IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0748

STATE OF MONTANA,

Plaintiff and Appellant,

v.

JONATHAN PARTAIN,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
tplubell@mt.gov

KIRSTEN H. PABST
Missoula County Attorney
MARK M. HANDELMAN
Deputy County Attorney
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLANT

KATHLEEN FOLEY
Attorney at Law
P.O. Box 9452
Missoula, MT 59807

ATTORNEY FOR DEFENDANT
AND APPELLEE

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STATEMENT OF THE ISSUE

Whether the district court imposed an illegal sentence when Defendant/ Appellee Jonathan Partain (Partain) pled guilty to the felony charge of sexual abuse of children, pursuant to a plea agreement beneficial to him but at the sentencing hearing the district court either *sua sponte* amended the felony charge and found Partain guilty of a misdemeanor or dismissed the felony charge and found Partain guilty of a misdemeanor and sentenced him on the nonexistent misdemeanor offense over the State's objection.

STATEMENT OF THE CASE

On November 22, 2022, after the district court granted leave, the State charged Appellee Jonathan Partain (Partain) by Information with one count of felony sexual abuse of children, victim under the age of 16, in violation of Mont. Code Ann. § 45-5-625(1)(b) and (2)(a), and one count of misdemeanor surreptitious visual observation or recordation in the residence in violation of Mont. Code Ann. § 45-5-223(1)(b).[1] (D.C. Docs. 1-3.) The district court set bail at $20,000 with conditions, including that Partain not have contact with the victim. (D.C. Doc. 1.) On December 7, 2022, attorney Kathleen Foley filed a notice of

[1] Because the victim was under the age of 16, the penalty for sexual abuse of children is a prison term of not less than 4 years or more than 100 years. Mont. Code Ann. § 45-5-625(2)(b).

appearance that she was counsel of record for Partain. (D.C. Doc. 9.) On December 12, 2022, Partain and his counsel filed a signed acknowledgment of rights form. (D.C. Doc. 10.)

On August 9, 2023, Partain's wife and the victim's mother, Lana, sent the district court an email she had written to the prosecutor and defense counsel. Lana also attached a letter from the victim. (*See* Sealed Documents, 8/9/2023 email and letter.)

On August 14, 2023, Partain filed a Plea of Guilty and Waiver of Rights. (D.C. Doc. 29, attached as App. A.) Both Partain and his counsel signed the form. (*Id*.) The same day, the parties filed an executed Plea Agreement with the district court. (D.C. Doc. 30, attached as App. B.) Partain agreed to plead guilty to an amended charge of felony sexual abuse of children, victim under the age of 18, and the State agreed to dismiss the misdemeanor surreptitious visual observation or recordation in the residence charge.[2] (App. B at 2.) The parties agreed to a specific sentencing recommendation of 10 years to the Department of Corrections, suspended. (*Id*.)

Partain agreed that he understood all possible lesser included offenses and waived his right to a jury finding him guilty of a lesser included offense. (*Id*. at

[2] The State agreed to amend the charge of sexual abuse of children to the victim being under 18 rather than 16 to avoid the mandatory 4-year prison term.

10.) Partain acknowledged that he understood the penalties he faced and that he had a right to a jury trial. Partain waived all objections to any defect in the charges. (*Id*. at 11.)

Defense counsel acknowledged she had advised Partain of the charges and penalties, the court's ability to impose the maximum sentence, the position the prosecutor would take at sentencing, and the inability of anyone to promise Partain a particular sentence. Defense counsel assessed that Partain had been sufficiently advised to knowingly enter his guilty plea. (*Id*. at 12; *see also* App. A.)

The district court conducted a change-of-plea hearing on August 15, 2023. (8/15/23 Transcript of Change-of-Plea Hearing [8/15/23 Tr.].) Pursuant to the plea agreement, the State had agreed to amend the charge from the victim being under the age of 16 to the victim being under the age of 18. (*Id.* at 6; D.C. Doc. 31.) The district court accepted Partain's guilty plea to the charge of sexual abuse of children with the victim being under the age of 18. (*Id*. at 10.) The district court ordered a presentence investigation (PSI). (*Id*. at 10.)

On September 26, 2023, Adult Probation and Parole Officer Eggum filed the PSI with the district court. (D.C. Doc. 33, filed under seal.) Within the PSI, Partain admitted his criminal conduct and his sexual motivation. (*Id*. at 3-4.) He also acknowledged he had devised a disclosure plan that he knew would result in his conduct being reported to law enforcement. (*Id*. at 3.) Officer Eggum documented

that Partain had no criminal history. (*Id*. at 12.) After summarizing Dr. Scolatti's recommendations from his evaluation of Partain, Officer Eggum stated:

> The plea agreement is for a community placement. The plea agreement in this case appears to be appropriate, although it should be pointed out, this is the Defendant's first felony offense, and he could be eligible for a deferred imposition of sentence if the court deems it appropriate. This writer believes a deferred sentence could be appropriate and beneficial for both the Defendant and his victim, but this recommendation should strongly consider the victim's impact statement, which is not available at this time, but which should be provided to the court prior to sentencing.

(*Id*. at 13.)

The victim's mother provided a written statement to the district court, which the court filed under seal. (D.C. Doc. 34.) At the sentencing hearing, the victim, who was not personally present, had the victim's advocate read her updated statement. (10/30/23 Transcript of Sentencing Hearing [10/20/23 Tr.] at 24-26.)

At the sentencing hearing, over the State's objection, the district court *sua sponte* orally "amended" the felony charge of sexual abuse of children, to which Partain had entered a knowing and voluntary guilty plea, to a misdemeanor charge of surreptitious recordation in the residence and sentenced him to a two-year deferred imposition of sentence and a $500 fine.[3] (*Id*. at 5-6; D.C. Doc. 37, attached as App. C at 2.) The district court stated in the judgment:

[3] The written judgment, dated November 20, 2023, erroneously states that the prosecutor filed an amended information charging Partain with two counts of first offense surreptitious visual observation or recordation. (App. C at 1.)

> Pursuant to the Court's authority under MCA § 46-16-107(3)(c) to modify or change the finding to a lesser included offense, based upon the evidence in the charging documents, the pre-sentence report, the psychosexual evaluation, the victim impact statements, and in the interest of justice as described in the record, the Court *reduced* the offense finding to surreptitious visual observation or recordation in violation of MCA § 45-5-223.

