

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0242

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT GRAHAM KING,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, The Honorable Michael F. McMahan, Presiding

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## **STATEMENT OF THE ISSUE**

Did the district court impose a legal sentence that was within statutory parameters, under the applicable DUI sentencing statute, Mont. Code Ann. § 61-8-731(3)?

## **STATEMENT OF THE CASE**

Appellant Robert Graham King (King) appeals from his judgment of conviction and sentence for felony aggravated DUI (7th offense) and misdemeanor driving while license is suspended and/or revoked. (D.C. Docs. 30, 36.) King entered an “open” guilty plea to the charges, without a plea agreement, without any promises or understandings as to sentencing or placement, and without any other agreement between the parties. (D.C. Docs. 17-18, 26; 12/20/17 Tr. at 3, 7.) As defense counsel put it, “we are disagreed as to sentencing,” and sentencing was going to be contested. (12/20/17 Tr. at 3, 12.)

The principal dispute at sentencing was whether King could participate—either by sentencing order of the district court or placement by the Department of Corrections (DOC)—in the “veterans treatment court” in the 8th Judicial District Court, Cascade County, without the prosecutor’s consent as required by treatment court statutes. (2/6/18 Tr. at 27-30, 32-38, 40-46; 2/7/18 Tr. at 4-6.) *See* Mont. Code Ann. §§ 46-1-1104(2), -1204(2). As phrased by the district court, it needed to

“figure out if the VA treatment court would require the prosecutor’s consent. . . . I really just need an answer.” (2/6/18 Tr. at 46-47; 2/7/18 Tr. at 4 (consideration of the “specific question of whether [the district court] could order [King] to a veterans treatment court in Cascade County without the prosecution’s approval or consent”).)

Based on the argument of counsel and the court’s own research, the district court ruled that its “hands are tied;” that it could not order King to the treatment court under the applicable sentencing statute; and that the treatment court statutes required the consent of the prosecutor. (2/6/18 Tr. at 35-36; 2/7/18 Tr. at 10-15, 17.) The district court understood the State’s interpretation of the treatment court statutes that, “You cannot get into these courts without a written agreement signed by all parties”—that is, a written agreement signed by the treatment court, defense counsel, and the prosecutor. (2/6/18 Tr. at 27, 30; 2/7/18 Tr. at 6.) King concedes that the district court “agreed with the State” regarding the requirement of consent of the prosecutor. (Br. of Appellant at 3.)

King never filed a motion or made any objection on constitutional separation of powers grounds to the “consent of the prosecutor” provisions of the drug and mental health treatment court statutes; nor did King object or argue that the actual sentence he received was illegal. The district court advised the State that it found the treatment court “consent” provisions “very offensive to the Court’s authority in

sentencing in these types of situations.” (2/7/18 Tr. at 17 (referencing Mont. Code Ann. §§ 46-1-1104(2), -1204(2)).) But the district court did not rule on the “consent of the prosecutor” provisions based on constitutional separation of powers grounds, only as a matter of statutory construction—that the treatment court statutes by their express terms required consent of the prosecutor (in addition to that of the defense attorney and the treatment court). In fact, the constitutional issue raised on appeal here would appear to remain an open question until, as the district court noted, “somebody challenges those statutes.” (2/7/18 Tr. at 17.)

At sentencing it was undisputed that the applicable DUI sentencing statute was Mont. Code Ann. § 61-8-731(3), because King had four or more prior DUI convictions and was previously placed in a residential alcohol treatment facility, having gone through WATCh twice already. (2/6/18 Tr. at 25-26, 28-29, 35-36, 46; D.C. Doc. 24 at 4-5 (presentence investigation); Br. of Appellant at 1.) That statute does not provide or allow for placement in a treatment court as a sentencing option. *See, contra*, Mont. Code Ann. § 61-8-731(1)(b)(i) (the legislature has determined that a sentence to an appropriate treatment court is an option for multiple-DUI offenders who have not previously been placed in residential alcohol treatment). King concedes on appeal that the parties agreed that he “would be sentenced pursuant to § 61-8-731(3) . . . rather than § 61-8-731(1).” (Br. of Appellant at 1.) This concession is the only time King cites to § 61-8-731(3) on appeal.

