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STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 13-0584

* * * * *

STATE OF MONTANA,

Plaintiff and Appellant,

v.

STACEY DEAN RAMBOLD,

Defendant and Appellee.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Judge G. Todd Baugh, Presiding

BRIEF OF APPELLEE

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IN THE SUPREME COURT

OF THE STATE OF MONTANA

* * * * *

No. DA 13-0584

* * * * *

STATE OF MONTANA,

Plaintiff and Appellant,

v

STACEY DEAN RAMBOLD,

Defendant and Appellee.

* * * * *

BRIEF OF APPELLEE

* * * * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State of Montana is precluded from appealing the issue that the District Court imposed a sentence that is contrary to law upon Stacey Dean Rambold?

2. Whether the District Court imposed a sentence that is contrary to law upon Stacey Dean Rambold?

3. If the District Court imposed a sentence that is contrary to law, whether the proper remedy is to remand the sentence to correct the illegal portion of the sentence or to remand the case to the District Court for re-sentencing?

STATEMENT OF THE CASE

The Appellee, Stacey Dean Rambold, pled guilty to one count of Sexual Intercourse Without Consent as alleged in Count II of the Information. On August 26, 2013, the Honorable G. Todd Baugh sentenced Mr. Rambold to a term of fifteen (15) years of imprisonment at the Montana State Prison, with all but thirty-one (31) days suspended. Immediately following the sentencing hearing, Mr. Rambold was committed to the Montana Department of Corrections.

On September 4, 2013, the State of Montana filed its Notice of Appeal of the sentence imposed, but the State did not attempt to stay the execution of the sentence. Mr. Rambold has served and discharged his 31 days of imprisonment at the Montana State Prison, and he is now serving the suspended portion of his sentence upon the conditions imposed. Although the State of Montana has identified only one issue to raise in its appeal, Mr.

Rambold contends that there are a total of three issues which may be appropriate for review.

STATEMENT OF THE FACTS

"Public outcry is the law of the lynch mob. Constitutional law is the bulwark that substitutes due process for public outcry."

Justice Charles Howell, dissenting opinion in
Rose v. State, 724 S.W.2d 832, 850 (Tex. App. 1987)

Much has been said and written regarding the statements of District Court Judge G. Todd Baugh made during the imposition of the sentence upon Mr. Stacey Rambold. These statements have been discussed by the State in their opening brief, and they have also been the primary focus of the authors of the Amicus Curiae brief. It is appropriate to place these statements in some perspective and with consideration being given to the statutory mandates of the Montana Code. Mr. Rambold also wishes to note that while the Statement of the Facts as recited by the State will not be repeated here, it is bears consideration that the "facts" taken from the charging documents are better described as alleged facts, with the exception of the facts related to Count II.

Turning to the sentencing of Mr. Rambold, judges in Montana are

required to consider many things in determining a just and reasonable sentence. First, judges are required to consider the correctional and sentencing policies of the State of Montana as set forth in Mont. Code Ann. § 46-18-101(2). Further, in order to achieve those policies, judges are also to follow the sentencing principles set forth in Mont. Code Ann. § 46-18-101(3).

With those policies and principles, judges must next consider the presentence investigation report prepared by the Probation Officer. The contents of a presentence investigation report are set by statute, namely Mont. Code Ann. § 46-18-112, and require that the report contain the defendant's characteristics, circumstances, needs, and potentialities; the defendant's criminal record and social history; the circumstances of the offense; the time of the defendant's detention for the offenses charged; the harm caused as a result of the offense, to the victim, the victim's immediate family, and the community; and the victim's pecuniary loss, if any. If the offense of conviction is for certain enumerated sexual offenses, then the presentence investigation must also include a psychosexual evaluation of the defendant and a recommendation as to the treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the

community and the defendant's needs, unless the defendant is to be sentenced to life without parole pursuant to Mont. Code Ann. § 46-18-219. See Mont. Code Ann. § 46-18-111(1). While the presentence report must be a part of the court record, Mont. Code Ann. § 46-18-113(1), mandates that the presentence investigation report may not be opened for public inspection. It is a confidential document.

In addition to the information contained in the presentence investigation report, a defendant has an affirmative duty to bring evidence outside the presentence report to the attention of the sentencing court. *State v. Herman*, 2008 MT 187, ¶ 22, 343 Mont. 494, 188 P.3d 978. A sentencing court may consider any relevant information relating to the nature and circumstances of the crime, the defendant's character, background, history, and mental and physical condition, and any other information that the court considers to have probative force. *State v. Walker*, 2007 MT 205, ¶ 21, 338 Mont. 529, 167 P.3d 879.

Finally, at the sentencing hearing, judges are required to afford the parties an opportunity to be heard on any matter relevant to the disposition, including the imposition of a sentence enhancement penalty and the

applicability of mandatory minimum sentences or an exception to these matters. See Mont. Code Ann. § 46-18-115(1). Judges must also personally address the defendant and inquire as to whether the defendant wishes to make any statement on his own behalf, and if so, afford the defendant a reasonable opportunity to do so. See Mont. Code Ann. § 46-18-115(3). Judges must also permit the victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding an appropriate sentence. See Mont. Code Ann. § 46-18-115(4). Finally, Mont. Code Ann. § 46-18-115(6), provides:

> In felony cases, the court shall specifically state all reasons for the sentence, including restrictions, conditions, or enhancements imposed, in open court on the record and in the written judgment.

Turning to the sentencing of Stacey Rambold, the record clearly establishes that a presentence investigation report was prepared containing the required elements, including a psychosexual evaluation of Mr. Rambold. Additional evidence was also brought to the attention of Judge Baugh in the form of two recorded interviews of C.M. The first recorded interview was conducted by Billings Police Department Detective Ken Paharik on April 29,

2008, and the second recorded interview of C.M. was conducted by defense counsel at the offices of the Yellowstone County Attorney on July 29, 2009. Due to the nature of these two interviews, the parties requested that the recordings be sealed and not be opened for public inspection. Rambold Sentencing Memorandum, page 2.

