IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0202

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SEIDEL PINE,

Defendant and Appellant.

REDACTED BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Robert Whelan, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

EILEEN JOYCE
Silver Bow County Attorney
KELLI FIVEY
Deputy County Attorney
155 E. Granite, Room 104
Butte, MT 59701

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Authorities

Montana Constitution

United States Constitution

Other Authorities

STATEMENT OF THE ISSUES

(1) In relevant part, subsection (2) of Mont. Code Ann. § 45-5-303 mandates a sentence of not less than two years or more than 100 years for someone convicted of aggravated kidnapping under subsection (1), unless the defendant voluntarily has released the victim alive, in a safe place, and without serious bodily injury, in which case the authorized sentence is not less than two years or more than 10 years. Does subsection (2) violate a defendant's rights to due process and to a fair and public jury trial under the United States and Montana Constitutions by allowing the sentencing judge to find additional facts that constitute elements of a different offense than the offense the State prosecutes at trial?

(2) Did Seidel Pine receive ineffective assistance of counsel causing prejudice at sentencing when his attorney (a) failed to argue the maximum sentence the court could impose for his aggravated kidnapping conviction was 10 years and instead requested a sentence of 20 years, and (b) acquiesced in a Tier 3 sexual offender designation under Mont. Code Ann. § 46-23-509(2)(c), even though the requisite statutory criteria were not met?

(3) Are the 50-year prison sentence for aggravated kidnapping and the Tier 3 offender designation imposed by the District Court illegal?

STATEMENT OF THE CASE

The State charged Seidel Pine with: (1) aggravated kidnapping, a felony, in violation of Mont. Code Ann. § 45-5-303 (2017), allegedly committed between November 26 – 30, 2018; (2) sexual intercourse without consent ("SIWC"), a felony, in violation of Mont. Code Ann. § 45-5-503 (2017), allegedly committed on November 26, 2018; and (3) partner or family member assault ("PFMA"), a misdemeanor, in violation of Mont. Code Ann. § 45-5-206 (2017), allegedly committed on November 26, 2018. (D.C. Doc. 4.) The case proceeded to a three-day trial in which Mr. Pine testified in his own defense. The jury found Mr. Pine guilty of all three counts. (Trial Tr. at 537; D.C. Doc. 96.)

No witnesses testified at sentencing. After considering each party's sentencing recommendation, the judge imposed a 50-year sentence to Montana State Prison ("MSP") for Count I, a 20-year sentence for Count II to run concurrently with Count I, and a one-year sentence for the PFMA. The judge "suspended 15 years of said

sentence." (Sent. Tr. at 16, attached hereto as App. A.) The District Court awarded 824 days credit for time served, imposed various costs and surcharges, restricted parole until the completion of sexual offender program courses 1 and 2, and ordered Mr. Pine to register as a Tier 3 offender. (App. A at 16 – 17.) The written judgment conforms with the oral pronouncement. (D.C. Doc. 119, attached hereto as App. B.)

Mr. Pine timely appealed.

STATEMENT OF THE FACTS

In November 2018, Seidel reconnected with his former wife, K.R. (Trial Tr. at 116 – 17, 368.) They divorced in 2015 and had four young sons together. (Trial Tr. at 115, 197, 367, 413.) Each of them recently had left other relationships. (Trial Tr. at 116 – 17.) At that time, Seidel was living in Butte in a house with three other people. (Trial Tr. at 368, 475.) K.R. was living with their boys in Missoula. (Trial Tr. at 210 – 11, 368.)

On about November 11, Seidel was visiting K.R. in Missoula and they drove to Butte on a spur-of-the-moment trip. (Trial Tr. at 118, 212, 368, 426.) The couple had been out drinking in Missoula and did not want to go back to K.R.'s apartment where her mom was

babysitting the boys. (Trial Tr. at 211, 426.) So, K.R. left the children at home with her mother and took off with Seidel. (Trial Tr. at 211, 426.) Once they got to Butte, K.R. stayed with Seidel at his home. It is undisputed they drank alcohol and used methamphetamine with Seidel's housemates and friends the entire time K.R. remained in Butte. (Trial Tr. at 119 – 20, 190.)

According to K.R., she and Seidel partied around town for about two weeks without any problems occurring between the two of them. (Trial Tr. at 120.) On November 17 and 23, however, the couple had interactions with law enforcement. (Trial Tr. at 121 – 25, 131 – 38, 368 – 75, 377 – 82.) Neither of those interactions resulted in arrests or criminal charges. (Trial Tr. at 230 – 36, 352 – 56.) K.R. remained with Seidel in Butte, despite claiming she wanted to return to her kids in Missoula.[1] (Trial Tr. at 121, 135 – 37, 375 – 76.)

On November 26, Seidel and K.R. went for a drive in her Jeep. With Seidel driving, the couple headed toward Rocker on the interstate

[1] Both sides presented rather detailed testimony at trial without objection concerning events preceding November 26. The State prosecuted none of K.R.'s allegations against Seidel concerning anything she claimed happened prior to November 26.

and exited there. (Trial Tr. at 143 – 44, 397.) While driving, they got into an argument that turned physical. (Trial Tr. at 143 – 44, 398.)

Seidel testified K.R. became hysterical and started punching and hitting him, grabbing his nose, and turning the steering wheel. He stated K.R. had a knife and started stabbing him with it. (Trial Tr. at 303 – 05, 401 – 03; Exh's. A – D.) He pulled off the road, "backhanded her a couple times[,]" kicked her, and took the knife away from her and threw it into a field. (Trial Tr. at 401 – 02, 416 – 17.) Later, Seidel parked the Jeep so they could fix a taillight. While they were doing that, Seidel knocked K.R. to the ground and kicked her. (Trial Tr. at 397 – 98, 416 – 17, 424 – 25.)

