IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0639

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM FREDERICK LAMOUREUX,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Amy Eddy, Presiding

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STATEMENT OF THE ISSUES

Issue One: The State charged three privacy in communications violations under Mont. Code Ann. § 45-8-213(1)(a). As a content-based restriction of speech, can § 45-8-213(1)(a) survive strict scrutiny?

Issue Two: Relating to the second of the three charges, § 45-8-213(1)(a) requires a threat to the person or property of the recipient of the communication. The State charged a threat of physical harm to someone else. Did the second charge state an offense?

Issue Three: Relating to the third of the three charges, the communication's recipient was in New York and the accused's location was unknown. Did the State prove territorial jurisdiction over the third charge?

Issue Four: Relating to some or all of the charges, the trial court instructed the jury on uncharged alternative elements and refused to instruct the jury on constitutional requirements pertaining to true threats and obscenity. Were the instructions full and fair?

STATEMENT OF THE CASE

As to Issue One, the State made all its charges citing Mont. Code Ann. § 45-8-213(1)(a) (alternatively referred herein as "subsection

(1)(a)").[1] (D.C. Docs. 35, 36.1.) William Frederick Lamoureux (Bill) moved to dismiss all the charges based on subsection (1)(a)'s facial unconstitutionality. (D.C. Doc. 15, 24.) The Eleventh Judicial District Court denied the motion, reasoning, "The Court does not dismiss Defendant's challenge as lacking in merit or support. Instead, the Court finds it is bound by [*State v. Dugan*, 2013 MT 38, 369 Mont. 39, 303 P.3d 705], and therefore Defendant's efforts must be rejected." (D.C. Doc. 34 (attached at App. A) at 3.)

As to Issue Two, Bill moved to dismiss the information's second count for failing to state an offense. (D.C. Docs. 14, 25.) The information charged that Bill threatened to injure someone other than the person who received the communication. (D.C. Docs. 35, 36.1.) The District Court denied the motion. (D.C. Doc. 46 (attached at App. B).) The court did not address that the alleged threat of injury was not, as subsection (1)(a) requires, to the "person or property of the person" who received the communication. (App. B at 1–2.) Although the State did

[1] The Legislature revised parts of § 45-8-213(1)(a) in 2019. *See* 2019 Mont. Laws chs. 56, 243. The State's information alleged Bill violated subsection (1)(a) in 2017. (D.C. Docs. 35, 36.1.) Unless otherwise noted, this brief refers to subsection (1)(a) as it existed in 2017.

not charge subsection (1)(a)'s alternative elements of obscene, profane, lewd, or lascivious language (*see* D.C. Docs. 35, 36.1), the court ruled such language upheld the charge. (App. B at 2.)

As to Issue Three, after the State rested at trial, Bill moved to dismiss the third count due to a lack of jurisdiction. (Trial at 200–01.) Bill noted the communication's recipient was in New York and that no one testified to knowing Bill's location at or near the time. (Tr. at 201–02.) The District Court denied the motion. (Trial at 203 (attached at App. C).)

As to Issue Four, Bill rested his defense on the State's failure to meet its burden. (Trial at 204, 252.) As part of that burden, Bill proposed instructing the jury on the constitutional requirements for true threats and obscenity. (D.C. Doc. 44; Trial at 222–25.) Bill also objected to instructions that permitted guilty verdicts through findings of uncharged and alternative elements in subsection (1)(a). (D.C. Doc. 44; Trial at 225–29.) The District Court overruled the objections. (Trial at 229 (attached at App. D).) The District Court's instructions as to all the counts permitted guilty verdicts based simply on findings that Bill swore over the phone with annoying or offending purposes. (D.C. Doc.

56.7 at Instrs. 20–23; Trial at 235–38.) In closing argument, the State argued Bill's curse words over the phone were offensive and "[y]ou need to write guilty on all three [verdict forms]." (Trial at 241–46, 247.) The jury obliged. (D.C. Doc. 56; Trial at 259–60.)

The District Court sentenced Bill to prison for three concurrent terms of five years. (D.C. Doc. 64 (attached at App. E).) Bill timely appeals. (D.C. Doc. 67.)

STATEMENT OF THE FACTS

The State prosecuted Bill for words he allegedly spoke in one phone call with Ashley Dunigan and two phone calls to Sam McGough. (D.C. Docs. 35, 36.1.) The State never sought phone records to verify whether the alleged calls happened or establish where the calls were placed from. (Trial at 164, 184, 188–91.)

Ashley worked at a store in Whitefish. (Trial at 166.) Stacey McGough, Bill's ex-wife, owned the store, and Sam, Stacey's father, owned the building. (Trial at 177.) Relating to the first charge, Ashley testified she answered an incoming call to the store and recognized Bill's voice. (Trial at 167, 169–70, 173–74.) The voice asked for phone numbers, and Ashley refused to provide them. (Trial at 170–71.) The

voice responded by saying "bullshit" and, per Ashley, that "he was going to kiss me and come down to the store and slap my ass." (Trial at 171.)

Relating to the second charge, Sam testified he was in Whitefish when he received a call in which Bill sounded drunk, called Stacey a "fucking cunt," and said he wanted to kill her. (Trial at 176, 178–79, 184.)

Relating to the third charge, Sam testified he was in New York when he received a call in which Bill sounded drunk, used foul language, and said he wanted to kill Stacey and burn down the store. (Trial at 179–80.) Sam testified that Bill threatened he was going to the store. (Trial at 181, 183.) While Sam "assumed [Bill] was on the way from where he lives" in Montana, Sam admitted "I don't know." (Trial at 181, 183.) The State offered no other evidence as to Bill's whereabouts at the time. (*See* Trial at 160–94.)

STANDARDS OF REVIEW

De novo review applies to legal questions, including issues of constitutional law, *Dugan*, ¶ 14, statutory interpretation, *Sartain v. State*, 2017 MT 216, ¶ 9, 388 Mont. 421, 401 P.3d 701, and jurisdiction, *Interstate Explorations, LLC v. Morgen Farm & Ranch, Inc.*, 2016 MT

20, ¶ 6, 382 Mont. 136, 364 P.3d 1267. This Court reviews whether jury instructions fully and fairly instructed the jury on the applicable law. *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402.