In his Sentencing Memorandum dated August 23, 2013, Mr. Rambold set forth his sentencing recommendation and his legal analysis that the only mandatory minimum sentence faced by Mr. Rambold was thirty (30) days of imprisonment. In the Sentencing Memorandum of the State of Montana dated August 23, 2013, the State set forth its sentencing recommendation of Mr. Rambold, namely twenty (20) years of imprisonment at the Montana State Prison with ten (10) years suspended, but the State made absolutely no mention whatsoever as to what was the applicable mandatory minimum sentence for Mr. Rambold.

At the sentencing hearing on August 26, 2013, Judge Baugh afforded the mother of C.M. to address the court, and he also afforded Mr. Rambold an opportunity to make a statement on his own behalf. (Tr. 8/26/13 at 4-6 and 44-45) It is clear that Judge Baugh also considered the Presentence Investigation

Report, the Psychosexual Evaluation of Mr. Rambold by Michael J. Scolatti, Ph.D., the testimony of Michael Sullivan of South Central Treatment Associates, and the two recorded interviews of C.M.

At the conclusion of the sentencing hearing the Judge then stated:

> Okay. Well, I have looked at the Presentence Report. I have read the attachments, which - - let's see, there's Mr. Sullivan's report, Dr. Scolatti's report. The Presentence Report, itself, reflects positives and negatives, as most of them do. The Defendant pled guilty. I think he's spent maybe one day in jail at this point. He's got a college education, employed, have all but completed the sexual offender treatment program.
>
> This is a sexual offense, which are violent by definition. That's a negative. Violated the deferred prosecution agreement. The victim was a troubled youth in and of itself. He took advantage of a troubled youth.
>
> There was a deferred prosecution agreement in July of 2010, which also took into consideration all of these things that we are talking about. It's the occurrences since then that brought us back together here. Okay. So he's brought in in August of last year, his absences and shortcomings in the program were discussed and the program continued. And, apparently, his attendance and assignments were good after that point until he was terminated from the program by later things that Mr. Sullivan came to be aware of. If I understand it, those are unauthorized contact with minors, but that was his nieces and nephews.
>
> I've got a number of letters from relatives that are attached to the Presentence Report. I'm given to understand that the adults in his family knew about this and were present during those times that he may have had contact with nieces and nephews.
>
> Omitted to relate to the program his sexual relations with adult females. And, of course, that's a violation of the program rules. Terminated from the program by Mr. Sullivan and back in counseling at this time with - - Mr. Lemons, is it, in Bozeman? And Mr. Sullivan indicates that the Defendant is still safely treatable in the community.

> The situation we have here is different than many sexual offense matters that come before this Court. In some respects, the Defendant took advantage of a troubled youth. I've looked at those interviews. And it's easy enough to say the Defendant should have been aware, should not, obviously, have engaged in the conduct that he did. And it was a troubled youth, but a youth that was probably as much in control of the situation as was the Defendant, one that was seemingly, though troubled, older than her chronological age.
>
> There is no good sentence in these kinds of situations. What the State asks for is understandable. What the Defendant asks for is understandable. The events and occurrences since the deferred prosecution agreement back in July of 2010, while they are of events and circumstances that warranted his termination from the program with Mr. Sullivan, are not in and of themselves the serious transgressions that would recommend, as appropriate, the sentence being recommended by the State.
>
> I believe that the sentence being recommended by the Defense is the more appropriate one. And it will be the sentence of the Court that the Defendant be sentenced to 15 years at the Montana State Prison, credit for time served, all but 31 days suspended. Impose the conditions of the Presentence Report at 1 through 53, omitting 33, 19, and 18. (Tr. 8/26/13 at 45-47)

Judge Baugh satisfied his statutory obligation of specifically stating the reasons for the sentence he imposed, and he clearly took into consideration all information that was presented to him. While it was clear to Judge Baugh and all parties that the nature of C.M.'s role and participation in this offense was not a defense in any way to the charge of Sexual Intercourse Without Consent, a related issue is whether C.M.'s reflection on her participation in this offense was a proper factor for the Court to consider when determining a just and

reasonable sentence. As previously stated, Mont. Code Ann. § 46-18-115(4) requires Judges to permit the victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding an appropriate sentence. In this case, those statements of C.M. were contained in the two recorded interviews.

When imposing a sentence, all judges are able to review and consider a great deal of confidential information that is not open for public inspection. This was true of Judge Baugh, who was able to review the presentence investigation report and other information, including the two recorded interviews of C.M. To some extent, that is the nature of sentencing proceedings - - the general public does not have access to all of the same information that the Court has. At some point we must place our trust and confidence in the judges that we elect to determine what is an appropriate sentence. Judge Baugh has faithfully satisfied his judicial responsibilities and evaluated sentencing facts and factors for thousands of defendants without complaint for nearly 30 years. Given such a record, it would be reasonable to assume that Judge Baugh, once again, gave appropriate consideration to both

public and confidential information in determining a just sentence.

Second, if the State of Montana did not believe that C.M.'s characterization of what occurred and her other statements were a proper factor to be considered for sentencing, then the State could have and should have objected to the Court's consideration of the two recorded interviews of C.M and the discussion of the interviews by Dr. Scolatti in his evaluation. However, the State did not do so.

Third, some citizens of Montana now say that a 14-year-old cannot have any responsibility in a criminal offense for purposes of sentencing. Defense counsel is not aware of any such statute that so states. Rather, such a statement ignores the fact that the citizens of Montana, through our elected representatives, have decided that persons as young as 12 years of age can have legal responsibility for a number of different types of offenses, including sexual intercourse without consent. See Mont. Code Ann. § 41-5-206 (1)(a). Further, a person who was at least 14 years of age at the time of the offense can face the additional legal consequences of the Extended Jurisdiction Prosecution Act if the county attorney so designates the case and various other requirements are satisfied. See Mont. Code Ann. § 41-5-1602(1)(a). As a

result, these statutes make clear that the citizens of Montana have determined that persons as young as 12 years of age will be held accountable and responsible for their actions in regard to certain types of sexual offenses. There is no rational basis to conclude that if the person is 14 years of age, the person can only have responsibility if they are the offender, but the person can have absolutely no responsibility in any way if they are the victim.

Judge Baugh fully considered all of the information provided to him. Judge Baugh and Mr. Rambold are now left with the impossible task of explaining and supporting the appropriateness of the sentence - - but without the ability to discuss confidential information which was obviously critical to the sentence imposed by Judge Baugh. While some people might disagree with the manner in which Judge Baugh expressed the reasons for his sentence, there should be no doubt, given the facts of this particular case, that Judge Baugh satisfied all of his statutory obligations and that the sentence imposed by Judge Baugh was a just and appropriate sentence.