(App. C at 2; emphasis added.)

On November 22, 2023, the State filed a Petition for Writ of Supervisory Control, arguing that the district court *sua sponte* reducing the charge to which Partain had pled guilty was a mistake of law, resulting in a gross injustice, and the State did not have an appeal remedy. (OP 23-0685, 11/22/23 Pet.) This Court ordered Partain and/or the Fourth Judicial District Court to file a response. (OP 23-0685, 11/28/23 Order.)

The district court responded that it had express authority to dismiss the felony charge pursuant to Mont. Code Ann. § 46-13-401(1) and by inference had the authority to *sua sponte* reduce the felony to a misdemeanor. (OP 23-0685, 12/15/23 Resp. at 3-5.) The district court further argued that it had authority to amend Partain's guilty plea pursuant to Mont. Code Ann. § 46-16-702. (*Id*. at 7.)

The district court urged that there was no gross injustice because it was acting in the best interest of the victim and her family as evidenced by letters from the victim and her mother as well as the PSI, and that the State had an adequate remedy of appeal. (*Id*. at 9-11.) Finally, the district court responded that its actions

did not violate the separation of powers provision of the Montana Constitution. (*Id.* at 11.)

On December 27, 2023, this Court denied the State's Petition, concluding that "the State effectively challenges the District Court's lawful authority to impose sentence on a charge on which the defendant had neither pleaded guilty nor been convicted . . . ." (OP 23-0685, 12/27/23 Order.)

On January 9, 2024, the district court filed an amended judgment.[4] (D.C. Doc. 39, attached as App. D.) The district court explained, "Pursuant to a plea agreement the Defendant pled guilty to Count I, sexual abuse of children and Count II, surreptitious visual observation [or] recordation, was dismissed without prejudice." (*Id.* at 2.) The district court further added in the amended judgment that it had authority under Mont. Code Ann. § 46-13-401 to *sua sponte* dismiss a charge in the furtherance of justice, and to modify or change a finding to a lesser included offense pursuant to Mont. Code Ann. § 46-16-702(3)(c). (*Id.* at 2.) In the amended judgment the district court stated that it *dismissed* the felony charge in Count I in the amended information and found Partain guilty of the lesser included offense of surreptitious visual observation or recordation in the residence as the

[4] The amended judgment correctly reflected that in the amended information the State alleged Partain had committed the offenses of sexual abuse of children and surreptitious visual observation or recordation in the residence. (App. D at 1.)

State charged in Count II in the amended information "which had been dismissed without prejudice at the change of plea hearing." (*Id*.)

This Court granted the State's Petition for an Out-of-Time Appeal.[5]

STATEMENT OF THE FACTS

I. The offense[6]

On July 26, 2022, 15-year-old Jane Doe (Doe), was changing clothes in her bedroom when she noticed a cell phone propped up against some speakers that Partain had been installing in her room earlier in the day. Doe picked up the phone and saw it was recording a video of her in a state of complete undress. Doe and her mother confronted Partain, who admitted to recording a video of Doe while he knew she was changing clothes. (D.C. Doc. 1 at 2.)

/ / /

[5] The Missoula County Clerk of Court's Office transmitted the district court record on February 23, 2024. (2/23/24 Notice of Filing.) On the same date, the Missoula County Clerk of Court sent a letter indicating that it was transmitting a letter from the victim's mother filed with the district court on February 20, 2024, which was omitted when it had previously transmitted the district court record. (2/23/24 Transmittal Letter.) To the extent the transmittal letter can be read to suggest that the State requested transmittal of the letter from the victim's mother, the State was unaware of the letter and did not make such a request. This letter has no bearing on the issue before this Court since the victim's mother provided it to the district court months after the district court sentenced Partain.

[6] Because Partain pled guilty to sexual abuse of children, the State relies on the charging documents for this portion of its Statement of Facts.

Doe participated in an interview at First Step in Missoula on August 23, 2022. On August 24, 2022, Partain participated in an interview with Detective Sullivan of the Missoula Police Department (MPD). Partain stated he was "completely at fault for all of it." (*Id*. at 3.) Partain explained that Doe had been wearing more revealing clothing that "caught [him] off guard," and "something inside of [him], it was like a switch flipped." (*Id*.) Partain explained that he had been installing a stereo in Doe's bedroom and had left his phone on top of the record player, positioning the camera to face the inside of the room. When Doe later announced she was going to change clothes, Partain used his watch that was paired to his phone to activate the video recording function of his phone. (*Id*.)

Partain explained that Doe had become "so mature" and all he saw was "a beautiful woman, dressed in a way that was, I don't know, stimulating I guess." (*Id*.)

II. The change-of-plea hearing

The district court began the change-of-plea hearing by asking Partain if he was clear-headed and understood what he was doing. (8/15/23 Tr. at 5.) Partain responded, "Yes." (*Id*.) Partain assured the court that he was sober and there was nothing that would affect his ability to act knowingly and voluntarily. (*Id*. at 5-6.)

Partain also told the court he was satisfied with the services his counsel had provided him. (*Id.* at 6.)

The district court asked Partain if he had any questions about the rights he would be waiving by entering a guilty plea, which were all listed in the waiver of rights form he filed with the court, or any question about the possible maximum penalty. Partain responded that he did not have any questions. (*Id*. at 6-7.) He told the court that he understood the court was not bound by the plea agreement. (*Id*. at 8.) Defense counsel informed the court that Partain had already completed a psychosexual evaluation. (*Id*.)

The district court stated:

> Okay. Well, I'll look at the psychosexual. I will also order a presentence report, and I'll look at that. And after I look at all that and any other information that anybody might bring forward regarding the sentence in this case, I'll make some decision about what to do.
>
> And, frankly, I don't even know what the plea bargain is. But I'll tell you what I want to do after I've done all those things. If it's more severe than what you bargained for, I'll tell you what I want to do, and I'll give you a chance to think about it. And if it doesn't suit you, I'll let you withdraw your plea.

(*Id*. at 8-9.) The court explained, though, that if Partain withdrew his guilty plea, the court would allow the State to reinstate any dismissed or reduced charge. (*Id*. at 9.)

Partain pled guilty to sexual abuse of children. (*Id*. at 9.) The State explained that the misdemeanor charge was dismissed without prejudice pending sentencing.