Thus, for the aggravated DUI, pursuant to Mont. Code Ann. § 61-8-731(3), the district court sentenced King to the DOC for a period of 5 years, with no time suspended; and to a concurrent 6 months in county jail, with all but 1 month suspended, for driving while license is suspended. (D.C. Doc. 30 at 2; 2/7/17 Tr. at 18.) King received credit for time served. (*Id.*) The district court imposed standard and other conditions—without objection from King—set forth in the presentence investigation report (PSI), including costs, fees, surcharges, and a \$5,000 fine, as well as the requirement that King complete chemical dependency and mental health evaluations (or a behavior modification class). (D.C. Doc. 24 at 4-9; D.C. Doc. 30 at 3-6; 2/7/17 Tr. at 18.) In addition, the district court made the recommendation that DOC “place the defendant into an appropriate community-based program, facility, or state correctional institution, with the Court’s recommendation for Montana Eighth Judicial District Veteran’s Court, and if not sent to Veteran’s Court, then the defendant be screened for the WATCH Program.” (D.C. Doc. 30 at 3; 2/7/17 Tr. at 18.)

### **Setting the record straight**

King asserts on appeal that he “was sentenced instead to the Montana State Prison [MSP].” (Br. of Appellant at 6.) This statement is incorrect and is directly contradicted by the record on appeal. (D.C. Doc. 30 at 2; 2/7/17 Tr. at 18.)

Along the same lines, King asserts on appeal that he is currently serving his sentence at MSP and is not receiving chemical dependency, substance abuse, or mental health treatment. (Br. of Appellant at 4-5, 6.) Whether or not that is the case, those factual assertions are not contained in the record on appeal and are irrelevant to the issue presented for review on direct appeal—that is, the legality of the actual sentence imposed, not the subsequent placement or treatment of the offender under that sentence, which are matters suited to habeas corpus or postconviction proceedings. *See* Mont. R. App. P. 8(1) (contents of the record on appeal); *id.* R. 12(1)(d) (parties must state “facts relevant to the issues presented for review”).

Finally, King asserts on appeal that the district court “**opined** that ‘prosecutorial veto over participation in a treatment court or mental health treatment court violate[s] separation of powers.’” (Br. of Appellant at 4 (referencing 2/7/18 Tr. at 11) (emphasis added).) This statement, too, misstates the record and what the district court actually said and did—as clearly shown on the record. The court “opined” no such thing as represented by King on appeal, but merely referenced a distinguishable decision of the Idaho Supreme Court, identified the legal issue presented in that case, and quoted a part of the opinion. (2/7/18 Tr. at 11-12.) *See State v. Easley*, 322 P.3d 296, 303 (Idaho 2014). The district court did not “opine” that the Idaho court’s reasoning was correct,

controlling, persuasive, or pertinent in any way to King’s case or Montana law; the court did not adopt Idaho’s reasoning or make any legal conclusions or constitutional findings based on the material quoted from the cited case.

This Court considers only the district court record, to which the parties are bound, and it will not tolerate or address references to extraneous, non-record material or evidence on appeal. *Brunette v. State*, 2016 MT 128, ¶ 16, 383 Mont. 458, 372 P.3d 476; *State v. MacKinnon*, 1998 MT 78, ¶ 15, 288 Mont. 329, 957 P.2d 23. Therefore, this Court may not consider or address the misstated and non-record “facts,” referenced above, in deciding this appeal.

### **STATEMENT OF THE FACTS**

King was stopped for erratic driving behavior just before 1 a.m., on July 1, 2017, as he was traveling south on North Montana Avenue in Helena. (Aff. at 1 (attached to D.C. Doc. 2).) When the officer activated his emergency lights, King turned sharply and came to a stop on the wrong side of the roadway. (*Id.*) When the officer made contact, King said that he was not supposed to be driving because his license was suspended, he did not have liability insurance, and he was “drunk.” (*Id.*) The officer could smell the odor of an alcoholic beverage emitting from King’s vehicle and he noted that King’s speech was slow and slurred.

The officer had King exit the vehicle to perform Standardized Field Sobriety Tests (SFSTs) and verify whether King was safe to be driving. (*Id.*) The officer observed that King was unsteady on his feet and had a hard time balancing when he exited the vehicle; King told the officer, “I’m not safe to be driving.” (*Id.*)

The Horizontal Gaze Nystagmus (HGN) test showed impairment, and King did not perform the “walk and turn” or “one leg stand” tests. (*Id.*) King, again, stated that he was “drunk,” and that there was no point in performing the tests. (*Id.*) While conducting the SFSTs, the officer, again, smelled the odor of an alcoholic beverage emitting from King’s breath; observed that King’s eyes were red and glassy; and observed King swaying side to side and front to back. (*Id.*)

The officer read King the Preliminary Alcohol Screening Test Advisory and requested a breath sample. (*Id.*) During the 20-minute deprivation period, King told the officer, “I’m drunk, I’m in the wrong, and I know it.” (*Id.*) The preliminary breath test provided a positive result of 0.204 BAC, and King was arrested for DUI. (*Id.*) King agreed to a blood test and was transported to St. Peter’s Hospital where a legal blood draw was performed. (*Id.*)

King’s drunk driving career spanned a period of nearly 30 years prior to the instant offense, during which he had been convicted of DUI 6 times before: on or around October 3, 1989; July 29, 1993; May 15, 2000; September 11, 2000; February 9, 2006; and May 1, 2014. (D.C. Doc. 3; D.C. Doc. 24 at 2; 2/6/18 Tr. at

32.) Thus, this was King's seventh DUI, and his third felony DUI—the first 2 felonies occurring in 2006 and 2014. (D.C. Doc. 24 at 4; 2/6/18 Tr. at 9.)