SUMMARY OF THE ARGUMENT

The problems on appeal begin with § 45-8-213(1)(a), the law the State cited to prosecute this case. On its face, subsection (1)(a) criminalizes speech based on content. Classifying speech by content renders a law presumptively unconstitutional. It is the judiciary's duty to strictly scrutinize such a presumptively unconstitutional law. In *Dugan*, this Court concluded that subsection (1)(a) is not confined to First Amendment exceptions. *Dugan* nonetheless held that subsection (1)(a) is constitutional based on the statute's purpose element. That holding is mistaken. Outside of First Amendment exceptions, the U.S. Supreme Court has rejected that purpose elements render content-based restrictions constitutional. Illustrating the problem, even with its purpose element, the State has repeatedly used subsection (1)(a) to target constitutionally-protected speech in Montana. This is untenable considering the Montana Constitution is intended to provide even greater protection to free speech than the U.S. Constitution. Because

subsection (1)(a) abridges, impairs, and chills free speech, subsection (1)(a) is unconstitutional, and the Court should dismiss the State's prosecution.

The State's second charge individually warrants dismissal. Subsection (1)(a) requires obscene language, a lewd suggestion, or a threat of injury to the "person or property of the person" who received the communication. The State charged none of these. Instead, the State charged that Bill threatened bodily injury to Stacey in a phone call with Sam. Stacey is not Sam's person or property under subsection (1)(a). Moreover, the State alleged nothing else that would represent obscene, lewd, or threatening language with regard to this count. The Court should dismiss the State's second charge for failing to state an offense under subsection (1)(a).

The third charge also independently warrants dismissal. District courts have jurisdiction in a subsection (1)(a) prosecution when the State proves either the maker or the recipient of the charged communication was in Montana when the communication occurred. But here, the communication's recipient was indisputably in New York, and the whereabouts of the alleged caller were unknown. The State did

not present phone records or any contemporary evidence establishing Bill's whereabouts. While the recipient of the communication "assumed" Bill was in Montana, he admitted, "I don't know." Jurisdiction is critically important, not some trivial matter dispensed with by speculation. The Court should dismiss the third charge because the State did not prove jurisdiction.

Instructional errors warrant reversing any remaining charges. When the State prosecutes alleged true threats or obscenity, precedent and constitutional requirements indicate it is the factfinder's role to determine whether the words were actually true threats or obscenity. The District Court erred by refusing to instruct the jury on those requirements. This Court has also previously established a trial court may not substantively amend the State's charges by instructing the jury on an offense's uncharged elements. The District Court here did precisely that with regard to the second and third counts. The effect of these instructional errors was to relieve the State of its burden, necessitating reversal and retrial with proper instructions.

ARGUMENT

I. The State's prosecution using an unconstitutional law is void.

The District Court first denied Bill's motion to dismiss all three counts based on § 45-8-213(1)(a)'s facial overbreadth and unconstitutionality and then denied Bill's motion to instruct the jury on obscenity and true threat requirements. (Apps. A, D.) Either denial warrants reversal.

A. Section 45-8-213(1)(a) is overbroad and unconstitutional for criminalizing substantial constitutionally-protected speech.

1. To an even greater degree than the U.S. Constitution, the Montana Constitution prohibits laws that constrain and weaken free speech.

The U.S. Constitution's First Amendment prohibits lawmakers from making any law "abridging the freedom of speech." Through the U.S. Constitution's Fourteenth Amendment, the prohibition applies in Montana. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). Article II, Section 7 of the Montana Constitution additionally directs that the Legislature may pass no law "impairing the freedom of speech or expression."

In litigation implicating both the federal and state constitutions, the federal right provides the floor while the state right may provide greater protection. *State v. Covington*, 2012 MT 31, ¶ 20, 364 Mont. 118, 272 P.3d 43. Whether the Montana Constitution provides greater protection turns on the implicated constitutional provision's original intent and unique language. *Covington*, ¶ 21.

Strange as it is, this Court does not appear to have previously analyzed the original intent and unique language of Article II, § 7. In *City of Billings v. Laedeke*, 247 Mont. 151, 157–58, 805 P.2d 1348, 1352 (1991), this Court determined neither the First Amendment nor Article II, § 7 invalidated an ordinance regulating nude dancing. Later, in *City of Helena v. Krautter*, 258 Mont. 361, 363, 852 P.2d 636, 638 (1993), the Court incorrectly suggested *Laedeke* had broadly held the Montana Constitution "provides no greater protection for free expression" than the U.S. Constitution. But *Laedeke* simply determined the First Amendment and Article II, § 7 applied the same in that specific case, not that they applied the same in every case. *See Laedeke*, 247 Mont. at 157–58, 805 P.2d at 1352.

The record establishes the original intent of the Montana Constitution is to provide greater protection to free expression than the federal constitution. The 1972 Constitutional Convention's Bill of Rights Committee presented Article II, § 7 as meant to provide "impetus to the courts in Montana" to "re-balance the general backseat status of states in the safeguarding of civil liberties." 2 Montana Constitutional Convention Verbatim Transcript 630 (1979) ("Verbatim Transcript"). The provision would further protect "forms of expression similar to the spoken word" and other ways one "expresses one's unique personality." Verbatim Transcript 630. The Committee stressed Article II, § 7's "primacy" and that protection of free expression in Montana should "not continue merely in the wake of the federal case law." Verbatim Transcript 630. The Montana Constitution's voter pamphlet further notified voters that Article II, § 7 would "enlarge[] a citizen's freedom to express himself." Proposed 1972 Constitution for the State of Montana: Official Text with Explanation 6 (1972).[2]

[2] *See also,* John Wolff, *Trailing in the Wake: The Freedom of Speech in Montana*, 77 Mont. L. Rev. 61 (Winter 2016).

