

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0527

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBIN REID COLLINS,

Defendant and Appellant.

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**APPELLANT'S OPENING BRIEF**

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On Appeal from Montana Sixth Judicial District Court, Park County  
The Honorable Brenda R. Gilbert Presiding

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Respectfully submitted this 9 day of March, 2022.

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## **ISSUES PRESENTED**

- I. Whether the prosecutor breached a plea agreement when it failed to argue in support of the plea agreement and instead emphasized the victims' dissatisfaction and that the agreement did not provide them justice?
- II. Whether the district court imposed an illegal condition of sex offender registration?

## **STATEMENT OF THE CASE**

On June 16, 2020, Park County District Court Judge Gilbert granted the State of Montana leave to file an Information charging Appellant Robin Reid Collins with Count I: Sexual Intercourse without Consent, a felony, in violation of Montana Code Annotated § 45-5-503(1); Count II: Sexual Assault, a felony, in violation of Montana Code Annotated § 45-5-502(3); and Count III: Sexual Assault, a felony, in violation of Montana Code Annotated § 45-5-502(3). The alleged victim of Count I was A.H., a seven year old foster child; the alleged victim of Count II was A.C., a step-daughter of Mr. Collins; and the alleged victim of Count III was C.N., a two year old step-grandson of Mr. Collins.

Mr. Collins appeared for arraignment on the charges on July 6, 2020, and entered not guilty pleas to all charges in the information. The Court signed an Order Setting Bond and Release Conditions, and released Mr. Collins on the previously posted \$15,000 bond. Mr. Collins remained out of custody until his sentencing hearing.

Mr. Collins moved to dismiss Count II of the information as time-barred by the statute of limitations. The State conceded the issue, and the Court dismissed Count II.

The State offered to amend the remaining two charges to Criminal Endangerment, in violation of Montana Code Annotated § 45-5-207. Mr. Collins agreed to plead no contest to an amended charge of Criminal Endangerment in Count I, and agreed to plead guilty to an amended charge of Criminal Endangerment in Count III.

Mr. Collins entered into a plea agreement with the prosecutor on the morning of the change of plea hearing. In it, the parties also agreed that Mr. Collins receive a six-year suspended sentence with registration as a Sexual Offender during the pendency of his sentence, complete phases one and two of a Sex Offender Treatment program, and continue private counseling. Mr. Collins agreed to submit to a psychosexual evaluation and follow all recommendations. Mr. Collins agreed to have no unsupervised contact with anyone under the age of 16. Mr. Collins agreed that the fines, costs and fees should be left to the discretion of the court at the time of sentencing. The prosecutor agreed, among other things, that she would not attempt to alter or renegotiate the terms of the plea agreement. The prosecutor represented that the victims agreed with the plea deal.

A presentence report was completed. The presentence report included the psychosexual evaluation designating Mr. Collins as a tier one, low risk offender in terms of sexual re-offense based on known re-offense factors. It also included written statements from the alleged victim of the dismissed Count II, and the mother and former foster mother to the victims of Counts I and III, which opposed the amendment to the charges and opposed the suspended six year sentence agreed upon by the parties.

On August 20, 2021, the district court conducted a sentencing hearing. The State presented testimony by Brittany Nickolay, who was the mother of the victim in Count III and former foster mother to the victim of Count I. The State also presented testimony from A.K., the alleged victim of the dismissed Count II.

The prosecutor begrudgingly remarked that she was committed to ask the court to follow the plea agreement. Mr. Collins then argued in support of the plea agreement. In an extensive rebuttal, the prosecutor repeatedly emphasized the victim's deep dissatisfaction with the terms of plea agreement.

The Court rejected the plea agreement, and instead sentenced Mr. Collins to the maximum imprisonment term of ten years at the Montana State Prison on both counts of criminal endangerment, to run concurrently. The Court ordered that Mr. Collins register as a Tier I Sex Offender and required that he complete Phase I and Phase II of Sex Offender Treatment before he is released from the Montana State

Prison. The Court imposed a fine and fees. Mr. Collins was taken into custody at the conclusion of the hearing. Judgement was entered on August 24, 2021.

