references to other statutes that permit a district court to waive an actual Omnibus hearing; (3) mandates that the prosecutor and defendant's counsel shall attend the Omnibus hearing and appear before a judge, even if by two-way audio and or/visual communication; (4) does not permit notification of PFO status by e-mail or sheriff's service; and (5) makes it clear that the purpose of an Omnibus hearing "is to expedite the procedures leading up to the trial of the defendant."

B. The District Court did not conduct an Omnibus hearing in the manner the law mandates.

The District Court acknowledged regarding this case, "We didn't have an Omnibus hearing. It was -- so under the procedures in Department C, we exchange the form, the due date was August 31, and she e-mailed, it appears the actual -- we need to be careful here because there were two notice documents."[83]

[83] May 16, 2023 Sent. Tr. at 11-12.

The District Court explained that its failure to conduct an Omnibus hearing in this case was consistent with local court policy, although Mont. Code Ann. § 46-13-110 does not empower courts to enact such policies:

> This Court no longer conducts in-person Omnibus hearings. Instead, the trial scheduling order issued at Mr. Anderson's June 30, 2022 Arraignment provided: Omnibus Orders will be emailed from the Prosecutor to Defense Counsel to be completed and then emailed to chambers at sarah.kersch@mt.gov on or before Wednesday, August 31, 2022 at 5:00 p.m.[84]

C. The District Court thus abused its discretion and committed plain error by not following the law mandating that it conduct an Omnibus hearing.

The District Court's decision not to conduct an Omnibus hearing was an abuse of discretion because it did not follow the law concerning Omnibus hearings as mandated in Mont. Code. § 46-13-110, which clearly states, "[T]he court *shall* hold an Omnibus hearing."[85] The Court in *Passmore* held, "In exercising its discretion, however, the court is bound by the…applicable statutes."[86]

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[84] D.C. Doc. 64 at 4, ¶ 13, Appendix B.
[85] Mont. Code. § 46-13-110(1)(emphasis added).
[86] *Passmore, Id.*

As the Appellant did not object to the lack of an Omnibus, the District Court's abuse of discretion is also worthy of the Court's plain error review. Based on *Akers,*[87] the plain error in this case implicates a fundamental right, the Appellant's right to due process, and leaves unsettled a question of the fundamental fairness of the trial or proceedings, as the District Court did not follow the law as promulgated under Mont. Code Ann. 46-13-110.

Some may argue that the District Court committed a mere "harmless error" when it did not follow the law mandating that it conduct an Omnibus hearing.

For example, the Court in *Hildreth* held that the appellant was not prejudiced by the lack of an Omnibus hearing.[88] However, the facts the Court cited in support of its holding in *Hildreth* that the appellant suffered no prejudice so differ from those of this case as to make the holding in *Hildreth* inapplicable to this case. *Hildreth* involved an alleged sexual assault case in which the appellant (1) objected to the

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[87] *Akers, Id.*
[88] *State v. Hildreth*, 267 Mont. 423, 427, 884 P.2d 771, 774 (1994).

State's introduction of other bad acts evidence; (2) had sought to have his attorney challenge the constitutionality of Montana "Rape Shield Law" as a defense; and (3) claimed that he was surprised at trial by the State's attempt to introduce into evidence some of the victim's clothing.[89]

Issues similar to the ones that drove *Hildreth* were not present in this case. While the facts in *Hildreth* were potentially relevant to the establishment of guilt, the facts of this case are relevant to the treatment of the Appellant under the PFO law after the establishment of guilt. This case did not involve the introduction of "bad acts" evidence. No surprise at trial in this case occurred because no trial occurred in this case, thus making the events leading up to the change of plea, including the lack of an Omnibus, all the more significant.

In *Good,* the district court vacated the Omnibus hearing after the parties submitted an Omnibus memorandum in which the appellant

[89] *Id.* at 267 Mont. 428-29, 884 P.2d at 774-75.)

stated he intended to file a motion to suppress and seven other pretrial motions and the State indicated when it would respond to the motions.[90]

However, neither the State nor the defendant in *Good* challenged the district court's decision to vacate the Omnibus on appeal.[91] Thus, the Court did not make a definitive ruling regarding the circumstances under which a district court can vacate an Omnibus hearing.

Also, as argued *supra*, courts should not permit violations of the law by those claiming to enforce, prosecute, interpret or administer the law. Such was the lesson of Justice Brandeis in *Olmstead*: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously."[92]

That said, the Court should vacate the guilty plea and sentence in this case due to an abuse of discretion and plain error by the District Court when it did not have an Omnibus hearing.

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[90] *State v. Good*, 2002 MT 59, ¶ 7, 309 Mont. 113, 115, 43 P.3d 948, 952.
[91] *Good, Id.* at ¶¶ 3-5.
[92] *Olmstead, Id.*

CONCLUSION

The District Court permitted the State to violate the law in its prosecution of this case by allowing it to file its PFO notice concerning the Appellant after the deadline mandated under Mont. Code Ann. § 46-13-108 had passed. The State had not shown "good cause" for the late filing as Mont. Code Ann. § 46-13-108 (1) mandates, and the District Court also failed to recognize this this deficiency. Also unrecognized by the District Court was the State's failure to follow a local requirement (which the District Court presumably helped promulgate) that it attach its PFO notice to the Omnibus order as an amendment.

The District Court itself violated the law without conducting an Omnibus hearing as Mont. Code Ann. § 46-13-110 mandates, a hearing that could have gone a long way toward helping the District Court avoid the briefing and arguing that characterized this case and thus resolving it earlier. Mont. Code Ann. § 46-13-110 (2) mandates regarding Omnibus hearings: "The purpose of the hearing is to expedite the procedures leading up to the trial of the defendant." An Omnibus

hearing specifically could have helped prevent any misunderstanding that the State's late filing of its PFO notice may have caused.

If society can punish those who violate its laws, then district courts and prosecutors should also follow the law to avoid the scenario Justice Brandeis envisioned in *Olmstead:*

> To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[93]

The Court should also use the opportunity this appeal presents to set *its* face against the change of plea and sentence in this case by vacating them and remanding this case back to the District Court for proceedings consistent with its ruling.

Respectfully submitted this 23rd day of August, 2024,

/s/ James M. Siegman
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[93] *Olmstead, supra.*

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 8,424 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

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