King has been to WATCh twice, once in 2006 and again in 2014, for the prior felony DUIs, as well as “level 1 outpatient treatment at Boyd Andrews in 2006.” (D.C. Doc. 24 at 4; 2/6/18 Tr. at 10.) King has been on and off supervision with DOC since 1996. (D.C. Doc. 24 at 4.) In fact, at the time of his arrest for this offense, King was on conditional release from DOC, was being supervised by the Helena Probation and Parole office for his most recent felony DUI, and was due to discharge that commitment on May 1, 2019. (D.C. Doc. 24 at 4; 2/6/18 Tr. at 9-10.) Thus—regardless of the sentence imposed in this case—King would be subject to DOC custody, placement, and supervision, at DOC's sole legal discretion, for his sixth DUI for more than a year following sentencing on this seventh DUI.

King pled guilty to this new felony DUI and does not dispute any of the above facts. (12/20/17 Tr. at 4-11.)

The PSI reflected conclusions about King's criminal and alcohol treatment history, arrived at after multiple interviews. (2/6/18 Tr. at 10-12.) Although King stated that he was pleading guilty to these charges “to accept accountability,” he offered “no explanation as to why he continues to drink and drive to the point of his seventh DUI conviction despite both inpatient and outpatient treatment. He

says he wants help but appears to deny that his actions are, as indicated by his NCIC record, criminal.” (D.C. Doc. 24 at 5.) When asked about his prior treatment and any possibilities for intervention, King stated that:

going through WATCH was like getting through boot camp for military recruits, stating that a person does what is needed to get through the program without any personal investiture. He indicated he felt WATCH did nothing to address his alcohol issues and that going a third time would be fruitless. He indicated he would be interested in Treatment Court and Veteran’s Treatment Court as well as any option that included continuing his chemical dependency treatment at Fort Harrison.

Throughout our PSI interview and in follow-up telephone conversations, Mr. King seemed either unaware of, in denial of, or insouciant toward the limited options available to him to account for this incident or the severity of potential sentences the Court could levy as he faces his seventh DUI conviction. This Writer is concerned that the Defendant is facing his third felony DUI and still cannot see the criminality of his behavior and the risk he poses to the community with his choice to drink and drive.

(*Id.*) Essentially, the PSI author concluded, based on what King had said during the interviews, that King did not seem to take his treatment experience at WATCH seriously; that he only did what was necessary to get through; that WATCH “didn’t do anything for him;” and that he still seemed unable “to see the criminality in his behavior of continuing to drink and drive.” (2/6/18 Tr. at 11-12.)

Despite this dim view of King’s seriousness about treatment, and his repeated failures to cease drinking and driving, the PSI author testified that WATCH remained a possible treatment option (although they usually do not accept

third-timers, especially if they, like King, do not show a willingness to take the program seriously), as was the Intensive Treatment Unit at MSP. (2/6/18 Tr. at 16-18.) Thus, both of these identified treatment options would remain an option if King received a DOC commitment as recommended by the State. (*Id.* at 17-18, 26, 33-34.)

The PSI reflected that King was interested in a treatment court placement, and information provided as part of the PSI indicated that King had “applied to and was accepted by the Treatment Court, should the [District] Court find his placement in that program appropriate.” (D.C. Doc. 24 at 3, 5.) The PSI made no recommendation, and the PSI author did not testify either on direct- or cross-examination at sentencing, regarding participation in treatment court. The district court record contains little, if any, evidence describing the operations, structure, or eligibility for treatment courts in general, or to the Cascade County veterans treatment court in particular.

At sentencing, defense counsel did describe the circumstances that King was “initially accepted into treatment court in Helena until the State indicated their non-agreement to it. But he was concurrently being screened in Great Falls [for veterans treatment court]. And they put their screening on hold.” (2/6/18 Tr. at 37.) As the State clarified, King was initially accepted in the Helena treatment court because King’s former attorney had submitted an application without consent of

the prosecutor, despite having been told the prosecutor did not agree with that placement in this case. (*Id.* at 46.) When the State “discovered what was going on, that’s when the approval from the treatment court was withdrawn. There was never any agreement on our part. The State has always disagreed with that avenue [in this case].” (*Id.*) The prosecutors here do not have a general policy or practice against treatment court—“Don’t assume that we don’t agree to treatment court”—and do agree to it in other cases where it is believed the offender would benefit from and be successful in treatment court. (*Id.* at 36.) As set forth in the PSI, and for the reasons explained on the record at sentencing by the State, “That’s just not the case here.” (*Id.* at 28, 30-32, 34-36.)

