IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0250

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TANNER DAVID ALFORD,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Howard F. Recht, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Cori.losing@mt.gov

WILLIAM FULBRIGHT
Ravalli County Attorney
205 Bedford Street, Suite C
Hamilton, MT 59840-2853

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

MISTY D. GAUBATZ
A&M Law
319 West Pine Street, Suite 2
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUE

Whether the district court erred when it imposed the mandatory minimum custodial sentence required by Mont. Code Ann. § 61-8-1008(1)(a)(i) (2021).

STATEMENT OF THE CASE

On April 12, 2023, the State of Montana charged Appellant Tanner David Alford by Information with Driving While Under the Influence of Alcohol and/or Drugs (DUI) (4th or subsequent), a felony, in violation of Mont. Code Ann. § 61-8-1002 (2021), Driving While Suspended or Revoked, a misdemeanor, in violation of Mont. Code Ann. § 61-5-212(1)(b)(iii), and Speeding, a misdemeanor, in violation of Mont. Code Ann. § 61-8-309.

After Alford pleaded guilty to felony DUI, the district court, in relevant part, committed Alford to the custody of the Department of Corrections (DOC) for a period of 13 months for placement in an appropriate correctional facility or program to run consecutive to a 5-year term of incarceration at the Montana State Prison, all suspended. (Doc. 45 at 3.)[1] The district court subsequently stayed imposition of Alford's sentence pending the instant appeal of his sentence. (Doc. 45 at 9.)

[1] Alford did not provide a transcript of his sentencing hearing on appeal.

STATEMENT OF THE FACTS

I. The offense

On March 31, 2023, Ravalli County Sheriff's Deputy Nick Helmer observed Alford traveling 79 miles per hour (mph) in a 60-mph zone. (Doc. 1 at 2.) Deputy Helmer initiated a traffic stop. (*Id*.) After Deputy Helmer made contact with Alford, Deputy Helmer immediately noticed that Alford's "speech was slow and slurred, and that there was a strong smell of an alcoholic beverage emanating from the vehicle." (*Id*.) Alford admitted he did not have a driver's license. (*Id*.) And, despite his vehicle registration sitting on his center console, Alford struggled to locate it. (*Id*.) Alford admitted that he consumed three beers at Higher Ground Brewery. (*Id*.) Alford then returned home, consumed a couple more beers, and then left his residence. (*Id*.) Alford told Deputy Helmer that "drinking was 'helping' with a lot of life issues." (*Id*.) Alford's breath alcohol content was 0.155. (*Id*.)

II. Relevant procedural history

Ultimately, Alford entered into a plea agreement with the State in January 2024. (Doc. 34.) In exchange for Alford's guilty plea to felony DUI, the State would not pursue the two misdemeanor charges. (Doc. 34 at 1.) As part of the plea agreement, Alford and the State both agreed to recommend the following custodial sentence: "a commitment to the Montana Department of Corrections for a term of thirteen (13) months, and suspended commitment to the Montana State

Prison for a consecutive term of not more than five years." (Doc. 34 at 2.) Alford pleaded guilty to felony DUI as charged in the Amended Information on February 28, 2024.[2] (Doc. 35.1.)

In advance of the sentencing hearing, Alford submitted a sentencing memorandum[3] to the district court. (Doc. 36.) In his memorandum, Alford recommended that the district court sentence him to a 5-year suspended sentence. (*Id*. at 4-5.) In support of his recommendation, Alford argued that "requiring [him] to spend at least 13 months in custody or in the WATCh program is so excessive and disproportionate to the unique circumstances of this case that such a punishment would be cruel and unusual." (*Id*. at 6.) As Alford explained, his treating professionals agree that Alford should maintain the status quo of his treatment and remain in the community. (*Id*. at 3-4.) As such, Alford argued that to require him to complete a 13-month DOC commitment "would harm him" rather than rehabilitate him. (*Id*. at 7.)

[2] Alford did not provide a transcript of the change of plea hearing.

[3] Although Alford's memorandum references Exhibits A-E, Exhibit E is not attached to the memorandum. (*See* Doc. 36.) Counsel filed with this Court a motion to supplement Exhibit E as it was inadvertently left off of the memorandum. Exhibit E, however, was never supplemented to the record, presumably because Exhibit E was inadvertently not attached to the original filing. Nonetheless, there is no record that any of the referenced Exhibits were admitted at sentencing. (*See* Doc. 37.1.)

Relying on *State v. Dowd*, 2023 MT 170, 413 Mont. 245, 535 P.3d 645, Alford further argued that the district court, when imposing a custodial sentence, must consider the defendant's financial hardship, which to Alford included consideration of the "human costs" associated with sentencing. (*Id*. at 9.)

