IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0092

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LINDA FAYE HARRIS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Robert Deschamps, III, Presiding

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1. Did the district court violate Harris's fundamental constitutional right to a jury when it pressured her and her attorney to appear at a bench trial without securing a valid written jury waiver, especially after the district court had already announced in advance it would find Harris guilty?

2. Did the district court illegally sentence Harris based on an impermissible consideration of gender when the district court stated that these kinds of crimes are women's crimes, women commit this crime most of the time, and prison authorities need to take that into consideration when releasing women on parole because they're serial offenders?

STATEMENT OF THE CASE

In 2016, the State charged Harris by information with two felony counts of Theft, one count for $9,493 allegedly taken from Gentle Dental, and another count for $24,890.12 allegedly taken from Northwest Denture Center. (Docs. 1, 3.) Harris was serving the suspended portion of a ten-year sentence from a previous theft at the time. (Doc. 1, Doc. 35 at 2.) Harris pled not guilty and asserted her right to a jury trial. (Doc. 9 at 3; Tr. 6.)

Based on the advice of her appointed attorney, Lisa Kauffman, Harris entered an open plea of no contest to both theft charges. (Tr. 35-37, 529-530.) The district court scheduled a restitution hearing to determine the amount of restitution Harris owed. (Tr. 37.) Several witnesses presented detailed testimony over three days about the facts of the case.

Upon hearing this testimony, the district court expressed befuddlement and asked why in the world Harris had pled no contest. (Tr. 527.) The district court asked Harris if she wanted to withdraw her plea and take the matter to trial. (Tr. 528.) Harris, who was on the stand, did not know how to answer the question. (Tr. 532.)

At the next hearing, defense counsel orally withdrew the no contest pleas and asked for a bench trial, which the court granted. (7/28/17 Tr. 9.) The district court did not ask Harris if she was waiving her right to a jury. The required written jury waiver was not filed.

After Harris withdrew her plea, the State said that it was going to have to start over and would need five days for trial. (7/28/17 Tr. 10.) The district court said, "I'm not gonna let you start over" and declared it would take judicial notice of all testimony already presented—the same testimony the court also said would be sufficient to support convictions on both charges. (7/28/17 Tr. 4-6, 10.) Defense counsel did not object.

As promised, the district court found Harris guilty of both theft charges following the bench trial. (Tr. 905.)

At sentencing, the district court talked about how women commit theft crimes most of the time and how Harris is evidence of that pattern. (Tr. 948-

949, attached as App. A.) The district court sentenced Harris to 20 years at Montana State Prison with 15 years suspended, to run consecutive to an eight-year revoked prison sentence she received from the previous theft. (Doc. 58 at 2-3; Tr. 920-921, 953-954.) Harris filed a timely appeal. (Doc. 62.)

STATEMENT OF THE FACTS

1. After being accused of stealing from two businesses, Harris pled not guilty and demanded a jury trial.

Between 2013 and 2015, Harris worked for multiple business, including Gentle Dental, owned by Dr. Robert Whalen, and Northwest Denture Center, owned by Erick Vines. (Tr. 63, 197-199, 287, 289.) Harris worked as a bookkeeper at both places; she accepted payments from patients, paid the bills, and recorded deposits. (Tr. 198, 241.) Vines fired Harris after he discovered she was on probation. (Tr. 297, 313.)

After Harris was fired, accountants began discovering discrepancies between the balances on the patient accounts and the sizes of the bank deposits. (Tr. 89, 140-141.) Payments received in the form of cash were recorded as cash against the patient's account but were not recorded on the bank deposit. (Tr. 54-59, 149-151.) Neither of the deposit envelopes at the businesses were secured in a safe. (Tr. 69, 454.)

There were also discoveries of business checks being written out to Harris personally, and purchases for shoes and jewelry being made on the business account. (Tr. 100-103, 154-155, 251.) Harris said that the business checks made out in her name were being cashed to purchase office supplies, and she had permission to purchase the shoes and jewelry on the business account. (Tr. 433-435, 463-465.) Harris denied stealing any money from Gentle Dental or Northwest Denture Center. (Tr. 433, 451, 525.)

Harris appeared at arraignment on May 3, 2016 and pled not guilty. (Tr. 6.) That same day Harris also signed an acknowledgement of rights form. (Doc. 9.) Harris acknowledged her right to "a speedy and public trial by jury on these charges." (Doc. 9 at 3.) A month later the State filed a notice of its intention to have Harris sentenced as a persistent felony offender (PFO) if convicted. (Doc. 13.)

At the omnibus hearing the parties presented a signed omnibus memorandum. (Doc. 17.) Harris and the State agreed that the expected length of trial would be 4-5 days, and that the district court would draw a panel of 80 prospective jurors for the trial. (Doc. 17 at 6.)

As the trial date approached, the State filed a master subpoena calling upon multiple witnesses to be present and to testify in a jury trial. (Doc. 18.)

The State also filed its proposed jury instructions. (Doc. 23.)