Article II, § 7's unique language reflects its original intent to offer greater protection to free speech. The First Amendment mandates that the government make no law "abridging freedom of speech." Article II, § 7, by contrast, mandates that the government pass no law "impairing the freedom of speech or expression." The differences are two-fold. First, Article II, § 7 explicitly protects a freedom of expression that the First Amendment does not. Second, Article II, § 7 substitutes the verb "impair" for the First Amendment's term "abridge." Those words are related but different. "Abridge" primarily addresses scope, as in to "cut short" or "lessen." *Oxford English Dictionary* 33 (Compact Edition, Oxford University Press 1971) (hereafter "*OED*"). "Impair" is broader and primarily addresses quality, as in to "make worse, less valuable, or weaker." *OED* 72. Something may be impaired, or reduced in quality, while not necessarily being abridged, or reduced in scope. Just the same, Article II, § 7 prohibits certain free-speech impairing laws that do not necessary constitute free-speech abridgement under the First Amendment. That reflects Article II, § 7's purpose, to give greater protection to free speech and expression in Montana.

2. Because § 45-8-213(1)(a) is a content-based restriction on speech, it is presumptively unconstitutional.

Under the First Amendment and Article II, § 7, a law regulating expressive content is "presumptively invalid." *United States v. Stevens*, 559 U.S. 460, 468 (2010); *see State v. Lance*, 222 Mont. 92, 101–02, 721 P.2d 1258, 1265 (1986). A regulation is content-based if the law "'on its face' draws distinctions based on the message a speaker conveys," such as "the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The judiciary must strictly scrutinize such laws to ensure they are "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226.

A person accused of violating such a law may mount a facial challenge that the law "threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution." *Lance*, 222 Mont. at 99, 721 P.2d at 1263 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). A court must void a law that "prohibits a substantial amount of protected speech," *United States v. Williams*, 553 U.S. 285, 292 (2008), and if there is a "significant possibility that the

law will be unconstitutionally applied," *State v. Lilburn*, 265 Mont. 258, 269, 875 P.3d 1036, 1043 (1994).

Here, the State charged Bill under § 45-8-213(1)(a). (D.C. Docs. 35, 36.1.) Subsection (1)(a) criminalizes a person, "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend," "communicat[ing] with a person by electronic communication and us[ing] obscene, lewd, or profane language, suggest[ing] a lewd or lascivious act, or threaten[ing] to inflict injury or physical harm to the person or property of the person."[3] An "electronic communication" is a transfer of information through a "wire, radio, electromagnetic, photoelectronic, or photo-optical system." Section 45-8-213(4). Other than the knowing and purposeful mental states, the rest of subsection (1)(a)'s terms are undefined, and this Court has suggested those terms receive their ordinary meaning. *See Dugan*, ¶ 72.

By its terms, subsection (1)(a) is a content-based restriction on speech. The only way to violate subsection (1)(a) is through expression—specifically "electronic communication." Electronic

[3] Section 45-8-213(1)(a) also contains an invalid prima-fascie evidence provision. *Dugan*, ¶ 63.

communications are particularly necessary to modern-day free speech. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). The statute proceeds to classify such communications by "the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. By its very terms, subsection (1)(a) targets speech with the content of "obscene," "profane," "lewd," "lascivious" or "threaten[ing] language"; the statute does not register speech without that content. By classifying speech based on content, subsection (1)(a) is a classic example of a content-based restriction on speech.

Because subsection (1)(a) is a content-based restriction, it is presumptively unconstitutional and must receive strict scrutiny. *Reed*, 135 S. Ct. at 2226; *Stevens*, 559 U.S. at 468. The State has the burden to prove the statute is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Generally, content-based restrictions like subsection (1)(a) "have been permitted . . . only when confined to the few 'historic and traditional categories . . . .'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citations omitted). The categories include obscenity, incitement, speech integral to criminal conduct, fighting words, and true threats. *Alvarez*, 567 U.S. at 717.

"Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, Ginsburg, Sotomayor, & Kagan, JJ. concurring). Moreover, there exists no "freewheeling authority to declare new categories of speech" not receiving constitutional protection. *Stevens*, 559 U.S. at 472.

3. Section 45-8-213(1)(a)'s history demonstrates its alarming breadth and unconstitutionality.

In *Dugan*, this Court upheld subsection (1)(a) as implicated in this appeal against overbreadth, as-applied, and vagueness challenges. *Dugan*, ¶¶ 50, 64, 72, 73. Dugan had become displeased with the assistance he received on a phone call with a government office. As he hung up, he called the person on the line's other end a "fucking cunt." *Dugan*, ¶ 9. Based on the name-calling, the State prosecuted Dugan with violating subsection (1)(a), and Dugan responded by challenging the statute's constitutionality. *Dugan*, ¶¶ 10–12.

In addressing Dugan's challenges, this Court recognized the rule that government may not regulate speech apart from several

historically-established, discreet categories. *Dugan*, ¶ 45; *accord Matal*, 137 S. Ct. at 1765; *Alvarez*, 567 U.S. at 717. One by one, the Court knocked down the application of those categorical exceptions to Dugan's speech. Electronic communications of the sort targeted in subsection (1)(a) are not fighting words because they do not occur face-to-face. *Dugan*, ¶ 43. The captive audience doctrine does not apply to a recipient of a telephone call who may hang up. *Dugan*, ¶¶ 46–47. Dugan's rude name-calling was not a true threat because it was not a statement meant to communicate an intent to commit an act of unlawful violence. *Dugan*, ¶ 48. Nor was the name-calling unprotected obscenity because it was not significantly erotic and did not appeal to a prurient interest in sex. *Dugan*, ¶ 48. This Court determined Dugan's speech "does not fall under one of the categorical exceptions to free speech protections" that would permit prosecution. *Dugan*, ¶ 49.