Mr. Collins filed a Motion for Resentencing or Rescission of the Plea, arguing that the State breached the plea agreement during the sentencing hearing. Mr. Collins requested that the district court either order specific performance of the plea agreement by the State at a new sentencing hearing, or permit Mr. Collins to elect to rescind his plea agreement and the pleas he entered on Counts I and III.

Mr. Collins filed a Notice of Appeal in this Court on October 20, 2021 because an appeal from a judgment must be taken within 60 days after the entry of judgment. Mr. Collins then moved to stay the appeal while the district court ruled on the pending Motion for Resentencing or Rescission of Plea.

This Court granted the stay of Mr. Collins' appeal, and remanded the case to the district court to rule on Mr. Collins' Motion on January 4, 2022. The following day, the district court issued its Decision and Order Denying Motion for Resentencing or Rescission of Plea.

Mr. Collins appeals.

### **STATEMENT OF FACTS**

As stated above, Mr. Collins was originally charged with one count of sexual intercourse without consent and two counts of sexual assault. Doc. 2. The State alleged that from 2016-2019, Mr. Collins had sexual intercourse with A.H.,

who was less than 16 years of age and the Defendant was four or more years older than the victim. Doc. 2. The charge carried a penalty of life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years, and a fine of not more than \$50,000. Doc. 2.

The State also alleged that Mr. Collins subjected A.C., a minor at the time of the alleged offense from 2003-2007, to sexual contact without consent. Doc. 2. The charge carried a potential penalty of life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years, unless good cause exists to impose a term of less than 4 years, and a fine of not more than \$50,000.

Finally, the State alleged that Mr. Collins subjected C.N., a minor at the time of the alleged offense in February, 2019, to sexual contact without consent. The charge also carried a potential penalty of life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years, unless good cause exists to impose a term of less than 4 years, and a fine of not more than \$50,000.

Mr. Collins entered not guilty pleas to all charges on July 6, 2020. Tr. 7/6/20 at 5. Mr. Collins moved to dismiss Count II as time barred, which the State conceded. Doc. 41. The Court dismissed Count II by Order dated December 30, 2020. Doc. 47.

The parties subsequently entered into a plea agreement on June 7, 2021. Doc. 63. The agreement provided that Mr. Collins would plead no contest to the amended charge of Count I: Criminal Endangerment, a felony, in violation of Montana Code Annotated § 45-5-207 and plead guilty to an amended Count III: Criminal Endangerment, a felony, in violation of Montana Code Annotated § 45-5-207. Doc. 63. The parties agreed that the Defendant shall be sentenced to a six-year suspended sentence with registration as a sexual offender during the pendency of his sentence, complete phases one and two of a Sex Offender Treatment program, and continue private counseling. Doc. 63 at 5. The agreement also provided that Mr. Collins shall obtain a psychosexual evaluation and follow all recommendations. Doc. 63 at 5. The plea agreement also required that Mr. Collins have no unsupervised contact with anyone under the age of sixteen. Doc. 63 at 5. The parties agreed that fines, costs and fees shall be left to the discretion of the Court at the time of sentencing. Doc. 63 at 5. The plea agreement further provided that:

- A) The prosecutor will abide by the terms of the pretrial agreement throughout all proceedings relevant to the determination of sentence including sentence review and parole proceedings; defendant understands that the victims of the offense may testify concerning this recommendation for sentencing, as well as the probation officer.
- B) The prosecutor will not attempt to alter or renegotiate the terms of this agreement.

- C) The prosecutor shall not be bound to make the agreed upon recommendation and may either withdraw from the agreement or make a different recommendation in the event that the defendant misrepresents material facts concerning his past record, or probable cause of additional or other criminal conduct by the defendant occurs or is discovered between the change of plea and the time of sentencing.

Doc. 63 at 6.

The plea agreement was not binding upon the court. Tr. 6/7/21 at 41.

Thus, State's support of the agreement was essential to its acceptance by the court, as was the stated support of the victims.