### **SUMMARY OF THE ARGUMENT**

Because King had more than four prior DUI convictions and had already participated in the WATCH program on his last two felony DUIs, the law required him to be sentenced under Mont. Code Ann. § 61-8-731(3), as concede by King. And because of those defining circumstances, the law also foreclosed the possibility of sentencing King to an “appropriate treatment court program” as may be permitted under Mont. Code Ann. § 61-8-731(1)(b)(i). Whether the prosecution consented or not to treatment court—as permitted by the treatment court statutes—

the district court here did not have the authority under Mont. Code Ann. §61-8-731(3) to sentence King to treatment court.

Ultimately, the district court retained the authority to recommend (but not order) alternative treatment placements, including the veterans treatment court and WATCh, as a part of King's legal DOC commitment. Thus, the district court imposed a legal sentence within the statutory parameters of Mont. Code Ann. § 61-8-731(3): an unsuspended 5-year DOC commitment; a statutory fine; standard and recommended PSI conditions; and recommending that DOC place King in veterans treatment court or, alternatively, WATCh.

King does not challenge on appeal the legality of this actual sentence imposed under Mont. Code Ann. § 61-8-731(3), therefore this Court should affirm that sentence. The Court should also decline to address King's constitutional issue raised for the first time on appeal: that the "consent of the prosecutor" provisions of the treatment court statutes somehow constitute an unconstitutional "veto" or usurpation of the district court's judicial power to sentence King for his seventh DUI.

King's claim on appeal has been waived by his failure to object to, raise, preserve, or even hint at the issue before the district court at sentencing. King has not argued or established the necessity for plain error review. King—who does not allege the illegality of his sentence under Mont. Code Ann. § 61-8-731(3)—has not

cited, argued, or established any right to review his unobjected-to sentence on appeal under the *Lenihan* exception.

Also, contrary to his off-hand assertion on appeal, King has not been “subjected to the constitutional error of which he complains,” because the treatment court statutes did not “apply” to King’s sentence. Only Mont. Code Ann. § 61-8-731(3) was “applied” to arrive at King’s sentence—and he does not challenge that statute or the legal sentence imposed thereunder. In the end, King’s constitutional challenge to the treatment court statutes is a speculative, abstract, and non-justiciable question which is not properly before this Court.

## ARGUMENT

**The district court imposed a legal sentence within the statutory parameters of the applicable DUI sentencing statute, Mont. Code Ann. § 61-8-731(3).**

### **A. Standard of review**

This Court reviews a criminal sentence for legality only. *State v. Whalen*, 2013 MT 26, ¶ 14, 368 Mont. 354, 295 P.3d 1055. A sentence is lawful when it falls within the statutory parameters. *State v. Mingus*, 2004 MT 24, ¶ 10, 319 Mont. 349, 84 P.3d 658. Reviewing a sentence for legality is confined to determining whether “the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of

the applicable sentencing statutes.” *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297. Whether a sentence is legal is a question of law that the Court reviews de novo to determine whether the district court’s interpretation was correct. *State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197.

This Court’s review of questions of constitutional law is plenary. *State v. Bedwell*, 1999 MT 206, ¶ 4, 295 Mont. 476, 985 P.2d 150. Whether a district court’s sentence violated a defendant’s constitutional rights is a question of law which this Court reviews de novo. *State v. Ferguson*, 2005 MT 343, ¶ 99, 330 Mont. 103, 126 P.3d 463.

All statutes carry with them a presumption of constitutionality, and this Court construes statutes narrowly to avoid an unconstitutional interpretation if possible. *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997). The Court also reads statutes as a whole, and terms used in a statute should not be isolated from the context in which they were used by the Legislature. *Id.* The party challenging a statute’s constitutionality bears the burden of proving that the law is unconstitutional. *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 13, 352 Mont. 46, 214 P.3d 1248.

**B. King’s DOC commitment under Mont. Code Ann. § 61-8-731(3) is legal.**

District courts are afforded broad discretion in criminal sentencing. *State v. Flanagan*, 2003 MT 123, ¶ 23, 316 Mont. 1, 68 P.3d 796. However, that discretion is not without limitation. *State v. Herd*, 2004 MT 85, ¶ 18, 320 Mont. 490, 87 P.3d 1017. In its most basic sense, the sentence imposed must be within statutory limits. *See* Mont. Code Ann. § 46-18-115(5) (“The court shall **impose sentence** or make any other disposition **authorized by law.**”) (emphasis added); *Himes, Mingus, supra*.