The district court imposed the sentence recommended in the plea agreement, which is also the statutory mandatory minimum sentence.[4] (Docs. 37.1; 45 at 3.)

SUMMARY OF THE ARGUMENT

The district court did not err when it imposed the mandatory minimum custodial sentence as required by Mont. Code Ann. § 61-8-1008(1)(a)(i).

First, Alford has waived appellate review of his sentence. In his plea agreement, Alford agreed to recommend the sentence the district court ultimately imposed. Moreover, Alford's constitutional challenge to his sentence is more appropriately construed as an as-applied challenge, not a facial constitutional challenge. The record is insufficient to support that Alford raised his as-applied challenge to the district court or asserted any other objections to his sentence.

[4] Notably, the district court imposed a $1,000 fine, with $900 suspended, instead of a fine within the statutory required fine range of $5,000 to $10,000. (Doc. 45 at 3.) Alford does not challenge the imposition of the fine on appeal. (*See* Appellant's Br.)

Ultimately, Mont. Code Ann. § 61-8-1008(1)(a)(i)'s mandatory custodial sentence does not violate Montana's Cruel and Unusual Punishment Clause. The mandatory custodial sentence, which requires placement in an appropriate facility or program, is proportional to the offense: first felony DUI. The statute also does not eliminate the district court's discretion. The statute authorizes the district court to impose a custodial sentence of 13 months to 2 years.

Moreover, the district court is free to exercise more discretion by considering an offender's own individual circumstances, if properly raised, to conclude that the mandatory custodial sentence constitutes cruel and unusual punishment as to that specific offender. Here, however, the record supports that even if Alford had properly raised such a challenge, his circumstances did not render the mandatory minimum custodial portion of the sentence as cruel and unusual punishment.

STANDARDS OF REVIEW

This Court reviews for legality criminal sentences. *State v. Gibbons*, 2024 MT 63, ¶ 20, 416 Mont. 1, 545 P.3d 686. A claim that a criminal sentence violates a constitutional provision is reviewed *de novo*. *Id.*

ARGUMENT

I. Alford has waived appellate review of his sentence.

Appellate review of Alford's sentence is not appropriate. First, Alford agreed, in the plea agreement, to the sentence the district court ultimately imposed. Second, Alford's facial constitutional challenge is a veiled as-applied constitutional challenge to his sentence, which there is no record of him raising to the district court at his sentencing hearing. Finally, Alford did not raise any objections to his sentence, which falls within sentencing parameters, being imposed.

A. Alford agreed to recommend the sentence that the district court ultimately imposed.

In his plea agreement with the State, Alford agreed to jointly recommend a 13-month DOC commitment for placement in an appropriate correctional facility or program followed by a consecutive term of 5 years to Montana State Prison, all suspended. Alford did not reserve any constitutional challenges. However, Alford did not fulfill his obligations under the plea agreement when he filed his sentencing memorandum that recommended a 5-year suspended sentence. Not only was the sentence that Alford recommended outside of the plea agreement, but it was also not a statutorily legal sentence to recommend. *See* Mont. Code Ann. § 61-8-1008(1)(a)(i).

Moreover, Alford failed to request a transcript of the sentencing hearing. Thus, there is no record before this Court indicating the basis for Alford not

fulfilling his obligations under the plea agreement. "Pursuant to M. R. App. P. 8(2), it is incumbent upon the appellant to transmit the proper record on appeal." *State v. Johnson*, 2008 MT 227, ¶ 17, 344 Mont. 313, 187 P.3d 662.

Based on the record before the Court, and the plea agreement, Alford was ultimately sentenced to the exact sentence he agreed to jointly recommend to the district court. This Court has long held that it will not lend its assistance to an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. *See, e.g.*, *State v. Bowley*, 282 Mont. 298, 310, 938 P.3d 592, 599 (1997); *State v. Sattler*, 170 Mont. 35, 37, 549 P.2d 1080, 1081 (1976); *State v. Nance*, 120 Mont. 152, 166, 184 P.2d 554, 561 (1947). This Court should affirm Alford's sentence because he agreed to that very sentence when he signed the plea agreement and pleaded guilty in exchange for the State eliminating two of his charges. *See Id.*

B. Alford failed to present a sufficient record for this Court to consider Alford's as-applied constitutional challenge.

As part of his argument on appeal, Alford argues that Mont. Code Ann. § 61-8-1008(1)(a)(i) is facially unconstitutional because it does not allow the district court to consider Alford's individual circumstances before imposition of sentence. (Appellant's Br. at 13-14, 18-20.) In doing so, Alford conflates an as applied challenge with a facial challenge.