STANDARD OF REVIEW

When reviewing a sentence for "legality," the Court is to determine whether the sentence falls within the parameters set by the applicable

sentencing statutes, and such questions of law are reviewed de novo. *State v. Mainwaring*, 2007 MT 14, ¶ 7, 335 Mont. 322, 151 P.3d 53, *citing State v. Montoya, 1999 MT 180,¶ 15, 295 Mont. 288, 983 P.2d 937.*

SUMMARY OF ARGUMENT

The State of Montana and a Defendant both have an obligation to make a timely objection to properly preserve an issue for appeal. If a party fails to lodge a timely objection, then the party is precluded from raising the issue on appeal. Here, the State of Montana failed to make a timely objection to the issue of what is the applicable mandatory minimum sentence for Mr. Rambold. As a result, the State is precluded from appealing the issue of what is the applicable mandatory minimum sentence, and the narrow exception to appeal preclusion available to some defendants as set forth in *State v. Lenihan* (1979), 184 Mont. 338, 602 P.2d 997, is not applicable or available to the State.

Even if this Court determines that the State may proceed with its appeal, the sentence imposed by Judge Baugh upon Mr. Rambold was within the statutory parameters for a conviction of sexual intercourse without consent. As such, while it may have been objectionable, it was not a sentence that was "contrary to the law" as required by Mont. Code Ann. § 46-20-103.

Finally, if this Court determines that Mr. Rambold's minimum sentence of 31 days of imprisonment was contrary to the law and that the applicable mandatory minimum sentence should have been four (4) years, such a ruling would not affect the entire sentence. In that case, the proper remedy is to remand the case to correct the illegal portion of the sentence, and nothing more.

ARGUMENT

1. DUE TO ITS FAILURE TO PRESERVE THE ISSUE FOR APPEAL, THE STATE OF MONTANA IS NOW PRECLUDED FROM APPEALING WHETHER THE SENTENCE IMPOSED ON STACEY DEAN RAMBOLD WAS CONTRARY TO LAW.

As previously stated, Mr. Rambold in his Sentencing Memorandum dated August 23, 2013, set forth his sentencing recommendation and his legal analysis that the only mandatory minimum sentence faced by Mr. Rambold was thirty (30) days of imprisonment. The Sentencing Memorandum was personally served on the State on August 23, 2013.

In the Sentencing Memorandum of the State of Montana dated August 23, 2013, the State set forth its sentencing recommendation of Mr. Rambold, namely twenty (20) years of imprisonment at the Montana State Prison with ten (10) years suspended. However, the State made absolutely no mention

whatsoever as to what was the applicable mandatory minimum sentence for Mr. Rambold.

At the sentencing hearing before the District Court on August 26, 2013, the State of Montana was obviously aware of the fact that Mr. Rambold contended that the mandatory minimum sentence was 30 days, and yet the State made no reference to and no argument whatsoever that the mandatory minimum sentence was anything other than the 30 day mandatory minimum sentence advocated by Mr. Rambold. The State said absolutely nothing about the mandatory minimum sentence. (Tr. 8/26/13 at 29-37)

Defense counsel for Mr. Rambold, on the other hand, again stated his sentencing recommendation of 15 years of imprisonment at the Montana State Prison, with all but 30 days suspended - - the same recommendation as set forth in the Sentencing Memorandum. (Tr. 8/26/13 at 44) After affording Mr. Rambold an opportunity to make a statement prior to the imposition of sentence, Judge Baugh again inquired of the parties if there was anything further before the Court imposed sentence. Once again, the State failed to present any argument or objection regarding the mandatory minimum sentence and stated, "No, sir." (Tr. 8/26/13 at 45)

Mr. Rambold contends that the State of Montana failed to timely object to the determination of the mandatory minimum sentence, and, as a result, is now precluded from appealing the issue as to what is the applicable mandatory minimum sentence. The Supreme Court of Montana has stated the established rule that the Court will not review any issue to which a party has failed to object and preserve for appeal because the objecting party never gave the trial court an opportunity to address and correct any perceived errors. *State v. Johnson*, 2011 MT 286, ¶14, 362 Mont. 473, 265 P.3d 638, citing *In the Matter of K.M.G.*, 2010 MT 81, ¶36, 356 Mont. 91, 229 P.3d 1227. This rule has been followed time and again, and recently in *State v. Rogers*, 2013 MT 221, ¶ 27, 371 Mont. 239, 306 P.3d 348, where the Court agreed with the State's argument that Rogers had failed to preserve this issue for appeal and stated:

> Generally, a 'defendant must make a timely objection to properly preserve an issue for appeal'. *Daniels*, ¶ 31 (quoting *State v. Paoni, 2006 MT 26, ¶ 35, 331 Mont. 86, 128 P.3d 1040); see also §§ 46-20-104(2) and -701, MCA.* To be timely, the objection 'must be made as soon as the grounds for the objection are apparent.' *Schuff v. Jackson, 2002 MT 215, ¶ 30, 311 Mont. 312, 55 P.3d 387.* 'Failure to lodge a timely objection constitutes a waiver of the objection and precludes raising the issue on appeal.' *State v. Sittner, 1999 MT 103, ¶ 13, 294 Mont. 302, 980 P.2d 1053.* Our consistent application of the timely-objection rule has been motivated by concerns of judicial economy and

> fundamental fairness, both of which require alleged errors to be brought to the attention of the district court 'so that actual error can be prevented or corrected at the first opportunity.' *State v. West, 2008 MT 338, ¶ 17, 346 Mont. 244, 194 P.3d 683* (citation omitted).

Here, as previously stated, the State failed to argue in their Sentencing Memorandum or at the sentencing hearing that the mandatory minimum sentence for Mr. Rambold was four (4) years, and the State failed to argue in their Sentencing Memorandum or at the sentencing hearing that the mandatory minimum sentence of thirty (30) days as advocated by Mr. Rambold was incorrect. The State of Montana was absolutely silent on the issue of the applicable mandatory minimum sentence. This failure on the part of the State precludes them from appealing the sentence of Mr. Rambold on the basis that the District Court imposed the incorrect mandatory minimum sentence.