But the *Dugan* Court did not follow its analysis to its logical end. Dugan's speech not falling under an exception would render the prosecution unconstitutional. *See Matal*, 137 S. Ct. at 1765; *Alvarez*, 567 U.S. at 717. Instead, citing only the statute, *Dugan* declared that because § 45-8-213(1)(a) proscribes speech made "with the purpose to

terrify, intimidate, threaten, harass, annoy or offend," the State's prosecution of Dugan's speech was constitutional. *Dugan*, ¶ 50. *Dugan* promised it would "further explain[]" that holding. *Dugan*, ¶ 50. But later in the opinion, the Court simply restated the conclusion, again without analysis. *Dugan*, ¶ 64 (stating that communications made with the statute's proscribed purposes "can be proscribed without violating the Montana and United States Constitutions"). The Court then remanded for trial on whether Dugan "'knowingly or purposely' us[ed] 'obscene, lewd, or profane language' on the telephone with [the alleged victim] 'with the purpose to . . . offend' her." *Dugan*, ¶ 73 (citation omitted). Dugan instead petitioned for certiorari, seeking to certify a question on First Amendment vagueness. The U.S. Supreme Court ordered the State to respond. Rather than respond, the State mooted the petition by dismissing its prosecution.[4]

The State avoided additional review in *In re C.S.*, DA 14-0230. There, a teenage boy and girl flirted for a few days over Facebook's

[4] *See* United States Supreme Court Docket, *Dugan v. Montana*, Case No. 13-13, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-13.htm (last visited Oct. 30, 2019).

messaging system. When the girl stopped responding, the boy typed "ugly mother fucker." That was the end of their interaction, both online and in real life. *In re C.S.*, DA 14-0230, Brief of Appellant, at 1 (filed May 6, 2015) (hereafter "*C.S.* Brief").

Based only on those rude words, the State wielded subsection (1)(a) to charge the boy as a delinquent youth. *C.S.* Brief at 2. The youth court rejected the boy's free speech challenge, found the boy violated subsection (1)(a), and declared the boy delinquent. *C.S.* Brief at 6. After the boy filed an opening brief with this Court arguing that the State's prosecution was unconstitutional, the State agreed to vacate the adjudication and dismiss the case with prejudice. *In re C.S.*, DA 14-0230, Appellee's Notice of Concession (filed Aug. 19, 2015).

In 2019, the Legislature amended subsection (1)(a). The Legislature removed the formerly proscribed purposes of "[to] annoy or offend" and replaced them with the purpose to "injure." 2019 Mont. Laws chs. 56, 243. The Legislature added that obscene, lewd, profane, or lascivious language must occur "repeatedly." 2019 Mont. Laws ch. 56. The Attorney General's Office supported the amendments, explaining, "We believe [these] changes are just helpful to help make

sure convictions under this statute are constitutional and that they are not overturned." Senate Judiciary Committee, Hearing on H.B. 228, at 09:04:30–09:05:00 (Feb. 14, 2019). The convictions in this case occurred under the old, unamended statute.

4. *Dugan*'s ruling that § 45-8-213(1)(a)'s intent element somehow renders the law constitutional is manifestly wrong.

This Court is "obligated to overrule precedent where it appears the construction manifestly is wrong." *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (quoting *ALPS Prop. & Cas. Ins. Co. v. McLean, PLLP*, 2018 MT 190, ¶ 30, 392 Mont. 236, 425 P.3d 651, emphasis and internal quotation marks omitted). The *Dugan* Court's holding that § 45-8-213(1)(a) is constitutional due to its intent element—"the purpose to terrify, intimidate, threaten, harass, annoy, or offend"—is manifestly wrong.

The *Dugan* Court remanded for trial on whether Dugan's words were spoken with the purpose to offend. *Dugan*, ¶ 73. However, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v.*

Johnson, 491 U.S. 397, 414 (1989). It is the nature and purpose of free speech to invite dispute. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Speech that aims to offend—that "induce[s] a condition of unrest" and "even stir[s] people to anger"—can "best serve" that purpose. *Terminiello*, 337 U.S. at 4.

Cohen v. California, 403 U.S. 15 (1971), illustrates that a disagreeable-purposes element does not bring a speech restriction into constitutional compliance. Like subsection (1)(a)'s restriction on profanity spoken with prohibited purposes, the statute in *Cohen* criminalized "offensive conduct" with the purposes of "maliciously and willfully disturb(ing) the peace . . . of any person." *Cohen*, 403 U.S. at 16. Cohen was convicted of such willfulness by wearing a jacket inscribed "Fuck the Draft" inside a courthouse. *Cohen*, 403 U.S. at 16. The U.S. Supreme Court reversed the conviction. *Cohen*, 403 U.S. at 26. "Admittedly," the Court noted, "it is not so obvious the [Constitution] must be taken to disable States from punishing public utterances of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic." *Cohen*, 403 U.S. at 23. "[E]xamination and reflection," however, "reveal the

shortcomings of [that] viewpoint." *Cohen*, 403 U.S. at 23. Indeed, the First Amendment does not permit "indulg[ing] the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process." *Cohen*, 403 U.S. at 26.

The same principles apply in modern day Montana. It may be facially appealing to think, as the *Dugan* Court apparently did, that the government may prohibit someone from swearing over the phone for a disagreeable reason. But further examination reveals such thinking as folly. *See Cohen*, 403 U.S. at 23

Dugan apparently conceived of subsection (1)(a)'s intent element as sufficient to save the statute by shielding from punishment words without such purposes. But that overlooks the risk of prosecution, which itself is sufficient to dissuade and chill free expression. *Brockett*, 472 U.S. at 503; *Lance*, 222 Mont. at 99, 721 P.2d at 1263. Because "purpose" is generally an issue for a jury to determine at trial, a purpose element hardly limits a law's breadth; instead, it "open[s] the door to trial on every [communication] within the terms of [a statute]." *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 468 (2007) (Roberts & Alito, JJ., controlling plurality opinion). That "blankets with

uncertainty whatever may be said" and "offers no security for free discussion.'" *Wis. Right to Life, Inc.*, 551 U.S. at 468 (citation omitted). The deterrent effect is especially acute with a content-based restriction that threatens incarceration. *Reno v. ACLU*, 521 U.S. 844, 872 (1997). Here, subsection (1)(a) suggests anyone who swears over the phone risks a penalty of up to five years in prison. Section 45-8-213(3)(c). Because "First Amendment freedoms need breathing space to survive," it is fatal to subsection (1)(a) and *Dugan*'s reasoning that "[a]n intent test provides none." *Wis. Right to Life*, 551 U.S. at 468–69 (internal quotation marks and citation omitted).