Seidel testified they had "make-up" sex after they argued. (Trial Tr. at 403 – 04, 418 – 19, 425.) He denied forcing K.R. into having sex with him, as well as other allegations K.R. made against him, such as making her get naked in the car while they were driving or walking around outside naked. (Trial Tr. at 397 – 98, 425.) Seidel said their sex was consensual. (Trial Tr. at 403 – 04, 418.) He expressly denied raping K.R, stating "he would never do that." (Trial Tr. at 293.) Seidel

explained they would go "from 100 percent hate each other to 100 percent, you know, loving each other." (Trial Tr. at 419.)

Seidel admitted he owned a flashlight-stun gun device. He stated only the flashlight portion of it worked, even when it was fully charged. Seidel denied ever threatening K.R. with the device or using it on her. (Trial Tr. at 413 – 14.) He expressly denied kidnapping K.R. or holding her in isolation against her will. (Trial Tr. at 366, 376 – 77, 396.)

K.R. testified differently about the events on November 26. She testified Seidel smacked a beer out of her hand as he was driving toward Rocker and she knew he was pretty mad. K.R. feared getting "beat up pretty bad[,]" so she tried to grab the keys from the ignition and cause a wreck. She also tried to open the door and exit the Jeep, but she claimed Seidel pulled her back inside by her hair and threw his phone out the window so she could not use it. (Trial Tr. at 144 – 45.) K.R. and Seidel both described sideswiping another vehicle without stopping as they drove around during this pandemonium. (Trial Tr. 145 – 47, 403.)

As Seidel was driving around, K.R. claimed he told her to take her clothes off and get naked. (Trial Tr. at 147.) K.R. complied, testifying,

"He tells me to get down into – get down into the little, like, foot area, so he's, like, pushing me down. And I – at that point, I felt like he was going to take me somewhere and, because of all the stuff I was doing, that he was, honestly, getting ready to kill me." (Trial Tr. at 147.)

At some point, as it was starting to get dark, K.R. said Seidel stopped and parked the Jeep. (Trial Tr. at 148.) K.R. stated Seidel told her to get out of the Jeep, naked in the snow, and fix the taillight. K.R. testified Seidel kicked her and punched her in the side of the head while she was attempting to fix the light. (Trial Tr. at 148 – 49.) K.R. said the assault "didn't seem that long, because after that he just picks me up and told me to get back in the car." (Trial Tr. at 149 – 50.) Once back in the car, K.R. stated Seidel tasered and punched her. She also claimed Seidel cut her hair off with a knife. (Trial Tr. at 149.)

Seidel started driving around again, but then "stop[ped] the Jeep in the middle of the road, and he pulls his seat back and he tells me to get on." (Trial Tr. at 150 – 51.) K.R. was still naked and Seidel wanted to have sex. K.R. told him she did not feel like it, but he told her, "'Sit your ass up and fucking get on. . . . You know I'm going to take it anyway.'" (Trial Tr. at 151.) K.R. stated she felt like she had no choice

but to get on Seidel. When she was making no effort during the sex, "He says, 'Turn your ass around.' And so I, like, get on, like, my fours, and I put my hands in the backseat. And then he's just – goes from behind." (Trial Tr. at 152.) Once Seidel was finished, K.R. said he told her she could put her clothes back on, which she did. (Trial Tr. at 153 – 54.)

After the fighting and sex, Seidel and K.R. each testified they drove to Deer Lodge, stopped at a liquor store, bought a liter of vodka they drank on the drive back to Butte, and finished the bottle with a friend at his house when they got back to Butte. (Trial Tr. at 154, 404 – 05.) They each also said the tires on K.R.'s Jeep were flat when they left the friend's house, but they were able to drive the Jeep to another friend's house, and eventually got a ride home that night from Seidel's boss. (Trial Tr. at 155 – 56, 406.)

K.R. testified for the next two days she was confined to Seidel's upstairs bedroom and did not believe she was free to move around the house or leave. (Trial Tr. at 156 – 57.) On the evening of November 28, however, K.R. was able to use a housemate's phone to send a Facebook message to her sister, stating, in part, "Michelle, I need your help,

please. He took me out to the hills and shaved my hair off and gave me two black eyes. . . . My car has three flat tires parked at his friend's . . . Please don't text anything back. I'll try and get ahold of you later. I'm trying to escape for real." (Trial Tr. at 158 – 61; Exh. 1.) An attached selfie photo shows K.R. with one black eye. K.R. acknowledged in her testimony that Seidel did not shave her head. (Trial Tr. at 161.)

Later that evening at about 11:30 p.m., police officers visited the house where Seidel and K.R. were staying to conduct a welfare check concerning a woman who "was being held at the house and wasn't allowed to leave, being held by her supposed boyfriend or another male. They reported her Jeep may be in the area. The tires had been slashed on the Jeep and she was reportedly in that house." (Trial Tr. at 267.) When the officers knocked, someone yelled out who's there; the officers announced their presence and then the lights were turned out. The officers left. They were unable to find the Jeep. (Trial Tr. at 267 – 68.)

K.R. testified she, Seidel, and others were inside the home when the officers arrived and knocked. Seidel told her to go upstairs and she did so without attempting to get the officers' attention. (Trial Tr. 164 – 65.) K.R. stated Seidel was mad at her after the officers left, but told

her, "You want to leave, you can leave." (Trial Tr. at 165.) K.R. testified she did not leave because she feared Seidel would tase and stab her with the knife and stun gun he had in his pocket. (Trial Tr. at 165 – 66.)

The next morning, Sergeant Kriskovich followed up on the welfare check by driving by the home. He did not see K.R., the Jeep, or anything illegal going on at the house and did not knock at the door. Another officer visited the home and knocked on the door later that morning, but no one answered. (Trial Tr. at 167 – 68, 239 – 40.)

That evening, K.R. and Seidel went outside to help one of his housemates whose keys were locked in her car. (Trial Tr. at 168.) While Seidel was distracted, K.R. started walking away from the house. K.R. claimed when Seidel noticed her leaving, he ran after her and took her back up to their bedroom where he forced her to change into "really dingy clothes" and threw her shoes out the window. (Trial Tr. at 169 – 70.) Then, according to K.R., Seidel took her outside or to the front door, grabbing his knife and taser and taunting her to leave. This time, K.R. left and took her shoes as she walked away. (Trial Tr. at 170 – 71.)

