IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0732

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT ALTON GOTSCHALL

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Sixteenth Judicial District Court,
Custer County, The Honorable Michael B. Hayworth, Presiding

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ISSUES PRESENTED

1. Did the district court implicitly reject the plea agreement and trigger Appellant's right to withdraw his plea when, for the protection of society, the court restricted Appellant's parole eligibility for the entirety of his sentence?

2. The State concedes that the district court improperly designated Appellant as a Level III sexual offender.

3. Did the district court properly impose sexual offense conditions that are related to Appellant's conviction for incest and necessary for the protection of society?

STATEMENT OF THE CASE

The State charged Appellant Robert Gotschall with felony incest for having sexual intercourse with his 22-year-old daughter, D.B. (Docs. 1, 3.) The charge carried a potential sentence of up to 100 years' incarceration. Mont. Code Ann. § 45-5-507(3).

The parties entered into a plea agreement that was binding upon the State and Gotschall under Mont. Code Ann. § 46-12-211(1)(b). (Doc. 62, attached to Appellant's Br. as App. A.) Gotschall agreed to plead guilty to felony incest in exchange for the State's recommendation that the district court impose a 25-year sentence of incarceration at the Montana State Prison (MSP), with no time

suspended. (Appellant's App. A at 4.) At the change of plea hearing, Gotschall pleaded guilty and the district court accepted the plea. (9/6/17 Tr. at 14, 19.)

The district court sentenced Gotschall to MSP for 25 years with no time suspended. (10/20/17 Tr. at 59; Doc. 73 at 2, attached to Appellant's Br. as App. C.) The court imposed a 25-year parole restriction. (10/20/17 Tr. at 59; Appellant's App. C at 2, 11-13.) The court designated Gotschall as a Level III sexual offender. (10/20/17 Tr. at 60; Appellant's App. C at 3-4.) The court ordered that Gotschall participate in sexual offender treatment during his incarceration, designated Gotschall as a sexually violent predator, and ordered that Gotschall register as a sexual offender. (Appellant's App. C at 3-4.)

STATEMENT OF THE FACTS

I. The Offense

Gotschall's 22-year-old daughter D.B. lived in Le Mars, Iowa, and had never met her father. (Doc. 1.)[1] D.B. obtained Gotschall's telephone number from her grandmother, called Gotschall, and asked to stay with him in Miles City. (*Id.*) Gotschall drove to Le Mars, picked up D.B., and stopped at a motel in Sheridan, Wyoming. (*Id.*) At the motel, they engaged in sexual intercourse. (*Id.* at 2.) The next day, they arrived in Miles City and stayed in Gotschall's camper, which had

[1] Because Gotschall pleaded guilty, the facts of the offense come from the Affidavit for Leave to File Information. (Doc. 1.)

one bed. (*Id*.) They had sexual intercourse over the next two weeks, after which D.B. moved out of the camper and reported Gotschall's conduct to authorities. (*Id*.) D.B. later give birth to a baby girl. (*Id*.) A paternity test identified Gotschall as the baby's probable father with a 99.99% confidence rate. (*Id*.)

At the change of plea hearing, Gotschall admitted to engaging in sexual intercourse with D.B, that he was the father of D.B.'s child, and that he knew that D.B. was his biological daughter. (9/6/17 Tr. at 18-19.)

II. The plea agreement, change of plea, and sentencing

The plea agreement contained the following pertinent understandings between Gotschall and the State:

> 1(a). The State shall recommend that the Defendant be sentenced to the Montana State Prison for twenty-five (25) years, with no time suspended.
>
> . . . .
>
> 1(c). The Defendant is free to argue for any disposition he wishes.
>
> . . . .
>
> 1(h). That a Pre-Sentence Investigation shall be conducted by Adult Probation and Parole which may result in the State making additional recommendations for conditions of probation and/or parole.

(Appellant's App. A at 4-5.) The agreement specified that "[n]o additional promises, agreements or conditions have been entered into other than those set

forth in this plea agreement." (*Id*. at 7.) It also specified that the written agreement "encompasses all of the understandings of the parties." (*Id*. at 3.) Nothing in the plea agreement addressed the district court's authority under Mont. Code Ann. § 46-18-202(2) to declare Gotschall ineligible for parole or to otherwise restrict his eligibility for parole, and it contained no commitment from the State regarding such a restriction.

At the change of plea hearing, the court informed Gotschall of the nature of the Mont. Code Ann. § 46-12-211(1)(b) plea agreement:

> **COURT**: Sure. This Court is not a party to the agreement. I didn't sign the agreement. I'm not bound by the agreement. I am free to impose any sentence up to the maximum provided by law. But based on how you have negotiated the agreement, and the agreement pursuant to 46-12-211(1)(b), if I do reject the agreement and seek to impose a sentence that is in in excess of the agreement, then I will inform you that I intend to exceed the plea agreement and that will trigger your right to either withdraw your guilty plea and to proceed to trial as though you had not pled guilty or to accept the more harsh sentence. Do you understand that?
>
> **DEFENDANT**: Yes, sir.

