IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0666

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL ALLEN DIETZ,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUE

Whether the district court committed reversible plain error and violated Dietz's procedural due process rights during his revocation hearing.

STATEMENT OF THE CASE

In 2007, Lewis and Clark County (State) charged Appellant Daniel A. Dietz (Dietz) with multiple sexual offenses involving a 13-year-old girl. (Docs. 2, 3 at 2.) Dietz negotiated a plea agreement with the State and entered guilty pleas to one count of sexual intercourse without consent and one count of sexual abuse of children. (Docs. 11, 12.) The district court sentenced Dietz to the Montana State Prison for a period of 50 years, with 40 years suspended. (Doc. 17 at 3.) The district court also imposed several conditions as part of his sentence, including that Dietz receive psychosexual treatment through an MSOTA-certified or department approved treatment provider and comply with all treatment recommendations. (Doc. 17 at 4.)

In 2021, the State petitioned to revoke Dietz's suspended sentence after he was terminated from his sexual offender treatment program for violating treatment rules. (Doc. 28 at 5.) Dietz appeared before the district court and entered an admission to the reported violation. (Doc. 34.) At the dispositional hearing, the district court revoked Dietz's suspended sentence. (Doc. 46 at 1.) The court

committed Dietz to the Department of Corrections (DOC) for 40 years and suspended 35 years. (*Id*. at 2.)

Dietz now appeals and argues that the district court violated his procedural due process rights at the revocation hearing because he was not afforded the opportunity for a timely presentence allocution. (*See* Br. at 9-10.)

STATEMENT OF THE FACTS

In addition to his conviction and sentence in the state district court, Dietz was prosecuted for federal crimes in the United States District Court. (Doc. 28 at 1; 9/7/22 Tr. at 7 (discussing Dietz's federal sentences and revocation); *United States v. Dietz*, No. CR 07-24-GF-BMM-JTJ, 2021 U.S. Dist. LEXIS 249481, at *1 (D. Mont. Dec. 16, 2021) (discussing procedural history of Dietz's federal case). In addition to his offenses in Montana, Dietz pleaded guilty to Coercion and Enticement of a Minor, and Transfer of Obscene Material to a Minor. *Dietz*, 2021 U.S. Dist. LEXIS 249481 at *1. The federal district court sentenced Dietz to 196 months of federal custody, followed by 10 years of supervised release. (*Id*.)

Following his convictions, Dietz was placed at various correctional facilities. (Doc. 28 at 5.) In October 2020, Dietz was granted an interstate compact and transferred to Pennsylvania where he began his community supervision. (*Id*. at 5.)

However, in June 2021, he was returned to Montana after he violated the conditions of his supervision in Pennsylvania. (*Id*. at 6.)

Less than two months after he returned to Montana and began community supervision, Montana probation and parole held an intervention hearing with Dietz. (Doc. 28 at 5.) Probation and parole alleged that Dietz had violated the conditions of his sentence by making physical contact with a minor child. (Doc. 28 at 5; *see also* Doc. 17 at 6 (sentencing condition prohibiting Dietz from having contact with minors unless accompanied by an adult approved by his supervising officer).) Specifically, Dietz reportedly "gave a piggyback ride and candy" to a child at a local gas station where he worked. (9/7/22 Tr. at 8.) Shortly thereafter, in September 2021, Dietz was terminated from sexual offender treatment by his provider, Dr. Bowman Smelko (Dr. Smelko). (Doc. 28 at 5.)

Dr. Smelko terminated Dietz because he reportedly violated treatment rules by having contact with an adult female with minor children, and then "fail[ed] to be honest with his treatment provider and disclose the contact." (Doc. 28 at 5.) Dietz also allegedly exposed his penis to the adult female. (*Id*.) The State filed a petition to revoke Dietz's suspended sentence and requested a warrant for his arrest. (*Id*. at 6.) In the affidavit in support of the petition, Dietz's probation and parole officer requested that his suspended sentence be revoked and that he be committed to an appropriate correctional facility. (*Id*. at 6.)

Dietz appeared before the district court and entered a partial admission to the allegations contained in the State's petition to revoke. (*See* 5/4/22 Tr. at 4-6.) Specifically, Dietz admitted that Dr. Smelko had terminated him from the sexual offender treatment program because he was in a relationship with a woman without prior approval. (*Id*. at 5-6.) Dietz told the court that, at the time, he "wasn't entirely clear on what a relationship involved." (*Id*. at 6.) Dietz added that he now understood the "parameters" of a relationship. (*Id*.) However, Dietz denied that he had exposed his penis. (*See id*. at 4 (defense counsel stating his "client is prepared to admit that he was terminated from Doctor Smelko's sex offender treatment group for having an undisclosed relationship with an adult female with underage children, but he would deny the last sentence of Count I in the Report of Violation").)

Defense counsel added that Dietz was having a "text relationship" with a woman. (*See* 5/4/22 Tr. at 7.) He represented that Dietz had "ran into her a couple of times, and went to her house once, over a period of about two or three weeks, and didn't realize when he had to report this contact." (*Id*.) Defense counsel offered, "[i]n hindsight, [Dietz] knows that he should have immediately reported it to his group." (*Id*.) The district court accepted Dietz's admission, ordered an updated Presentence Investigation Report (PSI), and set a dispositional hearing. (*Id*. at 7, 11-12.)

At the dispositional hearing, the State recommended that the district court revoke Dietz's suspended sentence and order him to serve 40 years, with 35 years

suspended, less credit for time served. (9/7/22 Tr. at 4.) In response, Dietz's defense attorney requested that the district court only resuspend his suspended sentence. (*Id*.) The defense did not call any witnesses in support of his recommendation.