To circumvent this failure on their part, the State may attempt to argue that the issue of what are the statutory parameters for sentencing in a given case is jurisdictional in nature and can be raised at any time. However, one of the statutes referenced in the above quoted language from *Rogers*, namely Mont. Code Ann. § 46-20-701, forecloses such an argument. Mont. Code Ann. § 46-20-701, as the title to this section states, basically describes what matters can be addressed on appeal, and specifically provides at Subsection (2):

> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. *A claim alleging an error affecting jurisdictional or constitutional rights may not be noticed on appeal if the alleged error was not objected to* as provided in 46-20-104, *unless the convicted person establishes* that the error was prejudicial as to the convicted person's guilt or punishment and that:
>
> (a) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application;
>
> (b) the prosecutor, the judge, or a law enforcement agency suppressed evidence from the convicted person or the convicted person's attorney that prevented the claim from being raised and disposed of; or
>
> (c) material and controlling facts upon which the claim is predicated were not known to the convicted person or the convicted person's attorney and could not have been ascertained by the exercise of reasonable diligence. (Emphasis supplied).

Two things are very clear from this language. First, the jurisdiction exception to the failure to object preclusion **only applies** to "the convicted person" and prejudicial error to "the convicted person's guilt or punishment .." It has no application whatsoever to the State of Montana. Second, even if one was to attempt to rewrite Subsection (2) in some way so that it applied to an unpreserved State jurisdictional issue, the State would still need to satisfy the various requirements, such as the right asserted in the claim did not exist at the time of trial; evidence was suppressed; or material facts upon which the claim is predicated were not known. None of those three requirements can be

satisfied in this case.

More importantly, if the State was allowed to appeal an unpreserved jurisdictional issue that was not statutorily provided, then this Court will have dramatically broadened the State's right to appeal in violation of Mont. Code Ann. § 46-20-103, which provides in pertinent part:

> (1) Except as otherwise specifically authorized, the State may not appeal in a criminal case.
> (2) The state may appeal from any court order or judgment the substantive effect of which results in:
>> (a) . . . .
>> . . . . .
>> (h) imposing a sentence that is contrary to law.

This statute is in keeping with *State v. Peck* (1928), 83 Mont. 327, 330, 271 P. 707, 708, where the Court stated that statutes granting the right of appeal to the State must be strictly construed, and the right limited to those instances mentioned; that no appeal will lie unless it is clearly authorized and unequivocally conferred; and that the power cannot be enlarged by construction of the statute. In regard to unpreserved jurisdictional errors or issues, the appeal of such errors or issues has only been authorized and conferred upon "convicted persons" is who also satisfy the statutory requirements. No such right is conferred upon the State of Montana.

Finally, to circumvent the established rule that failure to lodge a timely objection constitutes a waiver of the objection and precludes raising the issue on appeal, the State may attempt to rely upon *State v. Lenihan* (1979), 184 Mont. 338, 343, 602 P.2d 997, 1000, where the Supreme Court of Montana recognized a narrow exception to the general rule (no review for any issue to which a party has failed to object and preserve for appeal) that permits appellate review of criminal sentences that are alleged to be illegal or in excess of statutory mandates, even if the defendant failed to raise an objection in the District Court at the time of sentencing. The question is whether this narrow exception should apply to the State's appeal in this case. Mr. Rambold contends that the narrow exception should not apply for a number of reasons.

First, and most obviously, this narrow exception has only applied to defendants. Mr. Rambold is not aware of any decision by the Supreme Court of Montana where the *Lenihan* exception has been applied to an appeal by the State of Montana. Consequently, the Court would need to expand this narrow exception to now include the State of Montana in direct conflict with Section 46-20-103(1), MCA, and *State v. Peck.*

Second, the rationale behind the narrow exception set forth in *Lenihan*

does not apply to appeals by the State. In *Lenihan*, the Court explained the rationale behind this narrow exception and stated:

> . . . . As a practical matter, this may be a defendant's only hope in cases involving deferred imposition of sentence. If a defendant objects to one of the conditions, the sentencing judge could very well decide to forgo the deferred sentence and send him to prison. To guard against this possibility, a defendant often times must remain silent even in the face of invalid conditions. We, therefore, accept jurisdiction in this matter. *Lenihan* at p. 343.

In other words, the Court recognized the difficult position in which a defendant could be placed, namely make his objection known to the District Court and face a more severe sentence **or** remain silent about the objection and lose his ability to appeal the legality of the sentence. This rationale for the narrow exception was again recognized in *State v. Eaton*, 2004 MT 283, 323 Mont. 287, 99 P.3d 661, where the Court stated:

> . . . . This Court recognizes the often uncertain position that a defendant faces during a sentencing hearing. A defendant who objects to a condition imposed during the sentencing hearing bears the risk is that the judge could forgo a more lenient sentence. *Lenihan, 184 Mont. at 343, 602 P.2d at 1000.* Thus, 'a defendant often times must remain silent even in the face of invalid conditions,' to guard against this possibility. . . . . *Eaton* at ¶ 16.

Turning now to the State of Montana, it does not occupy some "uncertain position" where it faces a risk (opposite to that of a defendant) of

not being able to obtain a more harsh sentence. In the case of Mr. Rambold, the State was not in the difficult position of objecting to the 30-day mandatory minimum sentence and then face the risk that the District Court might forgo imposing the harsher sentence recommended by the State. Such a situation or risk did not exist for the State. If the rationale for applying the narrow exception to a defendant does not exist when applied to the State, then there is no basis upon which to apply the narrow exception of *Lenihan* to the State.

Third, a fair reading of the recent decisions of the Supreme Court of Montana reveal that the narrow exception of *Lenihan* appears to be further narrowing, not expanding. In *State v. MacDonald*, 2013 MT 105, ¶ 16, 370 Mont. 1, 299 P.3d 839; *State v. Bullplume*, 2013 MT 169, ¶ 17, 370 Mont. 453, 305 P.3d 753; and *State v. Phillips*, 2013 MT 317, ¶ 24, 372 Mont. 317, 312 P.3d 445; the Court stated that a merely objectionable sentence (a sentencing court's failure to abide by a statutory requirement) does not rise to the level of an illegal sentence and would not invoke the *Lenihan* exception, relying upon *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892. In *MacDonald*, the Court declined to apply the *Lenihan* exception to the District Court's order that the defendant pay fees, costs, and surcharges

without inquiring into the defendant's ability to pay. *MacDonald* at ¶ 18-20. In *Bullplume*, the Court declined to apply the *Lenihan* exception to the District Court's order that the defendant pay for the costs of his evaluations and treatment. *Bullplume* at ¶ 21. In *Phillips*, the Court declined to apply the *Lenihan* exception and held that a District Court's failure to abide by a statutory procedure when imposing a fine did not make a sentence illegal. *Phillips* at ¶ 26.