(9/6/17 Tr. at 7-8.) Gotschall confirmed that he signed and understood the plea agreement. (9/6/17 Tr. at 16.) The court advised Gotschall of the rights he was giving up by pleading guilty and accepted Gotschall's plea. (9/6/17 Tr. at 8-10, 13, 19.) The court ordered a psychosexual evaluation and presentence investigative report (PSI) to be completed prior to sentencing. (9/6/17 Tr. at 21.)

Michael Sullivan, the psychosexual evaluator, recommended that Gotschall be designated as a Level III sexual offender and be ineligible for parole at MSP until completion of Phases I and II of sexual offender treatment. (10/20/17 Tr. at 17, 19.) Sullivan detailed Gotschall's sexual offender history which included two prior sexual offense convictions from other states: one involving a five-year-old male child and one involving an adult woman. (10/20/17 Tr. at 8.) Sullivan also noted Gotschall's two prior convictions for failing to register as a sexual offender. (10/20/17 Tr. at 9.) Sullivan explained that Gotschall's wide variety of selection of previous victims showed a risk in terms of the overall "safety in the community[]" as well as a "high level of sexual deviance and criminality." (10/20/17 Tr. at 15.)

Sullivan explained that Gotschall scored "four out of possible five" for pedophilic interests. (10/20/17 Tr. at 13.) On the psychopathy checklist, Gotschall obtained a "score of 29" which Sullivan explained was "a really very high score[.]" (10/20/17 Tr. at 16.) Sullivan noted that Gotschall's prognosis for treatment was poor given Gotschall's risk assessment, his personality disorders, and pedophilic tendencies. (10/20/17 Tr. at 16-17.) Sullivan recommended that Gotschall be designated as a sexually violent offender because Gotschall had the mental abnormality of pedophilia, which made it likely for him to engage in another predatory sexual offense. (10/20/17 Tr. at 18-19, 23.)

Paul Hawkins, a Probation and Parole Officer at the Billings Department of Corrections, authored the PSI and testified at sentencing. (10/20/17 Tr. at 25.) Officer Hawkins suggested standard conditions as well as some specific sexual offense conditions. (10/20/17 Tr. at 29.) Officer Hawkins stated that he would " . . . fully support Phase I and Phase II at the prison." (*Id*.) The State asked Officer Hawkins about the timeline for completion of Phases I and II sexual offender treatment and Officer Hawkins averred that "five or six years" could be sufficient. (10/20/17 Tr. at 31-32.) The State inquired:

> **STATE**: Okay. So the plea agreement in this case calls for the State to recommend 25 years to Montana State Prison with no time suspended, as well as a battery of fines and fees. What is your recommendation for disposition, Mr. Hawkins?
>
> **OFFICER HAWKINS**: Well, I concur with this. I think this is a very fair and just sentence. I think if Mr. Gotschall is on board, recognizes his issues, like Mr. Sullivan said, perhaps some psychiatric and perhaps some medication and involves himself in the programming, I think that he can finish up that treatment and become parole eligible.
>
> **STATE**: He would be parole eligible after serving between six and seven years, correct?
>
> **OFFICER HAWKINS**: A quarter of the time, yes.

(10/20/17 Tr. at 32.)

The State recommended a 25-year commitment to the Montana State Prison with no time suspended, as provided in the plea agreement. (10/20/17 Tr. at 45-46.)

The State explained:

> **STATE**: This is what we commonly refer to as a modified 1(b) agreement. It's a binding agreement on the parties. The State agrees to make a specific recommendation. The Defendant can argue for whatever disposition that he wishes.
>
> Your Honor, I'm upholding my end of the bargain. I'm recommending 25 years to the Montana State Prison. I believe it's a fair recommendation. I can see the Court sentencing more. I can see the Court sentencing maybe a little less, but I believe this number is appropriate.
>
> Mr. Gotschall is 46 years old. In 25 years he will be 71. It's up to him whether he makes parole, assuming the Court sentences as I have recommended.

(10/20/17 Tr. at 46.) Defense counsel recommended a 15-year commitment to the Department of Corrections with 10 years suspended. (10/20/17 Tr. at 50.)

