IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0609

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SAMANTHA LEE NELSON,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew J. Cuff, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUE

Whether the District Court erred when it determined that Samantha Nelson was statutorily barred from receiving a deferred imposition of sentence.

STATEMENT OF THE CASE AND FACTS

Samantha Nelson pleaded guilty to felony criminal possession of dangerous drugs, in violation of Mont. Code Ann. § 45-9-102. (D.C. Doc. 8; 6/19/2017 Tr. at 8–9.) Under the terms of the plea agreement, the State and Nelson both agreed to recommend a two-year deferred imposition of sentence, "if [Nelson was] eligible for the deferred sentence." (D.C. Doc. 8 at 4.) If Nelson was not eligible for a deferred sentence, the parties agreed to recommend a two-year fully suspended commitment to the Department of Corrections. (D.C. Doc. 8 at 4.)

Nelson's Pre-Sentence Investigation Report (PSI)[1] noted that she had been convicted of second degree escape in La Paz, Arizona, a "class

[1] The PSI is marked "confidential." (D.C. Doc. 11 at 1.) Montana Code Annotated § 46-18-113(1) and M. R. App. P. 10(7)(a) suggest the PSI remains confidential on appeal. Nelson has agreed to waive confidentiality toward information in the PSI relating to her 2015 conviction of escape in La Paz, Arizona. Nelson reserves the right to object should the State file a publicly-viewable brief containing other confidential PSI content that does not concern this Arizona conviction.

five felony" there. (D.C. Doc. 11 at 5.) Attached to the PSI was a document from Nelson's Arizona conviction, entitled, "Imposition of Sentence (Probation)." (D.C. Doc. 11 at 9.) That document stated in part, "IT IS ORDERED suspending the imposition of sentence for a period of 1 year placing the Defendant on supervised probation under the terms and conditions stated by the Court and sentencing the Defendant to 17 days in jail with credit for 17 days previously served." (D.C. Doc. 11 at 9.) The PSI noted that Nelson "eventually discharged her one year probation term." (D.C. Doc. 11 at 2.)

Because of Nelson's conviction in Arizona, the PSI author and the State recommended that she receive a two-year suspended sentence—rather than a deferred imposition of sentence—which they both indicated was consistent with the plea agreement. (D.C. Doc. 11 at 5–6; 8/14/2017 Tr. at 16–17.) The State argued at Nelson's sentencing hearing that her Arizona conviction rendered her statutorily ineligible for a deferred imposition of sentence. (8/14 Tr. at 26.)

Nelson's counsel objected to the State's recommended sentence, pointing out that "the agreement was that we both recommend a two-year deferred imposition of sentence unless the Defendant is not

eligible." (8/14 Tr. at 17.) Counsel argued that Montana law should apply in determining the classification of Nelson's Arizona conviction and that, under Montana law, her conviction qualified as a misdemeanor, not a felony. (8/14 Tr. at 17–19, 23–24.) Counsel asserted that because the conviction did not constitute a felony in Montana, it did not bar Nelson from receiving a deferred imposition of sentence. (8/14 Tr. at 18, 24.)

The District Court held that Nelson's Arizona conviction statutorily barred her from receiving a deferred imposition of sentence, and it instead imposed a two-year suspended sentence. (8/14 Tr. at 28; D.C. Doc. 13.) The court explained:

> I think the law is what the law is, if there's a felony conviction on her record there isn't anything I can do to get around that. A deferred sentence is inappropriate. And while it might make me feel good, it is an illegal sentence and I am not going to do it. So, I am sentencing you to commitment to the Department of Corrections for two years, all two years suspended.

(8/14 Tr. at 28.)

The District Court stated that its sentence was consistent with the PSI author's recommendation and the plea agreement, that it "comports with Montana's sentencing mandates," and that it was "in the best

interest of justice." (8/14 Tr. at 29.) In its written judgment, the court listed three reasons for its sentence: "1. Consistent with the Plea Agreement of the parties; 2. Consistent with the recommendations of the Pre-Sentence Investigation Report; 3. Provides an opportunity for rehabilitation of Defendant." (D.C. Doc. 13 at 5.)

Nelson filed a timely appeal to this Court. (D.C. Doc. 16.)

STANDARDS OF REVIEW

This Court conducts plenary review of a district court's conclusions of law. *State v. Reiner*, 2003 MT 243, ¶ 12, 317 Mont. 304, 77 P.3d 210. It "reviews sentences that impose less than one year of actual incarceration for legality and an abuse of discretion." *State v. McCaslin*, 2011 MT 221, ¶ 6, 362 Mont. 47, 260 P.3d 403. "The determination of legality is a question of law" that the Court reviews de novo. *McCaslin*, ¶ 6. "A sentencing court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *City of Billings v. Edward*, 2012 MT 186, ¶ 17, 366 Mont. 107, 285 P.3d 523.

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law when it determined that Nelson's "felony" conviction in Arizona barred her from receiving a deferred imposition of sentence in Montana. Montana statute provides that a defendant may not receive a deferred imposition of sentence if she has been convicted of a felony. Although Nelson's prior conviction was labeled a "felony" in Arizona, that jurisdiction's classification of the offense does not control in Montana. The only relevant inquiry is whether Montana law would classify Nelson's Arizona conviction as a felony; it does not, and Nelson was eligible for a deferred imposition of sentence.

Montana, unlike Arizona, defines a felony as an offense for which the sentence *imposed upon conviction* exceeds one year of imprisonment in a state prison. Nelson's Arizona sentence did not amount to more than one year of imprisonment in a state prison. She therefore was not convicted of a "felony" under Montana's definition of the term. The District Court concluded incorrectly that Nelson was statutorily ineligible for a deferred imposition of sentence.

Had the District Court not committed this legal error, it almost certainly would have ordered a deferred imposition of sentence. The plea agreement obligated the State to recommend such a sentence if Nelson was eligible for it, and the District Court expressed a willingness to adhere to the plea agreement and to the State's recommendation. The court indicated that it was imposing a suspended sentence precisely because it believed that Nelson was not eligible for a deferred imposition of sentence. Because the District Court committed a legal error that affected its sentencing decision, this Court should vacate and remand for resentencing.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT NELSON'S ARIZONA CONVICTION STATUTORILY BARRED HER FROM RECEIVING A DEFERRED IMPOSITION OF SENTENCE.

Montana law provides that "imposition of sentence in a felony case may not be deferred in the case of an offender who has been *convicted of a felony* on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended." Mont. Code Ann. § 46-18-201(1)(b) (emphasis added). Contrary to the State's assertion and the District Court's conclusion,

Nelson's Arizona conviction did not constitute a "felony" under Montana law, and § 46-18-201(1)(b)'s bar on deferred sentences therefore did not apply to her.

A. The District Court Was Required to Apply Montana Law in Determining Whether Nelson's Arizona Conviction Constituted a "Felony" Within the Meaning of § 46-18-201(1)(b).

At the sentencing hearing, the District Court showed particular interest in the Arizona sentencing court's classification of Nelson's conviction as a "felony." The court held the following discussion with Officer Steve Watson, the PSI author:

> THE COURT: And is that [Arizona conviction] on her criminal history? Is it shown as a felony?
>
> OFFICER WATSON: It is a felony on the criminal history from NCIC.
>
> THE COURT: And this Exhibit that you have attached to [the PSI] identifies it as a felony, correct?
>
> . . .
>
> THE COURT: Defendant is guilty of a classified felony. Is that what I am seeing?
>
> OFFICER WATSON: That is what I show it to be.

(8/14 Tr. at 20–21.)

The State argued to the District Court that Nelson's Arizona conviction rendered her ineligible for a deferred imposition of sentence in part because the "offense is designated as a felony on the Defendant's record." (8/14 Tr. at 26.) The District Court seemed persuaded by this, noting in its explanation of its sentence that Nelson had a "felony conviction on her record." (8/14 Tr. at 28.) Despite Nelson's counsel's insistence, the District Court did not address whether her conviction would be considered a felony under Montana law. (*See* 8/14 Tr. at 14–30.)

The District Court's emphasis on the Arizona court's classification of Nelson's conviction as a "felony" was misplaced. Montana law, not Arizona law, determines whether Nelson's conviction constitutes a felony within the meaning of § 46-18-201(1)(b). In *Melton v. Oleson*, 165 Mont. 424, 427–29, 530 P.2d 466, 468–69 (1974), this Court addressed whether the plaintiff's federal convictions for liquor law violations constituted "felonies" within the meaning of the state voter registration statute that allowed for removal of convicted felons from the voting rolls. Melton received forty-day jail sentences for each conviction, but his offenses were punishable by up to two years in

prison. *Melton*, 165 Mont. at 426–28, 530 P.2d at 468–69. Although his convictions qualified as felonies under federal law, they did not under state law. *Melton*, 165 Mont. at 428, 530 P.2d at 469.

On appeal, the *Melton* Court addressed "whether state or federal law determines the definition of felony mandating cancellation of voter registration." *Melton*, 165 Mont. at 429, 530 P.2d at 469. The Court held that "in construing state statutes relating to voter disqualification, a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition." *Melton*, 165 Mont. at 431, 530 P.2d at 470. The Court expressly overruled a previous case that held the "character of an offense, i.e., whether a felony or a misdemeanor, must be determined by the laws of the jurisdiction where the crime was committed." *Melton*, 165 Mont. at 431, 530 P.2d at 470 (overruling *State ex rel. Anderson v. Fousek*, 91 Mont. 448, 8 P.2d 791 (1932)).

Melton thus establishes that, in determining whether to classify a conviction from another jurisdiction as a felony for the purpose of a Montana statute, it is "the law of Montana which controls and not the law of the jurisdiction where the conviction was had." *State v.*

DeGeorge, 171 Mont. 531, 535, 560 P.2d 138, 140 (1976) (citing *Melton*, 165 Mont. at 431, 530 P.2d at 470). Whether Nelson's Arizona conviction bars her under § 46-18-201(1)(b) from receiving a deferred imposition of sentence hinges not on Arizona's classification of her conviction, but rather on whether that conviction would constitute a felony under Montana law.

B. Under Montana Law, The Term "Felony," Unless Otherwise Specified, Refers to an Offense In Which the Sentence *Imposed* Exceeds One Year of Imprisonment.

A "felony" is often understood in Montana to mean an offense that *could* be punished by over one year of imprisonment in a state prison. This definition arises in a number of specific contexts. For instance, it applies when determining a court's jurisdiction at the commencement of an action and when determining "the commencement of the period of limitations." Mont. Code Ann. § 45-1-201; *see State v. Martz*, 2008 MT 382, ¶¶ 21, 28, 347 Mont. 47, 196 P.3d 1239. It applies when assessing whether an offender has "previously been convicted of two separate felonies" for the purpose of a persistent felony offender designation. Mont. Code Ann. § 46-1-202(18)(a). And it applies when determining whether a person attempted to commit or has committed a "forcible

felony," such that the person may be charged with deliberate homicide by felony murder, Mont. Code Ann. § 45-5-102(1)(b); *State v. Hicks*, 2013 MT 50, ¶ 20, 369 Mont. 165, 296 P.3d 1149, or such that a person may claim justified use of force in preventing the commission of a forcible felony, Mont. Code Ann. § 45-3-101 to -105.

a. General Definition of "Felony"

(1) Plain Language

Here, Montana's general statutory definition of "felony" controls. Montana Code Annotated § 45-2-101(23) defines a felony as "an offense in which the sentence *imposed upon conviction* is death or imprisonment in a state prison for a term exceeding 1 year." (Emphasis added.) The statute similarly defines a "misdemeanor" as "an offense for which the sentence *imposed upon conviction* is imprisonment in the county jail for a term or a fine, or both, or for which the sentence imposed is imprisonment in a state prison for a term of 1 year or less." Section 45-2-101(42) (emphasis added).

In interpreting a statutory definition, this Court should "first look to the statute's plain language. If that language is clear and unambiguous, no further interpretation is required." *State v. Hastings*,

2007 MT 294, ¶ 14, 340 Mont. 1, 171 P.3d 726; *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288; *see also* Mont. Code Ann. § 1-2-101 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). Section 45-2-101(23) states clearly and unambiguously that a "felony" is an offense in which the sentence *imposed upon conviction*—rather than the *potential* punishment—exceeds one year of imprisonment in a state prison.

This plain language reading of § 45-2-101(23) finds support in this Court's case law. In *State v. Ballard*, 202 Mont. 81, 86, 655 P.2d 986, 988 (1982), the Court interpreted this statutory definition of "felony" and held, "Under Montana law an offense is not classified as a misdemeanor or felony until the sentence is imposed." (Citing § 45-2-101(21), the substantively identical predecessor to § 45-2-101(23).) And in *In re Estates of Swanson*, 2008 MT 224, ¶ 31, 344 Mont. 266, 187 P.3d 631, the Court distinguished the term "feloniously" under the civil slayer statute at Mont. Code Ann. § 72-2-813 from § 45-2-101(23)'s definition of "felony," noting that the latter definition required an actual

sentence of death or imprisonment for more than one year. The plain language of § 45-2-101(23) and this Court's decisions in *Ballard* and *Estates of Swanson* show that a "felony" is defined by the sentence actually imposed upon conviction.

(2) Legislative History

Although the Court need not look to the legislative history in interpreting an unambiguously worded statute such as § 45-2-101(23), the history of this statute clearly supports the interpretation that a "felony" in Montana—absent a specific statutory definition to the contrary—is defined by the sentence actually imposed upon conviction. The current statutory definition of a "felony" was originally enacted under § 94-2-101(15) of the Montana Criminal Code of 1973. 1973 Mont. Laws ch. 513, § 1. The Criminal Law Commission's Annotator's Note to Section 94-1-105—the equivalent of the present-day § 45-1-201, regarding classification of offenses—explained at the time:

> This section represents a considerable change in the classification of offenses from prior law. The section must be read in conjunction with the new definitions for felony and misdemeanor located in 94-2-101. The two sections when taken together emphasize that the potential sentence determines jurisdiction, prosecution, and the running of the statute of limitations while *actual classification of the offense will not occur until judgment and sentencing*. This position is

> *intentionally opposite* State v. Atlas, 75 Mont. 547, 551, 244 P. 477 (1926) and the federal court position *that the potential sentence determines the grade of the crime*. However, the section is in accord with Gransberry v. State, 149 Mont. 158, 162, 423 P.2d 853: "Whether [act] is felony or misdemeanor is not determined until sentence is imposed."

Annotator's Note, Mont. Crim. Code of 1973, Annotated at 11 (1973 ed.) (emphasis added).

Despite the unambiguous language of § 45-2-101(23) and this legislative commentary that a felony is defined by the sentence imposed, rather than the potential sentence, this Court has attributed inconsistent meanings to § 45-2-101(23). *Compare Ballard*, 202 Mont. at 86, 655 P.2d at 988, *and In re Estates of Swanson*, ¶ 31, *with Hicks*, ¶ 20 (defining a "forcible felony," and in so doing, citing § 45-2-101(23) for the proposition that a "felony is any offense that carries a potential sentence of death or imprisonment in a state prison for a term exceeding one year"), *Martz*, ¶¶ 21, 28 (analyzing whether the district court had jurisdiction in a partner or family member assault case, and citing §§ 45-1-201 and 45-2-101(23) for the proposition that classification of an offense "depends on the maximum sentence that may be imposed"), *and Seltzer v. Morton*, 2007 MT 62, ¶ 193, 336 Mont. 225, 154 P.3d 561 (citing § 45-2-101(23) in a civil torts case to support

the statement that certain tortious actions "would have been felonies" in a hypothetical criminal prosecution because they were punishable by up to ten years in prison).

Neither *Hicks*, *Martz*, nor *Seltzer* control here, because the Court's holdings in those cases did not rely on its citations to § 45-2-101(23). The *Hicks* Court, which addressed whether assault on a minor constituted a forcible felony for the purpose of the deliberate homicide statute, conducted no statutory analysis and cited no authority for its interpretation of § 45-2-101(23). *Hicks*, ¶¶ 16–22. The Court's conclusion that a forcible felony refers in part to an offense punishable by over a year in prison was correct; commencing a deliberate homicide action based on "felony-murder" logically requires classification of the underlying "forcible felony" offense prior to conviction or sentencing on that offense. The Court's paraphrasing of § 45-2-101(23), however, was inaccurate, and its citation to that statute did not provide support for its otherwise correct conclusion that an offense is classified as a forcible felony prior to conviction and sentencing.

In *Martz*, the Court correctly held that the district court had jurisdiction over the case because the offense was *punishable* by more

than one year in prison and was therefore a "felony" for jurisdictional purposes. *See Martz*, ¶¶ 21, 28. Section 45-1-201 clearly establishes this principle, but § 45-2-101(23) does not. The Court's reliance on § 45-1-201 was sufficient to support its holding, and its citations to § 45-2-101(23) were superfluous.

In *Seltzer*, the Court analyzed the appropriateness of a jury's punitive damages award in a civil malicious prosecution and abuse of process lawsuit. *Seltzer*, ¶¶ 146–199. In discussing the seriousness of the tortious actions at issue, the Court noted in part that the actions could have been punished by up to ten years in prison in a hypothetical criminal prosecution. *Seltzer*, ¶ 193. The potential criminal sentences—not the technical classification of the offenses as "felonies" or "misdemeanors"—proved the Court's point. Its citation to § 45-2-101(23) for the proposition that the offenses "would have been felonies" was not necessary for the Court's conclusion about the severity of the tortious actions. The Court also acknowledged that its analysis "cannot be guided to any great extent by this criminal sanction." *Seltzer*, ¶ 193.

The citations to § 45-2-101(23) in *Hicks*, *Martz*, and *Seltzer* do not control here and do not change the fact that the statute, by its plain language, defines a felony by the actual sentence imposed.

(3) The General Definition of "Felony" Applies to Deferred Sentence Eligibility.

Section 46-18-201(1)(b) provides no specific definition of "felony" that would control over the general definition located at § 45-2-101(23). *See* Mont. Code Ann. § 1-2-102 (providing that a specific statutory provision controls over a conflicting general provision). The general definition of a felony as an offense in which the sentence imposed upon conviction exceeds one year of imprisonment applies here.

Nelson acknowledges the potential confusion that the language of § 46-18-201(1)(b) may create in regard to this question. That statute applies to "an offender who has been convicted of a felony on a prior occasion, *whether or not the sentence was imposed,* imposition of the sentence was deferred, or execution of the sentence was suspended." (Emphasis added.) One possible reading of this statute is that it applies regardless whether *any* sentence was imposed in the prior conviction, which would seemingly conflict with § 45-2-101(23)'s definition of a felony as hinging on "the sentence imposed upon conviction." But such

a reading would render the statute nonsensical. For "in order for there to be a conviction, a sentence must be imposed." *State v. Tomaskie*, 2007 MT 103, ¶ 12, 337 Mont. 130, 157 P.3d 691. If no sentence is imposed, there can be no conviction—let alone a felony conviction.

Moreover, the language in the second half of the statute, beginning with "whether or not . . . ," does not negate the first portion of the statute's clear and unambiguous requirement that a person be "convicted of a felony on a prior occasion." The statute cannot logically be read to apply to anyone with a prior felony conviction, "whether or not" that person was actually convicted of a felony. Without a prior felony conviction, the statute does not apply at all.

A more plausible reading of § 46-18-201(1)(b)—in which the statute is not internally inconsistent—is to understand the phrase "whether or not *the sentence was imposed*" to mean whether or not the felony sentence—i.e., the sentence of imprisonment in a state prison of more than one year—was deferred or suspended. The phrase "the sentence" clearly refers to the sentence ordered in relation to the offender's prior felony conviction. As discussed above, for a person to have been convicted of a felony, that person's sentence must have

included more than one year of imprisonment. Section 45-2-101(23). The phrase "the sentence" therefore must refer to the sentence that classified the conviction as a felony in the first place—i.e., a sentence of more than one year in prison.

The next phrase, "was imposed," is best understood as summarizing and adding emphasis to the succeeding language in the statute that an offender previously convicted of a felony may not receive a deferred sentence, regardless whether "imposition of the sentence was deferred, or execution of the sentence was suspended." The phrase "whether or not the sentence was imposed" thus emphasizes that the statute applies whether or not the offender actually served the term of imprisonment ordered as part of the prior felony conviction. Nothing in § 46-18-201(1)(b) suggests that § 45-2-101(23)'s definition of "felony" does not apply.

By contrast to Montana's definition of a felony located at § 45-2-101(23), Arizona defines a felony as "an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections *is authorized* by any law of this state." Ariz. Rev. Stat. Ann. § 13-105(18) (emphasis added). A conviction classified as a felony in

Arizona thus does not necessarily constitute a felony in Montana for the purpose of § 46-18-201(1)(b).

C. Under Montana Law, Nelson's Arizona Conviction Did Not Constitute a Felony Such that it Would Bar Her From Receiving a Deferred Imposition of Sentence.

Nelson's Arizona conviction did not result in a sentence exceeding one year of imprisonment in a state prison; it was therefore not a "felony" under § 45-2-101(23) and did not bar her from receiving a deferred sentence under § 46-18-201(1)(b). The sentencing document upon which the State relied to argue that Nelson was ineligible for a deferred sentence, entitled, "Imposition of Sentence (Probation)," ordered: "suspending the imposition of sentence for a period of 1 year placing the Defendant on supervised probation . . . and sentencing the Defendant to 17 days in jail . . . ." (D.C. Doc. 11 at 9.) Nelson successfully "discharged her one year probation term." (D.C. Doc. 11 at 2.)

One reading of Nelson's sentence is that it included a total of seventeen days in jail, the imposition of which was suspended for one year, pending her successful completion of probation. Another reading is that she received a one-year probationary sentence plus a seventeen-

day jail sentence. Under either reading, she was not convicted of a felony under Montana law.

Arizona defines probation as a "court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community *instead of* sending the criminal to jail or prison." *Calik v. Kongable*, 195 Ariz. 496, 499, 990 P.2d 1055, 1058 (1999) (emphasis added) (quoting *Black's Law Dictionary* 1220 (7th ed. 1999)). Nelson's placement "on supervised probation" did not constitute imprisonment in a state prison. Moreover, the sentencing document does not indicate that Nelson would have been subject to a prison term of over one year had she violated the terms of her probation. (*See* D.C. Doc. 11 at 9–10.)

Nelson's seventeen-day "jail" sentence likewise did not constitute imprisonment in a state prison. Arizona, like Montana, draws a distinction between county jails and state prison. *Compare* Ariz. Rev. Stat. Ann. Title 31, chapter 1 (pertaining to county jails), *with* Title 31, chapter 2 (pertaining to state prison). Nelson's sentence satisfied the definition of a misdemeanor conviction under Montana law. *See* § 45-2-101(42) (defining a "misdemeanor" in part as "an offense for which the

sentence imposed upon conviction is imprisonment in the county jail for a term").

Under any interpretation of Nelson's sentence, she did not receive a sentence of imprisonment in a state prison, let alone for a term exceeding one year. Her Arizona conviction thus does not constitute a felony under § 45-2-101(23) and did not bar her from receiving a deferred imposition of sentence under § 46-18-201(1)(b). The District Court erred as a matter of law in concluding otherwise.

II. THE DISTRICT COURT'S ERROR PREJUDICED NELSON BECAUSE IT LED THE COURT TO IMPOSE A SUSPENDED SENTENCE, RATHER THAN ORDER A DEFERRED IMPOSITION OF SENTENCE.

The District Court's erroneous belief that Nelson was statutorily barred from receiving a deferred imposition of sentence clearly affected its sentencing decision. In explaining its reasons for imposing a suspended sentence, the court stated that "if there's a felony conviction on [Nelson's] record there isn't anything I can do to get around that," that a deferred sentence was "inappropriate," and that "while it might make me feel good, it is an illegal sentence and I am not going to do it." (8/14 Tr. at 28.) The court gave no specific reason, other than its incorrect belief that Nelson was ineligible for a deferred sentence, to

explain its decision to impose a suspended sentence, rather than defer imposition of her sentence. (*See* 8/14 Tr. at 28–29.)

The plea agreement obligated the State to recommend a two-year deferred imposition of sentence if Nelson was eligible for such a sentence—which she was, as discussed above. (D.C. Doc. 8 at 4.) The PSI author stated that he "support[s] the plea agreement," and his sentencing recommendation mirrored the plea agreement's provision in the event that Nelson was ineligible for a deferred imposition of sentence. (D.C. Doc. 11 at 5–6.) Two of the primary reasons that the District Court gave for its sentence were that it was consistent with the plea agreement and with the PSI author's recommendation. (D.C. Doc. 13 at 5; 8/14 Tr. at 29.) By all indications, were it not for the mistaken belief that Nelson's Arizona conviction constituted a "felony" that barred her from receiving a deferred imposition of sentence, the State and PSI author would have recommended a deferred imposition of sentence, and the District Court would have followed those recommendations and the plea agreement.

This case resembles *State v. Arbgast*, 202 Mont. 220, 225–26, 656 P.2d 828, 831 (1983), where this Court held that the district court

committed reversible error when it determined that it was barred by statute from ordering a deferred or fully suspended sentence in a criminal sale of dangerous drugs case. The district court in that case sentenced Arbgast to five years of imprisonment with three years suspended. *Arbgast*, 202 Mont. at 223, 656 P.2d at 830. The district court stated several times during the proceedings that the "defendant was not a candidate for a suspended or deferred imposition of sentence," based on its understanding of the relevant sentencing statute as requiring imprisonment. *Arbgast*, 202 Mont. at 225, 656 P.2d at 831.

On appeal, this Court noted that the district court had relied "upon a misunderstanding" of the sentencing statute; the statute did not in fact require imprisonment in Arbgast's case, but instead allowed for a suspended or deferred imposition of sentence. *Arbgast*, 202 Mont. at 225–26, 656 P.2d at 831. The Court vacated and remanded for resentencing, holding, "In light of the facts it appears the District Court's belief that the charge required imprisonment was prejudicial to defendant." *Arbgast*, 202 Mont. at 226, 656 P.2d at 831.

As in *Arbgast*, the District Court here relied "upon a misunderstanding" of the law when it determined that Nelson's Arizona

conviction constituted a felony that barred her from receiving a deferred imposition of sentence. *See Arbgast*, 202 Mont. at 225, 656 P.2d at 831. Given the District Court's clear intention of following the plea agreement and its statements that it believed it could not legally order a deferred imposition of sentence, its erroneous belief demonstrably impacted its sentencing decision and was therefore prejudicial to Nelson.

Moreover, that Nelson was entitled to a statutory presumption in favor of a deferred imposition of sentence further compels a conclusion that the District Court would have ordered such a sentence but for its erroneous conclusion about Nelson's eligibility. Montana's criminal possession of dangerous drugs statute, § 45-9-102(4), provides, "A person convicted of a first violation under this section is presumed to be entitled to a deferred sentence of imprisonment." The record does not show that Nelson has previously been convicted of criminal possession of dangerous drugs; this statutory presumption therefore applies to her. Although this presumption is rebuttable, *see State v. Bolt*, 204 Mont. 261, 264, 664 P.2d 322, 324 (1983), the State presented no argument or evidence that Nelson was not deserving of a deferred imposition of

sentence. In the absence of evidence rebutting this presumption, the District Court would have been obligated to order a deferred imposition of sentence. *See Bolt*, 204 Mont. at 264, 664 P.2d at 324; M. R. Evid. 301(b)(2) ("Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.").

CONCLUSION

The District Court incorrectly concluded that Nelson's Arizona conviction for escape constituted a felony, such that it barred her from receiving a deferred imposition of sentence. But for this error, the record indicates that the District Court would have followed the plea agreement and ordered a deferred imposition of sentence, rather than a suspended sentence. Because the District Court erred, and because that error prejudiced Nelson's sentence, this Court should vacate and remand for resentencing.

Respectfully submitted this 15th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced 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 5,201, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

APPENDIX

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-15-2018:

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Dated: 08-15-2018