Here, the sentence “authorized by law” for King’s aggravated DUI—committed after six prior DUI convictions and after twice participating in residential alcohol treatment at WATCH—was established by the Legislature as follows:

If a person is convicted of a violation of 61-8-401 [DUI], 61-8-406 [DUI BAC] . . . or 61-8-465 [aggravated DUI], the person has . . . any combination of four or more prior convictions under . . . 61-8-401, 61-8-406, or 61-8-465 . . . and the person was, upon a prior conviction, placed in a residential alcohol treatment program under subsection (2), whether or not the person successfully completed the program, **the person shall be sentenced to the department of corrections for a term of not less than 13 months or more than 5 years or be fined an amount of not less than \$5,000 or more than \$10,000, or both.**

Mont. Code Ann. § 61-8-731(3) (emphasis added). In this case, the prosecutor recommended a sentence under that statute’s authority and within its parameters.

King did not—and still does not on appeal—object to his being sentenced under that statute. And the district court—though perhaps not in total agreement with the law—imposed a sentence in complete compliance with that statute. In other words, the district court had statutory authority to impose the sentence on King; the sentence imposed on King fell within the parameters set by the applicable sentencing statute; and the court adhered to the affirmative mandates of the applicable statutes. *See Himes*, ¶ 22.

Clearly, the district court was looking for treatment options for King: “I understand [the State’s] position on this, but I’m looking for another option for him to get the treatment that he needs.” (2/6/18 Tr. at 33.) But in the end, the court was limited in what it could impose as a sentence, not because the prosecutor did not consent to treatment court in this case, but because the applicable sentencing statute—Mont. Code Ann. § 61-8-731(3)—did not provide that treatment court was a sentencing option. The district court correctly interpreted the applicable statute on the record:

The way I interpret Subsection 3 is he’s not eligible for treatment court. That it is mandatory, because he’s been to WATCH at least once—a person shall be sentenced to the Department of Corrections for a term of not less than 13 months or more than 5 years or be fined an amount. It doesn’t give me that same option under Subsection 1(b), [R]oman numeral one.

(2/6/18 Tr. at 35-36.) While treatment court is an expressly available option under Mont. Code Ann. § 68-8-731(1)(b)(i) of the multiple-DUI offender sentencing

statute, the Legislature omitted treatment court as an option under Mont. Code Ann. § 68-8-731(3)—apparently having decided that multiple-offenders had forfeited such opportunities once they had already been to a residential alcohol treatment program as part of a prior sentence. *See State v. Kurtz*, 2019 MT 127, ¶ 36, 396 Mont. 80, 443 P.3d 479 (this Court noted that participating in or completing a residential alcohol treatment program is the “primary purpose of such a sentence” under Mont. Code Ann.

§ 61-8-731(1)(a)).

Therefore, the prosecutor’s (or the defense attorney’s or the treatment court’s, for that matter—they all have to agree under Mont. Code Ann. §§ 46-1-1104(2) and -1204(2)) consent or lack of consent to treatment court as an appropriate sentence, placement, condition, or recommendation does not change the district court’s sentencing authority or discretion under the applicable aggravated DUI sentencing statute, Mont. Code Ann. § 61-8-731(3). Even if the parties had all agreed to treatment court and there had been no opposition to it, the district court had no authority under Mont. Code Ann. § 61-8-731(3) to do anything other than what it did in this case—impose the fine and DOC

commitment, and make a recommendation<sup>1</sup> to DOC that King be placed in the veterans treatment court or other treatment program.

There is nothing illegal about the sentence imposed on King under Mont. Code Ann. § 61-8-731(3) and this Court should affirm.

**C. The constitutionality of the “consent of the prosecutor” provisions of the treatment court statutes, Mont. Code Ann. §§ 46-1-1104(2) and -1204(2), raised for the first time on appeal, is not properly before this Court.**

**1. The general rule of waiver and failure to invoke plain error**

Generally, this Court will not review an issue to which a party has failed to object and preserve for appeal. *Whalen*, ¶ 19. To properly preserve an issue for appeal, the party objecting has an “obligation . . . to make the basis and grounds for his objection clear to the court,” and “broad general objections do not suffice.” *State v. Weeks*, 270 Mont. 63, 85, 891 P.2d 477, 490 (1995). A party must state grounds for the objection that are sufficiently specific; a general objection to an alleged error is not sufficient. *In re B.I.*, 2009 MT 350, ¶ 16, 353 Mont. 183, 218 P.3d 1235. And the appellant must show that an objection was made at trial on the same basis as the error asserted on appeal. *State v. Nolan*, 2003 MT 13, ¶ 16,

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<sup>1</sup> It was undisputed at sentencing that the district court could make a recommendation to DOC regarding treatment court or other placement as a part of the required DOC commitment. (2/6/18 Tr. at 29-30, 36.)