The State then addressed the sexual offender treatment recommendation from Sullivan:

> **STATE**: . . . Mr. Sullivan mentioned in his testimony to the Court and in his evaluation that he would recommend that Mr. Gotschall complete Phases I and II sex offender treatment before being parole eligible. I'm not going to quote him exactly, but that's what I understood from his recommendation to the Court.
>
> I spoke briefly with [defense counsel] before about this, and I believe that the way that this plea agreement is structured, if the Court were to order that specific language it would trigger Mr. Gotschall's right to withdraw his guilty plea.
>
> My point here, Your Honor, is to say that there is a statute that I believe currently requires exactly what Mr. Sullivan recommended. So I don't believe it's necessary for the Court to include that in the

> sentence. And Your Honor, I am referring to 46-18-207, subparagraph 2(a)(ii.)

(10/20/17 Tr. at 54.) The State continued to argue the theory that because Phases I and II were statutorily required, the district court was not required to specifically order it in the sentencing order because it would be imposed regardless. (10/20/17 Tr. at 55.)

The court asked for defense counsel's response while observing that the plea agreement specified that the State could make "additional recommendations for conditions of probation and/or parole" based on the PSI. (*Id*.) Defense counsel responded: "The State's allowed to argue what they requested, too. The information in the PSI is from the NCIC and from the psychosexual evaluation." (10/20/17 Tr. at 56.) However, defense counsel argued that the State's reliance on the PSI did not "give cause for the State to make a different recommendation" and believed that such a condition would violate the plea agreement. (10/20/17 Tr. at 56, 57.)

In accordance with the plea agreement, the district court committed Gotschall to a 25-year term of imprisonment at MSP with no time suspended. (10/20/17 Tr. at 59.) The court also imposed a 25-year parole restriction, reasoning:

> **COURT**: Furthermore, pursuant to *State v. Lewis*, 2012 MT 157—here the plea agreement was silent, as in *Lewis* the plea agreement was silent

> as to parole restrictions and parole eligibility but allowed the Court to impose conditions that fell within the Court's lawful authority and I do invoke that authority. You are restricted from parole eligibility for the entire term of the sentence.

(*Id*.) Gotschall objected to the parole restriction, arguing that it would violate the plea agreement. (10/20/17 Tr. 60-61.) The district court replied, "So noted." (10/20/17 Tr. at 61.)

The court explained in its written judgment:

> The Plea Agreement is silent as to any parole restriction, whether for the purpose of completing sexual offender treatment, or parole restriction for any other good cause. Neither the document, nor argument at the Sentencing Hearing indicated that the parties agreed to limit the Court's authority to impose a parole restriction. Here, for the reasons set forth herein, the parole restriction is necessary for the protection of society. The Defendant's ongoing criminality, and resistance to benefits of sexual offender treatment, mandate a sentence that limits the opportunity for future victimization by stifling contact with vulnerable persons.

(Appellant's App. C. at 12.) The court imposed the parole restriction pursuant to Mont. Code Ann. § 46-18-202(2) and elaborated that it was necessary for the protection of society given: (1) Gotschall's prior convictions for criminal sexual conduct against a five-year-old child and a young adult; (2) Gotschall's previous violations of failing to register as a sexual offender; (3) Sullivan's prognosis of Gotschall's pedophilia and assessment of his risk to the community; and (4) Gotschall's "poor prognosis for success" on supervision based on past conduct

and unwillingness to accept responsibility for his actions. (Appellant's App. C. at 2, 11-12.)

SUMMARY OF THE ARGUMENT

The district court correctly determined that neither the plea agreement nor the discussion at sentencing indicated that the parties agreed to limit the court's authority to impose a parole restriction pursuant to Mont. Code Ann. § 46-18-202(2) for the protection of society. The parties did not agree to modify the plea agreement at sentencing to limit the court's authority to impose a parole restriction. The discussion at sentencing shows that there was no meeting of the minds on the issue. Because there was no modification of the plea agreement, this Court should interpret the unambiguous language of the plea agreement. The district court properly accepted the plea agreement and exercised its authority to impose a parole restriction for the entirety of Gotschall's sentence.

The State concedes that the district court improperly designated Gotschall as a Level III sexual offender because incest against a 22-year-old does not meet the statutory definition of a "sexual offense" for the purposes of a tier level designation. Although incest is listed as a sexual crime under title 45, chapter 5, part 5, based upon the victim's age, it does not meet the definition of a "sexual offense" pursuant to Mont. Code Ann. § 46-23-502(9)(a).

However, this Court should not relieve Gotschall of his designation as a "sexually violent offender" and related conditions requiring him to complete sexual offender treatment at MSP and register as a sexual offender. The conditions are legal because—although Gotschall did not commit a "sexual offense" for purposes of Mont. Code Ann. § 56-23-502(9)(a)—he did commit a sexual crime under the criminal code. The statutory directives for imposing the conditions for persons convicted of a "sexual offense" under Mont. Code Ann. § 46-23-502(9)(a) do not proscribe the district court's authority to impose conditions that are reasonably related to Gotschall's sexual crime of incest. Further, there is a significant nexus between Gotschall's conviction for incest against his daughter and Gotschall's past offenses and the interests of the protection of society.