For the Court to somehow apply the narrow exception of *Lenihan* to the State's appeal in this case would create an unprecedented broadening of this exception and a broadening in direct conflict with the narrowing that defendants/appellants have been experiencing. If the rationale behind the *Lenihan* exception has no application to the State, then there exists no basis upon which to justify allowing the State to proceed with their challenge to Mr. Rambold's sentence.

For decades, the State has prevented appellate review of issues raised by defendants by relying upon the burden placed upon defendants to make a timely objection to properly preserve an issue for appeal. It is time the State equally bears that burden. Therefore, as stated in *Rogers*, the timely-objection

rule should be consistently applied, and the State of Montana should be precluded from appealing the issue of whether the sentence imposed upon Mr. Rambold was contrary to law.

2. THE SENTENCE IMPOSED ON STACEY DEAN RAMBOLD WAS NOT CONTRARY TO LAW.

As authority for its appeal, the State has relied upon Mont. Code Ann. § 46-20-103(2), which provides "[t]he State may appeal from any court order or judgment "*the substantive effect of which*" results in ... (h) "*imposing a sentence that is contrary to law*." (emphasis added.) Although the State did not do so at the sentencing hearing, the State is now arguing that the sentence imposed by Judge Baugh must be illegal as Judge Baugh did not impose a four year mandatory minimum sentence. Mr. Rambold contends that this issue has not been preserved for appeal, but addresses here whether the fifteen year sentence, with all but 31 days suspended, was actually "contrary to law."

This Court has consistently concluded that a sentence is not illegal if it falls within statutory parameters. *State v. Garrymore*, 2006 MT 245, ¶ 9, 334 Mont. 1, 145 P.3d 946; see also *State v. Montoya*, 1999 MT 180, ¶ 11, 295 Mont. 288, 292, 983 P.2d 937. ("[A] sentence is not illegal when it is within the parameters provided by statute.") And, as noted above, this Court has

repeatedly determined that a sentencing court's failure to abide by a statutory requirement renders a sentence merely objectionable, not illegal. *MacDonald*, 2013 MT at ¶ 16; *Bullplume*, 2013 MT at ¶ 17, *Phillips*, 2013 MT at ¶ 24.

Therefore, contrary to how the State has phrased this issue, this issue should read: Whether the sentence imposed by Judge Baugh was within statutory parameters for a sentence imposed following a conviction for sexual intercourse without consent?

The statutory parameters of a sentence that may lawfully be imposed following a conviction of sexual intercourse without consent are those contained in Mont. Code Ann. § 45-5-503. This statute provides, in relevant part, that a person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000. Importantly, the statute provides that the above penalty applies: "*except as provided in 46-18-219, 46-18-222, and subsections (3) and (4) of this section.*" § 45-5-503(1).

Under subpart (3)(a) of § 45-5-503, if the victim is less than 16 years old and the offender is 4 or more years older than the victim *or* if the offender

inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than $50,000. Again, this section of the statute clearly provides that the above penalty applies, *except as provided in 46-18-219 and 46-18-222.*

Mont. Code Ann. § 46-18-219 addresses life sentences imposed without the possibility of release and is not applicable here. Mont. Code Ann. § 46-18-222, however, is applicable as it provides exceptions to mandatory minimum sentences. This statute must be reviewed to determine whether the sentence imposed in this case was within statutory parameters.

First, Mr. Rambold concedes that in his Sentencing Memorandum, he did not argue for any of the exceptions in § 46-18-222 and stated that they did not apply in his case. Rambold Sentencing Memorandum, page 5. This position is inconsistent with Mr. Rambold's argument that Mont. Code Ann. § 46-18-205 required a 30 day mandatory minimum sentence and ultimately is inconsistent with the sentence that was imposed by the district court. Moreover, for the reasons as set forth in more detail below, the failure to

request an exception does not preclude this Court from holding (when supported by the facts of the case) the application of an exception is actually required for the sentence to be legal. See *State v. Olivares–Coster*, 2011 MT 196, 361 Mont. 380, 259 P.3d 760.

In relevant part, Mont. Code Ann. § 46-18-222 provides that mandatory minimum sentences prescribed by the laws of this state, restrictions on deferred imposition and suspended execution of sentences and certain restriction on parole eligibility *do not apply* if certain exceptions apply. See Mont. Code Ann. § 46-18-222(1)(emphasis added). The statute then provides six separate exceptions that may apply, including: 1) if the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced; 2) the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution; 3) the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution; 4) the offender was an accomplice, the conduct constituting

the offense was principally the conduct of another, and the offender's participation was relatively minor; 5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense; and 6) the offense was committed under 45-5-310, 45-5-311, 45-5-502(3), 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(b), or 45-5-625(4) and the judge determines, based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination. Of all of the exceptions enumerated in § 46-18-222, only the exception in subpart (6) explicitly requires a finding by the Court.

The language in the beginning of Mont. Code Ann. § 46-18-222 is mandatory. The language at the beginning of § 46-18-222 provides, in

relevant part, that mandatory minimum sentences prescribed by the laws of this state . . . *do not apply* if an exception applies based upon the facts of the case. A District Court has the discretion to impose a sentence in excess of the mandatory minimum; but if an exception applies, the statute clearly states that the mandatory minimum sentences prescribed by the laws of this state - do not apply.

State v. Olivares-Coster, 2011 MT 196, 361 Mont. 380, 259 P.3d 760, provides an example of where this Court has applied the mandatory language in the introductory section of § 46-18-222 to a sentence challenged on appeal. Although the *Olivares-Coster* case involved an exception to a restriction on parole eligibility and did not address an exception to an otherwise mandatory minimum sentence, this Court's analysis in the case is instructive.