In contrast, Montana Probation and Parole Officer Jaimee Szlemko (Officer Szlemko) testified on behalf of the State. (9/7/22 Tr. at 8-13.) Officer Szlemko stated that Dr. Smelko terminated Dietz from sexual offender treatment for violating the conditions of his treatment. (*Id*. at 8.) Specifically, Officer Szlemko stated that about a month after his intervention hearing for having contact with a minor, Dietz reportedly met a woman at the gas station, and they exchanged phone numbers and began communicating. (*See* 9/7/22 Tr. at 9-10 (Officer Szlemko testifying that Dietz's phone was reviewed by his federal probation officer and showed that he had been communicating with the woman).) Dietz also showed up at the woman's house while children were playing in her yard. (*Id*.) Although Dietz later denied it, the woman said that Dietz exposed his penis to her while they were riding in his vehicle. (*Id*. at 9.) Officer Szlemko affirmed that Dr. Smelko terminated Dietz from sexual offender treatment as a result. (*Id*. (agreeing with the prosecutor that "Doctor Smelko had enough, and he terminated him").)

Officer Szlemko stated that at the time of the violation, Dietz was under federal supervision. (9/7/22 Tr. at 6-7.) Due to his reported conduct, the federal

district court revoked Dietz's supervision, sentenced him to six months custody, and imposed lifetime supervision. (9/7/22 Tr. at 7, 13; *see also United States v. Dietz*, No. CR 07-24-H-BMM, 2022 U.S. Dist. LEXIS 2823, at *3 (D. Mont. Jan. 5, 2022).) Officer Szlemko testified that the State filed the petition after Dietz served his six-month sentence. (*Id.*)

When asked by the prosecution if Dietz should receive any "street time" credit, Officer Szlemko replied in the negative. (9/7/22 Tr. at 9.) Officer Szlemko stated that Dietz was on supervision less than two months before the documented violations, and his supervision in Montana "came right on the heels of the termination from sex offender treatment" in Pennsylvania. (*See id*. at 9-10.) Officer Szlemko stated that Dietz had also been screened for placement at a prerelease center in the state, but all the facilities had denied him placement. (*Id*. at 10.)

Following Officer Szlemko's testimony, defense counsel for Dietz addressed the PSI and discussed the risk assessment portion. (9/7/22 Tr. at 14-15.) Defense counsel noted that Dietz denied he had exposed his penis to the woman and contended that the State abandoned the claim when Dietz admitted to being discharged from treatment. (*Id*. at 14-15.) Defense counsel also claimed that Dietz stayed in the vehicle when he saw there were children playing in the yard and had no contact. (*Id*.)

The district court asked if there was anything else Dietz would like to address in the PSI, and defense counsel replied that he would give a

recommendation "[a]nd, then, I'm sure my client wants a statement." (9/7/22 Tr. at 15.) Dietz's attorney noted that the federal court had already imposed a six-month custodial sentence for the same violation, adding that there was "no new crime here, Judge." (*Id*. at 16.) He also explained that Dr. Smelko was willing to take Dietz back into treatment, and stated that Dietz had a job waiting for him in the community and "an apartment lined up." (*Id*.) Defense counsel argued that it would not be fair to send Dietz to prison because no new crime was committed. (*Id*.) Instead, Dietz's attorney requested that the court resuspend his sentence and issue "a stern warning" to Dietz that he needs to "better disclose those relationships at the gate." (*Id*. at 17.)

After Dietz's attorney finished arguing in favor of resuspending the sentence, the district court asked if there was "anything further." (9/7/22 Tr. at 17.) Defense counsel responded, "No, Judge." (*Id*.) In response, the district court began to discuss the sentence that it would impose. (*See id*. at 17-20.) The court noted the allegations were "alarming" given Dietz's criminal history. (*Id*. at 17.) The court stated that "[i]t's really unusual for the prosecution to come in in a case like this and ask for a DOC commitment." (*Id*. ("Honestly, I think this is the first time I've ever seen them recommend 40 years DOC with five—35 suspended.").) The district court stated its belief that the prosecution was making the recommendation

to get Dietz screened by corrections and placed into a treatment program before reentering the community. (*Id*. at 17-18.)

The district court discussed some possible DOC programming and placement options for Dietz and then observed:

> But I think—I think, this—the State is recommending this because I think it satisfied their need to protect the community. And there's, certainly, a punishment component to it, also, but I think that they, perhaps, think that this is a sentence that is as fair as they can be. I've never seen a sentence like this.

(9/7/22 Tr. at 18.) The district court stated that the recommendation was appropriate given Dietz's criminal history and that the reported violation was serious. (*Id*. at 19.) The court announced that it would revoke Dietz's suspended sentence and impose the State's recommendation of 40 years DOC with 35 years suspended. (*Id*.)

The district court stated it would recommend that Dietz be placed at "MAS[C]" and screened for an appropriate sexual offender treatment program. (9/7/22 Tr. at 19.) The district court found that it would not order Dietz "to complete Sex Offender 1 and 2" in prison, and instead ordered him to follow the recommendations of his treatment providers and mentioned Dr. Smelko. (*Id*. at 19-20.) Dietz responded, "If he would take me." (*Id*. at 20.)

The district court agreed and said that if Dr. Smelko "leaves that door open, option open." (9/7/22 Tr. at 20.) But the court emphasized that not requiring Dietz

to recomplete Sex Offender 1 and 2 would be "a huge diversion from what is being recommended here, to be given that opportunity to the sex offender treatment providers." (9/7/22 Tr. at 20.) The court stated that it had "a lot of faith that [sexual offender treatment providers] hold defendants accountable." (*Id*. at 20.) The court observed that Dietz had been "eighty-sixed from the program in Pennsylvania, and Bo Smelko kicked you . . . out of his program." (*Id*.) The court stated that Dietz would likely need to go through treatment again before coming back into the community. (*Id*.)