2. Harris entered an open plea of no contest on advice of counsel.

Defense counsel moved for a change of plea hearing and asked to enter a plea of no contest. (Doc. 30; Tr. 29.) Defense counsel had not brokered a plea agreement, and because of her PFO status Harris was still subject to a 100-year sentence for each count. (*See* Tr. 34; Doc. 31.2 at 3-4.) Defense counsel instead told the court, "We're going to be asking for a restitution hearing and we're going to be arguing it's a misdemeanor amount." (Tr. 29.)

The district court asked the State whether the charge would be reduced to a misdemeanor if it could not prove the minimum $1500 amount. (Tr. 29-30.) The prosecutor disagreed that the charges could be reduced to misdemeanors and that this is the first time she's hearing of this. (Tr. 30.) "[Harris] can't plead no contest to felony theft if she thinks it's less than $1,000 [sic]." (Tr. 30.)

The district court expressed concern with proceeding in this manner and wondered if it would be better to go to trial. (Tr. 30.) Defense counsel said she had done something similar in another case. (Tr. 30.) The district court said, "Here's what you could do: You could waive jury and have a bench

trial, if you want to do that." (Tr. 30-31.)

Defense counsel was open to the district court's idea, but said she'd have to explain what that all meant to Harris. (Tr. 31.) Defense counsel added that Harris very much opposed the amount the State was seeking. (Tr. 31.) The district court told defense counsel that she needed to make a decision and that it was not going to accept a no contest plea over the State's objection. (Tr. 31.)

The district court heard other matters on its calendar and returned to Harris's case. (Tr. 31.) Defense counsel said, "Ms. Harris wants to go forward with pleading no contest to Counts I and II, and agreeing that she is pleading no contest to the felony minimum amount in each count of 1500. But we still need a restitution hearing regarding the balance." (Tr. 32.) The State did not object. (Tr. 32.) Defense counsel said the restitution hearing would take a minimum of three hours. (Tr. 32.)

Harris entered her plea, agreeing that she would have a felony on her record even if the district court decided the restitution was only ten cents. (Tr. 33, 35, 37.) Defense counsel claimed to have fully discussed the plea decision with Harris before she pled, however, Harris's waiver of rights form failed to list the correct maximum punishment, which was up to 100 years

on each count. (Tr. 36; Doc. 31.2 at 2.)

3. Harris participated in a heavily litigated, three-day restitution hearing.

Defense counsel made an opening statement at the outset of the restitution hearing and argued that Harris did not commit the crime of theft. (Tr. 48.) She said Harris had pled no contest because they assumed the jury wouldn't take the time to sift through the paperwork and simply only look at her prior theft conviction. (Tr. 48.)[1]

Rather than focusing on the restitution amount, defense counsel inferred that a cleaning crew could have taken the money. (*See* Tr. 65, 446.) She argued that Gentle Dental's owner had outstanding debt with the IRS, a drinking problem, and a criminal record that came with expensive legal fees. (Tr. 67-68.) When discussing Northwest Denture Center, defense counsel suggested the owner's "fairly young girlfriend", may have had access to the unsecured deposit envelope. (Tr. 171-174.) Far exceeding defense counsel's three-hour hearing estimate, the district court continued the restitution hearing for two months. (Tr. 189-190.)

[1] Harris's first defense attorney filed a motion in limine challenging the State's possible use of Harris's prior conviction. (Doc. 21.) However, Harris's second attorney (defense counsel in this appeal) abandoned the effort, and no ruling was made.

When the restitution hearing resumed, defense counsel again argued that different people took the money. She brought up Gentle Dental's tax issues and suggested the insurance claim the owner filed was a ploy to get more money and avoid IRS garnishment. (Tr. 213-215.) Defense counsel called up employers of other business where Harris worked, who both testified they had no problems with missing money. (Tr. 373-375, 470-472.) A defense expert contested the accounting procedures given by the State's witnesses. (Tr. 194-195, 547-555.)

The hearing did not have the protections of a normal jury trial. On multiple occasions, the prosecutor explored aspects of the case that would have otherwise been off-limits had the rules of evidence been in effect. (Tr. 53, 154-155, 205, 232-233, 254, 285-286, 289, 295-297, 321, 356, 391-412, 518.)

The district court was not particularly moved by the defense's presentation, telling defense counsel in response to a scheduling question, "Oh, I'm definitely considering prison." (Tr. 414-415.)

4. The district court asked why it was holding a restitution hearing at all.

Harris took the stand and detailed her employment at Gentle Dental

and Northwest Denture Center. Harris testified she saw office funds being used for personal expenses, cash being removed from the deposit envelope by one owner, and another owner talking about keeping money off the books. (Tr. 430-431, 445, 490-492.)

The district court began to lose patience with the proceeding, saying "it seems to be kind of morphing into a bench trial." (Tr. 494-495.) The court said that defense counsel may be trying to raise reasonable doubts about whether Harris committed the theft, but the court, noting the no contest plea, was only trying to figure out how much money was missing. (Tr. 495.)