(*Id*.) To provide a factual basis for the guilty plea, Partain offered the following testimony:

> The short version, I suppose, would be I used a phone that had been propped up in [Doe's] room. She exited the room, and then she told everyone that she had to change her clothes. I immediately thought of the positioning of my phone, and so I have a watch that has a remote. So I swiped over to the remote, and tapped it. I didn't see anything[.]

(*Id*. at 11.) Defense counsel added:

> And so, Your Honor, this person that he was videotaping did see it and was horrified and erased it and confronted him and told her mother. And [Partain] went and told all the appropriate authorities and made a confession and has been in counseling ever since. So he did do a lot, and I think that this agreement recognizes all of his efforts to make amends and take responsibility.

(*Id*.)

The district court asked Partain why he did it. Partain responded that it "was a sexual impulse." (*Id*. at 12.)

III. The sentencing hearing

The district court began the sentencing hearing by apologizing to Doe and stating:

> Yeah. And I know [Doe] watched the plea in this matter earlier. And I received a communication from her on August 11th, which pretty much said her side of the story. I did read it, and I ordered it to be placed in the file under seal and a copy sent to the attorneys.
>
> Four days later on August 15th, Mr. Partain came in and pled guilty to sexual abuse of children. And I guess I didn't pay enough

> attention to [Doe's] letter because I should've put a stop to this right then. *I should not have let this case go to the extent it has. I think it was overcharged. I think that this crime here is, at best, the count that was dismissed, which is surreptitious recording*.

(10/30/23 Tr. at 18; emphasis added.)

The district court went on to state:

> This was, again, a bad, stupid, foolish thing that Mr. Partain did, but he was—this family had everything under control, and I don't know why it even got charged. I really don't. And so—because if you've read all these letters like I have, you see that what we've done is caused more harm to this family by bringing these charges. And I want to put a stop to it.
>
> So at this point in time, *I do definitely reject the plea bargain. I—I'm gonna take it upon myself to reduce the charge to . . .* surreptitious visual observation based on all the evidence before me[.]

(*Id*. at 20-21; emphasis added.)

When the prosecutor asked that the district court hear from the victim before making any rulings, the court responded that it had heard from the victim. (*Id*.) The prosecutor explained that the victim had an updated statement to provide to the court. The district court responded, "No, Mr. Halderman [sic]," and then told the prosecutor, "Stop." (*Id*.) The district court indicated that the "primary thing" it was relying on was a letter from the victim's mother, along with her recommendations, and the victim's letter that she had written and submitted to the court back in August. (*Id*.) The district court finally conceded that if the victim had something more to say, the court would listen. (*Id*.)

The crime victim's advocate explained to the district court, "The victim would just like you to know that her previous statement was not fully in line with what her true feelings were, and that she's had time to process." (*Id*. at 24-25.) The crime victim's advocate then read the victim's updated statement as follows:

> I feel that the facts [] brought up in court in my case were all accurate. I have been impacted personally since the incident occurred. After the media outed my situation, I've experienced a lot of social backlash within my community, school, family, and friend group. My dad is well-known in the community, and a lot of people commented that I was at fault for the incident.
>
> I have changed my last name in the school so I don't get asked questions or have it brought up at school. It was really difficult when my last name was in the news. I was harassed at school about my dad because other students [] are involved with his boxing club and youth ministries.
>
> It has also been difficult to live in my home after this happened because everyone in my family has different opinions. That has made me feel pressure to change mine to make it easier for them. I have experienced anxiety, severe depression, shame, and embarrassment. I feel like some of the support I have in my family cannot be genuine at times. I don't feel like my needs have been met.
>
> The way the Court handled my case made me feel ashamed as a victim. I don't feel like I have had support in the court or media. I feel isolated and left to deal with it on my own. This has caused me issues in several areas. I have struggled to keep up and attend school, stay focused, and have had bad coping skills. This has caused me a lot of mistrust with adults, specifically men. I struggle to meet new people and develop trust with others. I feel like I can't let my guard down, specifically around men.
>
> This issue has caused me to not want to communicate what is happening with me to my family. I want to be in control of my contact with my dad. I feel like I do not want contact now, but in a year or two maybe I will. I want wiggle room to change that [] when the time is right. I want to be part of the [decision-making]. I don't feel

> comfortable weighing in on my dad's consequences, but want recognition for what I went through.

(*Id*. at 25-26; emphasis added.)

After hearing Doe's updated statement, the district court provided its opinion that any trauma or anxiety the victim experienced resulted from the State charging the case criminally and the court allowing it to do so. (*Id*. at 26-27.) When the prosecutor explained that members of the community had pressured Doe, asking her to ask the prosecutor to amend the charge, the district court interjected:

> Well, I think you should've, sir. I think you're wrong. I think you did the wrong thing here. And so you have not convinced me that you're right.
>
> And now, you're right that, you know, a lot of these crimes go undetected and problems erupt years down the road, but that's not what happened here. It was detected, and it was well under control, it appears, until you made the decision to charge. And so it—this train wreck, I take my share of the responsibility for letting it happen, but the engineer of that train was you. And I hope you learned something from this because you've got to have some compassion and realization of when it's appropriate to act and when it isn't as a prosecutor.

(*Id*. at 34.)

After criticizing defense counsel for her role in negotiating the plea agreement (*id*. at 34), the district court stated, "I do have the authority under the law to reduce the charge, and that's what I am doing." (*Id*. at 35.) The district court then found Partain guilty of misdemeanor surreptitious recordation in the home, sentenced him to a two-year deferred imposition of sentence, and placed him on misdemeanor probation (*Id*.) The court imposed the condition that Partain could

not access or possess any material depicting human nudity or television shows or motion pictures "geared towards sexual offending cycles" (*id*. at 39) because the court did not exactly know what Partain intended to do with the video recording of Doe had she not discovered it and erased it, but it suspected Partain might have used it to masturbate. (*Id*.)

SUMMARY OF THE ARGUMENT

After the district court accepted Partain's knowingly and voluntarily entered guilty plea to felony sexual abuse of children, the district court had no statutory or constitutional authority to *sua sponte* dismiss or amend the felony charge and sentence Partain on the misdemeanor offense of surreptitious recordation in the residence—an offense the district court had admittedly dismissed pursuant to a plea agreement and to which Partain had not entered a guilty plea. The district court had no statutory authority to impose a sentence on a dismissed charge or an amended charge when it had no authority to amend a felony charge to a misdemeanor. And, once the district court accepted Partain's guilty plea, its ability to reject the plea agreement was limited by statute. The statutory authority did not authorize the district court to act in the manner that it did.

