IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0567

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LESLIE DEAN ERNST,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald Harris, Presiding

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ISSUE 2: Is the sentencing of the Appellant on a partially unconstitutional statute, without the State or the Court stating with particularity that portion of the statute that the Appellant was being sentenced under result in an illegal sentence and thus should be set aside?

ISSUE 3: Did the Appellant meet his burden to prevent the use of prior convictions to enhance its sentence by bring forward the constitutional irregularity of the earlier convictions by asserting that the earlier conviction was based upon a statute with a part thereof that was later determined to be unconstitutional by the Supreme Court?

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ISSUE 5: Was the Court's analysis of the plea agreement and its interrogation of the Appellant at the time of the change of plea hearing sufficient to determine if the plea was sufficient, and was knowingly and voluntarily entered into, when it failed to inquire of the Defendant, as to the unconstitutional provisions of the statute that the Appellant was pleading too?

ISSUE 6: Should the Appellant have been allowed to withdraw his plea because the plea agreement was defective and illegal on its face?

ISSUE 7: Did Appellant's original trial counsel provide ineffective assistance for his failure to research and advise the Appellant of the unconstitutional nature of the statute that he was pleading to and take action to protect the Appellant's rights?

STATEMENT OF THE CASE

This is the second appeal filed in this matter that was filed in the district court in September 2013 (Dist. Ct. Cod. #1). This Appellant plead quality to 5 counts of Privacy in Communications (Felony) pursuant to Sec. 45-8k-213(1)(a) a constitutionally infirmed statute, under the terms of a Waiver of Rights and Plea Agreement (Dist. Ct. Doc. #103) and Third Amended Information, (Dist. Ct. Doc. #105)

He was subsequently sentenced to a term of 25 years to Montana State Prison with a 15-year parole restriction and certain terms of community release. (Dist. Ct. Doc. # 164).

The Appellant appealed to the Montana Supreme Court his first sentence and judgment. This Court dismissed the appeal after it remand the matter to the District Court for resentencing. The reason for this was the loss of the transcript from the original sentencing hearing at the District Court level. (Dist. Ct. Doc. #174).

After the remand to district court and after motions, responses, and hearings, which all resulted in the denial of the Appellant's various motions, the Appellant filed a Petition for Writ of Supervisory Control this Court under case number OP 22-0331. This Writ was denied. He was

subsequently resentenced on June 9th., 2022, with a judgment issuing therefrom. (Dist. Ct. Doc. #322, attached hereto as Appendix A).

It is from this second Judgment that this appeal is made.

STATEMENT OF THE FACTS

The matter before this Court is a matter that has been ongoing since September of 2013.

In 2013 this Court ruled the presumption portion of 45-0-213(1)(a) unconstitutional (State *v. Dugan, 2013 MT 38*). The legislature attempted to correct the statute during the 2019 legislative session.

Prior to his arrest, the Appellant did start and maintain social relationships with at least 5 women over a period of 9 years that he either previously knew, met because of his employment or through other means. Over the years they have been contacted in person, by phone or computer. All the relationships were voluntary and communications between the parties were voluntary, consistent, social and sexual/intimate, until such time as the ladies decided that they were something else. The Appellant was accused of using third party identities or aliases to maintain contact, even though the women could identify him through his aliases etc.

These contracts occurred during a very stressful period in the Appellants life. For most of his life he suffered from anxiety and depression and other mental health issues. He was socially awkward. He was pursuing a PHD. in psychology and had completed all his work on the degree except for his dissertation. He taught at the college level and pursued various volunteer positions. All of this was given up when his father required full-time care.

The Appellant became the sole caregiver of his dying father. This situation lasted about 2 years, with his father's passing. The caregiver role required Appellant's 24 hours a day, constant, exhaustive effort. His only social outlet was the contact he was having with these various women. After his father's death, the Appellant became a certified personal trainer and start his own business focused on meeting the needs of the elderly and disabled.