K.R. testified she saw a woman getting into her car down the road and asked her if she would give K.R. a ride to the store. Apparently, the woman agreed and K.R. got in the vehicle. So did Seidel, who was walking with or behind K.R. The woman dropped them both off in front of Stokes Market in Butte, where K.R. intended to "make a scene." (Trial Tr. at 170 – 72, 434 – 35.)

K.R. said she started "crying really loud" because she wanted "somebody to help me[,]" at which point Seidel got mad and said, "'Fine, you don't want to be with me, that's fine.'" Seidel then turned around and walked away, leaving K.R. alone in the parking lot. (Trial Tr. at 172 – 73.) K.R. called the police. (Trial Tr. at 173.) Seidel walked home alone. (Trial Tr. at 435.)

Officer Sullivan arrived at Stokes Market about 7 p.m. (Trial Tr. at 247 – 48.) After interviewing K.R., Officer Sullivan drove her to St. James Hospital for evaluation. (Trial Tr. at 256 – 57.) Meanwhile, other officers went to Seidel's home and found him hiding in a closet. They arrested Seidel without incident. (Trial Tr. at 219 – 24.)

At the hospital, the examining nurse observed K.R.'s left eye and cheek were swollen and bruised. The nurse also documented bruising

on K.R.'s thighs and right buttock and red, broken skin on an arm, a shoulder, and behind her right knee. (Trial Tr. at 323 – 28; Exh's. 2A – 2E, 5A – 5B.) The nurse performed a sexual assault examination, noting no signs of bleeding, tearing, or other physical injury to the vagina or labia. (Trial Tr. at 329 – 30, 337 – 39.) The nurse did not testify that any of these injuries created a substantial risk of death, caused serious permanent disfigurement or protracted loss or impairment of functioning of a body member or organ, or could reasonably expected to do so in the future. No other witness testified K.R. suffered that type of injury either.

Sentencing

Neither party presented witnesses at the sentencing hearing. The State requested a 40-year MSP sentence for the aggravated kidnapping, 20 years MSP for the SIWC, to run consecutively, and one year in jail for the PFMA to run concurrently to Counts I and II. Out of the combined 60-year prison sentence, the State requested 20 years suspended. Additionally, based on the recommendation of the sexual offender evaluator, Christopher Quigley, the State requested a Tier 3 sexual offender designation and a parole restriction until Seidel

completes sexual offender programs ("SOP") 1 and 2. (Sent. Tr. at 5 – 7.)

[2] The Presentence Investigation ("PSI"), its attachments, and Mr. Quigley's evaluation contain confidential personal information that is exempt from public disclosure. (D.C. Docs. 117, 118, attachments.) Mont. Code Ann. § 46-18-113(1); M. R. App. P. 10(7)(a), (b). Mr. Pine reserves the right to object to any unredacted disclosure of confidential information by the State in its response brief that is not included in the public record.

[redacted]

Defense Counsel requested a 20-year sentence for the aggravated kidnapping and a 10-year sentence for the SIWC, to run concurrently. The Defense simply requested "credit for time served" on the PFMA. (Sent. Tr. at 9 – 10.) Notwithstanding Counsel's initial request for concurrent sentences on Counts I and II, Counsel subsequently asked the District Court "to impose a 30-year sentence with 15 of that suspended[.]" (Sent. Tr. at 10.) Counsel did not object to Seidel needing to complete SOP 1 and 2 while in prison. (Sent. Tr. at 10 – 11.) Counsel did not argue against a Tier 3 sex offender designation or provide an independent psychosexual evaluation.

The District Court pronounced a 50-year MSP sentence for the aggravated kidnapping, 20-years MSP for the SIWC, to run concurrently, and credit for time served on the PFMA. The District Court "suspended 15 years of said sentence." (App. A at 16.) Consistent

with the State's requests, the District Court designated Seidel a Tier 3 offender, ordered him ineligible for parole until he completed SOP 1 and 2 in prison, granted 824 days credit for time served, and imposed surcharges and conditions of probation. (App. A at 16 – 20.)

No one acknowledged or mentioned during sentencing that Mont. Code Ann. § 45-5-303(2) requires a sentence of no more than 10 years when the defendant voluntarily released the victim alive, in a safe place, without serious bodily injury. No one argued K.R. suffered serious bodily injury during the ordeal or that Seidel did not voluntarily release her at Stokes Market. The District Court made neither of those findings before sentencing Seidel.

STANDARDS OF REVIEW

This Court undertakes plenary review of constitutional questions and reviews district court interpretations of the law for correctness. *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406 (citations omitted). "In reviewing constitutional challenges to legislative enactments, the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt."

Sedler, ¶ 5 (citation and internal quotation marks omitted). A party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt; if any doubt exists, it must be resolved in favor of the statute. *Sedler*, ¶ 5 (citations omitted).

"Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo." *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

This Court reviews "a district court's imposition of sentence for legality. . . . Whether a sentence is legal is a question of law that we review de novo to determine whether the court's interpretation of the law is correct." *State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 294 P.3d 197 (*en banc*) (citations omitted). The Court's review "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. Hinshaw*, 2018 MT 49, ¶ 7, 390 Mont. 372, 414 P.3d 271 (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

Mont. Code Ann. § 45-5-303(2) is facially unconstitutional. In relevant part, the statute allows a defendant convicted of aggravated kidnapping to be sentenced from two years to 100 years in prison unless the defendant voluntarily released the victim alive, in a safe place, and without serious bodily injury, in which case the maximum prison sentence is 10 years. The last clause of subsection (2) includes elements comprising a distinct crime from the one described in subsection (1), but does not specify they are facts to be proven by the State at trial beyond a reasonable doubt. This scheme violates due process of law by relieving the State of its burden to prove each element of an offense beyond a reasonable doubt. The scheme also violates a defendant's right to trial by a jury because it usurps the jury's ability to decide whether the defendant is guilty or innocent of the crime for which she or he is to be sentenced.