314 Mont. 47, 62 P.3d 1118. Requiring a defendant to raise the issue in the district court through a specific objection gives the prosecution and the trial court the ability to avoid or correct the purported error. *Id.*

King did not file a motion or object at sentencing that the prosecutor's refusal to consent to treatment court amounted to a constitutional separation of powers violation. King did not object that the treatment court statutes were unconstitutional in any way. King did not object to the sentence imposed by the district court under Mont. Code Ann. § 61-8-731(3), which did not contain a provision ordering that King be placed in an appropriate treatment court.

In fact, King did not even raise the treatment court issue at sentencing; rather, the State mentioned it during its initial recommendation of sentence and the district court made a lengthy inquiry about it. (2/6/18 Tr. at 27-36, 45; 2/7/18 Tr. at 10-15.) King did not cross-examine the PSI author about the availability or appropriateness of treatment court (2/6/18 Tr. at 18-22) and did not enter any facts or evidence on the record in that regard. The only arguments King made were limited to his assertions that the district court or DOC could order or recommend placement in treatment court without the prosecutor's consent, and that veterans treatment court participation did not need the consent of the prosecutor—"they accept virtually every veteran that they can to put into this program" and "they do their own screening." (2/6/18 Tr. at 37-38, 41.) These arguments were wholly

unsupported by legal authority. Instead, the basis of King's argument to the court was, "I'm just going off of what people relayed to me." (2/6/18 Tr. at 45.)

Apparently these people told King's attorney, again without any documentation or authority, that the veterans court does not require prosecutor agreement, only a court order. (2/7/18 Tr. at 6.)

In any event, King only commented or argued at sentencing in regard to whether the prosecutor was required to consent to treatment court proceedings; there was no argument or objection that refusal to consent was a constitutional separation of powers violation that would render King's sentence illegal. King has, therefore waived the constitutional claim and arguments raised for the first time on appeal.

This Court may review errors not objected to in the district court pursuant to its inherent power of plain error review. *State v. Beaudet*, 2014 MT 152, ¶ 18, 375 Mont. 295, 326 P.3d 1101. However, the Court will exercise plain error review sparingly, on a case-by-case basis, and only "where failing to review the claimed error . . . may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *Beaudet*, ¶ 18 (quoting *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996), *overruled in part on other grounds*, *State v. Gallagher*, 2001 MT 39, ¶ 4, 304 Mont. 215, 19 P.3d 817).

King has not invoked plain error on appeal and this Court will not invoke plain error review where a party requests it for the first time in its reply brief. *Beaudet*, ¶ 18; *State v. Raugust*, 2000 MT 146, ¶ 19, 300 Mont. 54, 3 P.3d 115; *State v. Hagen*, 283 Mont. 156, 159, 939 P.2d 994, 996 (1997). King has failed to meet his burden to show that plain error review is appropriate in this case, and he is prohibited from invoking the plain error doctrine in his Reply Brief; such review is unavailable to him in this case. *See State v. Gunderson*, 2010 MT 166, ¶¶ 101-02, 357 Mont. 142, 237 P.3d 74.

**2. Waiver at sentencing—the *Lenihan* exception is not available for King’s “as-applied” constitutional challenge to his legal sentence.**

The Court has also recognized a narrow exception to allow an appellate court “to review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing.” *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). A sentence is not illegal if it falls within statutory parameters. *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citing *State v. Garrymore*, 2006 MT 245, ¶ 9, 334 Mont. 1, 145 P.3d 946). Further, “a sentencing court’s failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one that would invoke the *Lenihan* exception.” *Kotwicki*, ¶ 13.

As argued above, King’s sentence in this case falls within statutory parameters and is a legal sentence—none of which King has disputed, either at sentencing or on appeal. *See supra* at 14-17. The *Lenihan* rule should not apply in this case because King has not alleged that his sentence is illegal or exceeds statutory mandates.

Although the *Lenihan* rule may apply to constitutional challenges of criminal sentences as well (primarily to “facial challenges” but not to “as-applied challenges”), *see Whalen*, ¶ 20 (citing *State v. Strong*, 2009 MT 65, ¶¶ 7, 12, 349 Mont. 417, 203 P.3d 848), King’s constitutional challenge is not directed to the statute under which he was sentenced, Mont. Code Ann. § 61-8-731(3). Instead, King challenges the treatment court statutes, Mont. Code Ann. §§ 46-1-1104(2) and -1204(2), to the effect that the prosecutor’s exercise of discretion to withhold consent to treatment court, as authorized by the statutes, unconstitutionally influenced the district court’s sentencing authority, preventing the court from ordering treatment court as a part of King’s sentence.