The original Information and Affidavit in Support (Dist. Ct. Doc. #1) was filed in this case in September of 2013 charging the Appellant with Count 1, Sexual Intercourse Without Consent, Count 2, Stalking a (Felony) and Count 3, Privacy In Communications (Felony) under MCA Sec. 45-8-213(1)(a). Even though the original filing states the statute by

title and section, it is silent as to whether the Appellant was being charged under the total statute or just the constitutional portion of the statute, without the language that contained the unconstitutional presumption, as ruled upon in this Court's opinion in *State v. Dugan (2013 MT 38)*. The State in its later filing entitled, "State's Response to Defendant's Motion to Withdraw Guilty Plea" (Dist. Ct. Doc. # 204) that was filed on December17, 2019 doubles down on its position that the statute enumerated in the charging documents is the one used as the basis for the charge in the original Information and Affidavit in Support.

A "Second Amended Information" (Dist. Ct. Doc. # 39) was filed on March 25th, 2015, and it added 3 more charges of "Privacy in Communications (Felony) under 45-8213(1)(a), for total charge under that statute of 5 counts. The State, as before, in its Response to Defendant's Motion to Withdraw Plea states that the added charges are brought under the cited statute.

A "Third Amended Information and Affidavit" (Dist. Ct. Doc. # 104) was filed by the State alleging only five counts of "Privacy in Communications (Felony) and deleting all the other Counts. For a third time the State is silent about the unconstitutional provisions.

In all the Affidavits filed in support of its information, the State does not make any statement concerning intent or purpose of the Appellant but simply lists certain activities and statements allegedly made and done, including the use lewd and obscene language.

Along with the filing of the Third Amended Information and Affidavit, the Appellant filed a "Plea Agreement and Waiver of Rights" (Dist. Ct. Doc. # 103). The Plea Agreement states that the Appellant used lewd and obscene language and the victims were harassed, annoyed, and offended by those actions. There is no statement in the plea agreement where the Appellant agreed or admitted that was his intent or purpose to harass, annoy or offend the victims.

This Court in its opinion in *Dugan supra*, declared that 45-8-213(1)(a) MCA specifically contained unconstitutional language as to the statement of a presumption embedded in the statute. The use of obscene, lewd, or profane language… is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend. The Court declared that it found the remaining sections of the statute to be constitutional. This offending language remained until the legislature session in 2019.

Prior to his first sentencing and after the change of plea hearing, the Appellant sought a "Finley" hearing over the continued representation of him by his first assigned lead counsel. As a result of that hearing, new counsel was assigned, and the Appellant had advised the Court that he wished to withdraw his plea.

The case went to sentencing the first time with the Appellant receiving as a sentence as recited in the Judgement, (Dist. Ct. Doc. #164) 5 years to the Montana State Prison with a parole restriction of 15 years, restitution as outlined in a schedule, sex offender treatment while in prison and the standard list of probation requirements for a sex offender. This led to an appeal to the Montana Supreme Court (Mt. Supreme Ct. Case # DA 17-0504). The appeal was dismissed due to a loss of the transcript from the sentencing and this matter was remanded to the district court for resentencing. (Dist. Ct. Doc. #174) and a new judge was assigned.

Prior to resentencing, the Appellant was assigned new counsel who filed "Unopposed Motion for Hearing on Opposed Motion to Withdraw Guilty Pleas". (Dist. Ct. Doc. #187.001) which in content and intent was a Motion to Withdraw Guilty Plea and a request for a hearing and a brief

in support. (Dist. Ct. Doc. # 187.002). In these pleadings the Appellant raised issues concerning the nature of his plea, as to whether it was knowingly, voluntarily entered. Those issues included: 1. Whether a plea can be entered into when a partially unconstitutional statute is involved. 2. This is particularly true where the Appellant had no understanding of the constitutionality of the statute because his prior counsel failed to advise the Appellant of his position concerning the nature of the statute, 3. The plea was the result of coercion and duress perpetrated on the Appellant by his prior counsel and influenced by the Appellant's mental state. 4. That the plea agreement had been violated by the State in that it prosecuted acts that were prohibited under the plea agreement. 5. The Appellant lack the mental capacity to execute the agreement in that his mental condition impaired his ability to agree to its terms knowingly and voluntarily and that he was never advised by counsel of any mental health defenses that could have or should have been raised at trial.

The State filed a response. The Appellant's attorney filed a reply further arguing the mental health of the Appellant, his lack of knowledge; the illegal nature of the plea agreement and that the

agreement had been violated by the State by the introduction of evidence that went to investigations that was prohibited by the agreement.