The idea that subsection (1)(a)'s purpose element would render the statute constitutional treats the purpose element as if it is a free speech exception. But it isn't. The element does not state the exception for obscenity, nor fighting words, nor a true threat, nor any other historically-recognized category. Beyond those categories, there exists no freewheeling authority to declare subsection (1)(a)'s intent element a new category of speech existing outside constitutional protection. *Stevens*, 559 U.S. at 472. Indeed, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to

the question of constitutional protection." *Wis. Right to Life*, 551 U.S. at 468–69 (citation omitted). *Dugan*'s assertion that § 45-8-213(1)(a) is constitutional based on the statute's intent element is manifestly wrong and should be overruled.

5. Section 45-8-213(1)(a) is facially overbroad and does not withstand strict scrutiny.

One need not strain for hypotheticals in which subsection (1)(a), unrestricted to First Amendment exceptions, targets free speech—*Dugan* and *C.S.* are two such instances. As the *Dugan* Court made clear in its analysis of the law, the words Dugan spoke did not "fall under one of the categorical exceptions to free speech protections guaranteed by the Montana and United States Constitutions." *Dugan*, ¶ 49. Because the words did not fall under an exception, the words were protected free expression. *See Matal*, 137 S. Ct. at 1765; *Alvarez*, 567 U.S. at 717. And like Dugan's one-time statement "fucking cunt," C.S.'s one-time statement "ugly mother fucker" also did not fall under any exception to free speech. The State nonetheless used subsection (1)(a) to prosecute a fifteen-year-old boy for fleeting foul language. *C.S.* Brief at 2, 6.

Subsection (1)(a), by its terms, criminalizes countless other constitutionally-protected communications, as well. Telling a telemarketer interrupting your dinner to "fuck off" may suggest a lewd act or use profane language and intend to offend. Leaving a voicemail for the contractor who ruins a job that unless he fixes it you will sue may be a threat to his property intended to intimidate, threaten, and annoy him into making good. Facebook messaging a lover who cheated on you "you are an asshole" may be obscene language intended to offend. Texting your teenager with exasperation to "put down your goddamn phone and mow the fucking lawn" may be obscenity intended to annoy him into compliance. Tweeting an elected official that climate change will cause forest fires in Montana to get "much fucking worse" may be profanity intended to terrify. While one may reasonably hold an opinion that any or all of these communications are disagreeable, they are certainly instances of protected speech.

No wonder, then, that other courts have struck down laws similar to subsection (1)(a) because they are unconstitutionally overbroad. Recently, in *Ex parte Barton*, No. 02-17-00188-CR, 2019 WL 4866036, at *2 (Tex. App. Oct. 3, 2019), a Texas court struck down a statute that

criminalized "repeated electronic communications" with "intent to harass, annoy, alarm, abuse, torment or embarrass another." Noting a person may at once intend to communicate with a proscribed purpose and with a more normatively-accepted, unproscribed purpose, the court determined the statute's purpose element offered little shelter for free expression. *Barton*, at *5. Similarly, in *New York v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014), New York's high court struck down a statute proscribing non-face-to-face communications that are intended to "harass, annoy, threaten or alarm." The statute was unconstitutionally overbroad because "'no fair reading' of this statute's 'unqualified terms supports or even suggests the constitutionally necessary limitations on its scope.'" *Golb*, 15 N.E.3d at 813 (citation omitted). *See also Bolles v. Colorado*, 541 P.2d 80, 84 (Colo. 1975) (striking down as overbroad a statute proscribing non-face-to-face communications intended to harass, annoy, or alarm).

Subsection (1)(a) suffers from the same infirmities. While the statute proscribes normatively-disagreeable purposes, people's actions often have multiple, mixed motives. For instance, one may use profanity in order to both offend and to communicate the seriousness of

an issue, like wearing a jacket inscribed "Fuck the Draft," *see Cohen*, 403 U.S. at 16, or profanely tweeting at an elected official. Subsection (1)(a)'s purpose element is not limited to communications made exclusively with normatively disagreeable purposes. *See* Mont. Code Ann. § 45-2-101(65) (defining purpose non-exclusively). The statute instead sweeps up all sorts of communications that are part of the "uninhibited, robust, and wide-open" expression of ideas. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

To avoid unconstitutional overbreadth, content-based restrictions on speech must, if possible, be confined to historical exceptions to free speech. For instance, in both *Lewis v. New Orleans*, 415 U.S. 130, 131 (1974), and *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 436, 704 P.2d 1021, 1023 (1985), defendants were charged with breaching the peace for cursing at police officers. The U.S. Supreme Court overturned Lewis's conviction on overbreadth grounds because the statute was susceptible to application to protected speech. *Lewis*, 415 U.S. at 132. By contrast, this Court denied O'Shaughnessy's overbreadth challenge because the district court had limited the ordinance and instructed the jury that the offense proscribed only unprotected "fighting words," and

this Court approved of that construction. *O'Shaughnessy*, 216 Mont. at 443, 704 P.2d at 1027. Similarly, in *Lance*, 222 Mont. at 104–05, 721 P.2d at 1266–67, this Court rejected an overbreadth challenge by construing an intimidation statute to proscribe only unprotected true threats.