Olivares–Coster was charged with one count of Deliberate Homicide and two counts of Attempted Deliberate Homicide. *Olivares-Coster* at ¶ 3. He was seventeen years old at the time of the offenses. Olivares–Coster pled guilty to all counts pursuant to the terms of a plea agreement. As part of the plea agreement, the State agreed to refrain from taking any position regarding Olivares–Coster's parole eligibility, leaving that issue to the discretion of the

District Court.

Olivares-Coster was eventually sentenced to three life sentences, one for each count. *Olivares-Coster* at ¶ 4. The two life sentences for the attempted homicide were to run concurrently to each other, but consecutively to the life sentence for the deliberate homicide count.

At sentencing, the State did not request and the District Court did not impose any parole restrictions. Instead, the District Court concluded that Olivares-Coster would be subject to the automatic parole restrictions contained in Mont. Code Ann. § 46-23-201(4). *Olivares-Coster* at ¶ 9. This statute provides "[a] prisoner serving a life sentence may not be paroled under this section until the prisoner has served thirty years." The District Court concluded that Olivares-Coster would not be parole eligible for sixty years - based upon the consecutive sentences that had been imposed in the case. Importantly, Olivares-Coster did not object to the District Court's conclusion nor did he argue that any of the exceptions in § 46-18-222 applied to the sentence in his case. *Olivares-Coster* at ¶ 8. Ultimately, the District Court's written judgment stated that Olivares-Coster would not be parole eligible for sixty years. Olivares-Coster appealed the legality of this sentence to this

Court.

On appeal, Olivares–Coster argued the District Court had incorrectly concluded his parole eligibility could be restricted for 60 years, as he argued this restriction was precluded by the exception contained in Mont. Code Ann. § 46-18-222 (1). Paraphrased, this exception provides that restrictions on parole eligibility do not apply if the offender was less than 18 years of age at the time of the commission of the offense. Importantly for the analysis in the present case, when raising the argument that the exception in § 46-18-222 (1) applied to him, Olivares-Coster conceded that he had not asked for the exception below. Instead, Olivares-Coster argued that his sentence was illegal and so this Court could review his claim under the *Lenihan* exception. See *Lenihan,* 184 Mont. 338, 602 P.2d 997 (1979). As discussed above, *Lenihan* provides a narrow exception for a defendant to this Court's error preservation rule.

In *Olivares-Coster*, this Court agreed that the parole restriction in the sentence was in conflict with the exception contained in Mont. Code Ann. § 46-18-222(1). *Olivares-Coster* at ¶ 14. Therefore, this portion of the sentence was illegal. Importantly, this Court found that imposing the sentence without

the exception was illegal despite the fact that Olivares-Coster had not asked for the exception below. The implicit holding of the case is that if an exception applies, its application is mandatory - even without a request for the exception or an objection to it not being applied. This holding is consistent with the mandatory language contained in the introductory section of § 46-18-222. What is important about this Court's reasoning and conclusion in *Olivares-Coster*, is the understanding that if an exception in § 46-18-222 applies, the defendant is entitled to be sentenced under the exception - even absent a request or a failure to object to the exception not being applied.

Of the exceptions enumerated in § 46-18-222, subpart (6) is the only exception that explicitly requires a judicial finding. This subsection lists specific sexual offenses and provides that when sentencing an offender who has been convicted under these statutes, the otherwise mandatory minimums and parol restrictions do not apply if the judge makes a determination, based upon the findings in a sexual offender evaluation report, treatment of the offender while in the community may afford a better opportunity for rehabilitation of the offender and ultimately, protection of society.

Mr. Rambold was convicted under subpart (3) of Mont. Code Ann. § 45-

5-503. Subpart (3) of § 45-5-503 is not one of the enumerated offenses in § 46-18-222(6) and Mr. Rambold does not contend that this exception applies in his case. Mr. Rambold would, however, call this Court's attention to the exception contained in Mont. Code Ann. § 46-18-222 (5). Including the relevant language from the beginning of § 46-18-222, this section provides:

> Mandatory minimum sentences prescribed by the laws of this state . . . do not apply if: . . .
>
> (5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense;

This Court previously addressed whether the exception in § 46-18-222(5)(no serious bodily injury) applied to a defendant who was convicted of sexual intercourse without consent. *State v. Goodwin* (1991), 249 Mont. 1, 813 P.2d 953(overruled on other grounds, *State v. Turner*, (1993), 262 Mont. 39, 864 P.2d 235. The discussion in *Goodwin* was based upon a previous version of the exception in subpart (5), which at that time provided "where applicable, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense."

In the *Goodwin* case, the State argued that the exception in § 46-18-

222(5) only applied in cases where the threat of bodily injury or actual infliction of bodily injury was "an essential element of the crime." It was the State's position that this was why the introductory language "where applicable" was used in this subpart of the statute.

This Court disagreed with the State. As explained by this Court:

> We agree that . . . there is at least an ambiguity regarding the meaning of "where applicable" in those cases where the victim is under the age of 16 (therefore, the threat of or infliction of harm is not an element of the crime), or where some injury less than "serious bodily injury" has been inflicted on the victim. However, if the legislature had intended this exception to minimum sentences to be limited to certain crimes, it had it within its power to clearly state the crimes to which the section was applicable. By doing so, the legislature could have made its intention clear. It did not do so, and under these circumstances our duty is clear. We must interpret the criminal statute in a way most favorable to the private citizen against whom it is sought to be enforced, and against the state which authored it.

Goodwin, 249 Mont. at 22, 813 P.2d at 966. This Court concluded that since the threat or infliction of actual bodily harm may, depending on the circumstances, be an element of the offense of sexual intercourse without consent, it is reasonable to conclude that the exception to the minimum sentence found at § 46-18-222(5), when no "serious bodily injury was inflicted on the victim" was applicable to the offense of sexual intercourse without consent. *Goodwin*, 249 Mont. at 24, 813 P.2d at 967. This Court said that any

ambiguity regarding the applicability of this exception was required to be "resolved in favor of lenity." *accord, State v. Van Robinson*, 248 Mont. 528, 813 P.2d 967 (1991).

The wording in the exception contained in § 46-18-222(5) has changed since the *Goodwin* and *Van Robinson* cases were decided. The language contained in this subsection now provides:

> "(5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense; . . ."