As set forth above, the prosecutor’s consent or lack of consent to treatment court under the treatment court statutes had no effect on the district court’s sentencing authority under the applicable statute, Mont. Code Ann. 61-8-731(3). *See supra* at 17. It is impossible under that statute to get what King apparently wants, which is an opportunity to be ordered into treatment court by the sentencing

judge. The prosecutor's consent to treatment court under the treatment court statutes is not even a statutory requirement of Mont. Code Ann. § 61-8-731(3) that would give rise to an objectionable sentence under the lens of *Lenihan* and *Kotwicki*. Even if it were objectionable, King would have had to object, which he did not do in this case.

**3. King's asserted basis for appellate review is faulty, because the statutes he challenges did not affect the legality of his sentence; his claim is speculative and non-justiciable.**

King asserts, without further elaboration, that he "was subjected to the constitutional error of which he complains. His claim is therefore properly before this Court. *See State v. Goodwin*, 208 Mont. 522, 530, 679 P.2d 231, 235 (1984)." (Br. of Appellant at 10 n.2.) This is the one and only basis upon which King claims his appeal is properly before this Court. However, what *Goodwin* actually says is that where a constitutionally-challenged statute was "not applied in defendant's case . . . [then] defendant was not subjected to any of the alleged constitutional errors he complains of and these issues are therefore not before this Court." *Id.* Similarly here, while there was much discussion about the prosecutor's consent provisions of the treatment court statutes, those statutes were not "applied" by the district court to arrive at King's sentence. The district court "applied" Mont. Code Ann. § 61-8-731(3), the DUI sentencing statute that is applicable to

multiple-DUI offenders like King who have previously been to residential treatment.

Basically, King's separation of powers claim on appeal is a speculative constitutional argument in the abstract, is not a justiciable claim, and this Court should decline to review it. *See Whalen*, ¶ 40. The existence of a justiciable controversy is a threshold requirement to a court's adjudication of a dispute. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont. 331, 142 P.3d 864. Among other reasons, a case may be non-justiciable because it presents an issue that is not ripe for judicial determination. *Havre Daily News*, ¶ 18. "[C]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, 278 P.3d 455. Courts do not function "to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364 (citing *Mont. Dep't. Nat'l. Res. & Conserv. v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976)). Even the district court noted, at least tacitly, the lack of a concrete case, ripe for judicial determination "until somebody challenges these statutes." (2/7/18 Tr. at 17.)

For all of the above reasons, this Court should dismiss and deny King's constitutional claim raised for the first time on appeal.

**D. King has not met his burden to prove that the “consent of the prosecutor” provisions of the treatment court statutes usurped the district court’s sentencing authority in this case and violated constitutional protections of separation of powers.**

As repeated throughout this brief, King did not receive the sentence that he did because the prosecutor did not consent to his participation in treatment court; he received the legal and unchallenged sentence that he did because that was the sentence provided for by the applicable multiple-DUI offender sentencing statute, Mont. Code Ann. § 61-8-731(3). That, in and of itself, should be sufficient to thwart King's constitutional separation of powers claim. But it is worth making a few observations regarding his claim.

First, the treatment court statutes read as a whole, which this Court must do, but King has failed to, provide a comprehensive “treatment court structure” beyond simply the parties' agreement. *See* Mont. Code Ann. §§ 46-1-1104, -1204 (cited hereinafter by subsection). In the first instance, treatment courts may be established so that offenders with certain problems (substance abuse or mental disorder) “may be processed to address [that] problem as a condition of pretrial release, pretrial diversion under 46-16-130, probation, incarceration, parole, or other release from a detention or correctional facility.” Subsection (1). Thus, the treatment courts

establish treatment programs to receive offenders through a variety of processes, but the treatment court statutes themselves do not specify, limit, or control how those offenders may be referred by the agencies with the proper authority to do so, such as sentencing courts or DOC.

Second, participation in treatment court is “voluntary and is subject to the consent of the prosecutor, the defense attorney, and the court pursuant to a written agreement.” Subsection (2). This sets up buy-in by the three primary concerned parties—it is not simply the prosecutor that may withhold consent, but also the defense attorney and the treatment court.

Third, incentives may be granted by the treatment court under the “written agreement” if the offender is performing satisfactorily. Subsections 1104(4), 1204(3). The treatment court may likewise impose sanctions under the written agreement if the offender is not performing satisfactorily. Subsections 1104(5), 1204(4). These provisions emphasize the importance of the written agreement in the treatment court process, the need for collaboration, and cooperative effort.

Fourth, upon successful completion of the treatment court program, an offender’s case “must be disposed of by the judge in the manner **prescribed by the agreement** and by **the applicable policies and procedures** adopted by the . . . treatment court.” Subsections 1104(6), 1204(5) (emphasis added). This provision demonstrates that each offender is governed not only by the written agreement, but

by the treatment court's policies and procedures, assuming they have adopted them.

Finally,

The provisions of this part apply only to **offenders who qualify for participation based on qualifications established by each . . . treatment court. . . . This part does not confer a right or expectation of a right to participate in a . . . treatment court and does not obligate a . . . treatment court to accept any offender.** The establishment of a drug treatment court may not be construed as **limiting the discretion of a prosecutor to act on any criminal case that the prosecutor considers advisable to prosecute.** Each . . . treatment court judge **may establish rules and may make special orders and necessary rules** that do not conflict with rules adopted by the Montana supreme court.

Subsection 1104(9) (drug treatment courts); *see also* Subsection 1204(7) (mental health treatment courts) (emphasis added). Again, these provisions emphasize the necessary eligibility and qualification of offenders based on criteria established by each treatment court. Importantly, participation in treatment court is not a right and the laws creating treatment courts do not confer an expectation of participation—the offender has to qualify and perform in accordance with policies and procedures, established qualifications, necessary rules and orders, and the terms of a written agreement, consented to by the court, defense counsel, and the prosecutor. Finally, the prosecution's discretion in criminal cases may not be limited by the establishment of the treatment court.

Read as a whole, then, the treatment court statutes at issue provide much more than a “prosecutorial veto.” They provide for (1) an opportunity for addressing treatment issues for troubled offenders pursuant to the required written agreement entered into by the treatment court, the defense attorney, and the prosecutor; (2) policies and procedures adopted by the treatment court; (3) qualifications established by the treatment court; and (4) other rules and orders of the treatment court. Offenders have no right or expectation to participate.

These statutes provide a structure for how treatment court will work for the offenders who are referred and approved—they do not dictate how those offenders are approved or referred. That ultimately is the “separation of powers” issue in this case: the treatment court statutes do not control how a sentencing court, DOC, probation and parole, or any other entity with authority, control, or custody over an offender decides what they will do within their sphere of power. These statutes are separate from the authority of the courts and correctional agencies that might attempt to sentence, refer, or place these offenders in treatment court. And, in this case, the district court could not sentence King to treatment court, whether all the parties consented or not.

Second, when the Legislature creates “such other courts as may be provided by law,” Mont. Const. art. VII, § 1, it has the inherent power and authority to formulate and revise the parameters of jurisdiction and authority of those courts.

*Bedwell*, ¶ 13; *In re Wood*, 236 Mont. 118, 127-28, 768 P.2d 1370, 1376-77

(1989). These cases are examples of how the adoption of the jurisdiction, structure, and operation of such other courts created by the Legislature, like the youth court in *Bedwell* and *Woods*, or the treatment courts here, do not violate the separation of powers.

Finally, the primary authority cited by King in support of his argument is distinguishable and unpersuasive. *See Easley*, at 303. There, the Idaho court was dealing with an “absolute veto” of the prosecution over the sentencing court’s ability to sentence an offender to treatment court. *Id.* at 302. There was no “agreement or protocol” specific to the treatment court among the various entities that participated in the process. *Id.*

In Montana, on the other hand, there is a detailed, statutorily created structure and jurisdiction which the Legislature has established for treatment courts, in which the prosecution is but one participant, and in which there are required agreements, policies, procedures, rules, orders, and qualifications which govern an offender’s participation. At least there should be—King presented none of these in the record at his sentencing. The circumstances of this case do not support the finding of a violation of the separation of powers based on the provisions of the treatment court statutes. The treatment court statutes are presumed to be constitutional; this Court is required to read them as a whole,

without isolating terms from the context in which they were used by the Legislature, as King has done; and the Court must construe them narrowly to avoid an unconstitutional interpretation.

Regardless of the procedural bars in this case, King has failed to bear his burden to prove the unconstitutionality of his lawful sentence or of the “consent of the prosecutor” provisions of the treatment court statutes.

### **CONCLUSION**

This Court should dismiss or deny King’s appeal because the sentence imposed on him was legal and within statutory parameters, because of his failure to properly preserve the constitutional issue raised, and/or for King’s failure to meet his burden on appeal to show that the district court imposed a sentence in violation of constitutional separation of powers.

Respectfully submitted this 21st day of October, 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 7,188 words, excluding certificate of service and certificate of compliance.

*/s/ Jonathan M. Krauss*  
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## CERTIFICATE OF SERVICE

I, Jonathan Mark Krauss, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-21-2019:

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