Alternatively, if the Court determines the statute is facially constitutional, then Seidel received ineffective assistance of counsel at sentencing when his lawyer requested a sentence twice as long as the facts allowed. The State did not provide evidence or argue at trial or

sentencing that K.R. suffered serious bodily injury. Nor did the State aver or prove Seidel failed to voluntarily release K.R. Everyone, including Defense Counsel, simply assumed Seidel could be sentenced up to 100 years for the aggravated kidnapping conviction. It was incumbent on Defense Counsel to assert Seidel's right to no more than a 10-year prison sentence under the facts in evidence.

Furthermore, Seidel's attorney performed deficiently by acquiescing in a Tier 3 sexual offender designation. Mont. Code Ann. §46-23-509(2)(c) sets forth three criteria that must be met before a sentencing court may designate someone a Tier 3 sex offender. [redacted]

Additionally, Seidel's 50-year sentence for aggravated kidnapping and Tier 3 designation are illegal. These portions of the sentence exceed statutory parameters and may be corrected by this Court on direct appeal. Defense counsel's acquiescence in an illegal sentence

cannot supersede the statutory maximum applicable to the facts presented or the statutory requirements for a Tier 3 designation.

ARGUMENT

I. Mont. Code Ann. § 45-5-303(2) is facially unconstitutional.

A. The State must prove all elements of an aggravated kidnapping beyond a reasonable doubt at trial.

In relevant part, subsection (1) of Montana's aggravated kidnapping statute provides:

> (1) A person commits the offense of aggravated kidnapping if the person knowingly or purposely and without lawful authority restrains another person by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force . . . :
>
> . . .
>
> (c) to inflict bodily injury on or to terrorize the victim or another[.]

Mont. Code Ann. § 45-5-303(1). "'Bodily injury' means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment." Mont. Code Ann. § 45-2-101(5).

Upon conviction for aggravated kidnapping under subsection (1), subsection (2) provides:

> (2) Except as provided in 46-18-219 and 46-18-222, a person convicted of the offense of aggravated kidnapping shall be punished by

> death or life imprisonment as provided in 46-18-301 through 46-18-310 **or** be imprisoned in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000, **unless the person has voluntarily released the victim alive, in a safe place, and with no serious bodily injury**, in which event the person shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years and may be fined not more than $50,000.

Mont. Code Ann. § 45-5-303(2) (emphasis added).

> (a) "Serious bodily injury" means bodily injury that:
>
> (i) creates a substantial risk of death;
>
> (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or
>
> (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ.
>
> (b) The term includes serious mental illness or impairment.

Mont. Code Ann. § 45-2-101(66). "Voluntarily released" is undefined in the Montana Code.

In *State v. Stewart*, 175 Mont. 286, 573 P.2d 1138 (1977), this Court held the right to a jury trial does not include the right to have the jury determine facts relating only to the severity of the punishment after guilt has been established. *Stewart*, 175 Mont. at 300 – 01, 573 P.2d at 1146. The Court determined the facts related to the level of punishment for an aggravated kidnapping conviction were not elements of the offense. Therefore, the Court ruled, "it is within the power of the state to allow the trial court, rather than the jury, to make this factual determination." *Stewart*, 175 Mont. at 301, 573 P.2d at 1146, relying on *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). *Stewart* did not address which party carries the burden to prove the facts necessary for the lower sentence. *Stewart* holds only that the sentencing court may determine whether a victim was voluntarily released. *Stewart*, 175 Mont. at 301, 573 P.2d at 1146. *See also State v. Smith*, 228 Mont. 258, 266, 742 P.2d 451, 455 (1987) (finding no abuse of discretion where the district court made no specific findings but refused to apply the reduced penalty for aggravated kidnapping because the trial record revealed the victim was not released voluntarily in a safe place).

More than 20 years after this Court decided *Stewart*, the Supreme Court ruled in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000):

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362–63, *citing Jones v. United States*, 526 U.S. 227, 252 – 53, 119 S.Ct. 1215, 1228 – 29, 143 L.Ed.2d 311 (1999). "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243, n.6, 119 S.Ct. at 1224, n.6. The Fourteenth Amendment commands the same answer in a case involving a state statute. *Apprendi*, 530 U.S. at 476, 119 S.Ct. at 2355. *Accord Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004); *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

This Court has acknowledged, "the determination of whether a jury must find a fact beyond a reasonable doubt in a criminal case turns upon whether the fact is an element of the offense." *State v. Meyer*, 2017 MT 124, ¶ 14, 387 Mont. 422, 396 P.3d 1265, citing *Alleyne*, 570 U.S. at 107, 133 S.Ct. at 2158. "A fundamental principle of our criminal justice system is that the State prove every element of a charged offense beyond a reasonable doubt, , and we have previously stated '[i]f the burden of proof was shifted as [the defendant] claims, there is no doubt his fundamental constitutional rights have been violated.'" *State v. Daniels*, 2011 MT 278, ¶ 33, 362 Mont. 426, 441, 265 P.3d 623, quoting *State v. Price,* 2002 MT 284, ¶ 33, 312 Mont. 458, 59 P.3d 1122 (citing *In re Winship,* 397 U.S. 358, 363–64, 90 S.Ct. 1068, 1072–73, 25 L.Ed.2d 368 (1970)). *Accord* Montana Constitution, Article II, Section 17. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304, 124 S.Ct. at 2357, quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

The Supreme Court's –

> commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305–06, 124 S. Ct. at 2538–39 (citations omitted).

Apprendi and *Blakely* reject the proposition "that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge." *Blakely*, 542 U.S. at 306, 124 S. Ct. at 2539. "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306–07, 124 S. Ct. at 2539, 159 L. Ed. 2d 403 (footnote

omitted). "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power." *Blakely*, 542 U.S. at 308, 124 S. Ct. at 2540.