No matter how laudable the district court believed its actions were—to serve the best interests of the family, the district court's non-legal, personal perception of

the right course of action could not overcome its lack of statutory or constitutional authority to act in the manner that it did. Even though the district court's non-legal motives are not relevant to the inquiry on appeal, it is worth noting that the district court's rationale that Partain and the family had it "handled" prior to the State filing criminal charges, is a dangerous one. And whether the district court's actions were in the victim's best interest is subject to debate. As the record demonstrates, the district court was hesitant to allow the victim to give her statement at the sentencing hearing.

Finally, because the district court had no authority to act, the sentence it imposed illegally violated the separation of powers doctrine. The district court usurped the prosecutor's discretion to make charging decisions and substituted its opinion about what was the best course of action for the prosecutor's statutory and constitutional authority to charge criminal conduct.

ARGUMENT

I. The standard of review

This Court reviews criminal sentences longer than one year for legality only. *State v. Fox*, 2012 MT 172, ¶ 16, 366 Mont. 10, 285 P.3d 454. Review for legality means whether the district court sentenced the defendant in accordance with governing statutory and constitutional parameters and requirements. *State v.*

Thiebeault, 2021 MT 162, ¶ 7, 404 Mont. 476, 490 P.3d 105. Whether a sentence is legal is a question of law that this Court reviews de novo to determine whether the district court's interpretation of the law is correct. *City of Whitefish v. Curran*, 2023 MT 118, ¶ 8, 412 Mont. 499, 531 P.3d 547.

II. The district court imposed an illegal sentence because it had no statutory authority to *sua sponte* amend the charge to which Partain had pled guilty, had no statutory authority to impose a sentence on a dismissed charge, and its attempt to do either or both violated the separation of powers doctrine.

A. The district court had no statutory authority to amend Partain's guilty plea to a lesser charge.

At the sentencing hearing, the district court stated it was *reducing* the felony sexual abuse of children charge to misdemeanor surreptitious recordation in the residence. (10/30/23 Tr. at 21.) The district court cited no statutory authority for its action. In the original judgment, the district court stated that it was reducing the felony charge to a misdemeanor. The district court cited to Mont. Code Ann. § 46-16-107(3)(c),[7] but was referencing the statute concerning a motion for new trial. Montana Code Annotated § 46-16-702 is entitled Motion for New Trial, and provides:

[7] Although there is a scrivener's error in the original judgment, the district court was citing to Mont. Code Ann. § 46-16-702(3)(c) as it clarified in its amended judgment. (App. D at 2.)

> (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice. A new trial may be ordered by the court without a motion or may be granted after motion and hearing.
> (2) The motion for a new trial must be in writing and must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served on the prosecution.
> (3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:
> (a) deny the motion;
> (b) grant a new trial; or
> (c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.

This statute is inapplicable to the circumstances of this case. Because there was never a trial, there could not have been a motion for a new trial for the district court to consider and rule upon. Likewise, the district court could not have ordered a *new* trial on its own accord when there had never been a trial. The word "verdict" in Mont. Code Ann. § 46-16-702(1) clearly applies to a jury verdict, and the words "finding of guilty" clearly reference a bench trial where the State presents evidence in support of criminal charges, not a change-of-plea hearing where a defendant proffers facts to satisfy the elements of an offense. *See* Mont. Code Ann. § 46-12-212(1).

Even though Mont. Code Ann. § 46-16-702 is not applicable to the circumstances here, if it were, surreptitious recordation in the residence *is not* a lesser included offense of felony sexual abuse of children as the district court

found at the sentencing hearing and pronounced in the original judgment and amended judgment. Montana Code Annotated § 46-1-202(9)(a) provides that an "included offense" means an offense that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged." According to this Court, "Where each offense requires proof of a 'fact' which the other does not, there cannot be a specific instance of conduct which is included in the other offense." *State v. Hooper*, 2016 MT 237, ¶ 11, 385 Mont. 14, 386 P.3d 548.

This Court has further explained, "In essence, if it is possible to commit Crime A without also committing Crime B, then Crime A is not an included offense of Crime B." *State v. Ohl*, 2022 MT 241, ¶ 20, 411 Mont. 52, 521 P.3d 759, citing *State v. Molenda*, 2010 MT 215, ¶ 7, 358 Mont. 1, 243 P.3d 387. And the term "facts," as used in Mont. Code Ann. § 46-1-202(9)(a), "refers to the statutory elements of the offense and not the individual facts of each case." *State v. Valenzuela*, 2021 MT 244, ¶ 18, 405 Mont. 409, 495 P.3d 1061, quoting *State v. Smith*, 276 Mont. 434, 443, 916 P.2d 773, 778 (1996).

Comparing the elements of surreptitious recordation in the residence and sexual abuse of children demonstrates that surreptitious recordation in the residence is not a lesser included offense of sexual abuse of children. Montana Code Annotated § 45-5-223 provides:

> (1) A person commits the offense of surreptitious visual observation or recordation in a place of residence if the person purposely or knowingly hides, waits, or otherwise loiters in person or by means of a remote electronic device within or in the vicinity of a private dwelling house, apartment, or other place of residence for the purpose of:
> (a) watching, gazing at, or looking upon any occupant in the residence in a surreptitious manner without the occupant's knowledge; or
> (b) by means of an electronic device, surreptitiously observing or recording the visual image of any occupant in the residence without the occupant's knowledge.

In comparison, Mont. Code Ann. § 45-5-625(1)(b) provides that a person commits the offense of sexual abuse of children if the person, "knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated[.]"

These statutes are clearly directed at different behavior and each statute has an element that the other statute does not. For example, the offense of surreptitious recordation in the residence requires that the defendant commit the offense in or near the residence. The offense of sexual abuse of children has no such requirement. The offense of sexual abuse of children requires that any recording be of a child engaging in sexual conduct, actual or simulated. The offense of surreptitious recordation in the residence has no such requirement. The offense of surreptitious recordation in the residence requires that the recordation occurs without the residence occupant's knowledge. There is no such requirement for sexual abuse of children.