STANDARD OF REVIEW

A plea agreement is essentially a contract and is subject to contract law standards. *State v. McDowell*, 2011 MT 75, ¶ 14, 360 Mont. 83, 253 P.3d 812. This Court reviews the district court's interpretation of a contract for correctness. *Brothers v. Home Value Stores, Inc*., 2012 MT 121, ¶ 6, 365 Mont. 196, 279 P.3d 157. Whether the State has breached a plea agreement is a question of law, which this Court reviews de novo. *McDowell*, ¶ 12 (citing *State v. Bullplume*, 2011 MT 40, ¶ 10, 359 Mont. 289, 251 P.3d 114). When a defendant is sentenced

to more than one year of actual incarceration, this Court reviews the sentence for legality only. *McDowell*, ¶ 11 (citing *Bullplume*, ¶ 10).

ARGUMENT

I. The district court properly imposed a parole eligibility restriction.

A. The written plea agreement did not address the court's authority to impose a parole restriction.

When an agreement is committed to writing, the court should generally restrict its interpretation of the parties' agreement to the plain language of the agreement itself. "Contract law principles require that '[w]here the contractual language is clear and unambiguous on its face, it is this Court's duty to enforce the contract as drafted and executed by the parties.'" *State v. Shepard*, 2010 MT 20, ¶ 14, 355 Mont. 114, 225 P.3d 1217, *quoting Felska v. Goulding*, 238 Mont. 224, 230, 776 P.2d 530, 534 (1989).

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Section 28-3-301, MCA. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter." Section 28-3-303, MCA. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." Section 28-3-202, MCA. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." Section 28-3-401, MCA; *see also Carelli v. Hall*, 279 Mont. 202, 209, 926 P.2d 756, 761 (1996) ("Where the language of an agreement is clear and unambiguous and, as a result, susceptible to only

> one interpretation, the duty of the court is to apply the language as written.").

Richards v. JTL Group, 2009 MT 173, ¶ 14, 350 Mont. 516, 212 P.3d 264.

The written plea agreement between the State and Gotschall plainly shows that the parties did not come to an agreement that the sentence to be imposed by the court would not include a restriction on Gotschall's eligibility for parole. As Gotschall acknowledges on appeal, the agreement was silent on the issue, and nowhere in the agreement did the parties express their intent that a parole restriction not be imposed. (Appellant's Br. at 13, 19.)

In accordance with the written plea agreement and the State's oral promise at sentencing, the State was bound to its recommendation in the plea agreement that Gotschall be sentenced "to the Montana State Prison for twenty-five (25) years, with no time suspended." (Appellant's App. A at 4.) The State made that recommendation. (10/20/17 Tr. at 46.) This Court "will not assist a defendant in escaping the obligations of his plea agreement after he has received its benefits." *State v. Keys*, 1999 MT 10, ¶ 19, 239 Mont. 81, 973 P.2d 812. Gotschall received a substantial benefit because the maximum possible sentence was 100 years' incarceration and the State recommended a 25-year sentence. The plea agreement is satisfied, and the district court properly accepted the agreed-upon terms. Therefore, this Court should apply the unambiguous language of the plea agreement as written.

B. The parties did not modify the plea agreement to limit the district court's authority to impose a parole restriction for the protection of society.

A prosecutor who engages in plea bargaining "must meet strict and meticulous standards of both promise and performance relating to plea agreements, because a guilty plea resting on an unfulfilled promise in a plea bargain is involuntary and prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable." *State v. Rardon*, 2002 MT 345, ¶ 18, 313 Mont. 321, 61 P.3d 132 (internal quotation marks and citations omitted). There are no hard and fast criteria for determining whether a plea agreement has been breached, because each case turns on its own unique facts. *McDowell*, ¶ 14.

Gotschall does not argue that the State breached the plea agreement but instead argues that the parties agreed to modify the plea agreement, the result of which foreclosed the district court's authority to restrict parole. (Appellant's Br. at 15-16.) Gotschall avers that the State "promised Gotschall its recommendation was that the court not impose a parole restriction." (Appellant's Br. at 19.) Gotschall argues that the parties "agreed the court would not impose a parole restriction" and the "State explicitly informed the court that a parole restriction would violate the plea agreement." (Appellant's Br. at 16.)

The State and Gotschall did not agree to limit the district court's authority to impose a parole restriction for the entirety of Gotschall's sentence under Mont. Code Ann. § 46-18-202(2) for the protection of society. When the State recommended a 25-year MSP sentence, it highlighted "how dangerous Mr. Gotschall is" and stated it could "go on and on" but referred to Sullivan's testimony and Gotschall's criminal history. (10/20/17 Tr. at 47.) Defense counsel argued for facts in mitigation of sentence. (10/20/17 Tr. at 51-53.) There was no meeting of the minds between the State and Gotschall that the district court could not exercise its discretion to impose a parole restriction for the protection of society.