Subsection (1)(a), on the other hand, is not limited to unprotected categories of speech. *See Dugan*, ¶ 49. Indeed, subsection (1)(a)'s "unqualified terms" do not "support[] or even suggest[] the constitutionally necessary limitations on its scope." *Golb*, 15 N.E.3d at 813. Subsection (1)(a)'s lack of confinement to First Amendment exceptions likens subsection (1)(a) to the law the Supreme Court struck down in *Lewis* rather the laws this Court upheld in *O'Shaugnessy* and *Lance*. Since subsection (1)(a) is "susceptible of application to protected speech," *Lewis*, 415 U.S. at 133, subsection (1)(a) is unconstitutionally overbroad and facially invalid.

6. Section 45-8-213(1)(a)'s broad-based unconstitutionality warrants dismissing all the charges.

As shown above, it is not one thing or another that dooms subsection (1)(a) in a constitutional analysis; rather, the statute

altogether ignores constitutional limits on restricting free expression. The statute is aimed at electronic communications, which are especially necessary for free speech in modern times. *Packingham*, 137 S. Ct. at 1736. The statute imposes criminal sanctions, which are particularly chilling. *Reno*, 521 U.S. at 872. The statute uses an intent-based test, which does not provide the breathing space necessary for free speech to survive. *Wisc. Right to Life*, 551 U.S. at 468–69. The statute is not limited to historical exceptions for free speech regulation, as regulations to speech must be. *Alvarez*, 567 U.S. at 717. The statute discriminates between speech based on content, which the government has no power to do. *Stevens*, 559 U.S. at 468. The State has used subsection (1)(a) to target protected speech, and, without intervention, it will surely do so again. *See, generally*, *Dugan*; *C.S.* Brief. The Montana Constitution, on the other hand, prohibits free speech-impairing laws like subsection (1)(a). As a whole, § 45-8-213(1)(a) is unconstitutional and should be struck down. The Court should dismiss the State's charges.

B. Alternatively, the convictions should be reversed because the trial court failed to properly instruct the jury on true threats and obscenity.

The State may argue to save subsection (1)(a) by construing the statute to reach only constitutionally-proscribable categories of speech like true threats and obscenity. Notably, such an argument would run counter to *Dugan* declining to further define the statute's terms and instead ruling that particular terms in the statute receive their "common usage" meaning. *See Dugan*, ¶ 72. But even if this Court were to adopt such limits on subsection (1)(a)'s reach, the District Court's failure to instruct the jury on any such limitations at Bill's trial would still require reversal.

If the First Amendment exception for true threats applies in a statute, "whether a statement constitutes a true threat is to be determined by the trier of fact." *Lance*, 222 Mont. at 104, 721 P.2d at 1267. In other words, it becomes part of the State's burden. *See Lance*, 222 Mont. at 104, 721 P.2d at 1267. By the same logic, if the First Amendment exception for obscenity applies in a statute, the trier of fact would need to determine whether the prosecuted statements fall within the exception. *C.f. Lance*, 222 Mont. at 104, 721 P.2d at 1267. Jury

instructions violate due process when they relieve the State of its burden to persuade the jury of all the facts necessary to convict. *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam).

At his trial, Bill moved to instruct the jury to determine whether the alleged words in the first charge met the constitutional definition of obscenity and whether the alleged words in second and third charges met the constitutional definition of true threats. (D.C. Doc. 44.) Obscenity is limited to material that appeals to the prurient interest in sex, portrays sexual conduct in a patently offensive way, and does not have serious value. *Miller v. California*, 413 U.S. 15, 24 (1973). A true threat is a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

If this Court deems subsection (1)(a) constitutional, the District Court erred by refusing to instruct the jury to determine whether the statute's application to the alleged words in this case fell under the implicated constitutionally-proscribable categories. Those were matters for the trier of fact. *See Lance*, 222 Mont. at 104, 721 P.2d at 1267. Relieving the State of that burden violates due process. *See Carella*,

491 U.S. at 265. Under the First Amendment and Article II, § 7, all three charges require either dismissal for the statute's unconstitutionality or retrial with proper instructions.

II. Additional errors necessitate reversing the second and third counts.

A. The second count failed to state an offense.

"The failure of a charging document to state an offense is a nonwaivable defect and must be noticed by the court at any time." Mont. Code Ann. § 46-13-101(3). In *State v. Smith*, 2004 MT 191, 322 Mont. 206, 95 P.3d 137, the State's information invoked Mont. Code Ann. § 45-5-213(b), which requires causing "reasonable apprehension of serious bodily injury in another." *Smith*, ¶¶ 4, 28. The State's information charged Smith with "caus[ing] Tami reasonable apprehension that Smith would kill Hernandez." *Smith*, ¶ 27 (emphasis removed). Smith appealed the trial court's denial of his motion to dismiss predicated on the information's failure to state an offense. *Smith*, ¶ 21.

On appeal, this Court conducted a statutory analysis of the alleged criminal offense in comparison to the State's charge. *See Smith*, ¶ 29. Read in context, the statute prohibits causing reasonable

apprehension to "the intended victim of the serious bodily injury, not a third party who was merely fearful that the intended victim would be harmed." *Smith*, ¶ 29. Because the State's information did not charge the sort of reasonable apprehension § 45-5-213(b) prohibits, the information did not state an offense, and this Court reversed the erroneous denial of the motion to dismiss. *Smith*, ¶¶ 31–32.

Subsection (1)(a), like § 45-5-213(b) in *Smith*, criminalizes a threat to the recipient of a communication but does not criminalize a threat to a person other than the communication's recipient. A privacy in communications offense under subsection (1)(a) requires the accused to "communicate[] with *a person* by electronic communication and use[] obscene, lewd, or profane language, suggest[] a lewd or lascivious act, or threaten[] to inflict injury or physical harm *to the person or property of the person*." (Emphasis supplied). The section's first clause refers to the "person" receiving the communication. The section's last clause regarding threats refers to that same "person." A threat to someone other than the person receiving the communication is not a threat to the "person or property" of the person receiving the communication. Opening up the statute to threats to another party would essentially

end the statute at "threaten[s] to inflict injury or physical harm" while disregarding the statute's further specification "to the person or property of the person." That construction would violate the fundamental rule of statutory interpretation not to "omit what has been inserted." Mont. Code Ann. § 1-2-101.