Just prior to sentencing, the Appellant filed a Motion in Limine (Dist. Ct. Doc. Ct. Doc. # 266. or in the alternative a motion challenging prior convictions and their use as sentencing enhancements and challenging the validity of the sentence.

After a hearing on all motions, the trial court issued an order, (Dist. Ct. Doc. #259) denying all motions. The reasons offered by the Court in its opinion included; that the evidence sought was never in the possession of the Billings Police Department: that based upon he plea agreement and his statements at the change of plea hearing that the plea of the Appellant was voluntarily and unknowingly entered into and without duress and coercion; there was no common scheme in that the victims were 5 in number; and that the competency of the Appellant was never reviewed by his treating therapist and the Appellant was determined to be sufficiently competent by the Pyscho Sexual evaluator and that his mental health issues did not interfere with his ability to knowingly and voluntarily enter into the plea agreement

In the Appellant's Motion in Limine or in the alternative, Motion Challenging Felony Sentencing Enhancements, Challenging Prior Convictions and for Evidentiary Hearing and Petition to Challenge Validity of Sentence and Brief in Support (Dist. Ct. Doc. #266) he argues that the Appellant never admitted to in any of his pleadings and in his Waiver of Rights and Plea Agreement or in his colloquy the change of plea hearing that he had any prior convictions for Privacy in Communications. Furthermore, the State in any of the filed pleadings did not allege or otherwise indicate that earlier convictions existed. The Appellant took the position that he was only subject to two felony convictions under the five he plead to. The Appellant further argues that his convictions are invalid in that the statute itself is unconstitutional on its face and that even if part of it is constitutional, it cannot be severed from the total in that the statute lacks a severability clause and the state of the law is that the statute cannot be mutilated to achieve a particular result, as well as other issues.

The Appellant, also, argues that the prior convictions, if any, are constitutionally infirmed in that they are convictions based upon an infirmed statute and that is direct evidence and as a result the obligation

now shifts to the State to prove that the conviction is a qualifying conviction.

The Court issued an order denying all pending motions, including the Motion in Limine. (Dist. Ct. Doc. 313). Said denial was based upon the lack of direct evidence on the part of the Appellant.

On the 29th., of June 2022 the Appellant was sentenced to 5 years on each count of the Third Amended Information to the Montana State Prison for a total sentence of 25 years with a prohibition for parole of 15 years with a list of community release provisions. (Dist. Ct. Doc. 322)

SUMMARY OF ARGUMENT

The advocacy for the Appellant starts with the principle of "Judicial Erasure" *("The Writ-of-Erasure Fallacy" by Jonathan F. Mitchell, 104 Va. L. Rev. 933*) The article states at page 52: "Judicial review of legislation is often misunderstood as a veto-like power to revoke or 'strike down' statutes. But the judiciary is powerless to suspend or erase a law; it can only refuse to enforce a statute and prevent the executive from enforcing it." Even after this Court determines that a portion of a duly enacted statute is determined to be partially unconstitutional, the statute, as enacted, remains as part of the written law of the State of Montana. *(See*

"Zombie Laws", 25 Lewis & Clark L. Rev. 1047) the article at page 32 opines: "The most unconstitutional law remains on the books and can be enforced by a departmental executive undaunted by the prospect of judicial defeat." As a result of this, the State in its prosecution of the Appellant has a duty to recognize and establish for the record that only the constitutional portion of the statute is being enforced. Further, that all parties to a criminal case, from initial pleading through sentencing has a duty to ensure that the Appellant is fully advised that it is only being prosecuted and or pleading to, tried and sentence on the portion of a stated statute that has been previously been determined to be constitutional by this Court, regardless as how it appears on the published laws of the State of Montana.

The failure to do so renders the proceedings a denial of the Defendant's rights of due process, equal protection and to be fully informed under the 6th., and 14th., amendments of the United States Constitution and the corresponding portions of the Constitution and laws of the State of Montana.