Also, no oral or written "promise" from the State exists that it would foreclose the district court's ability to impose such a parole restriction. Gotschall can identify no point in the record where the State "promised" Gotschall it would recommend the court not impose a parole restriction. Even if this Court viewed the State's discussion of sexual offender treatment as a promise to not recommend a parole restriction, the prosecutor abided by this "promise" and left the decision on parole ineligibility with the district court. *See* 10/20/17 Tr. at 46 (the prosecutor explained that his recommendation was a 25-year sentence and "It's up to [Gotschall] whether he makes parole, assuming the Court sentences as I have recommended.").

To the extent this Court interprets the discussion of Phase I and II sexual offender treatment as implicating the district court's authority to impose a 25-year parole restriction, the State and Gotschall did not agree to modify the plea agreement. The State argued that if the court ordered the "specific language" related to Phases I and II sexual offender treatment, it would trigger Gotschall's right to withdraw his plea, and advised the court to simply omit the language in its sentencing order. (10/20/17 Tr. at 54-55.) The State did not believe that it was "necessary for the Court to include [sexual offender treatment] in the sentence[]" because the State erroneously believed the condition would be imposed regardless of the court's disposition. (10/20/17 Tr. at 54; *see* Mont. Code Ann. § 46-18-207(2).) Defense counsel countered that the State's reliance on the PSI did not give "cause for the State to make a different recommendation." (10/20/17 Tr. at 56.) Both parties' comments strongly suggest that they did not have a meeting of the minds to modify the plea agreement and did not contemplate a modification to preclude the parole restriction that the district court actually imposed.

And the State ultimately made no recommendation on sexual offender treatment. The recommendation for sex offender treatment came from the psychosexual evaluator's well-founded conclusions, not from the prosecutor. (10/20/17 Tr. at 19.) This Court has observed in discussing when the PSI author recommended sex offender treatment and the State was silent on the issue that:

"[W]hen a probation officer recommends a sentence different from that contained in a plea agreement, this does not constitute breach of the plea agreement by the prosecutor because the probation officer's recommendation is not equivalent to the prosecutor's recommendation." *State v. Leitheiser*, 2006 MT 70, ¶ 21, 331 Mont. 464, 133 P.3d 185 (*overruled on other grounds by State v. Herman*, 2008 MT 187, 343 Mont. 494, 188 P.3d 978). This Court has explained that PSI recommendations are different because "the probation officer was not a party to the plea agreement, as probation works independently of the prosecution." *Id*.

Even if this Court viewed the State's discussion as a recommendation for disposition related to Gotschall's parole eligibility, the State still did not alter the plea agreement. Under the plea agreement, the State was allowed to make "additional recommendations for conditions of probation and/or parole" after the PSI recommendations. (Appellant's App. A. at 4-5.) The parties thus already agreed that the State could make recommendations regarding parole based on the PSI recommendation. If this Court considers whether the State breached the plea agreement, the State's actions were still within the confines of the plea agreement.

The State did not modify or breach the plea agreement regarding the court's authority to restrict Gotschall's parole pursuant to Mont. Code Ann. § 46-18-202(2).

C. The district court properly accepted the plea agreement and imposed a parole ineligibility restriction.

The district court was authorized to restrict Gotschall's parole for his entire sentence because the plea agreement was silent on the issue and the prosecutor did not modify the plea agreement to preclude the parole restriction imposed by the court. In *State v Lewis*, 2012 MT 157, 365 Mont. 431, 282 P.3d 679, the parties entered into an appropriate disposition agreement under Mont. Code Ann. § 46-12-211(1)(b). *Lewis*, ¶ 2. The agreement provided that the State would recommend a 20-year commitment to MSP with 10 years suspended. *Id*. Nothing in the plea agreement addressed the district court's authority to restrict Lewis's eligibility for parole, and it contained no commitment from the State regarding such a restriction. *Id*. At the change of plea hearing, the State averred that it "would not be seeking a parole restriction." *Id*. ¶ 3. The district court ordered a PSI be prepared, which resulted in the PSI author making a recommendation for a parole restriction. *Id*. ¶ 4.

At the sentencing hearing, the prosecutor recommended a sentence per the plea agreement, highlighted the court's authority to impose a parole restriction under Mont. Code Ann. § 46-18-202(2), and "stated that he would leave the decision of whether to impose a parole restriction to the discretion of the court." *Id*. ¶ 6. The district court accepted the plea agreement and imposed a 20-year commitment to MSP with 10 years suspended, but ordered that Lewis serve the

MSP commitment "without the benefit of parole." *Id*. ¶ 7. Lewis objected, arguing that the district court "had exceeded the bounds of the plea agreement by declaring Lewis ineligible for parole." *Id*. ¶ 8. The district court noted that the plea agreement "didn't address parole eligibility," which permitted the court "to impose parole restrictions up to and including the entire sentence." *Id*. ¶ 8.