At this point defense counsel interjected and stated: "So, I understand, Judge. But the defendant did want to say something." (9/7/22 Tr. at 20.) The district court apologized and stated that it "stepped ahead of [it]self." (*Id*.) The court also opined, "Under Montana law, you have a right to make a statement prior to sentencing." (*Id*.) Dietz addressed the court and stated that he had already been incarcerated several months for the violation and had time to recognize his mistakes, "mainly in not disclosing everything to my parole officers." (*Id*. at 21.)

Dietz offered that he did not realize that his interactions with the woman constituted a relationship. (9/7/22 Tr. at 22 ("I had met with her three times for a total of a half-an-hour, and I was deciding whether I wanted to have a relationship with her, or not.").) Dietz told the court that he had since spoken to his probation

officers and clarified their expectations. (*See id*. at 22.) Specifically, Dietz stated that he was instructed to let them know after he had met someone and got their phone number. (*Id*.) He said he was told not to just go over to people's houses and then disclose the meeting after. (*Id*.)

Dietz also explained that he was sober and had a sponsor in "AA." (9/7/22 Tr. at 23-24.) Dietz stated that he was employed, and his employer had said he could come back to work because he was a benefit to the business. (*Id*.) Dietz said he had no "desire to cause any harm in the community to anyone, especially children." (*Id*. at 24.) Dietz offered that when he went to meet the woman, he stayed in his truck because he saw the children and knew he was not supposed to have contact with kids. (*Id*.) Dietz stated that he "simply fell into . . . wanting to have a relationship with a woman, and—and she showed some interest in me." (*Id*.) Dietz stated that he failed to go to his treatment team with that information and recognized that he "messed up." (*Id*.) Dietz requested that the court give him another chance because he could "be a benefit to the community." (*Id*.)

After Dietz spoke, the district court apologized again for "stepping on [Dietz] and not giving [him] an opportunity to talk first." (9/7/22 Tr. at 24-25.) The court reiterated its belief that a five-year DOC commitment was warranted under the circumstances. (*Id*. at 25.) The court recognized that Dietz had been kicked out of the treatment program in Pennsylvania, and then had another violation right when

he came to Montana. (*Id*.) The court stated that it did not want to order Dietz to have to complete "Phases I and II of the sex offender treatment program before parole or discharge." (*Id*.) Doing so, the court found, would guarantee that Dietz would go to prison. (*Id*.) Instead, the court believed that DOC would put Dietz on conditional release and place him back in the community. (*Id*.) The court designated Dietz a Level 1 Sexual Offender and concluded the proceeding. (*Id*. at 27.)

SUMMARY OF THE ARGUMENT

The district court did not violate Dietz's procedural due process rights at his revocation hearing, nor did it commit constitutional error when it revoked his suspended sentence. Nevertheless, Dietz asserts that he enjoys a fundamental right of allocution that must be strictly applied during all revocation hearings in Montana. The problem with this argument, however, is that the United States Supreme Court has never expressly recognized a due process right to allocute. This Court should likewise refrain from adopting such a right under the facts of this case.

Critically, even if due process requires that a defendant be allowed to allocute at a revocation hearing if a request is made, Dietz never expressly made a request that was flatly denied by the district court. Instead, although defense counsel forecasted that Dietz may want to say something during the hearing, when the district court asked if there was anything further prior to revoking the

suspended sentence, Dietz failed to offer his allocution at that time. While Dietz later stated that he wanted to make a statement, and the district court permitted him to allocute before the hearing was concluded, it is incorrect to say that he was denied the opportunity to heard or to personally speak at his hearing. Consequently, this Court should refrain from adopting Dietz's argument under the facts of this case. Particularly because the authority relied on by Dietz for his argument is not controlling and distinguishable from the case-at-bar.

ARGUMENT

I. Standard of review

This Court "review[s] a criminal sentence for legality only; that is, whether the sentence falls within the statutory parameters." *State v. Kotwicki*, 2007 MT 17, ¶ 5, 335 Mont. 344, 151 P.3d 892 (citation omitted).

While the Court's "review of issues of constitutional law is plenary, [the Court] generally do[es] not address constitutional issues raised for the first time on appeal, except under the plain error doctrine." *State v. Abel*, 2021 MT 293, ¶ 4, 406 Mont. 250, 498 P.3d 199 (citations and quotation marks omitted). "Whether an asserted constitutional or other error of law was plain error is a question of law subject to de novo review." *Abel*, ¶ 4 (citations omitted).

II. The district court did not violate Dietz's statutory or constitutional rights by proceeding to disposition and stating its intention to revoke the suspended sentence before Dietz personally gave an allocution.

A. This Court should deny Dietz's claim pursuant to the plain error doctrine because he failed to address the district court when given the opportunity to do so.

On appeal, Dietz faults the district court for proceeding to disposition and stating that it would revoke the suspended sentence before he personally spoke and gave an allocution. (*See* Br. at 10.) Although Dietz ultimately made a statement and spoke directly to the lower court before the hearing was concluded, Dietz asserts that the district court committed reversible "structural" error because he was not given the opportunity to speak, and requests resentencing before a new judge. (*Id*. at 10, 16.) This argument, however, ignores that the court *did* give Dietz an opportunity to plead his case before imposing disposition.

Indeed, the record shows that when the district court asked Dietz if there was anything left to discuss in the PSI, Dietz's attorney told the district court that he would make a recommendation and added that he was "sure" Dietz also wanted to make a statement. (9/7/22 Tr. at 15.) Defense counsel then provided a comprehensive argument in support of Dietz's request to resuspend his sentence, highlighting that even though he had not broken the law, Dietz had already served time for the violation as part of his federal sentence. (*Id*. at 16.) Dietz's attorney also highlighted his successful employment and support in the community, and his

willingness to report to "P and P." (*Id.*) Importantly, after defense counsel requested that Dietz's sentence be resuspended and he be given a strong warning to better disclose his relationships, the district court impliedly offered Dietz an opportunity to make a personal allocution, but he failed to speak up. (*See id.* at 17.)