Repeatedly, the Supreme Court has reaffirmed *Apprendi*'s core holding: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, ___ U.S. ___, 139 S.Ct. 2369, 2373, 204 L.Ed.2d 897 (2019). "[T]he absence of a jury's finding beyond a reasonable doubt [not] only infringe[s] the rights of the accused; it also divest[s] the "'people at large'"—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments." *Haymond*, 139 S.Ct. at 2378–79, citing *Blakely*, 542 U.S. at 306, 124 S.Ct. 2531 (quoting Letter XV by the Federal Farmer (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981)).

In Montana, "[t]he right of trial by jury is secured to all and shall remain inviolate." Article II, Section 26 of the Montana Constitution.

See City of Kalispell v. Salsgiver, 2019 MT 126, ¶ 15, 396 Mont. 57, 443 P.3d 504 (*en banc*). "In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed[.]" Montana Constitution, Article II, Section 24. *See State v. Byrne*, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440 (*en banc*).

B. Subsection (2) of Mont. Code Ann. § 45-5-303 violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 2, Sections 17, 24, and 26 of the Montana Constitution, because it permits a judge to determine facts during sentencing that comprise elements of a different offense than the elements set out in subsection (1) proven by the State at trial.

"A defendant's facial constitutional challenge is based on the defendant's allegation that the *statute* upon which his sentence was based is unconstitutional—i.e. his sentence is illegal. . . . Facial constitutional challenges to sentencing statutes are addressed even if they are raised for the first time on appeal." *Sedler*, ¶ 11 (emphasis in original, citations and internal quotation marks omitted).

This Court has not reexamined *Stewart* in light of *Apprendi* and its progeny. As in *Apprendi*,

> this case does not raise any question concerning the State's power to manipulate the prosecutor's burden of proof by, for example, . . . placing the affirmative defense label on "at least some elements" of traditional crimes, *Patterson v. New York,* 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

Apprendi, 530 U.S. at 475, 120 S. Ct. at 2355. *Apprendi* thus makes explicit *Patterson*'s analysis is limited to affirmative defenses. The instant facial challenge is squarely before the Court.

In Montana, an affirmative defense is

> one that admits the doing of the act charged, but seeks to justify, excuse or mitigate it. . . . There is no need for an affirmative defense when the conduct is not unlawful in the first instance; an affirmative defense is necessary only when the charged conduct is unlawful but the unlawful conduct is excused by, for example, compulsion, entrapment, [or] justifiable use of force[.] Section 46-15-323(2), MCA.

City of Missoula v. Shumway, 2019 MT 38, ¶ 12, n.1, 394 Mont. 302, 434 P.3d 918 (citations and internal quotation marks omitted). "As a matter of law, proof of the elements of an affirmative defense completely negates otherwise sufficient proof of the essential elements of a charged offense." *City of Helena v. Parsons*, 2019 MT 56, ¶ 17, 395 Mont. 84, 436 P.3d 710 (citation omitted).

In *Stewart*, this Court summarized *Patterson*:

> [*Patterson*] held that **a state may require a defendant to prove mitigating circumstances of severe emotional distress as an affirmative defense to a second degree murder charge**. . . . The Court found the mitigating factor was a separate issue, neither presumed nor inferred to be an element of the crime from the statutory definition of the offense, and the state therefore did not have the burden of proving it.

Stewart, 175 Mont. at 300, 573 P.2d at 1146 (emphasis added).

While the Court correctly summarized *Patterson*, it made two analytical mistakes in reaching its result in *Stewart*. First, the Court read too much into *Patterson*'s holding, which is limited to whether a state may impose the burden to prove an affirmative defense at trial on the defendant. This Court erroneously analogized New York's affirmative defense requirements applicable during trial to Montana's bifurcated set of requirements in the sentencing subsection of the aggravated kidnapping statute. *Stewart*, 175 Mont. at 299, 573 P.2d at 1145; *Patterson*, 432 U.S. at 211, 97 S.Ct. at 2327.

Second, building upon the first error, the Court did not reconcile Montana precedent regarding affirmative defenses with its resolution of *Stewart*. Quoting only subsection (1) of the aggravated kidnapping

statute, the Court held, "The intent to restrain and the restraint, for any of the enumerated purposes, are the facts the jury must determine to establish an accused's guilt of aggravated kidnapping. No additional facts need be proved in order to constitute the crime." *Stewart*, 175 Mont. at 300, 573 P.2d at 1146. Unlike *Patterson*, where the elements of murder and manslaughter were the same under state law except for the defendant's mental state, *Stewart* and the present appeal involve the last clause of subsection (2) in Montana's aggravated kidnapping statute, which requires proof of facts, unrelated to the accused's mental state and never presented to or considered by the jury, to receive a lower sentence. Respectfully, the Court's analysis in *Stewart* is incomplete and cannot be reconciled with *Apprendi* and its progeny.

This Court's own precedent establishes that releasing a victim alive, in a safe place, and without serious bodily injury are not facts comprising an affirmative defense under Montana law. They are not admissions of committing an aggravated kidnapping under subsection (1) and seeking only to justify, excuse, or mitigate that kidnapping under subsection (2). *Shumway*, ¶ 12, n.1. Nor do the additional three facts "completely negate[] otherwise sufficient proof of the essential

elements of [subsection (1)]." *Parsons*, ¶ 17 (bracketed material added). Instead, they are additional facts related to an alleged kidnapping that are not presented to or considered by the factfinder.

Unlike the New York statute construed in *Patterson*, the additional facts do not comprise mitigating circumstances related to the accused's severe emotional distress. *Patterson*, 432 U.S. at 198 – 200, 97 S.Ct. at 2320 – 2322. The additional facts set forth in subsection (2) are elements of a distinct offense not defined in subsection (1). As a matter of law, these additional facts are elements a jury must find, pursuant to *Apprendi*.

"This Court has made clear that '[t]he rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon [a statute] in [a] former decision is manifestly wrong.'" *State v. Running Wolf*, 2020 MT 24, ¶ 22, 398 Mont. 403, 457 P.3d 218 (citation omitted, original brackets).

> Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider them carefully and to allow no previous error to continue if it can

> be corrected. The foundation of the rule of stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good from it.

Running Wolf, ¶ 22 (citations and internal quotations omitted).