At the change of plea hearing on June 7, 2021, the court was provided with the plea agreement. The court's first question was whether the plea agreement was discussed with the alleged victim and/or law enforcement. Tr. 6/7/21 at 39. The prosecutor confirmed that she had discussed the plea agreement with them, "[a]t length, your Honor." *Id.* The Court specifically inquired whether the alleged victim was in agreement with the plea agreement. *Id.* The prosecutor affirmed, "[y]es, we've been communicating. The victim, the alleged victim, is quite young. So, we've been communicating with his parents. Both I and the Victim Witness Coordinator have consulted with them." *Id.*<sup>1</sup>

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<sup>1</sup> Though there were two alleged victims of the charges, C.N. and A.H., A.H. was a ward of the state in therapeutic group home in Helena. Tr. 8/20/21 at 54. Thus,

Mr. Collins and the State explained the reasoning for the plea agreement to the court. With regard to the amendments from the sexual intercourse without consent and sexual assault charges to two counts of criminal endangerment, the parties explained that they wished to avoid traumatizing minor witnesses by requiring them to testify in the case or subject them to cross examination. Tr, 2/17/21 at 21; Tr. 8/20/21 at 64-66, 70. For Count I, the offer of proof read, “on or about 2016 through 2019, in Park County, Montana, [Mr. Collins] knowingly engaged in conduct that created a substantial risk of death or serious bodily injuries to a minor.” Tr. 6/7/21 Tr. at 48. Mr. Collins entered a no contest plea to this criminal endangerment charge even though he persisted in his denial of A.H.’s allegations, a denial beginning with his interview by law enforcement during the investigation of the case; at his initial appearance; at a motions hearing, during the presentence interview, and at sentencing. PSI at 4, 7; Tr. 7/6/20 at 5; Tr. 2/17/21 at 20.

Mr. Collins pled guilty to the amended offense of criminal endangerment in Count III, and admitted to the conduct of pinching C.N.’s penis. PSI at 4. Mr.

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while it is unclear from the record whether A.H. was consulted, the parents of C.N. who allegedly supported the plea agreement were also the former foster parents of A.H. *Id.*, at 39, 52. In any event, the prosecutor represented that there was agreement by the victims.

Collins explained that the amendment in Count III to criminal endangerment was appropriate because his conduct was not sexually motivated, although it was offensive to the child and his mother. Tr. 8/20/21 at 64.

The Court accepted Mr. Collins' pleas and released Mr. Collins on the same conditions previously set by the Court. Doc. 64.

A presentence report was completed by Adult Probation and Parole. The presentence report referenced Mr. Collins' completed mental health/psychosexual evaluation, which designated him a Tier Level 1, or low-risk for future sexual re-offense. PSI at 6. The evaluation indicated no significant signs of psychopathology but indicated he could benefit from an adult sex offender treatment and was "quite amenable to community treatment." *Id.* The Department of Corrections similarly rated Mr. Collins as a "low risk" offender, with minimal risk and requiring little to no intervention to prevent reoffending. *Id.*, at 7.

Attached to the PSI were the State's charging documents, letters from A.K. (the alleged victim of dismissed Count II), and Brittany Nickolay (mother to C.N. and former foster mother to A.H.). The letters voiced opposition to the State's amendment of the charges and opposed the six-year suspended sentence recommendation contemplated by the plea agreement. PSI exhibits, 6/14/20 letter from A.K. and 6/18/21 letter from Nickolay.

On August 20, 2021, the Court conducted the Sentencing Hearing. Doc. 74. The State called testimony from Brittany Nickolay and A.K. Doc. 74. The State characterized these individuals as “the victims in this case, and people who’ve been impacted by this within the family.” Tr. 8/20/21 at 51. First to testify was Ms. Nickolay. She was the mother of the victim from Count III, step-daughter of Mr. Collins, and previous foster-mother of A.H., the victim in Count I. *Id.* Her testimony recited the letter that was submitted with the PSI. Tr. 8/20/21 at 52. The clear message was that she believed Mr. Collins had not acknowledged his conduct or suffered consequences for his actions. *Id.*, at 54. She testified, “I do not agree with the plea charges that have been settled on. I believe these charges should reflect the fact that he sexually molested and had intercourse with children. The charges that have been settled on do not reflect the gravity of the trust that he built, manipulated and broke. I do not agree that he should only be sentenced to six years.” *Id.*, at 57. Ms. Nickolay hoped that Mr. Collins served consequences for his actions. *Id.*, at 58.

The State then called A.K., the victim of dismissed Count II, to testify. Tr. 8/20/21 at 59. A.K. read the letter that was attached to the PSI describing her experience and disclosure of abuse to Nickolay. A.K. stated that she believed “he has no remorse or sense of accountability for what he’s done to me and, at least, two others. All I can do is work on healing our family, myself, and pray that he

never does this to anyone again.” *Id.*, at 62. A.K did not support the suspended sentence of the plea agreement that would leave Mr. Collins in the community, and believed he was not remorseful or accountable. Tr. 8/20/21 at 62.