The failure of the State to specifically identify only the constitutional portion of the statute as the source of the violation of the

law in its initial pleadings denies and impacts the Appellant's ability to prepare a meaningful defense to the prosecution. In the case at bar, it forces the Appellant to take on an additional burden to defend both an unconstitutional presumption and a specific intent statute in direct conflict to his 6th. And 14th., amendment rights.

The failure on the part of the Court to inquire as to the Appellant's knowledge and understanding of the statute at the time of the change of plea hearing prevents the Court from determining if the change of pleas is knowingly and voluntarily entered. Particularly, the inquiry must be as to the law that was violated, and if appropriate, as it is in this case, what the State must prove to convict the Appellant. In addition, the Court, as well cannot determine if the plea agreement itself is a legal agreement and permitted under the law. The parties cannot enter into an illegal plea agreement based upon an unconstitutional law or any such impaired part of said law.

The failure of the Court to designate what portion of the constitutionally impaired statue it is sentencing under creates an illegal sentence, as the sentence could be the result of either one or the other or all provisions of a constitutional impaired statue and thus result in the

illegal sentence. The sentencing statutes of this state require that any sentence be sure, based upon a specific statute and not the result of misinformation.

For a previous conviction of the Appellant to be used as a basis for enhancement of a sentence and after the Appellant has established that the prior conviction was based upon an unconstitutional statute, the State has the obligation to show that the convictions were not based upon the unconstitutional portion of the statute.

Defense counsel has an affirmative duty to advise his client of the nature of the statute that he is being prosecuted under and its constitutionality or limits and their effect on his constitutional rights. This is particularly impactful and important when it directly affects the preparing of or even the existence of a defense of the Appellant in his trial. When by either ignorance or negligence, trial counsel fails to advise his client or take whatever action necessary to address the conflict between the various constitutional and unconstitutional portions of the statute with the court and advise the Appellant accordingly is nothing less than ineffective assistance of counsel.

The record of the Clerk of Court of the trial Court on its face is totally deficient of any effort to address the constitutional issue by motion to the Court, in the plea agreement by description or at the change of plea hearing by inquiry of the defendant or at the sentencing hearing by argument or inquiry of the defendant or statements to the court. Also, there is nothing on the record of the Clerk of Court, in the transcripts of the various hearings or documents filed by defense counsel indicating that this important issue was discussed or even brought up to the State or the court by defense counsel at any point of the proceedings that he represented the Appellant in

Given the above, the "*Finley Hearing*" held by the trial court, which resulted in the release of counsel, the various Motions to Withdraw Plea that were filed by subsequent counsel, the issue of ineffective assistance of counsel is properly before this Court, as a record-based issue for appeal.

In every step of the case against the Appellant the failure of any one of the parties to the proceedings to identify with certainty the statute of under which the Appellant was being prosecuted under results in a prosecution, plea agreement, sentencing and representation that is a

denial of the constitutional rights of the Appellant under each and every step described and this matter should result in a dismissal of the case as presented.

STANDARDS OF REVIEW

This Court exercises plenary review of constitutional questions including whether an accused 's constitutional right to due process was violated. *State v. Buttolph 2023 MT 238, 414 Mont. 207*

This Court has the discretion to review an unpreserved claim for "pain error" and do so sparingly when a defendant's fundamental constitutional rights are implicated, the error calls the fairness of the proceedings into question, results in manifest injustice, leaves or compromises the integrity of the judicial process. *State v. Dineen, 2020 MT 193, State v. Lackman, 2017 MT 127, 387 Mont. 459, State v. Miller, 2022 MT 92, 408 Mont. 316.*

When this Court reviews charging documents for sufficiency, it reads both the information and the affidavit together and determines whether a person of common understanding would know what was charged and whether that they sufficiently appraised the accused of the

charges so that they can prepare a defense. *State v. Willson, 2007 MT 327, State v. Hocter, 2011 MT 251.*

A claim of ineffective assistance of counsel is reviewed as a claim de novo which contains both questions of law and fact. *Garding v. State, 2020 MT 163,400 Mont. 496.* It is reviewed under the two-prong affirmative test of *Strickland v. Washington, 466 U.S. 468, 104 S. Ct. 2052.*

Whether a guilty plea was knowing, voluntary, and intelligent is a mixed question of fact and law, with the ultimate question subject to de novo review on appeal. *State v. Warclub, 2005 MT 149, 327 Mont. 352.*