Apprendi renders *Stewart* manifestly wrong. Stare decisis does not compel the Court to follow a manifestly wrong decision when the public policy at stake involves the State's burden to prove all elements of an offense beyond a reasonable doubt at a fair and public trial regarding the crime for which the defendant will be sentenced. Respectfully, the Court must overrule the portion of *Stewart* conflicting with *Apprendi*, i.e., the "Issue 10" discussion. *Stewart*, 175 Mont. at 299 – 301, 573 P.2d at 1145 – 46. This portion of *Stewart* violates an accused's fundamental constitutional rights under state and federal law to due process and to a fair jury trial when charged with aggravated kidnapping.

When the State seeks to sentence a defendant for more than 10 years for an aggravated kidnapping conviction, it must prove beyond a reasonable doubt at trial the alleged victim was killed during the kidnapping, or had to escape captivity, or was released from captivity in

an unsafe place or with serious bodily injury. As written, the "unless" clause of Mont. Code Ann. § 45-5-303(2) relieves the State of its burden to prove each element of the offense at trial for which a convicted defendant will be sentenced and interferes with the factfinder's sole responsibility to decide whether the accused is guilty beyond a reasonable doubt of the offense for which sentence will be imposed.

This Court should reverse Mr. Pine's conviction for aggravated kidnapping, vacate the judgment against him on that charge, and dismiss the charge with prejudice. The charge cannot be prosecuted again without violating double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution and Article 2, Section 25 of the Montana Constitution. *City of Billings ex rel. Huertas v. Billings Mun. Ct.*, 2017 MT 261, ¶ 17, 389 Mont. 158, 404 P.3d 709.

II. Seidel Pine received ineffective assistance of counsel at sentencing when his attorney requested a sentence twice as long as the applicable statutory maximum and failed to challenge a plainly incorrect Tier 3 sexual offender designation. The Court must remand for resentencing.

A. Legal standards.

Ineffective assistance of counsel claims are appropriate for review on direct appeal when no plausible justification exists for the actions or

omissions of defense counsel. *Wright*, ¶ 10 (citations omitted). When counsel is faced with an obligatory, non-tactical action, it is unnecessary to ask "why" counsel did or did not act; the question is "whether" counsel acted and, if so, if counsel acted adequately. *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095 (citations omitted). In such situations, "[w]hether the reasons for defense counsel's actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did." *Kougl*, ¶ 15.

> To prevail on an IAC claim, a petitioner must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387. This Court applies a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" contemplated by the Sixth Amendment. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. To show prejudice, the defendant must show that there is a reasonable probability the verdict would have been different but for counsel's deficient performance. *Kougl*, ¶ 25.

State v. Tipton, 2021 MT 281, ¶ 17, 406 Mont. 186, 497 P.3d 610.

B. Length of the sentence.[3]

During trial, the judge instructed the jury on the elements of aggravated kidnapping set forth in § 45-5-303(1), including bodily injury. (D.C. Doc. 95, Instructions 17, 18, 30; Trial Tr. at 490 – 91, 494.) The parties concurred these instructions were appropriate. (Trial Tr. at 446 – 50, 463 – 64.) No facts presented at trial establish K.R. suffered serious bodily injury, that Stokes Market was not safe, or that Seidel did not voluntarily release K.R. at Stokes Market. Nor did the jury's verdict address any of these issues. At sentencing, the prosecutor simply summarized the evidence presented at trial of K.R.'s bodily injury and presented no additional evidence. (Sent. Tr. at 4 – 6.)

Serious bodily injury, release in an unsafe location, and an involuntary release of a victim are essential facts needed to sentence a defendant up to 100 years for aggravated kidnapping. Otherwise, the sentence must be no more than 10 years. Mont. Code Ann. § 45-5-303(2). The aggravated kidnapping statute was originally enacted in

---

[3] If the Court finds the sentencing structure in Mont. Code Ann. § 45-5-303(2) facially unconstitutional and grants Mr. Pine the relief he requests in Section I of the Argument, his ineffective assistance counsel claim pertaining to Defense Counsel's request for a 20-year prison sentence for aggravated kidnapping becomes moot.

1973 and last amended in 1995. Thus, when Seidel was tried and sentenced, Mont. Code Ann. § 45-5-303 had been in effect for nearly 50 years and unaltered for more than 25 years.

Evidently unfamiliar with directly applicable sentencing provisions in a half-century-old statute, Defense Counsel requested a 20-year sentence. Counsel made no argument for a sentence that comported with the evidence the State presented through its own witnesses – K.R. was released alive, voluntarily by Seidel, in a safe place, and without serious bodily injury, as defined in Mont. Code Ann. § 45-2-101(66).

At sentencing, the Prosecutor summarily referenced an unsworn letter submitted by K.R. with the PSI. (Sent. Tr. at 4 – 5.) K.R. did not testify or attend the sentencing hearing. (Sent. Tr. at 4.) [redacted] None of K.R. assertions

establishes she suffered serious bodily injury within the meaning of Mont. Code Ann. § 45-2-101(66). Nor were they made under oath, subject to cross-examination, or supported with expert opinion. The only evidence the State presented at trial concerning K.R.'s bodily injury was that she had one black eye, some bruising, and rash marks on her skin when she was examined at St. James Hospital. (Trial Tr. at 322 – 24.)

No evidence indicates Seidel attempted to continue the kidnapping after walking away from K.R. at Stokes Market. Thus, the evidence before the sentencing court established K.R. did not escape nor was she rescued from captivity, but instead Seidel affirmatively released her, walking away and telling her that if she did not want to be with him, it was fine; in a safe place, a supermarket, where aid was readily available and where she was able to take advantage of such aid by borrowing a phone and calling the police; and without serious bodily injury, i.e., any bodily injury that placed her at substantial risk of death or resulted in serious permanent disfigurement or protracted loss or impairment of the function of a body member or organ or serious mental impairment. (Trial Tr. at 170 – 74, 434 – 35.)