Specifically, after defense counsel argued for Dietz's recommendation, the district court explicitly asked if there was "anything further." (9/7/22 Tr. at 17.) At this point, Dietz or his attorney could have requested an opportunity for Dietz to personally address the court. Instead, defense counsel responded, "No Judge." (*Id.*) Then, before the court announced that it would revoke Dietz's suspended sentence, it discussed the State's recommendation at length and expressed its surprise at the proposed disposition given the seriousness of Dietz's underlying crimes and the instant violation, i.e., termination from his sexual offender program for failing to follow treatment rules. Yet Dietz failed to interrupt the district court while it was discussing the case and the State's recommendation, or otherwise signal that there was something else that needed to be addressed, namely Dietz's allocution.

Furthermore, when Dietz and his counsel finally interjected and clarified that Dietz did want to say something, he failed to assert or argue that the district court had committed reversible legal error or otherwise raise the due process argument he now makes on appeal. Thus, because Dietz failed to object at the time and assert that the district court had committed serious legal error, this Court should conclude

that he has waived and forfeited his due process claim. *Abel*, ¶ 4 ("Failure to contemporaneously object to an asserted error generally constitutes a waiver of the right to later raise it on appeal.") (citing Mont. Code Ann. §§ 46-20-104(2) and -701(2); *State v. Long*, 2005 MT 130, ¶ 35, 327 Mont. 238, 113 P.3d 290); *see also Unified Industries, Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100 ("The general rule in Montana is that this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory. The basis for the general rule is that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.") (citation and internal quotations omitted).

Further, because Dietz was given a reasonable opportunity to timely present an allocution—but did not do so—this Court should review his claims under Montana's plain error jurisprudence. *See Abel*, ¶ 4. As a narrow exception to the waiver rule, this Court, may, in its "discretion, review and correct an unpreserved assertion of error upon a showing of: (1) a plain or obvious error; (2) that affected a constitutional or other substantial right; and (3) which prejudicially affected the fundamental fairness or integrity of the proceeding." *Abel*, ¶ 4 (citations omitted). "But, mere assertion that an asserted error implicates a constitutional or other substantial right is thus insufficient—the party asserting plain error must affirmatively demonstrate satisfaction of all elements of the plain error doctrine." *Abel*, ¶ 4 (citation omitted).

B. Dietz fails to meet his burden and show that the district court committed plain error during the revocation hearing.

"The Fourteenth Amendment of the United States Constitution protects individuals from State action that would deprive them of life, liberty, or property without due process of law." *State v. Sebastian*, 2013 MT 347, ¶ 17, 372 Mont. 522, 313 P.3d 198 (citing U.S. Const. amend. XIV, § 14). "Minimal requirements of due process apply to revocation hearings, which must afford 'fundamental fairness.'" *State v. Roberts*, 2010 MT 110, ¶ 16, 356 Mont. 290, 233 P.3d 324 (citing *State v. Triplett*, 2008 MT 360, ¶ 16, 346 Mont. 383, 195 P.3d 819; *State v. Kingery*, 239 Mont. 160, 165, 779 P.2d 495, 498 (1989)).

However, "[a] probationer's right to due process in a revocation proceeding is different from the right to due process in a criminal proceeding." *Sebastian*, ¶ 19. "A revocation hearing is a civil proceeding, and an offender is not entitled to the full range of constitutional rights available to a defendant in a criminal trial." *State v. Edmundson*, 2014 MT 12, ¶ 16, 373 Mont. 338, 317 P.3d 169. "The revocation hearing is not a criminal trial but a summary hearing to establish a violation of the conditions of the prisoner's probation." *Triplett*, ¶ 16 (quoting *Kingery*, 239 Mont. at 165, 779 P.2d at 498). "The probationer already stands convicted of a crime no matter what the grounds for the revocation may be." *Triplett*, ¶ 16 (brackets omitted).

"What is needed is an informal hearing structured to assure that the finding of a parole [or probation] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's [or probationer's] behavior." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (the same due process guarantees apply to both parole and probation revocation proceedings). The Supreme Court further recognized: "The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey*, 408 U.S. at 488.

Accordingly, this Court has recognized that "[i]n a probation revocation hearing the due process requirements are: a) written notice of the violations; b) disclosure of evidence against the probationer; c) opportunity to be heard in person and to present witnesses and evidence; d) a neutral tribunal; e) a written statement by the factfinder as to the evidence relied on and the reasons for revoking; f) the right to cross-examine witnesses unless the hearing body finds good cause for disallowing confrontation; and g) the right to counsel in some circumstances." *Kingery*, 239 Mont. at 165 (citing *State v. Lange*, 226 Mont. 9, 12, 733 P.2d 846, 848 (1987); *Black v. Romano*, 471 U.S. 606, 611-12 (1985)).

Thus, an offender is entitled to certain due process protections, "including written notice of the alleged violation, disclosure of the evidence against him or her, the opportunity to be heard and to present evidence, the right to confront witnesses, the right to a neutral arbiter, and the right to receive a written statement of the evidence relied upon and the reason for the revocation." *Edmundson*, ¶ 16 (citing *Gagnon*, 411 U.S. at 786); *see also* Mont. Code Ann. § 46-18-203(4) (listing procedures). "Aside from these guarantees, due process is ultimately measured by the fundamental fairness of the proceeding." *Edmundson*, ¶ 17; *State v. Evans*, 2012 MT 115, ¶ 30, 365 Mont. 163, 280 P.3d 871 (recognizing that "the proceedings must be fundamentally fair").

1. There is no constitutional right to speak before disposition during revocation proceedings.

Dietz asserts that the district court violated his "right to *pre*-sentence allocution." (Br. at 11 (emphasis in original).) However, while revocation proceedings enjoy certain due process protections, the United States Supreme Court has never held that there is a constitutional right to allocute at sentencing, let alone during revocation proceedings. *See Hill v. United States*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant . . . whether he has anything to say before sentence is imposed is . . . an error which is neither jurisdictional nor constitutional."); *see also McGautha v. California*, 402 U.S. 183, 219 (1971) ("This Court has not directly determined whether or to what extent the concept of

due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so.").