"A defendant's as applied constitutional challenge is based on the defendant's allegation that [his] *sentence* is unconstitutional, although imposed

pursuant to a constitutional sentencing statute." *State v. Ber Lee Yang*, 2019 MT 266, ¶ 11, 397 Mont. 486, 452 P.3d 897 (emphasis in original). "As long as within statutory parameters of a constitutional sentencing statute, the as-applied challenge is considered objectionable and therefore waived if not first presented to the sentencing court." *Id.* This Court, therefore, will not review as-applied challenges raised for the first time on appeal. *Id.*

Here, Alford had the opportunity to present his evidence to the district court establishing that his sentence, because of Alford's specific medical and rehabilitation needs, would be disproportionate. And, though Alford submitted the documents from his various providers to the district court, there is no record before this Court supporting that Alford admitted those exhibits at sentencing or argued that the district court should consider that information to find that Alford's mandatory custodial sentence would be disproportionate to him. *See Johnson*, ¶ 18.

Conversely, Alford cannot establish that the district court did not consider that information when the district court exercised *its discretion*, and imposed a 13-month, instead of a 2-year, commitment to the DOC for placement in an appropriate facility or program. Either way, Alford had a duty to provide this Court with a sufficient record to review his claims. By neglecting to include the sentencing transcript, Alford is unable to establish that he raised an as-applied

challenge to the district court. Without preserving such a challenge, appellate review of his as applied challenge to his sentence is not appropriate.

As part of his argument on appeal, Alford also argues that his sentence is inconsistent with Montana's general sentencing policy. (Appellant's Br. at 20-22.) Again, there is no record before this Court establishing that Alford raised any objection to his sentence. *See Johnson*, ¶ 18.

Generally, this Court refuses to review issues on appeal where the party failed to object to the trial court. *State v. Hinshaw*, 2018 MT 49, ¶ 16, 390 Mont. 372, 414 P.3d 271. However, an exception to this general rule exists "if the criminal sentence is illegal or in excess of statutory mandates." *Id*. ¶ 17. A sentence is legal "if it falls within statutory parameters." *Id*. "[A] sentencing court's failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one." *Id*. (internal quotations and citations omitted).

Here, Alford's sentence fell within statutory parameters. *See* Mont. Code Ann. § 61-8-1008(1)(a)(i). As such, Alford's argument, raised for the first time on appeal, that his sentence did not comply with Montana's general sentencing policy as codified at Mont. Code Ann. § 46-18-101, renders his sentence an objectionable one, not an illegal one. Alford accordingly has waived appellate review of this challenge to his sentence.

II. Alford does not have standing to challenge the constitutionality of all mandatory minimum sentences for felony DUIs.

On appeal, Alford argues that mandatory minimum DUI custodial sentences are facially unconstitutional because the district court is not allowed to consider individual factors before it imposes the sentence, which violates Montana's Cruel and Unusual Punishment Clause. (Appellant's Br. at 11.) Alford's custodial sentence, however, was imposed only pursuant to Mont. Code Ann. § 61-8-1008(1)(a)(i). Alford, therefore, does not have standing to challenge, universally, mandatory minimum felony DUI custodial sentences.

To establish standing: "(1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *State v. Thaut*, 2004 MT 359, ¶ 16, 324 Mont. 460, 103 P.3d 1012 (citation omitted). To satisfy the injury requirement, the complaining party must "allege a personal stake in the outcome of the controversy." *Id.* (internal quotations and citation omitted). The complaining party "must allege an injury personal to themselves as distinguished from one suffered by the community in general." *Id.* (internal quotations and citation omitted). A criminal "defendant must show a direct, personal injury resulting from application of the law in question in order to successfully challenge the constitutionality of a criminal statute." *Id.* (citation omitted).

Because the district court imposed Alford's sentence only pursuant to Mont. Code Ann. § 61-8-1008(1)(a)(i), Alford has not, and cannot, establish a direct, personal injury from the applicability of all the mandatory minimum custodial DUI sentences. Alford accordingly only has standing to challenge the constitutionality of Mont. Code Ann. § 61-8-1008(1)(a)(i).

III. Because Mont. Code Ann. § 61-8-1008(1)(a)(i)'s mandatory sentence is proportional to the gravity of the offense—felony DUI—it is not facially unconstitutional under Montana's Cruel and Unusual Punishment Clause.

Alford argues that Mont. Code Ann. § 61-8-1008(1)(a)(i)'s mandatory minimum sentence violates Montana's Cruel and Unusual Punishment Clause because it does not allow the district court to consider an individual offender's characteristics, including the offender's financial circumstances. (Appellant's Br. at 13.)