This Court upheld the district court's imposition of the parole restriction because the plea agreement was "silent" regarding parole eligibility and noted that the "plain language of the plea agreement demonstrates that the District Court could impose any lawful conditions on the sentence, as long as the sentence fell within the agreed upon disposition." *Id*. ¶ 17. This Court observed that the prosecutor, pursuant to the plea agreement, "was free to either seek a parole restriction, or not[,]" and opted not to do so. *Id*. ¶ 19. This Court also noted that the prosecutor told the court "it was within the court's discretion to impose a parole restriction if it saw fit." *Id*. This Court noted that the prosecutor "did not modify the plea agreement in any way, thus the unambiguous language of the contract is controlling." *Id*.

Lewis is applicable here. The plea agreement was silent regarding the district court's authority to impose a parole restriction; thus, the district court could impose any lawful conditions on Gotschall's sentence. The sentenced imposed was 25 years, in accordance with the agreed upon disposition. The prosecutor was free to

recommend or decline to recommend a parole restriction based on the results of the PSI per the plea agreement. The prosecutor repeatedly highlighted the district court's discretion to craft a sentence. (10/20/17 Tr. at 46.)

Unlike in *Lewis*, however, the prosecutor did not address the court's specific authority to impose a parole restriction under Mont. Code Ann. § 46-18-202(2) and argued that a sentencing condition resulting in a parole restriction would trigger Gotschall's right to withdraw his guilty plea. Such comments and omissions are not fatal to the court's disposition, however, because the court was aware of its exclusive authority to impose a parole restriction, and—to the extent the parties agreed to modify anything in the plea agreement—they did not agree to preclude the restriction actually imposed. The district court imposed the parole restriction pursuant to Mont. Code Ann. § 46-18-202(2) for the entirety of Gotschall's sentence and explained how it was related to Gotschall's danger to society. (Appellant's App. C. at 2.) The parole restriction actually imposed is wholly unrelated to the discussion at sentencing of a 6-7 year restriction to complete Phases I and II sexual offender treatment and, in fact, the district court highlighted the futility of a sex offender treatment restriction for the purposes of treatment given Gotschall's past conduct and the importance of imposing a 25-year parole restriction:

> The safety of the community from sexual assault by Mr. Gotschall is assured for the balance of the 25-year term. It is true that after the

> 25-year term the Defendant will emerge from prison untreated and unsupervised; however, past sexual offender treatment, prior supervision, and prior programming have not been adequate to protect the vulnerable during periods of Mr. Gotschall's community release. There is no reason to believe that (poor prognosis for success) treatment and probation supervision will result in a safer community. However, holding Mr. Gotschall for the balance of the term does assure that he will not continue the pattern of criminality, at least for as long as he is incarcerated.

(Appellant's App. C. at 12-13.)

The court did not implicitly reject the plea agreement in imposing a parole restriction for the protection of society, which the parties did not foreclose in their plea agreement or discuss at sentencing. Therefore, the court was not required to allow Gotschall to withdraw his guilty plea.

If this Court concludes that the district court rejected the plea agreement, the State agrees with Gotschall that the proper remedy is to remand this case to the district court to allow Gotschall an opportunity to withdraw his guilty plea. (Appellant's Br. at 21; Mont. Code Ann. § 46-12-211(4); *State v. Nauman*, ¶ 27, 2014 MT 248, 376 Mont. 326, 334 P.3d 638.)

II. The State concedes that the district court erroneously designated Gotschall as a Level III sexual offender because Gotschall did not commit a "sexual offense."

Under Mont. Code Ann. § 46-23-502(9)(a), a "sexual offense" includes "any violation of . . . 45-5-507 (if the victim is less than 18 years of age and the offender

is 3 or more years older than the victim or if the victim is 12 years of age or younger and the offender is 18 years of age or older at the time of the offense.)" Because D.B. was 22 years old at the time of the offense, the State concedes that, under the facts of this case, Gotschall's conviction for incest is inapplicable as a "sexual offense" under the statute. Since the incest conviction was not a "sexual offense" in this circumstance, "the district court should not have attached a sexual offender level designation" as part of the sentence. *See State v. Holt*, 2011 MT 42, ¶ 21, 359 Mont. 308, 249 P.3d 470; *State v. Leyva*, 2012 MT 124, ¶ 21, 365 Mont. 204, 280 P.3d 252. The State agrees with Gotschall that this Court should remand with instructions to strike the illegal portion of the written judgment. (*See* Appellant's Br. at 26.)