K.R.'s bodily injury did not create a substantial risk of death. Nor could her injuries cause or reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (Trial Tr. at 322 – 24.) Additionally, the State did not prove or contend K.R. suffered serious mental illness or impairment on account of the kidnapping. On this record, and under the plain language of Mont. Code Ann. § 45-5-303(2), the district court was only statutorily authorized to impose a maximum sentence of 10 years on the aggravated kidnapping conviction.

This Court held as much under analogous facts in *State v. Nelson*, 2002 MT 122, ¶¶ 29 – 31, 310 Mont. 71, 48 P.3d 739. There, the State conceded and this Court agreed resentencing the defendant to no more than 10 years was required where the record established the victim was released alive, voluntarily, in a safe place, and without serious bodily injury. According to the State's witnesses at trial, the defendant had wrapped wire around the victim's wrists to restrain her in her home and threw her to the floor, where she struggled, receiving rug burns, scrapes, and bruises. *Nelson*, ¶ 5. Ultimately, the defendant let the victim get up from the floor and after a period of time an accomplice

untied her. According to the victim and her husband, the defendant and his accomplice took $70 and then left the home, whereupon the victim and her husband called the police. *Nelson*, ¶ 5. *Nelson* is applicable here.

In the instant case, unlike others, the State made no attempt to prove K.R. suffered serious bodily injury. For example, in *State v. Goodwin*, 208 Mont. 522, 524, 525, 526, 529, 679 P.2d 231, 232, 233, 234, 235 (1984) (*en banc*), the district court determined a 7-year-girl suffered serious bodily injury and was at substantial risk of death when the defendant kidnapped and sexually assaulted her, causing a severe laceration to her vagina extending all the way to her cervix, which required major surgery to repair and left her permanently scarred. Here, by contrast, the State did not contend and the District Court did not find K.R. suffered serious bodily injury. Similarly, in *State v. Flores*, 1998 MT 328, ¶¶ 9, 45 – 46, 292 Mont. 255, 974 P.2d 124, this Court concluded a knife wound to the victim's forearm exposing torn muscle, tissue, and bone, which precluded the victim from working in his pre-injury occupation and required extensive physical therapy to recover even partial use of his right hand, constituted serious bodily

injury. In *State v. Potter*, 2008 MT 381, ¶¶ 8 – 9, 31 – 33, 347 Mont. 38, 197 P.3d 471, the Court concluded the victim of an assault suffered serious bodily injury when defendant broke into her home, hit her 20 to 25 times and struck her head against the wall or floor 10 or 15 times, resulting in a hospital stay of three to four days from a fractured vertebra, a perforated eardrum, an eye laceration, a fractured hand, back pain, a sore nose, cuts an bruising on her face and scalp, bruised arms, and a concussion, with bruising that lasted for months, headaches that continued for some time, and various cognitive problems that persisted.

The State shoulders the burden to prove the facts necessary for a particular sentence as a matter of due process. "A defendant's due process rights include protection against a sentence predicated on misinformation." *State v. Sherman*, 2017 MT 39, ¶ 13, 386 Mont. 363, 390 P.3d 158 (citations and internal quotation marks omitted). "In the context of a criminal sentence in Montana, it is not the duration or severity of a sentence that might render it constitutionally invalid; it is the imposition of a sentence based on a foundation which may be extensively and materially false, and which the prisoner had no

opportunity to correct that can deny the defendant due process of law." *State v. Samples*, 2008 MT 416, ¶ 33, 347 Mont. 292, 198 P.3d 803 (citations omitted). *See also State v. Krebs*, 2016 MT 288, ¶¶ 19 – 20, 385 Mont. 328, 384 P.3d 98 (holding the State shoulders the burden to prove the fact of a prior conviction before a defendant may receive a felony sentence for driving under the influence).

Counsel squandered Seidel's opportunity to correct the State's sentencing request, which was based on extensive and materially false information regarding the facts in evidence. Defense counsel also failed to point out the statutory limitation on the court's sentencing authority during the sentencing hearing. To the contrary, defense counsel requested the court to impose what would be an illegal 20-year sentence for aggravated kidnapping—double what the court was authorized to impose under the facts of this case. Counsel's failure to do so constitutes deficient performance for which no plausible justification exists.

Not knowing the sentencing law governing a client's case or the legal consequences of a sentence falls below professional norms. "A lawyer shall provide competent representation to a client. Competent

representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Mont. Prof. Rules Cond. 1.1. Requesting a sentence twice as long as the relevant statutory maximum, without even arguing the lower statutory maximum should apply, constitutes incompetent representation. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Wright*, ¶ 18 (citations and internal quotation marks omitted). Had defense counsel raised this issue during sentencing, it is reasonably probable Seidel would not have received a 50-year sentence for aggravated kidnapping and instead would have received no more than a 10-year sentence, as the statute requires.

This Court should vacate Seidel's 50-year sentence for aggravated kidnapping and remand for resentencing for no more than 10 years for aggravated kidnapping.

C. Sexual offender designation.

Defense Counsel accepted Dr. Quigley's recommendation without question that Seidel should be designated a Tier 3 sexual offender. Yet

Dr. Quigley's recommendation failed to meet statutory requirements for a Tier 3 offender designation.

Mont. Code Ann. § 46-23-509(1)(c) provides in relevant part:

> (1) Prior to sentencing of a person convicted of a sexual offense, a sexual offender evaluator who has a license endorsement as provided for in 37-1-139 shall provide the court with a psychosexual evaluation report recommending one of the following levels of designation for the offender:
>
> . . .
>
> (c) level 3, **[1] the risk of a repeat sexual offense is high, [2] there is a threat to public safety, and [3] the sexual offender evaluator believes that the offender is a sexually violent predator**.