While subsection (1)(a) plainly does not register threats to third parties, if there is any ambiguity, the narrower reading should control. Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *accord State v. Madsen*, 2013 MT 806, ¶ 18, 372 Mont. 102, 317 P.3d 806. The rule preserves the fundamental interests of fair notice and keeping criminalization vested in the legislature rather than the judiciary. *Davis*, 139 S. Ct. at 2333. In subsection (1)(a), the Legislature forewarned Bill the statute applied to threats of injury to the "person or property" of the communication's recipient. If there is any ambiguity about the statute's restriction to those sorts of threats, the rule of lenity urges the restrictive reading.

Given the limitations of subsection (1)(a)'s threat prohibition, the charging documents here did not state a subsection (1)(a) offense in the

second count. The State charged that Bill "communicated with another, Sam McGough, by telephone and threatened to kill his daughter." (D.C. Doc. 36.1.) As evidence purporting to establish probable cause, the State alleged that in the phone call to Sam, "[Bill] used threatening and offensive language. [B]ill told Sam he was planning to find Sam's daughter, [Bill's] ex-wife, Stacey McGough, and kill her." (D.C. Doc. 35.) The charging documents thus did not charge a threat to Sam's person or property. Similar to the charging failure in *Smith* with regard to § 45-5-213(b), the charging documents here did not state an offense under subsection (1)(a)'s "person or property" threat clause.

The District Court erred by failing to grant Bill's motion to dismiss the second count for the failure to state an offense. Rather than rule on subsection (1)(a)'s threat clause in comparison to the State's charge, the District Court ruled that Bill in the second count "us[ed] obscene, lewd, or profane language" or "suggest[ed] a lewd or lascivious act"—alternative means of committing subsection (1)(a)'s actus reus. (App. B at 2.)

The State's charging documents, however, did not charge Bill with such language in the second count. It is the State's job, not the

judiciary's, to choose the offense the State will prosecute. *State v. Russell*, 2008 MT 417, ¶ 27, 347 Mont. 301, 198 P.3d 271. With the second count, the State never charged or amended its information to charge the use of obscene, lewd, or profane language or the suggestion of a lewd or lascivious act. The State's first count specifically charged that Bill "used obscene, lewd, and profane language, and suggested lewd and lascivious act." (D.C. Doc. 36.1.) No such charges were leveled in the second count. (D.C. Doc. 36.1.) "Changing the essential elements" of a charge "change[s] the nature and substance of the charge" and constitutes a substantive amendment. *Spotted Eagle*, ¶ 11. Upon Bill's motion to dismiss, the District Court had the duty to assess whether the second count stated an offense, not to judicially-amend the State's charge.

The charging documents here also contained no allegations to support finding obscene or lewd language in relation to the second count. With regard the first count, for instance, the State alleged Bill "made several offensive comments to Dunigan, used obscene language and suggested lewd acts including touching and kissing her." (D.C. Doc. 35.) But no such allegations of obscene and lewd language existed with

regard to the second count, which alleged only the language of Bill threatening Stacey's person. (D.C. Doc. 35.)

"The failure of a charging document to state an offense . . . must be noticed by the court at any time." Section 46-13-101(3). Because the District Court erred by failing to notice that defect below, this Court should resolve the error on appeal and remand for dismissal of the second count.

B. The State failed to prove jurisdiction concerning the third count.

Jurisdiction is the "authority to hear and determine a case." *City of Helena v. Frankforter*, 2018 MT 193, ¶ 8, 392 Mont. 277, 423 P.3d 581. Montana's district courts have jurisdiction over criminal offenses occurring within the state's territorial bounds. Mont. Code Ann. §§ 3-5-312(1), 46-2-101(1)(a). That requires "either the conduct that is an element of the offense or the result that is an element occur within the state." Section 46-2-101(2). Like failure to state an offense, lack of jurisdiction is a "nonwaivable defect and must be noticed by the court at any time." Section 46-13-101(3).

At trial, the State carries the burden of proving the presiding court's jurisdiction over a charge. *Frankforter*, ¶ 22. In *Frankforter*,

this Court addressed an assault charge in Helena Municipal Court, which has jurisdiction limited to offenses committed in Lewis and Clark County. *Frankforter*, ¶ 20. The alleged victim and her husband, the defendant, were Helena residents. *See Frankforter*, ¶¶ 2–3. At trial, the alleged victim recanted her prior claim that her husband had injured her hand and testified she accidently injured her hand at Canyon Ferry Reservoir. *Frankforter*, ¶ 3. The defendant, meanwhile, testified the alleged victim had injured her hand at Hauser Lake. *Frankforter*, ¶ 3. Because this evidence was insufficient to establish the offense actually occurred in Lewis and Clark County, the State failed carry its burden to prove jurisdiction. *Frankforter*, ¶ 20. The lack of jurisdiction led this Court to vacate the conviction. *Frankforter*, ¶¶ 21–22.

The same principles warranting reversal for lack of municipal court jurisdiction in *Frankforter* warrant reversal for lack of district court jurisdiction here as to the State's third charge.

To establish jurisdiction here, the State had to prove either the charged conduct or result under § 45-8-213(1)(a) occurred in Montana. Sections 3-5-312(1), 46-2-101(1)(a), (2). The result in a subsection (1)(a)

prosecution corresponds to the reception of an electronic communication. *See* § 45-8-213(1)(a). Thus, the State could have proven jurisdiction here through evidence that Sam, the recipient of the charged telephonic communication, was in Montana when he received the call. But the State at trial proved the opposite. Sam testified he was New York when he received the call (Trial at 179–80), far outside of the jurisdiction of Montana's district courts.