The definition of included offense under Mont. Code Ann. § 46-1-202(9)(b) is not applicable to Partain's case because the State did not charge Partain with an attempt. And the definition under Mont. Code Ann. § 46-1-202(9)(c) provides that "included offense" means an offense that

> differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

This Court has explained that under this subsection, if the only difference between the two offenses is one of degree, it can be a lesser included offense. *Ohl*, ¶ 23, citing *Molenda*, ¶ 16. But, if there are other differences between the two statutes besides differences of degree, it cannot qualify as a lesser included offense.

Here, as set forth above, there are other qualitative differences between the two statutes. The elements of surreptitious recordation in the residence are not equivalent to or a subset of the elements of sexual abuse of children. *Ohl*, ¶ 26. The district court erred in concluding that surreptitious recordation in the residence was a lesser included offense of sexual abuse of children. Although Mont. Code Ann. § 46-16-702(3)(c) is not applicable in a case where the defendant has pled guilty to a crime, the district court also erred when it concluded that surreptitious recordation in the residence was a lesser included offense of sexual abuse of children.

Finally, at the sentencing hearing, the district intimated that it had the statutory authority to sentence Partain on the dismissed misdemeanor charge because it was "definitely reject[ing]" the plea agreement. (10/30/23 Tr. at 20.) Statutorily, the district court did have authority to *reject* the plea agreement, but not in the manner that it thought.

Montana Code Annotated § 46-12-211(1)(a) and (b) provides that the prosecutor and defendant may reach a plea agreement whereby in exchange for the defendant entering a guilty plea, the prosecutor will move for dismissal of other charges or agree that a specific sentence is the appropriate disposition of the case. Here, the parties entered into the plea agreement under Mont. Code Ann. § 46-12-211(1)(b), agreeing that Partain would plead guilty to felony sexual abuse of children, and the parties agreed that the appropriate disposition was a ten-year suspended commitment to the DOC. (App. B at 1-2.) The State also agreed to dismiss the misdemeanor charge. (*Id.*)

If a plea agreement is reached under Mont. Code Ann. § 46-12-211(1)(a) or (b), the court may accept or reject the agreement or defer its decision until it considers a PSI. Mont. Code Ann. § 46-12-211(2). If the court rejects a plea agreement of the type specified in Mont. Code Ann. § 46-12-211(1)(a) or (b), the court shall

> on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant

> an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo plea contendre plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Mont. Code Ann. § 46-12-211(4).

Here, the court accepted Partain's guilty plea and deferred on ruling whether it would accept the agreed-upon sentence until after it reviewed the PSI. It instructed Partain that if it intended to sentence him more harshly than the plea agreement contemplated, it would allow him to withdraw his plea, but it would also allow the State to reinstate any amended or dismissed charge.

But, at sentencing, the court neither accepted the agreed-upon sentence, nor allowed Partain to withdraw his guilty plea, thereby allowing the State to proceed to trial on the original charges. Instead, the court *sua sponte* amended the felony guilty plea to a misdemeanor charge and sentenced Partain on the misdemeanor. In crafting what the court perceived to be the "morally" correct outcome, after accepting Partain's guilty plea to a felony but then amending the charge, the court foreclosed the State from prosecuting Partain for the felony offense it had charged and to which Partain had pled guilty. While the court had the authority, as defined by statute, to decline to accept Partain's guilty plea, it did not have the authority to amend Partain's guilty plea from felony sexual abuse of children to a misdemeanor charge. Importantly, if the court had declined to accept Partain's guilty plea, the State still could have proceeded to trial on both charges.

At the sentencing hearing, the district court had authority to impose a lesser sentence or a harsher sentence than the parties had negotiated for the charge to which Partain pled guilty, provided it gave Partain the opportunity to withdraw his guilty plea. The district court did not have authority to amend a felony charge to a misdemeanor and sentence Partain on that misdemeanor charge because it felt better about that outcome. Since the district court had no authority to act in the manner that it did, it had no authority to impose a sentence on a previously dismissed misdemeanor charge.

B. The district court had no statutory authority to sentence Partain on a dismissed charge.

In the amended judgement, the district court changed course, explaining that it "dismissed the felony charge in Count I and found the Defendant guilty of the lesser included offense of surreptitious visual observation in violation of MCA § 45-5-223 as charged in Count II which had been dismissed without prejudice at the change of plea hearing." (App. D at 2.) In the amended judgment, in addition to Mont. Code Ann. § 46-16-702(3)(c), the district court cited Mont. Code Ann. § 46-13-401 as its authority to act in the manner that it did because the statute allowed it "to *sua sponte* dismiss a charge in the furtherance of justice . . . ." (*Id*.) There are several problems with the district court's reasoning set forth in the amended judgment.

First, the district court had no statutory authority to find Partain guilty of the misdemeanor offense, which the court erroneously labeled a lesser included offense. Since the court had no statutory authority to find Partain guilty of surreptitious recordation in the home, it likewise had no authority to impose a sentence for that charge. As this Court has explained, courts have no power to impose a criminal sentence in the absence of specific statutory authority. *City of Missoula v. Franklin*, 2018 MT 218, 392 Mont. 440, 425 P.3d 1285, citing *State v. Blackwell*, 2001 MT 198, ¶ 6, 306 Mont. 267, 32 P.3d 771. A district court's authority to impose sentences in criminal cases "is defined and constrained by statute." *Blackwell*, ¶ 6, quoting *State v. Nelson*, 1998 MT 227, ¶ 24, 291 Mont. 15, 966 P.2d 133. Since the district court lacked statutory authority to find Partain guilty of an offense without a trial, it could not sentence Partain on that offense.

Also, the district court's additional reliance on Mont. Code Ann. § 46-13-401(1) was misplaced. The statute provides:

> The court may, either on its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for the dismissal are set forth in an order entered upon the minutes.

Here, the district court dismissed the felony *charge* of sexual abuse of children, not the entire Information, so the first sentence of Mont. Code Ann.