After the State presented this testimony, the court then asked whether the State wished to make any argument to the Court. The prosecutor essentially declined to do so. Tr. 8/20/21 at 63. In a single sentence, the prosecutor grudgingly acknowledged she was bound by the plea agreement. The prosecutor’s abbreviated response all but told the Judge that she disagreed with the plea agreement by highlighting the victim opposition in the next breath:

Well, not necessarily argument, your Honor, we did reach the plea agreement in good faith, so we will abide by our commitment to ask the Court to follow the terms of the plea agreement. Of course, we understand that the Court will take into account the victim impact statements, as well.

Tr. 8/20/21 at 63.

Mr. Collins’ attorney then addressed the court regarding the issues of accountability and consequences to Mr. Collins under the plea agreement. Tr. 8/20/21 at 63. Trial counsel noted the State amended the charges with good reason based upon issues of proof as addressed in Mr. Collins’ pretrial motions, and his lack of sexual intent. Tr. 8/20/21 at 64. The defense reiterated that Mr. Collins did not want force a four year old boy to take the stand to testify at a trial.

*Id.* Nor did he want to force A.H. to testify at trial due to her vulnerability, even though he denied her allegations. *Id.*, at 65.

Defense counsel noted Mr. Collins had taken accountability by voluntarily writing an apology letter prior to being charged. Tr. 8/20/21 at 65. Mr. Collins had also taken accountability by voluntarily seeking counseling to address his behavior and to understand his impact on others. *Id.* Mr. Collins also agreed in the plea agreement to register as a Level 1 sexual offender, even though it was not required by the statute of conviction. *Id.*, at 66. The defense also noted that the PSI author found Mr. Collins accountable and empathetic. *Id.*

Defense counsel also discussed the consequences to Mr. Collins as a result of the convictions and sentence contemplated by the plea agreement, including a conviction of record for a crime that he denied committing in order to keep a child off the stand and to obtain the benefit of the plea offer. Tr. 8/20/21 at 67.

Defense counsel also argued in support of the plea agreement because it provided for accountability, punishment, long-term protection in the community, and rehabilitation of Mr. Collins. Tr. 8/20/21 at 68.

Immediately before the court pronounced sentence, it inquired whether there was anything else that it should consider before pronouncing the sentence. Tr. 8/20/21 at 70. Having previously made its two-sentence argument, the State chose

to interject. In light of the letters and testimony of opposition, it was incumbent upon the prosecutor, *if anything*, to argue in favor of the plea agreement. Instead, the prosecutor spoke at length in support of the victims' positions while undermining the defense argument for the plea agreement:

Your Honor, I would just like to say, while it's completely understandable, I understand why the victims in this case have expressed some dissatisfaction with how the matter was resolved, I will say that our Victim/Witness Coordinator, Jenn Zang, and I have both met with the victims, there were some things, like the statute of limitations as it related to Count II, that were unavoidable, it was a consideration, although it wasn't the only consideration by any means, that we, you know, who are all in the judicial system loathe to put small children on the stand and put them through having to testify, particularly regarding emotionally traumatic events.

Nonetheless, the only thing that I would say in response to Ms. Whipple's comments is that, you know, obviously, we appreciate that he's undertaken the obligation to undergo counseling, that he's agreed to register as a sexual offender when the statutory charges to which he's pleading, or which he's agreed to plead in the plea agreement, don't mandate that, but in the end, you know, he is trying to remediate himself within the community, *I get that, but as we've heard, today, from the victims*, they really, you know – these are traumas that they're have to deal with for the remainder of their lives, and, you know, particularly for Count II, which was dismissed because of the statute of limitations, that victim, through no fault of her own, because as Ms. Whipple pointed out, you know, we all get why there is a delay or failure to report sexual crimes on a minor, it is dissatisfying, deeply dissatisfying in terms of perceiving that justice has been had.

Tr. 8/20/21 at 70-71 (emphasis supplied).

The prosecutor then, even while begrudgingly and insincerely asking the court to follow the plea agreement, once again refers the court back to the victim statements:

So, like I said, we entered into the plea agreement in good faith, we would ask you to follow it, taking into consideration the victims' impact statements that have been filed with the Court and read, here, today, into the record, and, you know, in terms of capping the amount of the fine, you know, I don't really – I just think that the Court should assess what the Court deems would be an appropriate amount, given the offenses that are at issue in this case.

Tr. 8/20/21 at 70-71.

Counsel for Mr. Collins commented that the prosecutor's emphasis and invitation to the Court to consider the victim impact statements suggested to the Court that the plea agreement was invalid and should not be followed. Tr. 8/20/21 at 71. Counsel reminded the court that the prosecutor was required to pay the plea agreement more than mere lip service. Tr. 8/20/21 at 71.

The court then stated that it did not perceive the State's argument as inviting it to not support the plea agreement. Tr. 8/20/21 at 71. However, the court then explained that it "paid particular attention to the presentence investigation that includes the statements of the victim, the statements put on the record at the sentencing hearing, and the psychosexual evaluation by Dr. Page, and the statements of counsel," in considering the sentence. Tr. 8/20/21 at 72. The court recited the amendments to the charges, and contended that Mr. Collins already received the benefit of the reduced maximum sentence of the amended charges. The court noted Mr. Collins' denials of the charges and his admissions during the PSI interview and the psychosexual evaluation. *Id.*, at 73.

The court then echoed the statements of A.K. and Ms. Nickolay, which had just been repeatedly highlighted by the prosecutor, and concluded that the plea agreement was “wholly inadequate in terms of accountability and punishment.” Tr. 8/20/21 at 74. The court rejected the plea agreement and instead imposed the maximum sentence of ten years to Montana State Prison for Count I and a sentence of ten years to the Montana State Prison for Count III, to run concurrently. Tr. 8/20/21 at 74. The Court required Mr. Collins to register as a Tier I Sex Offender. Tr. 8/20/21 at 75. The Court imposed a fine of \$2,000 for each felony offense, with costs and fees. Tr. 8/20/21 at 75. The Court required Mr. Collins to complete Phase I and Phase II Sex Offender Treatment prior to his release from Montana State Prison. Tr. 8/20/21 at 75. The Court forbade Mr. Collins from having contact with anyone under the age of eighteen. Tr. 8/20/21 at 75. The Court required that Mr. Collins be screened for alcohol treatment and to follow recommendations. Tr. 8/20/21 at 75. The Court remanded Mr. Collins to the custody of Park County Sheriff’s Department for transport to the Montana State Prison. Tr. 8/20/21 at 76.

Mr. Collins subsequently filed a Motion for Resentencing or Rescission of Plea, based upon the prosecutor’s breach of the plea agreement during the sentencing hearing. Doc. 80. The court ultimately denied his Motion. Doc. 99.

## STANDARD OF REVIEW

A plea agreement is a contract and is thus subject to contract law standards. *State v. Hill*, 2009 MT 134, 350 Mont. 296, 207 P.3d 307. It is well established that the question of whether a contract has been breached is a question of law which the Court reviews de novo. *State v. Shepard*, 2010 MT 20, ¶ 8, 355 Mont. 114, 225 P.3d 1217. Whether a prosecutor has breached a plea agreement is subject to the de novo standard of review. *State v. Rardon*, 2002 MT 345, ¶ 15, 313 Mont. 321, 61 P.3d 132 (*Rardon II*); *State v. Manywhitehorses*, 2010 MT 225, ¶ 10, 358 Mont. 46, 243 P.3d 412.

## SUMMARY OF THE ARGUMENT

Mr. Collins entered into a plea agreement with the State of Montana while facing two remaining counts of sexual abuse of minors. The plea agreement provided that Mr. Collins would enter one no contest and one guilty plea to amended charges of criminal endangerment. The plea agreement provided that the parties would jointly recommend, among other terms, a fully suspended six year sentence.

At a change of plea hearing, the parties presented the district court with the plea agreement. The State represented that the victims were in support of the plea agreement. Mr. Collins pled no contest and guilty to the two amended counts of criminal endangerment.

At sentencing, the prosecutor elicited testimony from the alleged victim of a count that was previously dismissed by the court based upon the statute of limitations. The victim's testimony opposed the plea agreement. The prosecutor also elicited testimony from the mother of one victim, who was also the former foster mother to the second victim. This witness also testified in opposition to the amended charges and six year suspended sentence in the plea agreement.

After eliciting this testimony, the prosecutor failed to make any argument in support of the plea agreement. Instead, the prosecutor noted it was obligated by the plea agreement, but then repeatedly suggested to the court to consider the victim impact statements and testimony.

After defense counsel presented her argument in support of the plea agreement and the court was about to pronounce the sentence, the prosecutor interjected. Rather than joining in the defense's argument or otherwise arguing in support of the plea agreement as she was bound to do, the prosecutor joined in the victims' "understandable" dissatisfaction with how the case was resolved. The prosecutor noted that the children would have to deal with this trauma for the remainder of their lives. The prosecutor noted the way the case resolved was "deeply dissatisfying in terms of perceiving that justice has been had." Even while superficially expressing adherence to the plea agreement, the prosecutor

again asked the court to take into account the victim statements in imposing sentence.

The prosecutor breached the plea agreement. The prosecutor gained the benefit of the bargain of Mr. Collins' pleas, but failed to perform her promise and obligation to jointly recommend a six year suspended sentence. Mr. Collins's case must be reversed and remanded so that he may elect his remedy of specific performance or withdrawal of his pleas.

The district court also imposed an illegal condition of Mr. Collins' sentence. Because criminal endangerment is not a sexual or violent offense, the district court could not require sex offender registration unless Mr. Collins agreed to do so in a plea agreement and the court accepted the plea agreement. The district court rejected the plea agreement. Thus, the court was without power to require Mr. Collins to register as a sexual offender.

## **ARGUMENT**

### **I. THE PROSECUTOR BREACHED A PLEA AGREEMENT WHEN IT UNDERMINED THE PLEA AGREEMENT AND EMPHASIZED THE VICTIMS' DISSATISFACTION AND THAT THE PLEA AGREEMENT DID NOT PROVIDE THEM JUSTICE.**

Regarding the enforceability of plea agreements, this Court has repeatedly held that a plea agreement is a contract between the State and a defendant and is subject to contract law standards. *State v. Rardon*, 2002 MT 345, ¶ 18 (“*Rardon II*”) (citing *State v. Munoz*, 2001 MT 85, ¶ 14, 305 Mont. 139, 23 P.3d 922). The

prosecutor may not retain a benefit of its plea bargain agreement, but avoid its obligation. *Rardon II*, ¶ 18 (citing *State v. Bowley* (1997), 282 Mont. 298, 314, 938 P.2d 592, 601 (Trieweiler, J., specially concurring)). The Court has emphasized that a prosecutor “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. *Rardon II*, ¶ 18.

There are no hard and fast criteria that define when a prosecutor has merely paid “lip service” to a plea agreement as opposed to when a prosecutor has fairly, but strongly, presented the State’s case in order to influence a court to accept its sentencing recommendation. *Hill*, ¶ 29 (citing *Rardon II*, ¶ 21). Each case stands or falls on the facts unique to it. *Id.* “Lip service” is defined as “service consisting only of avowed expressions of adherence, devotion or allegiance; service by words but not by deeds.” *Id.*, at fn. 3 (quoting Webster's Third New International Dictionary: of the English language, unabridged 1319 (Philip Babcock Grove et al. eds., Merriam-Webster Inc. 2002)).

In *Rardon II*, the prosecutor gave mere lip service to the letter of the plea agreement. *Rardon II*, ¶ 19. The prosecutor recommended the sentence agreed upon, but the prosecutor solicited inflammatory testimony at the sentencing hearing from the victims. *Rardon II*, ¶ 19. The Court found that it was not acceptable for the prosecutor to solicit testimony that “is clearly intended to

undermine the plea agreement and to convince the sentencing court that a plea bargained sentence recommendation should not be accepted.” *Rardon II*, ¶ 23 (emphasis retained)(citing *Matter of Palodichuk*, (Wash. App. 1978) 22 Wn. App. 107, 589 P.2d 269 (Prosecutor technically adhered to the terms of the agreement by recommending probation as promised, but by expressing sentence reservations he tainted the sentencing process so that a breach occurred)) (other citations omitted). Even though the district court judge stated that the prosecutor did not influence his sentencing decision, this Court remanded the case to the district court for further consideration in the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in plea negotiations. *Rardon II*, ¶ 23.

In *State v. Hill*, the Court warned the prosecutor came “dangerously close” to breaching the plea agreement by characterizing K.S. as a victim and stating that the case against K.S. was not dismissed because of a lack of evidence. *Hill*, ¶ 30. Three concurring Justices would have found that the prosecutor did not comply with the strict and meticulous standards of promise and performance of the plea agreement when it reminded the district court of the victim of the dismissed charge, contended that the proof against the defendant on that charge was strong, and noted the victim was substantially impacted by the crime. *Hill*, ¶ 49 (Cotter, J., concurring).

In the case at hand, the prosecutor claimed it entered into the plea agreement in good faith but paid mere lip service to the agreement by expressing simply that it was required to follow the agreement, yet repeatedly directing the court to the disagreement of the “victims.” The prosecutor argued that it was “completely understandable” why the victims in the case have “expressed some dissatisfaction with how the matter was resolved.” Tr. 8/20/21 at 70. This is not a case involving disparate sentencing recommendations as in the *Hill* case, where the prosecutor was simply arguing for the court to accept her sentencing argument over the Defendant’s. *Hill*, ¶ 11. This case involves a plea agreement with a joint sentencing recommendation. Doc. 63 at 5.

The prosecutor was bound to meet the strict and meticulous standards of promise and performance of the plea agreement. The prosecutor did not fairly or strongly argue for the plea agreement. To the contrary, the prosecutor’s arguments undermined the plea agreement and emphasized that the resolution agreed to was unjust. The State spent a single sentence of its primary sentencing argument expressing lip-service support for the agreement, and the second sentence drawing the court’s attention to the opposition of the victims. The State later interjected a lengthy statement highlighting the inadequacy of the plea agreement. Due to the joint sentencing agreement, if anything the State was obligated to join the defense in arguing why the agreement was appropriate. It did the opposite.

The prosecutor argued that the reason for the unsupported plea resolution included that it was “loathe to put small children on the stand and put them through having to testify, *particularly regarding emotionally traumatic events.*” Tr. 8/20/21 at 70 (emphasis supplied). The prosecutor thus undermined the plea agreement by emphasizing to the court the particularly traumatic effect of Mr. Collins’ crime upon the victims and the emotional trauma suffered by them. She further undermined the plea agreement by contending that a reason for the agreement was as a means to avoid putting the children on the stand, rather than arguing strongly, or even *arguing* at all, in favor of the resolution contemplated by the agreement.

The prosecutor continued to undermine the plea agreement by reiterating to the court that it heard from the “victims” and the “traumas that they’[ll] have to deal with for the remainder of their lives.” Tr. 8/20/21 at 71. The prosecutor again referred to A.K. as a victim of a crime that was dismissed, and emphasized to the court how it was “particularly” dissatisfying, “deeply dissatisfying in terms of perceiving that justice has been had” since the count was dismissed “through no fault of her own.” *Id.*, at 71. Again, the prosecutor asked the court to consider the victim’s impact statement when sentencing Mr. Collins. *Id.*

The prosecutor undermined any contention that she supported the plea agreement by suggesting that the reasons for resolution were unjustified. *Id.* The court had already dismissed Count II in December of 2020 on the State’s

concession. The prosecutor's repeated characterizations of A.K. as a victim when that charge was dismissed, coupled with her heavy emphasis on the trauma suffered by A.K and deep dissatisfaction with an unjust sentence effectively undermined and breached the plea agreement.

The prosecutor's argument had the intent of, and successfully was able to, undermine the plea agreement. The record shows that the Court "paid particular attention to" the statements of the victim, the statements put on the record at the sentencing hearing, and the statements of counsel. Tr. 8/20/21 at 72. The Court then rejected the fully suspended sentencing recommendation of the plea agreement by imposing the maximum ten year sentence to Montana State Prison with an onerous parole restriction, ensuring that Mr. Collins will serve a long prison term. Tr. 8/20/21 at 74.

Barring a showing of a miscarriage of justice, "a non-breaching defendant must be afforded the initial right to choose from available remedies where the State breaches a plea agreement" being either specific performance or rescission of the agreement. *Munoz*, ¶ 38. In the case of specific performance and resentencing, the new sentencing hearing should "be conducted before a different judge." *State v. Rardon*, 1999 MT 220, ¶ 18, 296 Mont. 19, 24, 986 P.2d 424, 427 (*Rardon I*)(overruled by *Munoz* only as to defendant's choice of remedy). Consequently, Mr. Collins requests that this Court reverse the district court's Judgment and Order

(Doc. 76) and the district court's Decision and Order Denying Motion for Resentencing or Rescission of Plea (Doc. 99), and remand the case for either a hearing for resentencing before a new judge with specific performance of the plea agreement by the State of Montana at that sentencing hearing, or the option of rescission of the agreement.

**II. THE DISTRICT COURT IMPOSED AN ILLEGAL CONDITION OF SEX OFFENDER REGISTRATION.**

The district court's Judgment and Order required that Mr. Collins register as a Tier 1 Sex Offender, and to complete phases 1 and 2 of Sex Offender Treatment prior to being released from the Montana State Prison. Doc. 76.

Montana Code Annotated § 46-23-504(1) requires that a sexual or violent offender shall register as such. A sexual or violent offender means a person who has been convicted of or, in youth court, found to have committed or been adjudicated for a sexual or violent offense. Mont. Code Ann. § 46-23-502(10). The definition of sexual offense includes a discrete list of statutes that count as a sex offense. Mont. Code Ann. § 46-23-502(9). Criminal endangerment, a violation of Mont. Code Ann. § 45-5-207, is not a sexual offense. Nor is it considered a violent offense. Mont. Code Ann. 46-23-502(13).

Montana law otherwise provides that:

A defendant convicted of an offense that would otherwise not be subject to registration under this part may agree to comply with the registration requirements of this part as part of a plea agreement, and a court accepting the plea agreement may order the defendant to comply with this part.

Mont. Code Annotated § 46-23-512.

Consequently, if the sentencing court accepts a plea agreement which includes a provision that the defendant register as a sex offender, then the court is authorized to impose the agreed registration requirement.

In this case, Mr. Collins entered into a plea agreement with the State. Doc. 63. Mr. Collins agreed to enter no contest and guilty pleas to two counts of criminal endangerment. The parties agreed, among other conditions, “that the Defendant shall be sentenced to a six-year suspended sentence with registration as a sexual offender during the pendency of his sentence.” Doc. 63 at 5.

However, the district court unequivocally rejected the plea agreement. Tr. 8/20/21 at 74. The district court concluded “that the plea agreement and the sentence recommended in the plea agreement is wholly inadequate in terms of accountability and punishment.” *Id.* The court contended that the defendant has “volunteered” to register as a Tier 1 Sex Offender, and ordered him to do so. *Id.*, at 74-75; Doc. 76.

The district court was unauthorized to require Mr. Collins to register as a sex offender. Because Mr. Collins was not convicted of a sexual or violent offense, the court could only order him to register if both he agreed to do so in a plea

agreement, and if the court accepted the plea agreement. Mont. Code Ann. § 46-23-512. While Mr. Collins agreed to register as a sex offender as a condition of the plea agreement, the district court's rejection of the plea agreement divested it of any authority to order Mr. Collins to comply with the sex offender registration requirements.

Because the district court did not have the authority to require Mr. Collins to register as a sex offender, this provision of the district court's sentence was illegal. *In re TML*, 2012 MT 9, ¶ 19, 268 P.3d 1255. This Court should strike the condition that Mr. Collins register as a sexual offender.

### **CONCLUSION**

For the foregoing reasons, the judgment of the district court should be reversed and remanded for Mr. Collins to elect either a hearing for resentencing before a new judge with specific performance of the plea agreement by the State of Montana at that sentencing hearing, or the option of rescission of the agreement. The Court should strike the condition that requires Mr. Collins to register as a sex offender.

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**APPENDIX**

Judgment and Order .....1  
Transcripts .....2

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant’s Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quotes and indented mater, and the word count calculated by Microsoft Word for Windows is 6,330 words, excluding certificate of services and certificate of compliance.

By: /s/ Jennifer A. Dwyer

Jennifer A. Dwyer

**CERTIFICATE OF SERVICE**

I, Jennifer Dwyer, hereby certify that I have served a true and accurate copy of the foregoing Appellant's Opening Brief to the following, on March 9, 2022:

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