This Court presumes legislative enactments to be constitutional. *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (citation omitted). "The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional." *Yang*, ¶ 14 (citations omitted). To prevail on a facial challenge, the challenging party must show that "no set of circumstances exists" under which the statute would be valid or that the statute

lacks any "plainly legitimate sweep." *Id.* (internal quotations and citations omitted).

Article II, Section 22 of the Montana Constitution and the Eighth Amendment, incorporated through the Fourteenth Amendment, prohibit cruel and unusual punishment. The touchstone of the Eighth Amendment and Mont. Const. art. II, § 22, is proportionality. *Yang*, ¶ 16. Montana's Cruel and Unusual Punishment Clause mirrors the Eighth Amendment's Cruel and Unusual Punishment Clause. "[T]he Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

"[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin v. Michigan*, 111 S. Ct. 2680, 2703 (1991) (quoting *Rummel*, 445 U.S. at 275-76). Generally, sentences that fall within the statutory guidelines do not violate the constitutional prohibitions against cruel and unusual punishment. *State v. Wardell*, 2005 MT 252, ¶¶ 13, 28, 329 Mont. 9, 122 P.3d 443 (citations omitted).

"It is well-settled that individualized sentences only are required in capital cases and that it is not cruel and unusual punishment under the Eighth Amendment for mandatory minimum sentences to be given without consideration of mitigating

circumstances." *United States v. Galvis-Quintero*, 1992 U.S. App. LEXIS 24529, *9 (9th Cir. 1992) (citing *Harmelin*, 111 S. Ct. at 2701-02; *United States v. LaFleur*, 952 F.2d 1537, 1547 (9th Cir. 1991)). That said, where "a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice, it constitutes cruel and unusual punishment." *Wardell*, ¶ 28 (internal quotations and citations omitted).

When an offender is sentenced on his first felony DUI, which means he has at least four DUI convictions, Mont. Code Ann. § 61-8-1008(1)(a)(i) requires the district court to impose the following custodial sentence: a DOC commitment for a term of not less than 13 months or more than 2 years for placement in either an appropriate correctional facility or a program, followed by a consecutive suspended term of 5 years to the Montana State Prison.

Despite Alford's contention otherwise, the Legislature enacting mandatory sentences does not automatically equate to a violation of Montana's Cruel and Unusual Punishment Clause. First, Mont. Code Ann. § 61-8-1008(1)(a)(i)'s sentencing scheme provides the district court discretion from imposing a 13-month custodial sentence up to a 2-year custodial sentence. And, even with a mandatory sentence, a district court has the discretion to alter the sentence imposed. *See* Mont. Code Ann. § 46-18-222. Additionally, if Alford had raised an as applied challenge, the Constitution would have allowed the district court to find that the

mandatory minimum sentence would be cruel and unusual punishment as applied to Alford based on his individual circumstances.

Alford's argument also ignores that the felony DUI custodial sentence is not disproportionate to the offense. The catastrophic results of drunk driving are undisputed. Montana consistently has a high percentage of fatal accidents caused by drunk driving. *See* NHTSA, *2021 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2023) (leading nation in percentage of fatal accidents caused by drunk driving); NHTSA, *2022 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2024) (exceeding the national average in percentage of fatal accidents caused by drunk driving).

To combat the tragedies caused by drunk drivers in Montana, the Legislature has implemented a sentencing scheme that imposes a mandatory custodial sentence along with residential treatment for a first felony DUI conviction. To that end, Mont. Code Ann. § 61-8-1008(1)(a)(i) supports those legislative goals and does so without shocking the conscience.

Nonetheless, Alford relies on this Court's recent decision in *Gibbons* to support that Montana's Cruel and Unusual Punishment Clause also should require consideration of individual characteristics before imposing a mandatory minimum custodial sentence. *Gibbons*, however, is not applicable to this case as *Gibbons*

exclusively addressed a challenge to a mandatory fine under Montana's Excessive Fines Clause.

In *Gibbons*, this Court held that Mont. Code Ann. § 61-8-731(3) (2019) violated Montana's Excessive Fines Clause because it prevented the district court from considering the offender's ability to pay before it imposes a fine within the mandatory fine range. *Gibbons*, ¶ 66. In reaching its conclusion, the *Gibbons* Court elevated Mont. Code Ann. § 46-18-231 to the statutory equivalent of Montana's Excessive Fines Clause, concluding that "the Montana Legislature has effectuated these federal and state constitutional protections against excessive fines by codifying the inquiry necessary to guarantee that a fine is proportional in § 46-18-231, MCA." *Id*., ¶ 50. Essentially, only by promoting Mont. Code Ann. § 46-18-231 to constitutional status was the *Gibbons* Court able to conclude that Mont. Code Ann. § 61-8-731(3) (2019) was facially unconstitutional under Montana's Excessive Fines Clause because it did not comply with Mont. Code Ann. § 46-18-231.