§ 46-13-401(1) is not applicable. The second sentence of the subsection additionally requires good cause for the dismissal of a felony charge. *See State ex rel. Flether v. Dist. Court*, 260 Mont. 410, 417 859 P.2d 992, 996 (1993). The furtherance of justice and good cause, however, must be something more than the district court's own non-legal assessment of whether the prosecutor should have filed charges in the first instance or whether the prosecutor filed the right charges. For example, in *Fletcher*, the furtherance of justice and good cause was tied to sufficiency of the evidence and outrageous government conduct. *Id*. As argued below, when the district court is merely substituting its non-legal-based opinion for that of the prosecutor's decision-making, the result is a violation of the separation of powers doctrine. *See*, *e.g.*, *State v. Brumage*, 435 N.W.2d 337, 340-41 (Iowa 1989) (trial courts may dismiss prosecutions in the furtherance of justice against the wishes of the prosecutor only in rare and unusual cases when compelling circumstances require such a result to assure fundamental fairness in the administration of justice); *State v. Blackwell*, 845 P.2d 1017, 1022 (Wash. 1993) (requiring a showing of arbitrary action or government misconduct before a trial court may dismiss a prosecution in the interest of justice).

In Partain's case, it is impossible to find good cause for dismissal after Partain entered a knowing and voluntary guilty plea to felony sexual abuse, admitting every element of the offense, the district court accepted the guilty plea,

and there is no evidence of the prosecutorial misconduct in its decision making. Finally, Partain never asked to withdraw his guilty plea.

Another problem with the district court's reasoning is that after the court dismissed the sexual abuse of children charge, to which Partain had pled guilty, there was no crime remaining because, as the district court acknowledged, it had already dismissed the misdemeanor charge without prejudice at the change-of-plea hearing. In *Fox*, 2012 MT 172, this Court held that the district court had no authority to impose a 50-year sentence on a sexual assault charge it had previously dismissed. *Id*. ¶ 17. Consequently, the 50-year sentence the district court imposed on a dismissed criminal charge was an illegal sentence. *Id*.

The same holds true in Partain's case. Because the district court dismissed the misdemeanor surreptitious recordation in the residence charge prior to sentencing, it had no authority to impose sentence on that dismissed charge. And because the district court dismissed the felony sexual abuse of children charge at the sentencing hearing, it could not sentence Partain for any crime. The district court had no authority to impose a sentence on a charge it had admittedly dismissed, even though the dismissal was without prejudice because only the State could have resurrected the dismissed charge. *State v. Mosby*, 2022 MT 5, ¶ 29, 407 Mont. 143, 502 P.3d 116.

Although the district court believed it was acting in the best interests of the victim and her family, that does not entitle it to act without or contrary to statutory or constitutional authority. Also, based on the victim's statement at the sentencing hearing, it is debatable whether the court's actions were in *the victim's* best interest. The district court's non-legal reasons for its decision, whether laudable or not, do not control the inquiry. For example, the Texas Court of Criminal Appeals reversed a court of appeals decision affirming the trial court's order dismissing an indictment over the state's objection. *State v. Mungia*, 119 S.W.3d 814 (Tex. Crim. App. 2003). In *Mungia* the defendant and appellee, Mungia, was indicted on one count of murder and one count of engaging in organized criminal activity. *Id*. at 815. Mungia pled guilty pursuant to a plea agreement in which he agreed to testify at the trials of former gang members in exchange for the state's lenient sentencing recommendation. *Id*. The trial court accepted Mungia's guilty plea and postponed sentencing until after Mungia testified in the other cases. Mungia fulfilled his obligations under the agreement. *Id*. at 816. The trial court found Mungia had provided a tremendous public service and dismissed Mungia's indictment with prejudice. The trial court found that sentencing Mungia to prison, even for the reduced term the state agreed to recommend, would place Mungia in danger every day. The trial court concluded it was in the best interest of justice to dismiss Mungia's indictment. *Id*.

The state appealed but the court of appeals upheld the dismissal. The Texas Court of Criminal Appeals reversed the court of appeals and identified the issue before it to be whether a trial court has the authority to dismiss an indictment without the consent of the state for the purpose of protecting the defendant from retaliation. *Id*. The court concluded that the trial court had no statutory or constitutional authority to dismiss the indictment since it did not do so to remedy a constitutional violation. *Id*. at 817. Although the criminal appeals court found the trial court's concerns about Mungia's safety in prison to be laudable, that did not provide authority for the trial court to dismiss the indictment without the consent of the state. *Id*.

The criminal appeals court further explained that *after* the trial court accepted Mungia's guilty plea, it was left with few options to address its concern about Mungia's safety. But the court pointed out that the trial court could have rejected the plea agreement *and allowed Mungia to withdraw his guilty plea. Id*. at 818.

Similarly, in *State v. Krueger*, 588 N.W.2d 921 (Wis. 1999), the Wisconsin Supreme Court overruled the circuit court's dismissal of the state's indecent exposure charges against Krueger. *Id*. at 922. Krueger asked the court to rule that a circuit court has the inherent power to dismiss a prosecution if the circuit court's sense of fairness has been violated, equating the sense of unfairness to a due

process violation. The Wisconsin Supreme Court refused to do so, recognizing that a prosecutor has broad discretion in determining whether to charge an accused, which offenses to charge, under which statute to charge, and whether to charge a single count or multiple counts. *Id*. at 924. The court recognized there were limits on prosecutorial discretion "to avoid arbitrary, discriminatory or oppressive results," but, generally, the "district attorney is answerable to the people of the state" in the manner he or she exercises discretion. *Id*. at 924-25.

And, in *State v. Whittington*, 926 P.2d 237 (Kan. 1996), the state charged Whittington with aggravated battery when Whittington hit his wife with a vehicle following a domestic altercation. *Id*. at 238. Whittington's wife had misgivings about the state charging her husband with criminal conduct and wanted the charges dropped. *Id*. at 875. The trial court dismissed the charges at the preliminary examination stage, remarking that the state had no business disrupting a marital relationship when the parties did not want the state to intervene. The trial court concluded that a felony prosecution could have a disruptive effect on the marital relationship of Whittington and his wife. *Id*. at 876.

The Kansas Supreme Court reversed the trial court's dismissal order, concluding that the trial court "exceeded its authority to the extent that the dismissal of the complaint was based not on a lack of evidence to show probable cause, but on the conclusion that prosecution would have a disruptive effect on the

marital relationship." *Id*. at 879. The court emphasized that the county attorney is the representative of the state in criminal prosecutions, and it is the county attorney who has authority to dismiss or reduce any charge. *Id*.