(Emphasis and bracketed material added). A "'[s]exually violent predator' means a person who . . . has been convicted of . . . a sexual offense and who suffers from a mental abnormality or a personality disorder that makes the person likely to engage in predatory sexual offenses[.]" Mont. Code Ann. § 46-23-502(11). A "'[m]ental abnormality' means a congenital or acquired condition that affects the mental, emotional, or volitional capacity of a person in a manner that predisposes the person to the commission of one or more sexual offenses

to a degree that makes the person a menace to the health and safety of other persons. Mont. Code Ann. § 46-23-502(2). A "'[p]ersonality disorder' means a personality disorder as defined in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders adopted by the American psychiatric association." Mont. Code Ann. § 46-23-502(4). A "'[p]redatory sexual offense" means a sexual offense committed against a stranger or against a person with whom a relationship has been established or furthered for the primary purpose of victimization." Mont. Code Ann. § 46-23-502(5).

[redacted] Mr. Quigley's Tier 3 recommendation was unwarranted by his testing or the circumstances of this case.

A Tier 3 sex offender designation entails consequences extending beyond a person's prison term and period of supervision. Those consequences include, but are not limited to, registration requirements (§§ 46-23-503 through -506), criminal penalties for failure to register or timely register (§ 46-23-507), public dissemination of otherwise confidential information (§ 46-23-508), and GPS monitoring (§ 46-23-1010). A level 3 offender is *never* eligible to petition to reduce their tier designation, regardless of individual circumstances. Mont. Code Ann. § 46-23-509(4). Practical obstacles and societal challenges of lifetime sex offender registration include restrictions on places of residence, an inability to obtain employment, and a concentration of prior offenders in certain, often low-income, neighborhoods. *See, e.g.*, Craun and Bierie, Federal Probation, *Are the Collateral Consequences of Being a Registered Sex Offender as Bad as We Think? A Methodological Research Note*, (June 2014)[4]; Auge, Collective Colorado, The

[4] Available at https://www.uscourts.gov/file/22785/download#:~:text=Collateral%20harms%20include%20harassment%20or,et%20al.%2C%202014)., (last visited 11/30/2022).

Unintended Effects of Sex Offender Registries (07/23/2019)[5]; Equal Justice Under Law, *Shackled: The Realities of Home Imprisonment* (06/14/2018)[6].

This Court has determined, "there is a liberty interest at stake when a person is designated as a particular risk level under [Mont. Code Ann. § 46-23-509(2)(c)]." *Samples*, ¶ 34. A determination that a person is a risk to the public or a predatory sex offender, which a Tier 3 designation statutorily requires, implicates a liberty interest that goes beyond "mere reputation" – "It is an interest in avoiding ostracism, loss of employment opportunities, also such a designation likely involves verbal or even physical harassment." *Samples*, ¶ 31 (citations omitted).

It was incumbent on Seidel's attorney to challenge Mr. Quigley's and the State's Tier 3 recommendation and object to the District Court's Tier 3 designation. No plausible justification exists to acquiesce in a tier designation that patently fails to meet statutory requirements. It is

---

[5] Available at https://collective.coloradotrust.org/stories/the-unintended-effects-of-sex-offender-registries/, last visited (11/30/2022).

[6] Available at https://equaljusticeunderlaw.org/thejusticereport/2018/6/12/electronic-monitoring#:~:text=The%20set%2Dup%20fee%20for,wear%20ankle%20monitors%20for%20years (last visited 11/30/2022).

reasonably probable that but for Counsel's failure to object to the State's recommendation for a Tier 3 designation, which itself was based solely on Mr. Quigley's unsupported recommendation, the District Court would not have imposed the Tier 3 designation.

The Court should vacate Seidel's Tier 3 offender designation and remand for proceedings to determine an appropriate tier designation.

III. The 50-year prison sentence the District Court imposed for the aggravated kidnapping conviction and the Tier 3 offender designation are illegal because they exceed statutory parameters.

"The *Lenihan* rule[7] provides a sentence not objected to in the district court that is 'illegal or exceeds statutory mandates,' *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000, and not merely an 'objectionable' statutory violation, *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citations omitted), may be reviewed on appeal." *State v. Hansen*, 2017 MT 280, ¶ 12, 389 Mont. 299, 405 P.3d 625, *overruled in part on other grounds Gardipee v. Salmonsen*, 2021 MT 115, 486 P.3d 689 (pro se petition for writ of habeas corpus).

[7] *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

In this case, the evidence established Seidel voluntarily released K.R. alive without serious bodily injury in a public place. [redacted] Seidel's 50-year MSP sentence and Tier 3 designation are illegal and can be addressed by this Court on appeal under *Lenihan*.

Despite indicating in the Information that the possible sentence for aggravated kidnapping was no less than two years or more than 100 years, the State made no attempt either at sentencing or at trial to establish the elements necessary to sentence Seidel for more than 10 years. [redacted] When a sentence exceeds statutory parameters, it is irrelevant that Defense Counsel acquiesced to the illegal sentence. *Salsgiver*, ¶¶ 40 – 44. This Court may correct the sentence on direct appeal because it was void *ab initio*. *Salsgiver*, ¶¶ 36 – 40. In this case, Counsel's acquiescence in an illegal

sentence does not, and cannot, supersede statutory requirements. *Salsgiver*, ¶ 43.

Accordingly, the Court should vacate Seidel's 50-year sentence for aggravated kidnapping and remand for resentencing for no more than a 10-year sentence for aggravated kidnapping. The Court should also vacate Seidel's Tier 3 offender designation and remand for proceedings to consider an appropriate designation.

CONCLUSION

For the foregoing reasons, Seidel Pine respectfully requests the Court to declare the last clause of Mont. Code Ann. § 45-5-303(2) facially unconstitutional, reverse his conviction for aggravated kidnapping, vacate the judgment against him for that charge, and dismiss the charge with prejudice.

Alternatively, the Court should vacate Seidel's 50-year sentence for aggravated kidnapping and remand for resentencing for no more than 10 years due to prejudicially deficient performance of counsel at sentencing and because any sentence greater than 10 years is illegal.

Additionally, the Court should reverse the Tier 3 offender designation and remand for proceedings to determine an appropriate

tier designation on account of counsel's deficient performance at sentencing and because the Tier 3 designation is illegal.

Respectfully submitted this 20th day of December, 2022.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Deborah S. Smith
DEBORAH S. SMITH
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,959, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX