

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0014

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH WESLEY ROWE,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Thirteenth Judicial District Court
Yellowstone County, Honorable Michael Moses, Presiding

Appearances:

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in imposing a probation condition prohibiting Mr. Rowe from accessing or possessing of any material that describes or depicts human nudity.

STATEMENT OF THE CASE

On April 9, 2021, the State of Montana charged Mr. Rowe with one count of Sexual Intercourse without Consent (Felony), four counts of Sexual Assault (Felony), one count of Surreptitious Visual Observation or Recordation 1st Offense (Misdemeanor), one count of Criminal Production or Manufacture of Dangerous Drugs (Felony), and three counts of Sexual Abuse of Children (Felony). Doc. 43.

Subsequently, Mr. Rowe and the State of Montana reached an agreement resolving the case. Doc. 70. Mr. Rowe agreed to enter guilty pleas as to Count I: Sexual Intercourse Without Consent (Felony), Count II: Sexual Assault (Felony), Count III: Sexual Assault (Felony), and Count VI: Sexual Abuse of Children (Felony). *Id.*, pg. 6. Counts were to run concurrent and Mr. Rowe was free to argue for any lawful sentence. *Id.* The State of Montana would request a net eighty-year sentence to the Montana State Prison. *Id.*

On September 28, 2023, Mr. Rowe was sentenced to a net sixty years to the Montana State Prison with twenty-five years suspended. Doc. 103, pg. 2. The

sentence was accompanied by a twenty-year parole restriction and conditions of probation. Doc. 103, pg. 2.

STATEMENT OF THE FACTS

Mr. Rowe was sentenced to a net sixty years to the Montana State Prison with twenty-five years suspended. Doc. 103, pg. 2. The sentence was accompanied by a twenty-year parole restriction and conditions of probation. *Id.*

As to Count I: Sexual Intercourse Without Consent (Felony), Mr. Rowe was sentenced to sixty years to the Montana State Prison with twenty-five years suspended. *Id.*, pgs. 1-2. As to Counts II and III: Sexual Assault (Felony), Mr. Rowe was sentenced on each count to ten years to the Montana State Prison. *Id.*, pg. 2. As to Count VI: Sexual Abuse of Children (Felony), Mr. Rowe was sentenced to ten years to the Montana State Prison. *Id.* All counts were set to run concurrent to each other. *Id.*

At issue herein, the district court-imposed probation condition number twenty-nine. *Id.*, pg. 6. The condition provides:

The Defendant shall not access or have in his/her possession or under his/her control any material that describes or depicts human nudity, the exploitation of children, consensual sexual acts, non-consensual sexual acts involving force or violence, including but not limited to computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc., without prior written approval of the Probation & Parole Officer and therapist. The Defendant shall not frequent adult bookstores, topless bars, massage parlors, or use the services of prostitutes.

Id.

At sentencing, Mr. Rowe argued the district court could not lawfully bar him from possessing all materials that describe or depict human nudity. TR 16-17. Mr. Rowe conceded the balance of probation condition number twenty-nine was appropriate. TR 17:5-12. The State of Montana argued probation condition number twenty-nine was appropriate in its entirety. TR 17-18. The district court-imposed condition number twenty-nine in its entirety. TR 18-19. The district court did not address the specific issues raised by the defense.

STANDARD OF REVIEW

Criminal sentences are reviewed for legality. *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26. This review is confined to determining whether sentencing court had statutory authority to impose the sentence, whether the sentence fall within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. *State v. Rickman*, 2008 MT 142, ¶ 11, 343 Mont. 120, 183 P.3d 49 (citations omitted). This determination is a question of law and is de novo. *Id.* (citation omitted).

SUMMARY OF ARGUMENT

Mr. Rowe, after changing his plea, was sentenced on Count 1: Sexual Intercourse Without Consent, Counts II and III: Sexual Assault (Felony), and Count VI: Sexual Abuse of Children Felony. The district court imposed a net sixty-year

sentence with twenty-five years suspended. A twenty-year parole restriction was further imposed.

As a condition of probation, the District Court barred the Mr. Rowe from possessing or having under his control any material that depicts human nudity. The district court's prohibition is not reasonable and is overly broad. Further, the broad prohibition enjoys no nexus to Mr. Rowe's offense or person. So long as they are not sexually explicit, Mr. Rowe should properly be entitled to possess of materials that depict human nudity. The district should have imposed a narrower probation condition prohibiting the possession of material that describes or depicts sexually explicit acts.

ARGUMENT

1. The District Court erred in imposing a probation condition prohibiting Mr. Rowe from accessing or possessing of any material that describes or depicts human nudity.

When suspending or all or a portion of a sentence, the district court may impose reasonable restrictions or conditions during the period of the suspended sentence. Mont. Code Ann. § 46-18-201(4). Conditions or restriction must be reasonable related to the objectives of rehabilitation or the protection of the victim or society. *State v. Whalen*, 2013 MT 26, ¶ 31, 368 Mont. 354, 295 P.3d 1055. Further, conditions must enjoy a nexus to either the offense committed or to the offender

himself. *Id.*

The district court's imposition of condition of number twenty-nine was simply not reasonable and was readily correctable. As Mr. Rowe's defense counsel made clear depictions of nudity are not inherently sexually explicit in nature. Examples are nearly endless. Medical records may contain depictions and descriptions of human anatomy. Newspapers and educational programming may contain images of sculptures from antiquity depicting nudity. Is there an appropriate nexus barring a sex offender from owning a book containing a picture of Michelangelo's David? The sculpture depicts the biblical David in the nude with genitals exposed. Similarly, why should Mr. Rowe not be permitted to possess a copy of Leonardo Da Vinci's "Vitruvian Man"?

There are many valid reasons why it would be appropriate for Mr. Rowe to possess images or descriptions of human nudity. Admittedly, While Mr. Rowe should not possess sexually explicit images, the district court should have imposed the following condition:

The Defendant shall not access or have in his/her possession or under his/her control any material that describes or depicts **sexually explicit** human nudity, the exploitation of children, consensual sexual acts, non-consensual sexual acts involving force or violence, including but not limited to computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc., without prior written approval of the Probation & Parole Officer and therapist. The Defendant shall not frequent adult bookstores, topless bars, massage parlors, or use the services of prostitutes.

The above proposed condition weighs Mr. Rowe's rights and ensures societal protection.

CONCLUSION

This Court should enter an order striking probation condition twenty-nine as originally imposed and remand for entry of an amended judgment containing a condition-twenty-nine consistent with the one proposed above.

Respectfully submitted this 15th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that the Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word Software and excluding tables and certificates is 1,369.

Respectfully submitted this 15th day of May, 2025.

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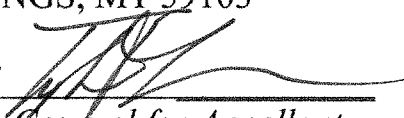
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