Even though there was no objection raised to a criminal sentence at the district court level, the Supreme Court because of an exception to the general rule will review said sentence on appeal when it is alleged that the sentence was illegal, based upon misinformation, or exceeds statutory authority. *State v. Lenihan, 184 Mont. 338, 602 P2d. 997 (1979), State v. Walker, 2007 MT 205.*

ARGUMENT

ISSUE 1:

This appeal presents a conflict between two legal principles. The first principle is the duty of the Supreme Court, when appropriate, to determine a statute to be constitutional in whole or part. The second is the duty of the legislature to amend a statute to ensure that it meets constitutional muster. Each principle is exclusively under the control of the designated party. The extent of this conflict and its practical impact is further explained and discussed in detail in the law review articles, *"The Writ-of-Erasure Fallacy", 104 Va L. Rev.933 and "Zombie Laws", 25 Lewis & Clark L. Rev. 1047. (see quotes in Summary of Argument Supra)*

Both Articles highlight the failure of a law or the unconstitutional language in a specific statute to go away, "erased" and the practical impact on the rights of parties to an action as a resulting from a legislature not acting timely in removing the offending language.

The summary of the articles is that erasure does not happen, and enforcement continues until a court of competent jurisdiction rules the offending language of the statute is not enforceable in a particular case.

This issue is ripe for plenary review in this matter in that it contains in it a significant denial of the Appellant's constitutional rights and in additional is subject to plain error review by this Court in that if this matter is left unattended to it will result in a manifest injustice to the Appellant; it will leave unsettled questions of the fundamental fairness, and will compromise the integrity of the judicial process. (*State v. Welch, 2024 MT 42 citing State v. Wells 2021 MT 103*).

In the case at bar, with all its twists and turns, is a prime example of this legal theory pit. In the present case in front of this Court is the direct result of this Court in *State v. Dugan, 2013 MT 38* determining that the proof of a presumption authorized to be used by the legislature when it enacted the statute *45-8-213(1)(a) MCA* is in fact unconstitutional and infringes on right of free speech. The language remained in the statute and as the statute appeared on the statute books of this state. It is important to note that the legislature did not review the statute until its 2019 session, when it deleted the offending language. This did not happen in a timely manner, even though *Dugan* was a 2013 case, and the statute was basically unchanged since enactment in 1973 and amendment in 1977. The net result for the Appellant is the five

counts that he was sentenced on based upon an unconstitutional provision that was still unstricken, as part of the statue.

The impact of this Court determining the extent of the constitutionality of a statue is addressed in *State v. Coleman, 185 Mont 299*. The Supreme Court in *Coleman* stated that there exists a rule or principle of statutory construction that a statute that is determined to be unconstitutional by a Supreme Court is "void ab initio and has no effect". The *Coleman* Court then quoted a United Supreme Court case of *Norton v. Shelby, (1886), 118 U.S. 425, 442 S. Ct. 1121*, 'A constitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed'. The *Norton* case went on to conclude that the aim of such a rule of construction is to hold the exercise of legislative power in excess of the constitutional limits of no effect. After some further discussion of the development of the concept, the Montana Supreme Court in the case of *(Ex Parte Anderson (1951) 125 Mont. 331* unequivocally states:" an unconstitutional law is void and is no law. An offense created by it is no crime."

This position of the ineffectiveness and enforceability of the unconstitutional statue is further discussed with approval in *Sadler v. Connelly, 175 Mont 484.* This Court took the position consistent with the much earlier *Norton* and *Anderson* cases.

Regardless of the argument that most of these cases, except for *Coleman* are civil cases, the principle of statutory interpretation and its effect on criminal cases is still valid, as validated in the *Coleman* case.