There is no Montana Supreme Court case that directly addresses the issue of whether the exception of no serious bodily injury, as contained in the present version of subpart (5), is available to a defendant convicted of sexual intercourse without consent. Mr. Rambold contends that this exception applies to the offense of sexual intercourse without consent for the following reasons.

Montana Code Ann. § 45-5-503(1) provides: "A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent." As used in § 45-5-503, the term "without consent" is defined (in relevant part) in § 45-5-501 as follows:

> . . . the term "without consent" means:

(i) the victim is compelled to submit by force against the victim or another; or

(ii) . . . the victim is incapable of consent because the victim is:

(A) mentally defective or incapacitated;
(B) physically helpless;
(C) overcome by deception, coercion, or surprise;
(D) less than 16 years old;
. . .

The term "without consent" is statutorily defined to include when a victim is compelled to submit by force as an element of the offense. Therefore, the exception contained in subpart (5) applies to the offense of sexual intercourse without consent. It will apply when no serious bodily injury is inflicted on the victim. There is no question in the present case that all parties conceded the victim in this case did not suffer serious bodily injury.

In reply, the State may try to argue that the case of *State v. Fauque* stands for the proposition that the exception for no serious bodily injury is not available to a defendant convicted of an offense under § 45-5-503(3)(a). 2000 MT 168, 300 Mont. 307, 4 P.3d 651. A closer reading of *Fauque*, however, demonstrates that this is not true.

In *Fauque*, the defendant who was 53 years old, pled guilty to one count of sexual intercourse without consent and one count of sexual assault for acts

committed against his 14-year-old daughter. *Fauque* at ¶ 3. After concluding that the exception in subpart (5) of § 46-18-222 did not apply, the District Court sentenced Fauque to 25 years at the Montana State Prison, with all but 4 years suspended. *Fauque* at ¶ 6.

Fauque appealed his sentence to this Court. On appeal, Fauque did not challenge the District Court's conclusion that the exception in subpart (5) did not apply to him. Instead, he argued that the District Court had committed reversible error by not sentencing him to the 30 day minimum sentence in § 46-5-201(8). Fauque argued that there was a conflict between the 30 day minimum sentence provided for in § 46-5-201(8) and the 4 year mandatory minimum sentence as found in Mont. Code Ann. § 45-5-503(3)(a) and due to the conflict, he was entitled to be sentenced under § 46-5-201(8). *Fauque* at ¶ 9.

This Court disagreed. This Court found that because the District Court had concluded that none of the exceptions in § 46-18-222 applied, then the 30 day mandatory minimum sentence in § 46-18-201(8)(1997) also did not apply. Importantly, because Fauque had not appealed the District Court's conclusion that subpart (5) did not apply to him, this Court did not address or resolve that

issue. *Fauque* at ¶ 12. In short, the *Fauque* decision does not stand for the proposition that the exception in subpart (5) can never apply to a person convicted of an offense under § 45-5-503(3)(a) because that issue was not presented to or decided by this Court.

It also bears repeating, that the present case comes before this Court on a very different procedural basis than did the decision in *Fauque*. In *Fauque*, the sentence was appealed by the defendant. This appeal has been brought by the State. The biggest reason that this makes a difference is that for the State to succeed on appeal, it must prove that the sentence imposed on Mr. Rambold was "contrary to law." A sentence - even if "objectionable" is not contrary to law if it is within statutory parameters.

Mr. Rambold argues that subpart (5) of § 46-18-222 can apply to an conviction under § 45-5-503(3)(a) and so the sentence imposed by Judge Baugh, despite being procedurally objectionable, was within statutory parameters, was not contrary to law and so should be upheld on appeal.

First, § 45-5-503 explicitly states that the exceptions in § 46-18-222 apply to convictions under subpart (3)(a) of the statute. The statute does not say - all of the exceptions contained in § 46-18-222 apply - *except the*

exception in subpart (5). The statute says, except as provided for in § 46-18-222, period. See § 45-5-503(3)(a).

Second, when the Legislature clearly wants to exclude the application of an exception, it does so. For example, in subpart (6), the Legislature did not include a violation of § 45-5-503(3) in the statutes enumerated in that section; and so the exception in subpart (6) clearly does not apply to a conviction under § 45-5-503(3)(a). Subpart (5) on the other hand, does not exclude § 45-5-503(3)(a) from the operation of this exception. If the Legislature had wanted the exception in § 46-18-222(5) <u>not</u> to apply to convictions under § 45-5-503(3)(a), then it could have clearly said so.

Third, the present case is brought before this Court on a very different procedural posture than was the *Fauque* case. Here, it is not the defendant who is appealing the decision of the District Court - but rather, the State. As noted above, the State is narrowly limited as to the issues it can properly appeal. To appeal the sentence in the present case, the State must prove that the substantive effect of the sentence imposed was contrary to law. That can only be true if there is no exception that could apply to a conviction under Mont. Code Ann. § 45-5-503(3)(a). This, of course, is inconsistent with the plain

language of §45-5-503(3)(a) which provides, in relevant part, that a mandatory minimum sentence will apply - *except as provided in 46-18-222.*

The sentence imposed by Judge Baugh was not contrary to law. A sentence can be procedurally objectionable - but not illegal, if it falls within statutory parameters. The sentence imposed in the present case was not outside the statutory parameters for a conviction under § 45-5-503(3)(a). Therefore, the State has failed to meet its burden to prove the sentence imposed was "contrary to law" and the sentence imposed by Judge Baugh must be upheld on appeal.

3. IF THE DISTRICT COURT IMPOSED A SENTENCE THAT IS CONTRARY TO LAW, THE PROPER REMEDY IS TO REMAND TO CORRECT THE ILLEGAL PORTION OF THE SENTENCE.

If this Court determines that the applicable mandatory minimum sentence for Mr. Rambold was four (4) years, then the question becomes what is the proper remedy. The State at pages 33-35 of its Brief relies upon *State v. Heafner*, 2010 MT 87, 356 Mont. 128, 231 P.3d 1087, and appears to argue that the appropriate remedy is to vacate the judgment of the District Court and remand the case for an entire new sentencing hearing at which the District Court would be free to impose any sentence upon Mr. Rambold, so long as it is between four (4) years and one hundred (100) years.