The district court went on to tell defense counsel she wasn't helping. (Tr. 495.) The district court reminded defense counsel that a restitution determination was the State's burden on a preponderance of the evidence standard. (Tr. 495-496.) "And your client getting up here and just saying, No, they did it, is not sufficient, I think, to tip the balance in her favor." (Tr. 496.)

The prosecutor asked Harris if it was still her position that she did not steal a cent from either Gentle Dental or Northwest Denture Center. (Tr. 525.) Harris reiterated that she did not take any money from them. (Tr. 525.)

With Harris still on the stand, the district court began to question what was going on:

> Okay. Well, the -- you know, I'm totally befuddled. I don't understand -- I, honest to God, I don't understand why you even entered a no contest plea if you believe you're innocent and are being framed by these people.
>
> And now you're here making this case to me that it's a frame-up. And, you know, I think I probably have the authority, even in a no contest plea – I certainly do have it at trial -- to modify the verdict. But, you know, why in the world did you do this if you're innocent; I mean, plead no contest?

(Tr. 527.)

The district court wondered if Harris should just withdraw her plea and go to trial. (Tr. 528.) "I've got somebody sitting here that says, I'm innocent." (Tr. 528.)

Defense counsel said she had advised Harris that it was in her best interest to plead no contest and to try to get the restitution down to a more reasonable amount so she could argue for no prison time. (Tr. 529-530.) Counsel added, "You know, she may want to file ineffective counsel against me for my advice, but that's basically kind of why we ended up where we were." (Tr. 530.)

The district court said, "I'm just trying to envision how the Supreme Court's going to view this on a post-conviction relief petition." (Tr. 530.) The

district court told Harris if she truly believed she was innocent, then she had the right to a trial and to make the State prove their case beyond a reasonable doubt. (Tr. 531.) The court agreed with the prosecution's claim that Harris was most likely lying when she said she did not steal any money but said that was beside the point if she claimed innocence. (Tr. 531.)

The court asked Harris if she wanted to stand by her no contest plea or if she wanted to withdraw it. (Tr. 531-532.) Harris did not know how to answer the question and looked to defense counsel for help. (Tr. 532.) Defense counsel said Harris was "freaking out right now," and the court continued questioning Harris for another ten pages of transcript, advising her of the consequences of committing perjury in the process. (Tr. 532-541.)

5. Defense counsel withdrew Harris's no contest pleas, but then requested a bench trial despite the district court's assessment that Harris was lying and would be found guilty. Harris does not waive her jury trial right orally or in writing. The district court took judicial notice of the restitution hearing and adopted its testimony as trial evidence.

Before the scheduled sentencing hearing, defense counsel sent an email that read, "Please advise the Judge Linda Harris will be withdrawing her pleas of "No Contest" and requesting a bench trial." (Doc. 40, Ex. 3.)

At the outset of what was supposed to be the sentencing hearing, the

district court said, "Now, I am aware that Ms. Kauffman has sent an email saying that Ms. Harris wishes to withdraw her guilty [sic] pleas and ask for a bench trial, which is fine." (7/28/17 Tr. 4.) The district court did not question Harris or her attorney about the consequences of waiving her jury right. Harris never stated verbally or produced any writing that she was waiving her jury right.

Turning to the prosecutor, the district court asked, "If we had a bench trial, would you be adding additional evidence regarding the checks?" (7/28/17 Tr. 4.) The State replied that it would. (7/28/17 Tr. 4.) The district court said that based on the testimony it had already heard, it would find Harris guilty of stealing a felony amount from Gentle Dental and guilty of at least a misdemeanor amount from Northwest Denture Center. (7/28/17 Tr. 4-6.) "[But] if there's gonna be more evidence then maybe my picture will change." (7/28/17 Tr. 5.)

Turning back to defense counsel, the district court said Harris and her lawyer needed to understand the evidence as the court currently saw it, because if the court found her "guilty even on one count, you're going away." (7/28/17 Tr. 6.) Defense counsel asked for a moment to talk to her client. (7/28/17 Tr. 6.) One hour later, counsel said that the decision to withdraw

her pleas was based on the court's earlier representation that it saw some reasonable doubt. (7/28/17 Tr. 7.)

The district court warned defense counsel she was misinterpreting its prior discussion about the differences in proof between restitution and guilt. (7/28/17 Tr. 7-9.) "She might be acquitted on Vines, I don't know. Or maybe found guilty of a misdemeanor, but given the current state of the evidence I would find her guilty on Whalen and for a felony amount." (7/28/17 Tr. 8.)

Despite just being told that the district court would find Harris guilty if she went to a bench trial, defense counsel pressed forward with a bench trial request:

> I understand. My client indicates that she wants to withdraw her pleas of no contest and go to a bench trial. She doesn't -- she feels very certain she did not do any of this and that she has been trying to follow my advice to just fight the restitution amount and plead no contest, but.

(7/28/17 Tr. 9.)

Defense counsel did not produce a signed written waiver from Harris waiving her right to a jury trial. The district court did not ask nor did Harris state she was waiving her jury rights.

The court asked the prosecutor how many more days of testimony she would need for the bench trial. (7/28/17 Tr. 10.) The prosecutor said, "I'm

gonna start over. I'm probably gonna need five." (7/28/17 Tr. 10.)

The district court responded:

> Well, I'm not gonna let you start over. I don't want to rehear two [sic] days of evidence that I've already heard. I'll take judicial notice of what you've already put on. We've got a transcript for quite a bit of it and I'll get a transcript for the rest of it. I'll certainly let you supplement it, but I'm not gonna listen to two [sic] days of testimony that's already in the record.

(7/28/17 Tr. 10.)

Defense counsel did not object to the district court's reliance on the restitution evidence. After the transcript was prepared, defense counsel made no objections and all content in the transcript was adopted as evidence in Harris's bench trial. (Tr. 603.)

6. The district court held a bench trial and convicted Harris, just as it said it would.

The district court began the trial by announcing it was a nonjury trial, that there was a lengthy restitution hearing earlier in the year where a great deal of testimony was given, and it still had the exhibits from that hearing. (Tr. 603.) The district court asked the parties to limit repetitious testimony already presented. (Tr. 604-605.)

This time, the State only called four witnesses, compared to the seven they had called before. None of the witnesses reprised their earlier

testimony and any new testimony was in response to matters brought up by Harris at the restitution hearing. (*See* Tr. 605-611, 631-638.) The State's accountant witnesses presented illustrative exhibits that summarized and restated their previous testimony as to the missing deposits. (*See* Tr. 672-679, 701-710.) Harris also testified again. (*See* Tr. 812-840, 893-905.)

After Harris finished testifying, the district court said "Well, I'm going to find you guilty on both counts." (Tr. 905.) The district court provided no oral or written factual findings.

7. The district court said Harris was more likely to commit thefts because she was a woman and sentenced her to prison.

At Harris's sentencing hearing, the judge told Harris she had "phony-baloney" excuses, her excuses were lame, and she bordered on being sociopathic. (Tr. 947.) Noting her prior theft conviction, the judge said the fact that Harris was a woman explained her criminal behavior:

> And sad as it is, these kinds of crimes are women's crimes. I can't recall ever dealing with an embezzler who was a man. Although, I guess we had one in here earlier this afternoon that stole for the bowling league. But it's women that commit this crime most of the time. And they commit it big time. And it seems like once they start doing it, they just keep coming back. And she's evidence of that pattern.

> And I think prison authorities and Department of Corrections need to take that into consideration when releasing these people on parole. They're serial offenders.

(Tr. 948-949.)

The district court then imposed a prison sentence. (Tr. 953-954.)

SUMMARY OF THE ARGUMENT

A district court plainly errs when it conducts a bench trial without a valid jury waiver. The procedure for waiving the jury right is constitutionally directed and does not allow for a totality of the circumstances analysis. A jury waiver in a felony case is only effective upon a written consent of both parties that is filed in the district court. Neither party waived their jury rights. Defense counsel's oral statement of "go to a bench trial" is insufficient. Defense counsel's email does not constitute a writing, two-party consent, or a filing in the district court. The absence of the jury has left the fundamental fairness of Harris's ad hoc and haphazard bench trial unsettled, requiring reversal for a new trial.

This error is structural and does not require additional analysis or review, however, the lack of a valid jury waiver in this case was particularly bad for Harris. The district court told Harris it would find her guilty at a bench trial, yet defense counsel asked for a bench trial anyway. The bench

trial was a farce, hardly taking in substantive testimony. Instead, the district court took everything that was said at a restitution hearing and brought it in as evidence for the bench trial. Doing so violated rules of judicial notice and hearsay. The district court's action also created an evidentiary mess of determining Harris's guilt beyond a reasonable doubt by using testimony considered on a preponderance of the evidence standard, with the subject matter being the issue of restitution, and where the Rules of Evidence had not applied. Allowing this disaster of a bench trial to stand would be a manifest miscarriage of justice and would compromise the integrity of the judicial process.

If this Court does not reverse for a new trial, then it must at least remand for a resentencing before a different judge. A judge cannot sentence defendants based on impermissible considerations, including a defendant's gender. Sentences based only partially on impermissible considerations still violate due process. Even if there are other legitimate factors justifying the sentence, they do not inform whether Harris would have been sentenced differently if she was a man. When the judge ruled that Harris's theft crime was a women's crime, that women commit this crime most of the time, and that Harris is evidence of that pattern, he was gender stereotyping Harris.

Based on that gender stereotype, the judge urged prison authorities to take the purported fact that women repeatedly steal into consideration when releasing "these people" on parole. Given the judge's express bias against women facing theft charges who appear before him, resentencing before a new judge is needed.

STANDARDS OF REVIEW

"To reverse a decision for plain error, the appellant must: (1) demonstrate that the claimed error implicates a fundamental right; and (2) firmly convince this Court that a failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142.

"This Court reviews de novo whether a district court violated a defendant's constitutional rights at sentencing." *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657.

ARGUMENT

I. Harris never waived her right to a jury trial.

A. The right to be tried by a jury is a fundamental constitutional right that prohibits the judge from conducting a bench trial unless a written waiver has been filed in the district court with the consent of both parties, which did not occur.

The authority to utilize plain error is derived from the Court's inherent power and paramount obligation to interpret the Montana Constitution and protect the rights set forth in that document. *State v. Taylor*, 2010 MT 94, ¶ 13, 356 Mont. 167, 231 P.3d 79. The right to be tried by a jury is amongst these fundamental rights and clearly provided for in the Montana Constitution. *State v. Dahlin*, 1998 MT 113, ¶ 15, 289 Mont. 182, 961 P.2d 1247.

"The right of trial by jury is secured to all and shall remain inviolate." Mont. Const. art. II, § 26. A jury trial may only be waived under the Montana Constitution's specific procedure for doing so. Mont. Const. art. II, § 26. There is a reasonable presumption against such a waiver. *State v. Reim*, 2014 MT 108, ¶ 31, 374 Mont. 487, 323 P.3d 880. The Montana Constitution in relevant part provides:

> The right of trial by jury is secured to all and shall remain inviolate. But upon default of appearance or *by consent of the*

> *parties expressed in such manner as the law may provide*, all cases may be tried without a jury or fewer than the number of jurors provided by law.

Mont. Const. art. II, § 26 (emphasis added).

Following this constitutional directive, the Legislature passed a law expressing the manner of how a jury trial in a felony case can be waived:

> **Right to jury trial -- waiver.** (1) The parties in a felony case have a right to trial by a jury of 12 persons.
> (2) The parties may agree in writing at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than that to which they are entitled.
> (3) *Upon written consent of the parties, a trial by jury may be waived.*

Mont. Code Ann. § 46-16-110 (emphasis added).

The statute Mont. Code Ann. § 46-16-110(3) serves as the "law" portion of "by consent of the parties expressed in such manner as the *law* may provide" in Mont. Const. art. II, § 26. The statute requires written consent of the parties to waive a jury trial. Mont. Code Ann. § 46-16-110(3). In the absence of written consent, the statute does not allow this Court to otherwise review a jury waiver under the totality of the circumstances. *Dahlin*, ¶ 22. This Court has continued to uphold the requirement of written consent for jury waivers in felony cases and does not permit deployment of the standard

waiver analysis—intelligent, knowing, and voluntary—to excuse compliance with this rule. *Reim*, ¶ 32.

For a criminal defendant to waive their right to a jury trial, the waiver must be 1.) in writing; 2.) with the consent of both parties; and 3.) filed with the district court. *Dahlin*, ¶ 23. The district court errs when it conducts a bench trial and convicts a defendant without following these steps. *Dahlin*, ¶ 24. The remedy for such an error of this fundamental constitutional right is reversal. *Dahlin*, ¶¶ 15, 25.

The requirement that a jury waiver be put into writing means that the oral representation of an attorney purporting to waive a jury is insufficient. *Dahlin*, ¶ 20. In *Dahlin*, a minute entry documented the defense attorney telling the district court Dahlin had waived his right to a jury trial and was proceeding with a bench trial. *Dahlin*, ¶ 5. The district court record contained no written waiver or consent to a bench trial. *Dahlin*, ¶ 5. Under plain error review, this Court concluded the jury right was not waived and reversed. *Dahlin*, ¶¶ 15, 24-25.

In contrast, a written motion waiving jury trial signed by defense counsel and filed in the court with the consent of both parties has acted as an effective waiver of the jury right. *Reim*, ¶¶ 20-21, 33. In *Reim*, the State

first waived its jury rights in a written omnibus memorandum. *Reim*, ¶ 20. Then defense counsel filed a "motion to vacate jury trial and set for judge trial." *Reim*, ¶ 21. The district court granted the motion and scheduled a bench trial accordingly. *Reim*, ¶ 21. The Court concluded the district court did not err in conducting a bench trial under such circumstances. *Reim*, ¶¶ 33-34.

Jury waivers in criminal cases require the consent of both the defense and the State. *State ex rel. Long v. Justice Court, Lake County*, 2007 MT 3, ¶ 16, 335 Mont. 219, 156 P.3d 5. The language of Mont. Const. art. II, § 26 secures the jury right to every party in any civil or criminal case. *Long*, ¶¶ 12-13. If the defense was permitted to waive a jury trial by unilateral consent, then the defense would also be allowed to reduce the number of jurors to three or even one, a logically absurd conclusion. *Long*, ¶ 13. The Montana Constitution requires written consent by both the defense and the State before the jury trial right may be lost, and the trial court errs if it schedules a bench trial contrary to that constitutional requirement. *Long*, ¶¶ 19-21.