III. This Court should affirm Gotschall's designation as a sexually violent offender and the imposed requirements for sex offender treatment at MSP and registration as a sex offender.

A. There is no conflict between the oral and written judgment.

Gotschall argues that—although the written judgment specifies the conditions of sexual offender treatment, requirement to register as a sexual offender, and the sexually violent predator designation—the district court failed to pronounce the conditions as part of his sentence during the sentencing hearing; thus, the conditions are invalid. (Appellant's Br. at 24.)

Although the oral version of a sentence is controlling, written judgments may help clarify an ambiguous oral sentence. *State v. Waters*, 1999 MT 229, ¶¶ 31-32, 296 Mont. 101, 987 P.2d 1142. A defendant "should not be heard to complain" where "a defendant was clearly put on notice of sentencing conditions and given a sufficient opportunity to respond to those conditions and ask for clarification[.]" *Waters*, ¶ 32.

In *Waters*, this Court found no error where the district court failed to enumerate some conditions at sentencing but the defendant was clearly on notice of the conditions. *Waters*, ¶¶ 31-32. This Court observed that the defendant acknowledged that he had "read and discussed" the PSI, agreed to follow "the conditions of probation or parole set forth in the Plea Agreement[,]" and the district court "clearly put Waters on notice" at the sentencing hearing that he was "subject to the parole conditions listed in the PSI and Plea Agreement[.]" *Id*. ¶ 32.

Here, the district court did not specifically detail the conditions during the oral pronouncement of sentence. However, the district court asked Gotschall at sentencing if he had reviewed the PSI prior to sentencing and defense counsel replied, "He has, Your Honor." (10/20/17 Tr. at 4.) The PSI included the recommendation for sex offender treatment, the sexually violent predator designation, and the sex offender registration requirement. (Doc. 69 at 7, 9.) During the court's oral pronouncement, the court informed Gotschall that he

would be "subject to the conditions and requirements from the PSI, as well as the recommendations, conditions and requirements from the psychosexual evaluation." (10/20/17 Tr. at 60.)

Gotschall was on notice of all of his sentencing conditions. Moreover, the written judgement and the oral pronouncement do not "conflict" because the oral pronouncement did not contain any contradictions to the written judgment. This Court need not remand for correction of Gotschall's sentence based on Gotschall's argument of a conflict between the oral and written judgment.

B. This Court should affirm the district court's imposition of the sentencing conditions because they are related to Gotschall's sexual crime, his past sexual offenses, and the protection of society.

Gotschall argues that because he cannot be designated as a Level III sexual offender as he did not commit a sexual offense, his remaining sexual offense conditions are invalid and should be stricken. (Appellant's Br. at 23-26.)

District courts are afforded "broad discretion in criminal sentencing" and this Court's "review of sentencing conditions is correspondingly deferential." *Nauman*, ¶ 16. This Court will generally affirm a restriction or condition imposed pursuant to Mont. Code Ann. § 46-18-202(1) as long as the restriction or condition has some nexus to the underlying offense or the offender. *State v. Melton*, 2012 MT 84, ¶ 18, 346 Mont. 382, 276 P.3d 900. "A nexus to the offense or offender exists when the restriction or condition is 'reasonably related to the

objectives of rehabilitation and protection of the victim and society.'" *Nauman*, ¶ 17 (citations omitted.) A nexus to the offender is only sufficient to support the condition or restriction when a history or pattern of conduct to be restricted is recent, and significant or chronic. *Id*.

Even if the defendant was not convicted of a "sexual offense" under Mont. Code Ann. § 46-23-502(9)(a), the court retains statutory authority pursuant to Mont. Code Ann. §§ 46-18-201 and -202 to impose such restrictions and conditions as long as they are not otherwise statutorily prohibited. In *Leyva*, the State alleged that the defendant committed burglary "with the purpose to commit a sexual assault[.]" *Leyva*, ¶ 7. Leyva was convicted of burglary and the district court imposed, among other conditions, a condition requiring sexual offender treatment. *Id*. at ¶ 11. Leyva argued that the condition was illegal and should be stricken from his sentence because the condition was permissible only when a defendant was convicted of a sexual offense, which he was not. *Id*. ¶ 18. This Court disagreed, stating:

> Leyva misinterprets a statutory directive for a particular condition as a proscription against the court's discretionary authority to impose such a condition. The statutes cited by Leyva require that the above conditions be imposed when the defendant is convicted of a sexual offense, but they do not restrict those conditions to sex offenses alone.

Id. ¶ 19.

1. Sexual offender treatment[2]

Leyva applies here. If an offender is convicted of a "sexual offense" the district court "shall order" that the defendant complete sex offender treatment during incarceration. Mont. Code Ann. § 46-18-207(2)(a). This statute does not otherwise restrict the district court's authority to impose sex offender treatment. The Legislature's decision to mandate sex offender-related conditions for persons who commit a statutorily defined sexual offense does not imply that the legislature meant to prohibit a sentencing court from imposing the same sex offender-related conditions pursuant to Mont. Code Ann. §§ 46-18-201 and -202 for other offenses. This is especially true for this special application of incest that does not fall under the statutory definition of a "sexual offense," but is certainly a sexual crime under the criminal code and involves an offender with a sexual offending history. As such, the requirement that Gotschall complete Phases I and II sexual offender treatment for his crime of incest is appropriate. *See Leitheiser*, ¶ 24 (rejecting the theory that because the defendant did not plead guilty to a "sex offense[,]" the court lacked authority to impose sex offender treatment as a condition of his sentence.)

[2] Gotschall does not argue that this condition violates the plea agreement, but rather that this condition cannot be applied because Gotschall is not a Level III sexual offender. (Appellant's Br. at 24-25.)

This Court has consistently upheld the imposition of sex offender treatment during incarceration as authorized under Mont. Code Ann. §§ 46-18-201 and -202 if the crime committed was of a sexual nature or if the condition was necessary for rehabilitation or the protection of society. *State v. Larson*, 266 Mont. 28, 33, 878 P.2d 886, 889 (1994); *State v. Black*, 245 Mont. 39, 46-47, 798 P.2d 530, 535 (1990). This Court also analyzes whether there is a "history or pattern of conduct to be restricted" that is "recent, and significant or chronic." *Nauman*, ¶ 17.

Here, there is a clear nexus between Gotschall's conviction for incest and the requirement to complete sexual offender treatment at MSP based on the sexual nature of his crime and his criminal history. First, Gotschall admitted to committing a sexual crime under the criminal code of incest against his biological daughter. (9/6/17 Tr. at 18-19.) Next, Sullivan testified that Gotschall had previously committed a sexual offense against a five-year-old boy and a middle-aged woman, which indicated a high level of sexual deviance and a risk in terms of the "overall safety of the community." (10/20/17 Tr. at 8, 15.) During the court's oral pronouncement, it highlighted Sullivan's observation that Gotschall had been "previously convicted of two sexual offenses." (10/20/17 Tr. at 58.) As Gotschall's committed a crime of a sexual nature and has a history and pattern of committing sexual offense crimes, the condition is appropriate.

2. Registration requirement

For the same reasons, the district court's requirement that Gotschall register as a sexual offender must also be upheld. The fact that Gotschall would be required to register as a sexual offender if Gotschall was convicted of a "sexual offense"[3] does not amount to a proscription against the court's discretionary authority to impose such a condition. *See Leyva*, ¶ 19.

A significant nexus exists between the defendant and his conviction of incest and his previous convictions for failing to register as a sexual offender, allowing the imposition of a condition that Gotschall register as a sexual offender. Gotschall has a criminal history pattern that is significant. *Nauman*, ¶ 17. Here, Gotschall has a history of two prior convictions of failing to register as a sexual offender. (10/20/17 Tr. at 9.) Sullivan specifically testified that Gotschall's multiple failures to register is "additional criminal history which is a significant factor in the overall determination of risk." (10/20/17 Tr. at 10.) Sullivan averred that it showed that Gotschall failed to accept his current status and take responsibility and it related "to the community in terms of public safety." (10/20/17 Tr. at 10-11.) The registration requirement was an appropriate condition of Gotschall's sentence.

[3] *See* Mont. Code Ann. § 46-23-502; Mont. Code Ann. § 46-18-201(7).

3. Sexually violent predator designation

This Court should affirm the district court's designation of Gotschall as a "sexually violent predator" which means a person who "*has been convicted* of a sexual offense against a victim 12 years of age or younger and the offender is 18 years of age or older." Mont. Code Ann. § 46-23-502(11)(b) (emphasis added). Here, Gotschall has a prior sexual offense conviction in Minnesota in 1996 against a five-year-old child. (10/20/17 Tr. at 8, 15.) Gotschall admitted to this conviction. (10/20/17 Tr. at 23-24.)

Although the district court would be required to designate Gotschall as a sexually violent predator under Mont. Code Ann. § 46-23-509(3)(c) if Gotschall was designated as a Level III sexual offender, nothing limits the court's authority to impose a "sexually violent predator" designation if this Court concludes that Gotschall meets the statutory definition.

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CONCLUSION

This Court should remand this case to the district court to strike Gotschall's designation as a Level III sexual offender. This Court should otherwise affirm Gotschall's conviction and sentence.

Respectfully submitted this 23rd 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 principal brief is printed with a proportionately spaced Times New Roman 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 6,875 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-23-2019:

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