Mr. Rambold contends that the applicable law clearly establishes that the proper remedy is to remand the case to the District Court to correct, and nothing more, the illegal portion of the sentence, namely to impose a sentence of 15 years of imprisonment at the Montana State Prison, with all but four years suspended. The State correctly noted that the Supreme Court of Montana in *Heafner* stated that a consistent approach would be desirable regarding the appropriate remedy for a partially illegal sentence. Consequently, the Court held that when a portion of a sentence is illegal, the better result is to remand to the District Court to correct the illegal provision. *Heafner* at ¶ 11.

Here, if the Court holds that the applicable mandatory minimum sentence in this case was four (4) years, then the only portion of the sentence of Mr. Rambold that is illegal is the portion which states what amount of time is not suspended, namely " . . with all but thirty one (31) days suspended." The entire remainder of the sentence is a legal and lawful sentence. The portion of the sentence which imposed a sentence of 15 years of imprisonment at the Montana State Prison is a legal sentence; the portion of the sentence which designated Mr. Rambold as a Level I offender is a legal sentence; and the remaining portion of the sentence which imposed the 49 conditions for any

period of community supervision is also a legal sentence. Therefore, pursuant to *Heafner*, the required approach is to remand to the District Court to correct the illegal portion - - namely to commit the Defendant to the Montana State Prison for fifteen (15) years with all but four (4) years suspended.

Correspondingly, this is not a case that would justify a remand for resentencing. The Supreme Court of Montana set forth the applicable rule for when resentencing is required in *Potter v. Frink*, ____ Mont. ____, 310 P.3d 1099, OP 13-0126, where the Court stated:

> This Court has held that resentencing is required where the illegal portion of the sentence 'affected the entire sentence, or where we were unable to determine what sentence the District Court would have adopted had it correctly followed the law.' *State v. Heafner, 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087, citing State v. Heath, 2004 MT 58, ¶ 49, 320 Mont. 211, 89 P.3d 947.....*

If one reviews those cases which rely upon *Heafner* and have been remanded for resentencing (not a correction), one finds that the cases share a common characteristic - - an illegal persistent felony offender sentence. See *Potter v. Frink*, ____ Mont. ____, 310 P.3d 1099, OP 13-0126; *Knudsen v. Kirkegard*, ____ Mont. ____, ____ P.3d ____, OP 13-0519; *Ayers v. Seventh Judicial District Court* (2013), 369 Mont. 541, 310 P.3d 1098; and *Larsen v. State* (2011), 362 Mont. 543, 272 P.3d 124. In each of these four cases, just as

in the case cited by the State in their Brief, *State v. Johnson*, 2010 MT 288, 359 Mont. 15, 245 P.3d 1113, the defendant was improperly sentenced for the underlying offense and also as a persistent felony offender. Consequently, the entire term of the sentences had to be vacated. This undermined the integrity of the sentence as a whole and required resentencing.

Such is not the case with Mr. Rambold. Mr. Rambold's sentence did not include a sentence for the underlying offense and a sentence as a persistent felony offender. *Johnson* and the related cases are not controlling precedent and have no application. Further, a change in the amount of suspended time for Mr. Rambold would not undermine the integrity of the sentence as a whole. Resentencing is not required.

Second, as stated in *Potter*, resentencing is required where the Court is unable to determine what sentence the District Court would have adopted had it correctly followed the law. Judge G. Todd Baugh stated very clearly in his Notice and Order dated September 3, 2013:

> The sentence as imposed was 15 years, all suspended but 31 days. The Court's intent was to impose a 15 year sentence, all suspended except for the mandatory minimum.

It is difficult to imagine a more clear statement as to what the District Court

intended to do. Once again, even on this second basis, resentencing of Mr. Rambold is not justified.

In addition to the established law set forth above that resentencing is not the proper remedy, if this case is remanded to the District Court for resentencing, then the State of Montana will have been provided the practical equivalent of sentence review, a right not afforded the State. It seems clear from the Brief of the State of Montana that it wishes a second sentencing hearing for Mr. Rambold, a hearing at which it can argue to the District Court that the sentence imposed upon Mr. Rambold was unreasonably lenient and that the sentence on remand should be considerably more harsh. Very simply, the State will be asking the District Court to review the sentence.

The Supreme Court of Montana has clearly held that the Court does not review a sentence on appeal for mere inequity or disparity, but rather the proper channel for a challenge to the equity of a sentence, as opposed to its legality, is through the Sentence Review Division. *State v. Legg*, 2004 MT 26, ¶ 53, 319 Mont 362, 84 P.3d 648, *citing State v. DeSalvo (1995), 273 Mont. 343, 350, 903 P.2d 202, 207*. In other words, if a party to a criminal case has a challenge based upon unfairness or inequity, the only forum for such review is the

Sentence Review Division. However, pursuant to Title 46, Chapter 18, Part 9 of the Montana Code Annotated, sentence review is only available to the defendant, not the State. To remand this case for resentencing would provide the State with a remedy to which it is not entitled - - a review of the equities of a defendant's sentence.

For the reasons set forth above, the only appropriate and lawful remedy is to remand to the District Court to correct the illegal portion of the sentence, mainly to impose a sentence of 15 years of imprisonment at the Montana State Prison, with all but four years suspended. To do anything further and remand for an entire resentencing would result in a direct conflict with *Heafner* and *Heath*.

CONCLUSION

Based upon the foregoing discussion, the appellee, Stacey Dean Rambold, respectfully requests that the Supreme Court of Montana affirm the Judgment and the sentence imposed by the Honorable G. Todd Baugh on August 26, 2013.

DATED this 27th day of February, 2014.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by United States mail on the following counsel on the 27th day of February, 2014:

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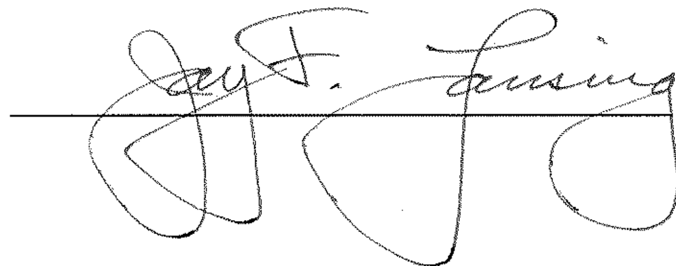

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by WordPerfect 6.1 for Windows, is 9,915 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 27th day of February, 2014.