The district court's motive to act in a manner it perceived to be in the best interests of the family in the instant case is not relevant to the inquiry before this Court because, just as in the cases cited above, the district court had no statutory or constitutional authority to act in the manner that it did. Even so, the district court's reasoning for its drastic actions was far more focused on what Partain did *after* his criminal conduct than what Partain did *to the victim*. What has been labeled a momentary lapse in judgment will have lifelong consequences for Doe to navigate.

Since the district court did not have statutory or constitutional authority to reinstate the misdemeanor charge it had already dismissed or to amend the felony charge to a misdemeanor, its action of imposing sentence on the misdemeanor charge violated the separation of powers doctrine.

C. The district court acting without statutory or constitutional authority violated the separation of powers doctrine.

Article III, section 1, of the Montana Constitution provides:

> The power of the government of this state is divided into three distinct branches—the legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The principle behind the separation of powers doctrine is that "each branch of government is separate and distinct and is immune from the control of the other two branches of government in the absence of express constitutional authority to the contrary." *Powder River Cnty. v. State*, 2002 MT 259, ¶ 111, 312 Mont. 198, 60 P.3d 357.

The attorney general is the legal officer of the State. Mont. Const. art. VI, § 4(4). The attorney general has supervisory powers over county attorneys "in all matters pertaining to the duties of their offices." Mont. Code Ann. § 2-15-501(5).

The county attorney is the public prosecutor and shall "draw all indictments and informations." Mont. Code Ann. § 7-4-2712. "An information is a written accusation of criminal conduct prepared by a prosecutor in the name of the State." *State v. Allen*, 278 Mont. 326, 330, 925 P.2d 470, 472 (1996). An application for leave to file an Information by affidavit against a criminal defendant must be granted "[i]f it appears that there is probable cause to believe that an offense has been committed by the defendant." Mont. Code Ann. § 46-11-201(2). "The decision whether to prosecute, and for what offense, lies in the prosecutor's discretion." *State v. Hamilton*, 2007 MT 223, ¶ 45, 339 Mont. 92, 167 P.3d 906, quoting *State v. Schmalz*, 1998 MT 210, ¶ 9, 290 Mont. 420, 964 P.2d 763. Where the facts of a case support a possible charge of more than one crime, it is within the discretion of the prosecutor to decide what crime to charge. *State v. Brown*,

2022 MT 176, ¶ 15, 410 Mont. 38, 517 P.3d 177, citing *State v. Cameron*, 2005 MT 32, ¶ 17, 326 Mont. 51, 106 P.3d 1189.

The district court has original jurisdiction in all criminal cases amounting to a felony. Mont. Const. art. VII, § 4(1). The powers of the court are enumerated in statutes. Mont. Code Ann. §§ 3-1-111, -402. The list does not include the authority to *sua sponte* amend the criminal offense the prosecutor has charged. Importantly, as this Court has recognized, "Charging decisions are generally within the prosecutor's exclusive domain," and "the separation of powers [doctrine] mandates judicial respect for the prosecutor's independence." *State v. Passmore*, 2010 MT 34, ¶ 46, 355 Mont. 187, 225 P.3d 1229, quoting *United States v. Carrasco*, 786 F.2d 1452, 1455 (9th Cir. 1986); *see also Fletcher v. District Court*, 260 Mont. at 414-15, 417-18, 859 P.2d at 995, 996-97.

"The State has broad discretion in determining when to prosecute a case and what crime to charge." *State v. Brandt*, 2020 MT 79, ¶ 17, 399 Mont. 415, 460 P.3d 427. As this Court has explained, "it is not for the judiciary to undertake review of the State's charging decisions absent a statutory or constitutional violation." *State v. Allen*, 2016 MT 185, ¶ 13, 348 Mont. 257, 376 P.3d 791. Here, the State committed no statutory or constitutional violation. The district court simply disagreed with the prosecutor's charging decision, even though it found probable cause supported that decision and even though Partain admitted he had

committed every element of the felony offense and the court had accepted his voluntarily entered guilty plea after his admission of each element of the offense. The district court foreclosed Partain's felony conviction on policy grounds rather than on evidentiary or legal grounds, even though Partain pled guilty to the felony charge.

Courts around the country have historically found similar judicial conduct to violate the separation of powers doctrine. As the Massachusetts Supreme Court has succinctly explained:

> The conclusion that judicial power does not extend to authorize a judge to dismiss an otherwise legally adequate indictment, prior to verdict, finding, or plea, in the "interests of public justice" is inescapable.

Commonwealth v. Cheney, 800 N.E.2d 309, 314-15 (Mass. 2003), citations omitted. The court continued:

> To conclude otherwise would be to permit judges to substitute their judgment as to whom and what crimes to prosecute, for the judgment of those who are constitutionally charged with that duty, and who are accountable to the people for doing so responsibly. The line that the principle of separation of powers requires us to draw between the exercise of judicial and executive powers could not be more clear.

Id. at 315.

For example, in *State v. Knight*, 884 S.W.2d 258 (Ark. 1994), the facts of which are remarkably like the facts at issue here, the state appealed an order of the circuit court that reduced a charge against Knight to possession of a controlled

substance after Knight had pled guilty to possession of a controlled substance with intent to deliver. After the circuit court did so, it sentenced Knight to supervised probation. The Arkansas Supreme Court agreed with the state that a probationary sentence constituted an illegal sentence. There was a mandatory prison sentence for the offense to which Knight had pleaded guilty. *Id*. at 259.

At the sentencing hearing, after considering testimony about Knight's circumstances, including his addiction, that it was Knight's first offense, and that because the felony to which Knight pled guilty had a mandatory sentence, the circuit court reduced the charge to possession of a controlled substance. *Id*. at 259-60. When the prosecutor objected, the court responded that it could find, based on the evidence before it, that the sentence should be less than the mandatory sentence and reduce the charge so its sentence was in accordance with the law. *Id*. at 260.

On appeal, the state argued that the circuit court did not have the authority to reduce the charge against Knight because that authority vests solely with the prosecutor. Since the district court did not have the authority to alter the charge against Knight, the circuit court erred in not sentencing Knight to a mandatory sentence. *Id*. The Arkansas Supreme Court agreed with the state because the Arkansas Constitution provides that the duty of charging an accused with a felony is reserved for either the grand jury or the prosecutor, and it had consistently held

that a circuit court does not have the authority to amend the charge that a prosecutor has charged. *Id.*; *see also State v. Murphy*, 864 S.W.2d 842, 844 (Ark. 1993) (even though the trial court found the appellee to be a habitual offender with two prior felony convictions, the trial court later dismissed the habitual offender charges over the state's objection, thereby usurping the prosecutor's constitutional duties and violating the separation of powers).