Montana Code Annotated § 46-18-231, however, does not require the district court to conduct an ability to pay analysis before imposing a custodial sentence. Nor has this Court ever held that such consideration should occur as Alford suggests. Instead, consideration of financial hardships and ability to pay is

considered only before imposing specific financial penalties and fees.[5] And the financial hardships discussed in *Dowd*, as relied on by Alford, do not include the "human cost" of a custodial sentence. The financial hardships, again, are strictly associated to an inability to pay financial penalties and fees. Alford's contention that assessment of the "human cost" of a custodial sentence must be required for a district court to impose a mandatory custodial sentence for that sentence to be proportional to the offense is, therefore, without merit.

Alford has not proven beyond a reasonable doubt that Mont. Code Ann. § 61-8-1008(1)(a)(i)'s mandatory minimum custodial sentence is unconstitutional. *See Yang*, ¶ 14. Alford has not established that under no circumstances would Mont. Code Ann. § 61-8-1008(1)(a)(i)'s mandatory sentencing range be valid or that the statute lacks a plainly legitimate sweep. *See Yang*, ¶ 14. Montana Code Annotated § 61-8-1008(1)(a)(i)'s mandatory sentencing range furthers the legislative goal of deterring offenders from committing further DUIs, endangering the public and themselves. In doing so, the Legislature has set a proportional punishment to the gravity of an offender's first felony DUI. Montana Code

[5] The district court presumably considered Alford's financial hardships and ability to pay in the appropriate context: fees and fines. This is supported by the district court lessening substantially the mandatory minimum fine required by Mont. Code Ann. § 61-8-1008(1)(a)(i).

Annotated § 61-8-1008(1)(a)(i), therefore, does not violate Montana's Cruel and Unusual Punishment Clause.

IV. Alford's sentence is not unconstitutional under Montana's Cruel and Unusual Punishment Clause.

Even if this Court construes Alford's exhibits attached to his sentencing memorandum filed in support of his recommended sentence as an as-applied cruel and unusual punishment challenge, the district court did not err when it imposed the mandatory minimum sentence.

After Alford drank a few beers at a brewery, drove home, consumed two more beers, and decided to drive again, Alford was pulled over and ultimately arrested for DUI. Alford admitted that he was using alcohol to self-medicate. This is Alford's fourth DUI conviction.

Following his arrest, Alford completed a chemical dependency evaluation, which concluded that Alford met the criteria for level one treatment and diagnosed Alford with Alcohol Use Disorder, Severe. (Doc. 36, Ex. A.) Alford was also diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, and Post-Traumatic Stress Disorder. (Doc. 36, Ex. B.) Alford attended only six therapy sessions before his April 2024 sentencing hearing, with those sessions occurring between June and August 2023. (*Id*.) Alford, however, has attended weekly chemical dependency scheduled appointments with Rachel Lund, LCSW, LAC

since July 2023. Alford was receiving treatment and monitoring following a traumatic brain injury he received in November 2023. (Doc. 36, Ex. C.) Alford is the primary provider for his partner and young child. (Doc. 36 at 7.)

Based on all of the evidence, Alford's 13-month DOC commitment for placement in an appropriate facility or program is proportional to his own circumstances. Alford used alcohol to self-medicate and then chose to drive his vehicle, well over the speed limit. Alford is familiar that drinking and driving results in punishment. He knew his conduct was wrong. And, although Alford has made strides since his arrest, those improvements do not negate that his conduct requires a proportional punishment. The district court abiding by the mandatory minimum sentence here, which will result in Alford receiving treatment through an appropriate program selected by the DOC, which presumably includes programs in the community, furthers Montana's general sentencing policy, will rehabilitate Alford, and does not constitute cruel and unusual punishment.

CONCLUSION

This Court shoulder affirm Alford's conviction and sentence.

Respectfully submitted this 19th day of December, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Cori Losing*
CORI LOSING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,869 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-19-2024:

Misty D. Gaubatz (Attorney)
319 W. Pine St.
Suite 2
Missoula MT 59802
Representing: Tanner David Alford
Service Method: eService

William E. Fulbright (Govt Attorney)
205 Bedford St #C
Hamilton MT 59840
Service Method: eService
E-mail Address: bfulbright@rc.mt.gov

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 12-19-2024