The majority of state courts also take this approach. *See Barksdale v. Ricketts*, 233 Ga. 60, 61, 209 S.E.2d 631, 633 (1974) (holding that there is no federal constitutional provision granting the right to make a statement in mitigation of punishment upon the entry of a guilty plea); *State v. Germaine*, 152 Vt. 106, 107, 564 A.2d 604, 605 (1989) (recognizing that there is no right of allocution constitutionally required at sentencing or revocation of probation proceedings) (citing *Gagnon*, 411 U.S. at 789); *S.K.G. v. State*, 344 So. 3d 901, 902-03 (Ala. Crim. App. 2021) ("That is to say, there is no federal or state constitutional right to allocution.") (citing *Hill*, 368 U.S. at 428); *State v. Caruthers*, 22 Kan. App. 2d 910, 911, 924 P.2d 1278, 1280 (1996) ("We hold that allocution prior to revoking a defendant's probation is not required either by the statutes of this state or by the Due Process Clause of the United States Constitution."); *Shelton v. State*, 744 A.2d 465, 493 (Del. 1999) ("Moreover, the majority of federal courts and state jurisdictions hold that the United States Constitution does not protect the right to allocution.").

Even some of the decisions cited by Dietz recognize that the right of allocution is not guaranteed under the Due Process Clause. *See United States v. Patterson*, 128 F.3d 1259, 1260 (8th Cir. 1997) ("Initially, we recognize the right

of allocution is not a constitutional one.") (citing *Hill*, 368 U.S. at 428); *State v. Canfield*, 154 Wash. 2d 698, 702-03, 116 P.3d 391, 393 (2005) (recognizing "that the denial of the right of allocution is 'an error which is neither jurisdictional nor constitutional,' nor is it 'a fundamental defect which inherently results in a complete miscarriage of justice'") (quoting *Hill*, 368 U.S. at 428).

Instead, Dietz cites authority from this Court that has recognized "a defendant must be given an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life, liberty, or property." (Br. at 12 (citing *State v. McCoy*, 2021 MT 303, ¶ 39, 406 Mont. 375, 498 P.3d 1266).) First, however, this authority is unavailing as it pertained to the due process protections afforded to criminal defendants during sentencing hearings—not revocation proceedings. *See McCoy*, ¶¶ 38-39 (considering whether the district court failed to provide a criminal defendant with an opportunity to allocute at his sentencing hearing in violation of due process and Mont. Code Ann. § 46-18-115).

Second, this due process guarantee is meant to protect against sentencing a defendant based on false information, not the defendant's right to provide a personal allocution. *See State v. McLeod*, 2002 MT 348, ¶ 19, 313 Mont. 358, 61 P.3d 126; *see also State v. Ferguson*, 2005 MT 343, ¶ 100, 330 Mont. 103, 126 P.3d 463 ("When a criminal defendant contests matters in a pre[]sentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies.");

State v. Harper, 2006 MT 259, ¶ 18, 334 Mont. 138, 144 P.3d 826 (recognizing that a person convicted of a crime "has a due process right to be sentenced based on correct information"); *Edmundson*, ¶ 20 ("The rigorous standards of accuracy required in an original sentencing proceeding are equally as important when the trial court is passing upon the state's motion to revoke a deferred or suspended sentence.") (quotation marks and citation omitted). As recognized by the United States Supreme Court:

> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by services which counsel would provide, that renders the proceedings lacking in due process.

McLeod, ¶ 19 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). Consequently, this authority is inapplicable to Dietz's claim and does not support his argument.

2. Montana law does not afford an offender a due process right to speak before disposition at a revocation hearing.

In addition to failing to show that the district court violated his federal due process rights during the revocation hearing, Dietz also fails to show that the procedures employed during the proceeding violated Montana statutory law. As discussed, aside from the minimum due process requirements as outlined in *Morrissey* and its progeny, the United State Supreme Court largely leaves the procedural requirements of revocation hearings to state law. *See Morrissey*,

408 U.S. at 488 ("We cannot write a code of procedure; that is the responsibility of each State."); *see also United States v. Li*, 115 F.3d 125, 132-33 (2d Cir. 1997) (stating that "a defendant's right to a sentencing allocution is a matter of criminal procedure and not a constitutional right").

In turn, this Court has found that "[t]he revocation of a suspended sentence is 'particularly and expressly governed'" pursuant to Mont. Code Ann. § 46-18-203. *Roberts*, ¶ 12 (citing *State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15). Indeed, the procedures to be followed during revocation hearings are explicitly outlined by Mont. Code Ann. § 46-18-203(4)-(6). *Roberts*, ¶ 16 (citing *Kingery*, 239 Mont. at 167, 779 P.2d at 498); *see also State v. Larson*, 2023 MT 236, ¶ 8, 414 Mont. 200, 539 P.3d 655 ("In part, § 46-18-203(4), MCA, sets forth the process due."). Specifically, these include:

> (4) Without unnecessary delay and no more than 60 days after arrest, the offender must be brought before the judge, and at least 10 days prior to the hearing the offender must be advised of:
>
> (a) the allegations of the petition;
> (b) the opportunity to appear and to present evidence in the offender's own behalf;
> (c) the opportunity to question adverse witnesses; and
> (d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 8, part 1.

Roberts, ¶ 12 (citing Mont. Code Ann. § 46-18-203(4)).

None of these procedures require that a district court must personally inquire whether the offender desires to make a statement during a revocation hearing. Or,

as in this case, whether the district court must remind the offender that he had expressed an interest in making a statement but has not yet done so—despite having had ample opportunities to speak. Importantly, here, Deitz does not even argue that this section expressly provides such a right and concedes that the provision "does not 'specifically delineate a right of allocution[.]'" (Br. at 14 (citing *Patterson*, 128 F.3d at 1261).)

Instead, he contends that, "consistent with due process principles," the Court should apply the procedural requirements found in the criminal sentencing statute, i.e., Mont. Code Ann. § 46-18-115(3), to revocation proceedings. (Br. at 14.) Dietz suggests that this Court read the sentencing statute's procedural requirements into the revocation statute, specifically the requirement that a district '"court shall address the defendant personally to ascertain whether the defendant wishes to make a statement'" at the sentencing hearing and, if he does, the district court '"shall afford the defendant a reasonable opportunity to do so.'" (Br. at 14-15 (citing Mont. Code Ann. § 46-18-115(3)).) The Court should reject Dietz's argument for multiple reasons.

First, Dietz's argument is incongruent with this Court's longstanding approach to interpreting Montana law. Although Dietz is apparently arguing that the Court apply common law to read Mont. Code Ann. § 46-18-115(3) into Mont. Code Ann. § 46-18-203(4), this Court has steadfastly stated that '"the office

of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'" *City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P.3d 815 (citing Mont. Code Ann. § 1-2-101); *State v. Beam*, 2020 MT 156, ¶ 11, 400 Mont. 278, 465 P.3d 1178 ("In the construction of a statute, we are simply to ascertain and declare what is in terms or in substance contained therein, neither inserting what has been omitted nor omitting what has been inserted."). Thus, if the procedures outlined in Mont. Code Ann. § 46-18-115(3) must also be strictly applied during revocation proceedings, that is the prerogative of the legislature.

Second, Dietz's argument completely disregards that "[a] probationer's right to due process in a revocation proceeding is different from the right to due process in a criminal proceeding." *Sebastian*, ¶ 19. This Court has recognized that "[i]n *Morrissey*, the Supreme Court did not intend to lay down a rigid set of procedures to be followed ritualistically in every situation." *State v. Howell*, 222 Mont. 136, 140, 720 P.2d 1174, 1176 (1986) (quoting *Pierre v. Washington State Bd. of Prison Terms & Paroles*, 699 F.2d 471, 473 (9th Cir. 1983)). Instead, "[t]he themes of flexibility and informality run throughout *Morrissey*[.]" *Id*. "No formalistic set of procedures need be followed as long as the minimum due process requirements enunciated in *Morrissey* are met." *Id.*

Thus, the contention that the district court committed reversible error because it did not formally inquire with Dietz about whether he wished to speak—as stipulated in a nonapplicable and extraneous criminal sentencing statute—is incongruent with the minimal due process guarantees that are afforded to an offender during a revocation hearing. As found by this Court, aside from the minimal due process guarantees announced in *Morrissey* and codified at Mont. Code Ann. § 46-18-203(4), "due process is ultimately measured by the fundamental fairness of the proceeding." *Edmundson*, ¶ 17.

Thus, except for the handful of procedures outlined in *Morrissey*, revocation hearings must only be fundamentally fair. As discussed below, Dietz's revocation hearing was fair as he appeared in person and was provided multiple opportunities to present evidence on his behalf. This it is all that was required under Montana law. Consequently, the Court should decline to adopt Dietz's argument as it is antithetical to the flexible due process protections that apply at revocation hearings.

3. Although some federal judications have recognized a limited due process right to allocute at sentencing, the Court should refrain from doing so under the facts of this case.

As discussed, the United States Supreme Court has never found that the Due Process Clause provides a defendant the right to speak at a sentencing hearing or during revocation proceedings. *Boardman v. Estelle*, 957 F.2d 1523, 1527 (9th Cir. 1992) ("*Hill* therefore left open the question of whether a defendant who asks the

court to speak has a Constitutionally guaranteed right to do so."). However, some jurisdictions have gone further and recognized a due process right to speak in certain "sentencing situations." *See United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991). For example, the Ninth Circuit Court of Appeals found that "the right of allocution 'contemplates an opportunity for the defendant to bring mitigating circumstances to the attention of the court.'" *Boardman*, 957 F.2d at 1526 (quoting *Sherman v. United States*, 383 F.2d 837, 839 (9th Cir. 1967). Consequently, the Ninth Circuit has concluded "that allocution is a right guaranteed by the due process clause of the Constitution." *Boardman*, 957 F.2d at 1530.

The Ninth Circuit made its determination based off "the ancient origins of this common-law right and . . . the continuing importance of the interests protected by affording the defendant the opportunity to speak on his own behalf." *Boardman*, 957 F.2d at 1525. However, *Boardman* limited its holding to circumstances where the defendant asks to speak at sentencing and is denied that opportunity. *Boardman*, 957 F.2d at 1530; *see also id*. at 1527 (noting that *McGautha* "assumed without deciding that the Constitution does require that the trial court permit a defendant to speak at sentencing if he so requests").

Building off *Boardman*, the Ninth Circuit has found that the right of allocution provided in the general sentencing statute, Fed. R. Crim. P. 32, extended to revocation proceedings in some cases. *See United States v. Carper*, 24 F.3d

1157, 1162 (9th Cir. 1994). Although the federal revocation statute, Rule 32.1, did not provide for the right to speak at a revocation hearing, *Carper* concluded "that the provisions of Rule 32(a)(1)[1] apply to sentencing after revocation of supervised release when the district court imposes a new sentence based on conduct that occurred during supervised release."[2] *Carper*, 24 F.3d at 1162. The *Carper* court found that due process required the district court to address the defendant "personally to determine if he wished to speak on his own behalf before imposing sentence." *Carper*, 24 F.3d at 1162.

In making this determination, *Carper* noted that other courts have also addressed the issue:

> Three other circuits have addressed the issue of a defendant's right of allocution upon revocation of probation or supervised release. These cases fall into three categories: (1) proceedings that reinstate a previously imposed sentence whose execution has been suspended; (2) proceedings that impose a new sentence for a conviction for which sentencing was previously deferred; and (3) proceedings that impose a new sentence based on conduct that occurred during supervised release.

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[1] Rule 32 provides that, "[b]efore imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii).

[2] Rule 32.1 has since been amended to expressly state that during a revocation hearing, "[t]he person is entitled to . . . an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1(b)(2)(E).

Carper, 24 F.3d at 1160. The Court stated that Carper, who had been revoked for violations committed on supervised release, fell "into the third category." *Carper*, 24 F.3d at 1160.

Examining the specific statutory language of the Federal Rules of Criminal Procedure, *Carper* interpreted Rules 32 and 32.1 as "complementing rather than conflicting with one another." *Carper*, 24 F.3d at 1160. The Ninth Circuit found that, although Rule 32.1 did not address sentencing, and only included procedures for modifying or revoking supervised release, Rule 32(a) "which governs sentencing, d[id] not expressly limit its application to the imposition of sentence immediately following conviction." *Carper*, 24 F.3d at 1159-60. Thus, based off the statutory language of the Federal Rules of Criminal Procedure and the common law right to allocute, the Ninth Circuit concluded that the district court "erred by failing to address Carper personally to determine if he wished to speak on his own behalf *before imposing sentence*." *Carper*, 24 F.3d at 1162 (emphasis added).

Other courts have ruled similarly and concluded that "[t]he right of allocution is implicated only before the imposition of sentence, not in all sentencing situations." *Barnes*, 948 F.2d at 329. The Seventh Circuit Court of Appeals held that "allocution should be allowed, but is not required when the trial court simply executes the original sentence after revoking probation." *State v. Nez*, 130 Idaho 950, 958, 950 P.2d 1289, 1297 (Ct. App. 1997) (citing *United States v. Core*,

532 F.2d 40, 42 (7th Cir. 1976). Instead, in *Core*, the Seventh Circuit acknowledged that, while the district court did not err by failing to personally address the defendant, "the better practice would be for the trial court to personally address the defendant and permit him to speak regardless of whether it is at the time of original sentencing, at a hearing on a motion to reduce a sentence previously imposed, or . . . at a revocation of probation proceeding." *Core*, 532 F.2d at 42.

Other federal circuit courts "have likewise concluded that the right of allocution attaches before the imposition of sentence, but not in all sentencing situations." *Nez*, 130 Idaho at 958-59, 950 P.2d at 1297-98 (citing *United States v. Turner*, 741 F.2d 696, 699 (5th Cir. 1984) (the right of allocution must be afforded when a sentence is deferred and later imposed following a revocation of probation)); *see also Patterson*, 128 F.3d at 1261 ("Rule 32 applies to sentencing upon revocation of supervised release when the court imposes a new sentence based on conduct that occurred during supervised release.").

Nonetheless, unlike the defendants in *Carper* and *Patterson*, Dietz was not the subject of revocation proceedings regarding supervised release, where "the district court impose[d] a new sentence based on conduct that occurred during supervised release." *Carper*, 24 F.3d at 1162; *see also* 18 U.S.C. § 3583(e)(3) (stating a district court may "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized

by statute for the offense that resulted in such term of supervised release"). Rather, in this case, Dietz's suspended sentence was being revoked—a sentence that had already been imposed by the district court and was simply ordered into execution during the hearing. *See State v. Cook*, 2012 MT 34, ¶ 16, 364 Mont. 161, 272 P.3d 50 (reiterating that "[r]evocation subjects the defendant to execution of the original sentence as though he had never been given a suspension of sentence"); *State v. Haagenson*, 2010 MT 95, ¶ 16, 356 Mont. 177, 232 P.3d 367 (summarizing precedent that a revocation hearing is an "exercise of the trial court's supervision over the offender during probation, and the consequence of revocation is execution of a penalty previously imposed"). This factual and legal point cuts across Dietz's argument and undercuts the federal authority cited in his opening brief. Consequently, the federal cases cited by Dietz in support of his argument do not apply to the facts of this case and are distinguishable.

4. The district court did not deny Dietz the opportunity to be heard.

While the State disputes that Dietz's fundamental rights were violated by the district court during the proceedings, as discussed above, it does not deny that offenders in Montana are afforded limited due process guarantees during hearings for revocation of suspended sentences. *Kingery*, 239 Mont. at 165; *Lange*, 226 Mont. at 12, 733 P.2d at 848. As recognized in *Morrissey*: "The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the

conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey*, 408 U.S. at 488. Indeed, this guarantee has been codified into Montana law, which provides offenders "the opportunity to appear and to present evidence in [their] own behalf." Mont. Code Ann. § 46-18-203(4)(b). Dietz was given this opportunity.

Although Dietz does not expressly argue that he was denied the opportunity to appear, he cites to *Canfield*. (Br. at 13.) There, the Supreme Court of Washington found that the "opportunity to be heard in person" was not strictly limited to affording defendants the opportunity to testify upon their own behalf but also included a limited right of allocution. *Canfield*, 154 Wash. 2d at 706, 116 P.3d at 395. *Canfield* held that an offender has a procedural due process right to allocute at a revocation hearing if he requests it, but stressed that "allocution itself is not a right of constitutional magnitude . . . ." *Canfield*, 154 Wash. 2d at 708, 116 P.3d at 396. Instead, *Canfield* "recognize[d] a limited right of allocution based upon the common law right of allocution and the minimal due process requirements at revocation hearings." *Id*.

Here, however, even if this Court were inclined to agree with the *Canfield* decision and recognize a limited right of allocution when a defendant requests it, Dietz never made an affirmative request to allocute that was denied by the district court. Instead, as discussed above, the district court directly asked Dietz if there

was "anything further." (9/7/22 Tr. at 17.) Dietz could have requested to speak at this point or could have given his allocution at several different points during the hearing. But, instead of providing an allocution at this point, defense counsel responded in the negative and the district court continued with the hearing. Thus, this is not a case where Dietz directly requested to allocute but was affirmatively denied by the district court. Consequently, this Court should decline to find that the district court committed plain error requiring reversal.

5. Because the district court afforded Dietz the opportunity to address it before concluding the hearing, he cannot show that the proceeding prejudicially affected his fundamental rights or the integrity of the proceeding.

While defense counsel forecasted that Dietz may want to make a statement after his attorney argued in favor of resuspending the sentence, when counsel finished making his argument and the district court directly asked if there was anything further, Dietz said nothing. (*See* 9/7/22 Tr. at 17.) Dietz could have requested to speak at this point, or given his allocution at several other points during the hearing. Instead, when defense counsel finally spoke up and stated that Dietz wanted to say something, the district court apologized profusely and objectively considered what Dietz had said. Although Dietz contends that his allocution came too late in the process, and cites to decisions where lower courts have been reversed because defendants were belatedly provided an opportunity to

allocute, those cases are distinguishable and are not controlling. (*See* Br. at 16-18.) Most importantly, none of the cases cite to an analogous situation or involved the revocation of a suspended sentence. Rather, they dealt with the procedural due process requirements provided to defendants during a criminal sentencing. *E.g.*, *United States v. Landeros-Lopez*, 615 F.3d 1260, 1268 (10th Cir. 2010) (defendant's Fed. R. Crim. P. 32 right of allocution violated when district court definitively announced defendant's criminal sentence before providing him an opportunity to speak on his own behalf). Here, again, Deitz's situation is simply distinguishable from the authority he cites.

This Court should decline to reverse Deitz's revocation proceeding because it was fundamentally fair—the proper standard for adjudicating whether a district court provided an offender with due process during a dispositional hearing. *Roberts*, ¶ 16. The district court provided Dietz with the procedural due process requirements discussed in *Morrissey* and codified at Mont. Code Ann. § 46-18-203(4). He was provided an opportunity to appear at the hearing and call witnesses in support of his argument, and was given many opportunities during the hearing to speak up and plead for mercy if he wanted to.

Now, before this Court, Dietz asks that his disposition be reversed because the district court supposedly did not properly recognize a procedural due process right that has never been expressly recognized by the United States Supreme Court,

or the Montana Supreme Court, and is largely based off common law. Although it may have been better practice for the district court to directly inquire with Dietz and make sure he did not want to speak before announcing its disposition, Dietz cannot show that the district court committed plain error that affected a constitutional or other substantial right. Dietz thus fails to "affirmatively demonstrate satisfaction of all elements of the plain error doctrine." *Abel*, ¶ 4. Because Dietz cannot meet his high burden under the plain error doctrine, the Court should decline to adopt his argument and affirm his conviction.

C. Alternatively, if the Court decides to vacate Dietz's revocation disposition, it should not reassign the matter to a different judge.

Dietz also argues that if the Court reverses for a new dispositional hearing, it should also order that the hearing be conducted before a different judge. The State briefly notes that rehearing before a new judge would not be necessary, or appropriate, under this Court's jurisprudence. "Remand to a different judge is not the usual remedy when error is found in District Court proceedings [and] is reserved for 'unusual circumstances.'" *Coleman v. Risley*, 203 Mont. 237, 249, 663 P.2d 1154, 1161 (1983) (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977)). "[T]he principal factors considered by us in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be

expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Coleman*, 203 Mont. at 249, 663 P.2d at 1161 (quoting *Robin*, 553 F.2d at 10).

Here, the *Coleman* factors do not weigh in favor of remand before a new judge. First, Dietz asserts procedural error, and not an error concerning a finding that was determined to be erroneous or based off evidence that was later rejected. Although Dietz suggests a rehearing before the same judge risks the appearance that the judge could not approach the hearing with an open mind, that is not the standard. (*See* Br. at 36.) Rather, under *Coleman*, the original judge must have "substantial difficulty in putting out of his or her mind previously-expressed views" to warrant remand before a new judge. *Coleman*, 203 Mont. at 249, 663 P.2d at 1161. Here, there is nothing to suggest that the district court would have "substantial difficulty" in reconsidering its determination if the Court reversed for rehearing.

Second, rehearing before a different judge in this case is not required "to preserve the appearance of justice." *Coleman*, 203 Mont. at 249, 663 P.2d at 1161. Critically, Dietz does not accuse the district court judge of being biased or prejudiced against him, which would counsel in favor of reassignment. *State v.*

Smith, 261 Mont. 419, 445-46, 863 P.2d 1000, 1016-17 (1993) (remanded for resentencing to a new judge when the judge's statement at trial evidenced bias against the defendant); *see also State v. Rambold*, 2014 MT 116, ¶ 22, 375 Mont. 30, 325 P.3d 686 (remanded for resentencing before a new judge because judge's comments during sentencing reflected an improper basis for his decision and "cast serious doubt on the appearance of justice"). Thus, the facts of this case do not suggest that rehearing before the same judge would cast doubt, let alone serious doubt, on the appearance of justice. *Rambold*, ¶ 22.

Lastly, rehearing before a different judge would result in waste and a duplication of court resources, which would be "out of proportion to any gain in preserving the appearance of fairness." *Coleman*, 203 Mont. at 249, 663 P.2d at 1161. Rehearing before a new judge would essentially require the whole hearing to be conducted from scratch, and require the parties to reargue the entire proceeding. This would provide Dietz with a windfall and give him a second bite at the apple, in addition to causing fiscal waste. All for a technical error that could have been timely cured if Deitz, or his attorney, had spoken up when the opportunity presented itself. Thus, the *Coleman* factors do not weigh in favor of rehearing before a new judge and the Court should decline to do so if it remands for a new hearing.

CONCLUSION

The Court should affirm the revocation of Dietz's suspended sentence.

Respectfully submitted this 16th day of September, 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 8,967 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-16-2024:

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