The Arkansas Supreme Court also rejected the notion that the circuit court did not really amend the charge, stating:

> Here, the judge accepted Knight's guilty plea to possession with intent to deliver. At the sentencing hearing, the judge on his own motion determined that Knight was guilty only of the lesser included offense, possession of a controlled substance, and he, in effect, amended the charge to a lesser included offense. *This the circuit judge could not do.*

Id at 260-61; emphasis added.

The court further observed that there clearly was a factual basis for Knight's guilty plea to possession with intent to deliver. *Id*. at 261. Thus, the circuit court was not addressing the factual legitimacy of the charge to which Knight pled guilty. Rather, it was seeking the means to impose a probationary sentence. *Id.* The court also elaborated that, even if the circuit court had appropriately rejected the guilty plea for a lack of factual basis after it had accepted it, the circuit court did not follow the correct statutory procedure, which only allows for the circuit court to inform the parties and allow the defendant to either affirm or withdraw his plea.

Id. citing Ark. R. Crim. P. 25.3. The court explained that the rule at issue did not authorize the circuit court to reduce the charge to a lesser included offense or to permit the defendant to plead guilty to another charge the circuit court deemed more appropriate. *Id*.

Similarly, in *State v. Williamson*, 853 P.2d 56 (Kan. 1993), the Kansas Supreme Court overturned the trial court's dismissal of criminal charges against Williamson after the trial court concluded that the case would be more appropriately handled under the state's civil commitment statutes rather than under the criminal code. *Id*. at 57-58. The state had charged Williamson with two counts of aggravated assault after Williamson threatened his wife and daughter with a knife. *Id*. at 57.

The trial court found probable cause for the charges. The trial court subsequently held a hearing on Williamson's motion to dismiss the charges. The trial court expressed its intention to dismiss the charges because Williamson was mentally ill. The trial court informed the prosecutor that the actions he had taken were not in the best interest of "the State or anyone else" and the prosecutor had not considered "the harm that you are doing." *Id*. at 58. The Kansas Supreme Court concluded that the trial court's order of dismissal violated separation of power principles, even though the Kansas Constitution contained no express provision requiring the separation of powers. *Id*. at 59. The court concluded:

> In this case, the decision to proceed with criminal rather than civil commitment for care and treatment was a decision within the discretion of the prosecutor's office. The court's dismissal, no matter how enlightened, amounts to an impermissible judicial intrusion into the prosecutor's function.

Id.

Recently, in *Commonwealth v. Blackford*, 674 S.W.3d 465 (Ky. App. 2023), the Appeals Court of Kentucky considered similar, although less consequential, judicial overreach. In *Blackford*, an officer charged Blackford with speeding 26 miles per hour or more over the speed limit and reckless driving. The prosecutor and Blackford reached an agreement whereby Blackford would plead guilty to the speeding offense as charged in exchange for the commonwealth dismissing the reckless driving charge. At a later hearing, when the prosecutor was not present, the district court crossed out the prosecutor's written plea agreement for the speeding charge and amended it to a less serious speeding offense. The district court wrote that it did so because Blackford did not have a record and was leaving for active military duty. (*Id.* at 466.)

The Appeals Court of Kentucky held that the district court was not permitted to unilaterally amend the speeding offense because "without consent of the Commonwealth a trial court may not before a trial amend or reduce to a lower degree the charge brought against a defendant [as] it is not the prerogative of a court to choose what the accusation will be." *Id.* at 469, quoting *Allen v. Walther*, 534 S.W.2d 453, 455 (Ky. 1976); *see also Flynt v. Commonwealth*, 105 S.W.3d

415, 425 (Ky. 2003) ("because prosecutors have the sole discretion whether to engage in plea bargaining with a defendant, this court and its predecessor have held that, unless the Commonwealth consents, courts cannot: (1) accept pleas of guilty and unilaterally limit the sentences which may be imposed; (2) amend a charge prior to the presentation of evidence; or (3) dismiss a valid indictment"); *Hoskins v. Maricle*, 150 S.W.3d 1, 13 (Ky. 2004) ("[S]ubject to rare exceptions usually related to a defendant's claim of denial of the right to a speedy trial, a trial judge has no authority, absent consent of the Commonwealth's attorney, to dismiss, amend, or file away before trial a prosecution based on a good indictment.").

Although this Court has never considered the precise issue presented in this case, the reasoning from the other state courts set forth above is clearly in line with this Court's rationale expressed in *Fletcher*, *Hamilton*, *Brown*, and *Passmore*. The district court had no statutory or constitutional authority to act in the manner that it did. The district court's act of *sua sponte* amending the felony charge to which Partain pled guilty or dismissing the felony charge and finding Partain guilty of a misdemeanor offense usurped the prosecutor's decision-making in violation of the separation of powers doctrine, regardless of the district court's non-legal motivation to do so. Whether the district court's motivations were laudable is subject to debate, but, because the district court's decision-making was based upon

its subjective view of the right course of action, the district court's motives are irrelevant to the inquiry.

CONCLUSION

For the reasons argued above, the State respectfully requests this Court conclude that when the district court sentenced Partain on an unlawfully amended or dismissed charge it imposed an illegal sentence. This Court should reverse the district court's judgment dismissing or amending the felony sexual abuse of children charge and remand this matter for a sentencing hearing before a different district court judge, in accord with *State v. Rambold*, 2014 MT 116, ¶ 21, 375 Mont. 30, 325 P.3d 686, on the felony sexual abuse of children charge to which Partain pled guilty.

Respectfully submitted this 29th day of March, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Tammy K Plubell*
TAMMY K PLUBELL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,968 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0748

STATE OF MONTANA,

Plaintiff and Appellant,

v.

JONATHAN PARTAIN,

Defendant and Appellee.

APPENDICES

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-29-2024:

Kathleen Foley (Attorney)
P.O. Box 9452
Missoula MT 59807
Representing: Jonathan Partain
Service Method: eService

Mark Malhiot Handelman (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Kirsten H. Pabst (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy K Plubell
Dated: 03-29-2024