Harris never waived her right to a jury. Such a waiver, verbally or written, is never stated in the record. The only thing close to a writing was

an email from defense counsel about her intentions to withdraw Harris's pleas and then ask for a bench trial without mentioning a jury waiver. (Doc. 40, Ex. 3.) At the next day's hearing, defense counsel then indeed asked to "go to a bench trial." (7/28/17 Tr. 9.) In *Dahlin*, *Reim*, and *Long*, the defense attorneys at least explicitly stated they were waiving the jury trial right. *Dahlin*, ¶ 5; *Reim*, ¶ 21; *Long*, ¶ 2. For the district court to nonetheless conduct a bench trial in a felony prosecution without an iota of consideration for the most fundamental of rights frustrates the Montana Constitution.

None of *Dahlin*'s three elements are satisfied. Defense counsel's oral statement of "go to a bench trial" is insufficient. *See Dahlin*, ¶ 20. What remains is an email sent by defense counsel. (Doc. 40, Ex. 3.)

First, the e-mail "writing" holds about the same value as the minute entry in *Dahlin*. Like how *Dahlin*'s minute entry simply acts as a memorandum of a verbal waiver, defense counsel's email acts as no more than an advisory about a verbal waiver at the next hearing. Unlike *Reim*, where the defense attorney communicated to the district court directly by formal written motion of an intent to vacate a jury trial, defense counsel's email does not satisfy the "writing" requirement.

Second, the State never consented to the loss of its jury trial rights. The record is bereft of any mention by the State of a desire to waive a jury trial. The State did not waive its jury right in the omnibus form. (Doc. 17.) The State's master subpoena of its witnesses stated they would be appearing in a jury trial. (Doc. 18.) When defense counsel emailed, she did not ask for consent to waive the jury right, but only advised of an intent to request a bench trial. (Doc. 40, Ex. 3.) By not complying with the Montana Constitution, the district court has harmed the jury protections of both Harris and the State.

Third, the email cannot be construed as a filing with the district court. The email does not have a date stamp from the clerk, it was not filed by defense counsel, and it does not have its own number in the case register report. In contrast, the written motion in *Reim* was filed in the district court, considered by the district court, ruled upon, and subsequently acknowledged as being "on the record" by the district court. *Reim*, ¶¶ 21, 23.

Reim does not support the entry of a valid jury waiver here. It is true the *Reim* court noted that the defendant stood next to his attorney and remained silent as the judge said that Reim had waived his jury trial right. *Reim*, ¶¶ 23, 33-34. The judge made that statement due to a signed motion

filed by the defense waiving the jury right, which the court granted prior to trial. *Reim*, ¶¶ 21, 33. The judge's heads-up was simply an additional notification to the parties that the jury right had been waived.

When the *Reim* court wrote, "Reim, through his silence at trial, actively participated in the alleged error he now contests," *Reim*, ¶ 34, surely the Court was not suggesting that the only way for non-lawyer criminal defendants to preserve their own rights is by contemporaneously objecting, interrupting the judge, and speaking over their own attorneys. That would invite chaos. In *Dahlin*, the defendant also stood silently by as the defense attorney made an oral waiver of the jury right. *See Dahlin*, ¶ 5. The difference between *Dahlin* and *Reim* is not the silence of the defendants in front of judges or the oral waivers of their lawyers. The difference is that in *Reim* the attorney had filed a signed written motion waiving jury trial, while the attorney in *Dahlin* had not. *Reim*, ¶ 33; *Dahlin*, ¶ 24.

Harris never waived her right to a jury trial. The district court plainly erred when it conducted a bench trial anyway.

B. Permitting the result of the bench trial to stand without a valid jury waiver is manifestly unjust, compromises judicial integrity, and leaves the fundamental fairness of Harris's proceedings unsettled.

The error of conducting a bench trial without a valid jury waiver is already serious enough that this Court reverses on plain error grounds without conducting an in-depth analysis of how trial without jury unsettles the fundamental fairness of the proceedings. *See Dahlin*, ¶¶ 22-25. If the waiver is not carried out by the procedure designated in the Montana Constitution, error cannot be excused under a totality of the circumstances analysis. *Dahlin*, ¶ 22. Problems with the jury process are structural in nature and presumed to be prejudicial, undermining the fairness of the proceeding and affecting the framework within which the trial proceeds, requiring no additional analysis or review. *See State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735.

For Harris's case, the lack of a valid jury waiver was particularly bad. The district court had already announced in advance it would find Harris guilty of the offenses if she went to a bench trial, and indeed it did exactly that. (7/28/17 Tr. 4-6; Tr. 905.) The district court did not even issue any oral or written factual findings.

The district court did not conduct a complete trial. Instead it incorporated all the evidence brought in through a restitution hearing held months earlier, resulting in an inane bench trial that did little more than add some rebuttal material to Harris's testimony and give the experts a second chance to explain their accounting reports. The district court focused on the restitution amount in that earlier hearing, not Harris's factual guilt or innocence. (*See* Tr. 49, 495.) And the incorporated material was considered under the preponderance of the evidence standard, not beyond a reasonable doubt. (Tr. 495-496.) Yet the district court used the restitution evidence to decide Harris's guilt.

The incorporated material was also unlawfully admitted. Courts may not take judicial notice of facts from a prior proceeding when the facts are reasonably disputed. M. R. Evid. 201(b); *In re Marriage of Carter-Scanlon and Scanlon*, 2014 MT 97, ¶ 21, 374 Mont. 434, 322 P.3d 1033. The facts are quite disputed: The State's and defense's accountants disagreed on the records, the State said Harris did not have permission to sign blank checks while Harris said she did, the State said Harris stole tens of thousands of dollars while Harris denied stealing a cent. Taking statements from the testimony of a prior proceeding to prove the truth of the matter asserted (i.e.

an assertion that Harris stole) is inadmissible hearsay. M. R. Evid. 801(c), 802; *State v. Homer*, 2014 MT 57, ¶ 9, 374 Mont. 157, 321 P.3d 77. And while the Rules of Evidence apply at trials, they do not apply at sentencing restitution hearings. M. R. Evid. 101(a), 101(c)(3); *State v. Aragon*, 2014 MT 89, ¶¶ 12-13, 374 Mont. 391, 321 P.3d 841. When the district court took testimony from a forum where the Rules of Evidence did not apply and brought it into another forum where the Rules of Evidence did apply, no one protected Harris from the resulting evidentiary mishmash.

Had the jury been the factfinder, this case by necessity would have to be presented anew. The testimony of the witnesses would be fresh, no one would be ordering or digging through transcripts, and all objections would be resolved at trial and on the record. The disjointed, invalidly jury-waived bench trial that took place exposed Harris to evidence introduced with lower standards without the protections of the Rules of Evidence. Waiver of Harris's jury trial right cannot be imposed in the face of the district court's repeated breaches to the integrity of the judicial process.

II. If this Court does not reverse for a new trial, then it must remand for resentencing before a different judge that will not sentence Harris based on her status of being a woman.

The judge imposed a sentence based upon his conjecture that: theft crimes are "women's crimes", Harris is a woman convicted of theft so she's evidence of that pattern, and corrections officials need to take gender into consideration when releasing "these people" on parole. (Tr. 948-949.) You can't do that. Harris is entitled to a new sentencing hearing and a sentence that is not about her being a woman committing "women's crimes."[2]

This Court may review any sentence in a criminal case the appellant alleges to be illegal or exceeding statutory mandates, even in the absence of an objection. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). Allegations that a sentence is illegal because the sentence violates constitutional guarantees of due process is reviewable under *Lenihan*. *State v. Winter*, 2014 MT 235, ¶ 27, 376 Mont. 284, 333 P.3d 222. Being sentenced based on her gender is an illegal sentence that violates Harris's due process rights, and thus is reviewable here.

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[2] The judge's gender stereotyping, in addition to being illegal, also isn't true. According to the most recent Department of Corrections report, women are convicted of theft offenses at the same rate as men. *See* Montana Department of Corrections, *2019 Biennial Report* (December 2018), at A-4. The report is accessible at http://cor.mt.gov/Portals/104/Resources/Reports/2019BiennialReport.pdf.

Sentences imposed based on impermissible considerations violate due process. *U.S. v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). Impermissible considerations include immutable characteristics such as race and national origin. *Bakker*, 925 F.2d at 740. Sentencing courts cannot allow these impermissible considerations to form even a part of the basis for a sentence, even if there might be policy justifications in pursuing certain crimes. *See U.S. v. Borreo-Isaza*, 887 F.2d 1349, 1355-1356 (9th Cir. 1989). For example, while there is an interest in prosecuting drug trafficking from the country of Columbia, it is illegal to sentence a Columbian-origin defendant dealing in Columbian drugs to a harsher sentence than an American-origin defendant dealing in Columbian drugs. *Borrero-Isaza*, 887 F.2d at 1356. Judges cannot make "unfounded assumptions or groundless inferences in imposing sentence." *Borreo-Isaza*, 887 F.2d at 1352.

A defendant's gender is irrelevant at sentencing and is an impermissible consideration. According differential treatment between men and women violates the due process clause. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 690-691 (1973). This remains true when decisions effecting a person's rights are couched within gender stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 250-251 (1989). Judges retain discretion

when deciding a defendant's sentence, but that discretion must still "be exercised within the boundaries of due process." *Bakker*, 925 F.2d at 740.

Once a person's gender is impermissibly considered, the resulting decision is illegal, even if that decision was based on other legitimate factors not related to gender. *Price Waterhouse*, 490 U.S. at 241. When considering a woman applicant in the high-pressure finance industry for a promotion, the partners described their employee as having flawed interpersonal skills that could be correctable by a soft-hued suit, a new shade of lipstick, or by taking a course at charm school. *Price Waterhouse*, 490 U.S. at 256. The partners ultimately denied the promotion. *Price Waterhouse*, 490 U.S. at 256.

The U.S. Supreme Court recognized that even if the applicant had legitimate "personality problems," this would not inform whether the partners would have criticized her as sharply (or at all) if she was a man and so found the employment decision illegal. *Price Waterhouse*, 490 at 258. A criminal sentence based on an impermissible consideration, even if only partially, is still an illegal sentence. *Borreo-Isaza*, 887 F.2d at 1355.

The judge impermissibly considered Harris's gender when imposing sentence. When the judge said that theft crimes are women's crimes, that

women commit theft most of the time, they commit it big time, they keep coming back, and Harris is evidence of that pattern (Tr. 948-949), the judge engaged in gender stereotyping by identifying his perception of Harris's behavior and matching it with his impression of how other woman behaved. Having stereotyped Harris for being a woman, the judge went on to rule that prison authorities and Department of Corrections need to take that stereotype into consideration when releasing "these people" on parole. (Tr. 949.) The judge is explaining that when the crime is theft, being a woman needs to be a part of the sentencing determination because being a woman is an indication that they will steal again and will do so big time. "They're serial offenders." (Tr. 949.) Sentencing a defendant differently because she is a woman is an impermissible consideration, and the judge violated due process when he nonetheless considered Harris's gender before sending her to prison.

The fact that the judge considered other factors in imposing sentence does not defeat Harris's due process claim. The judge said Harris lacked credibility and had "phony-baloney" excuses. (Tr. 947.) The judge also said Harris was a danger to the community given the fact she was on probation and now stood convicted of two more serious felonies. (Tr. 948.) Those

considerations are proper, nonetheless, sentencing proceedings become irredeemably tainted once impermissible considerations like gender become part of that sentencing decision.

Similar to *Price Waterhouse*, the presence of other legitimate factors justifying the sentence does not inform whether the judge would have sentenced Harris differently if she was a man. There may be legitimate reasons to deny a woman a promotion, just as there may be legitimate reasons to put a woman in prison. Nonetheless, once those decisions are couched within gender stereotypes, the resulting sentence violates due process. Even if Harris's gender was not the primary basis for the criminal sentence, it is still a sentence based on an impermissible consideration, and still illegal. *See Borreo-Isaza*, 887 F.2d at 1355.

On remand for resentencing, this Court should order that any further sentencing proceeding be handled by a different judge. Reassignment "is necessary to preserve the appearance of fairness and justice" in Harris's case. *See State v. Rambold*, 2014 MT 116, ¶ 22, 375 Mont. 30, 325 P.3d 686. When determining if a different judge should preside on remand, this Court considers three factors: 1.) Whether the original judge would be reasonably expected to have substantial difficulty putting previously expressed

erroneous views out of mind; 2.) Whether reassignment is advisable to preserve the appearance of justice; and 3.) Whether the waste and duplication of reassignment outweighs the gains made in preserving the appearance of fairness. *State v. Smith*, 261 Mont. 419, 445, 863 P.2d 1000, 1016 (1993). Previously, this Court has remanded for resentencing in front of a different judge following a due process violation. *See Bauer v. State*, 1999 MT 185, ¶¶ 30-32, 295 Mont. 306, 983 P.2d 955.

In *Rambold*, the judge remarked that a fourteen year-old student who had sexual intercourse with her teacher acted older than her "chronological age." *Rambold*, ¶¶ 6, 9. Looking to the factors in *Smith*, the Court concluded that the judge's statements cast serious doubt on the appearance of justice. *Rambold*, ¶ 22. The Court also concluded that there was no basis in the law for a distinction between a victim's "chronological age" and the judge's perception of the victim's maturity; the Court ordered reassignment to a new judge for resentencing. *Rambold*, ¶ 22.

The judge's comments about women committing women's crimes repeatedly and committing them big time have no basis in the law. Presuming that upon remand the judge will somehow disregard his prior erroneous gender stereotyping would be a big leap and not preserve the

appearance of justice. A new sentencing judge would properly ensure Harris will only be sentenced for her conduct, not because she is a woman.

Finally, this Court could also examine this issue for plain error. The U.S. and Montana Constitutions guarantee equal protection of the laws. *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. To prevail on an equal protection claim, an injured party must demonstrate that the governmental action at issue discriminated by impermissibly classifying persons and treating them differently on the basis of that classification. *Spina*, ¶ 85. Judges must always maintain impartiality in demeanor as well as in actions. *State v. Skinner*, 2007 MT 175, ¶ 36, 338 Mont. 197, 163 P.3d 399. Every defendant has the right to an impartial judge, no matter the strength of the evidence. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Plain error avenues are available, however, the straightforward due process illegality presented here through the *Lenihan* exception reaches the same result. If this Court does not remand for a new trial, then it must at least remand for resentencing.

CONCLUSION

Harris respectfully requests this Court to reverse and remand for a new trial. In the alternative, Harris respectfully requests this Court to remand for a new sentencing hearing before a different judge.

Respectfully submitted this 1st day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,705, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-01-2019:

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