With Sam out of state, jurisdiction rested on the State proving Bill's location. The proscribed conduct in a subsection (1)(a) prosecution corresponds to the making of the electronic communication. *See* § 45-8-213(1)(a). The State, however, failed to prove Bill was in Montana when that alleged conduct occurred. The State could have attempted to introduce evidence that someone saw Bill in Montana at or near the time of the call. But the State had no such evidence. (Trial at 188 ("Q: [H]e couldn't be located? A: No.").) The State could have attempted to show the alleged electronic communication came from a landline or cell tower in Montana. But the State presented no phone records. (Trial at 164 ("Q: Did police ever ask for phone records? A: No.").)

The State instead sought to establish jurisdiction through speculation premised on Bill being a Montana resident. (*See* Trial at 201.) But as in *Frankforter*, residency does not establish jurisdiction. *See Frankforter*, ¶¶ 2–3, 20. Just as Sam, a Montana resident, was indisputably out of the state and in New York, Bill's residency did not place him in Montana at the time of the alleged offense.

While Sam "assumed" Bill was in Montana because Bill allegedly threatened that he was on the way to the store, Sam admitted regarding Bill's location, "I don't know." (Trial at 181, 183.) Resting jurisdiction on "I don't know" does not cut it. Jurisdiction is of "paramount importance." *In re McGurran*, 2002 MT 144, ¶ 20, 310 Mont. 268, 49 P.3d 626 (Gray, C.J., specially concurring). Without it, there is no authority for a court to act. *Frankforter*, ¶ 8. Like a conviction, jurisdiction should not rest on mere "conjectures, however shrewd, on suspicions, however justified, [or] on probabilities, however strong." *State v. Riggs*, 61 Mont. 25, 51, 201 P. 272, 280 (1921). Such assumptions did not establish jurisdiction in *Frankforter*, and they do not establish it here. The Court should order the third charge dismissed for lack of jurisdiction.

C. The trial court erred by effectively amending the information and instructing the jury on uncharged, alternative elements as to the second and third counts.

The State's prosecutorial discretion includes choosing the charges against a defendant. *Russell*, ¶ 27. At any point prior to the week of trial, the State may seek to amend its charging choice. Mont. Code Ann. § 46-11-205(1). If the State so amends, the court must arraign the defendant on the new charge. Section 46-11-205(2). Within five days of trial, however, substantive amendments are prohibited. Section 46-11-205(1). An amendment is substantive if it "alters the nature of the offense, the essential elements of the crime, or the proofs and the defenses required." *State v. Hardground*, 2019 MT 14, ¶ 10, 394 Mont. 104, 433 P.3d 711.

The judiciary "must take the case as it comes" given the State's prosecutorial discretion. *State v. Williams*, 2010 MT 58, ¶ 20, 355 Mont. 354, 228 P.3d 1127. The prohibition on late substantive amendments extends to prohibit a court from effectively amending the charge by instructing the jury on uncharged elements of an offense. *Spotted Eagle*, ¶¶ 13–16.

In *Spotted Eagle*, this Court reversed based on instructions that permitted the jury to convict through finding an element the State had not charged. The State's information generally invoked the partner or family member assault statute but charged that Spotted Eagle committed the assault specifically through causing bodily injury. *Spotted Eagle*, ¶ 2. At trial, the court instructed the jury on the defendant causing reasonable apprehension of bodily injury alternatively to actually causing bodily injury. *Spotted Eagle*, ¶ 3. On appeal, this Court determined the instruction represented a substantive amendment of the charge because "[c]hanging the essential elements changed the nature and substance of the charge." *Spotted Eagle*, ¶ 11. The judicial amendment was erroneous and grounds for reversal both because such substantive amendments are prohibited within five days of trial and because Spotted Eagle was never arraigned on the amended charge. *Spotted Eagle*, ¶¶ 13–15.

As in *Spotted Eagle*, at Bill's trial, the District Court improperly instructed the jury on uncharged elements. The State's second count charged Bill with communicating with Sam, threatening Stacey, and speaking with the purposes to intimidate, threaten, and harass. (D.C.

Doc. 36.1.) The State never amended. The District Court nonetheless instructed the jury on "obscene, lewd, or profane language" with the purposes to "harass, annoy or offend"—elements found nowhere in the State's charge. (D.C. Doc. 53, Instr. 22.) Similarly, the State's third count charged Bill with communicating with Sam, threatening Stacey and Sam's store, and speaking with the purposes to intimidate and threaten. (D.C. Doc. 36.1.) The State never amended. Once again, however, the District Court freelanced and instructed the jury on Bill using "obscene, lewd, or profane language with the purpose to harass, annoy or offend," or, alternatively, threats "with the purpose to harass, annoy or offend." (D.C. Doc. 53, Instr. 23.) The court's instructions changed the charges.

The District Court's improper instructions represent reversible substantive amendments. As in *Spotted Eagle*, ¶ 4, Bill objected to the erroneous instructions. As in *Spotted Eagle*, ¶ 11, by "[c]hanging the essential elements" the erroneous instructions "changed the nature and substance of the charge." As in *Spotted Eagle*, ¶¶ 13–14, the instructions constituted unauthorized and late substantive

amendments and deprived Bill of proper arraignments on the tried charges.

The erroneous instructions further prejudiced Bill by removing the notice to which he was entitled. The prior charges had informed Bill the second and third counts were prosecutions based on threats, not bad words. The District Court's instructions, by contrast, permitted convictions based on bad words, not threats. Due to the erroneous instructions, this Court should "reverse the District Court and remand for a new trial." *Spotted Eagle*, ¶ 17.

CONCLUSION

Errors and violations permeated this prosecution, warranting several forms of relief. Based on subsection (1)(a)'s unconstitutionality, Bill requests the Court reverse and order all three counts dismissed. Alternatively, due to charging and jurisdictional failures, Bill requests the Court reverse and order the second and third charges dismissed. Finally, as to any charges that remain, Bill requests the Court correct the trial court's multiple instructional errors and remand for a new trial.

Respectfully submitted this 14th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,476, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-14-2019:

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