Given the analysis of the law review articles cited herein*, "Zombie Laws"* and the other*, "Fallacy of the Theory of Erasure*", and their discussion of the concepts and their impact on the infirmed statutes and their parts, the overarching issue is when is the duty to disclose the infirmity of the statute and what stage or stages during the criminal prosecution process is the Defendant entitled to that disclosure and by whom and the failure to do so is a denial of his constitutional right of due process and equal protection of the Appellant. The Sixth Amendment of the United States Constitution*, U.S. Const. amend VI* clearly requires that a criminal, defendant has the right, "to be informed of the nature and cause of the accusation" brought against him. *State v. Dobrowski, 2016 MT 261.* This constitutional right is clearly established in Montana

Law in Sec. *46-11-401(1) MCA*, which requires charging documents to state the name of the offense and, for each count, to state the official or customary citation of the statute.... (*Dombrowski supra*). Simply allowing the statutorily required information without considering the partially unconstitutional statute is misleading at best and a denial of equal protection and due process under the 14th., amendment of the United States constitution.

Further, the purpose of the charging documents is not only to advise of the offense but also to allow the defendant an opportunity to prepare a defense. *State v. Fehringer, 2013 MT 10* which cites the leading case of *State v. Wilson, 2007 MT 327.* The Wilson case *supra* states clearly that the test applied to the charging documents whether the defendant is apprised of the charges and "whether he will be surprised" citing *State v. Brogan, 261 Mont. At 86.*

One would believe that there will be more than surprise on the part of the Defendant that he is being prosecuted under a partially unconstitutional statute. If this is not disclosed to him in the charging documents, how can he prepare a defense? This is particularly true, if he is charged under a burden of proof that requires a different and more

complex level of defense. Must he find out for himself what the law is, when the State has a constitutionally mandated and statutory mandated duty to reasonably appraise him of the law and the conduct that constitutes the offense. It also places the Defendant at trial in a position that he or his attorney must, as in this case, defend against a presumption, where a defendant not charged under an infirmed statute was not have to face. Tis unconstitutional position carries all the way through to sentencing. The 14th. Amendment of the United States Constitution demands that all defendants not be placed in different positions but have the same opportunity to defend itself under any accusation as anyone else so situated. *U.S. Const. amend IV.* The concepts of equal protection and due process demand equal treatment and that equal treatment starts with a fair and accurate state of the offense. Thus, not letting the Defendant figure out on his own what the applicable is law. The Defendant is charged by this inaccurate statement of the law, with the burden to resolve the State's error and preventing the Court from misconstruing the charging documents, as it proceeds through the process.

The "common understanding" test of all charging documents read together, lays out a simple standard: …." are sufficient if a person of common understanding would know what was charged". *State v. Hocter 2011 MT. 251.* If that person of common understanding is misled by a misstatement of the law, it is impossible for that person to have an accurate understanding of what conduct, or action was being charged.

This Court in *State v. Buttoilph, 2023 MT 238*, clearly stated 'One of the Montana Legislative purposes for enacting criminal statutes is to give fair warning of the nature of the conduct declared to constitute an offense." (citing *State v. Abe 1998 MT 206)* The burden must be on the State at the time of filing its charging documents to accurately state the statute for the Defendant to have a fair warning of the conduct at issue. In this case, simple use of the words does not in itself lead to criminal conduct according to this Court in *State v. Dugan,* but the State must prove intent, as found in the constitutional portion of the statute. How can the Appellant in this case have known at his initial appearance that the State did not meet its statutory obligation of reasonably appraising the Appellant of the conduct at issue?

This omission is far different than simply a "scribner's error" as ruled in *State Bahr 2009 MT 378*. The Court held that the charging documents containing an erroneous name for the offense, or an erroneous statutory reference is not invalid if the charging language meets the "common understanding" test. The failure to distinguish between the constitutional language and the unconstitutional language of *45-8-213 MCA* is not a mere error of description but a substantial error of omission that results in the Appellant being denied his due process and equal protection rights. It lays upon him a burden far larger than other criminally charged individuals to determine the appropriate law in the case, raise and defend the issue before the trial court, all awhile trying to put together a defense that other Defendants are not obligated to put together.

A case in the State of Washington clearly identifies the constitutional issue, with slightly different facts*, State v. Habermam. 105 Wn.App.926*. In the above Washington case, the statue was fully unconstitutional. The Washington Appellate Court addressed the constitutional issue head on by stating that charging the defendant with violating an invalid law is a fundamental 'due process" violation *(citing*

cases). The remedy for an **insufficient** *(emphasis added*) charging document is reversal and dismissal of charges, without prejudice. What charging document could be more insufficient than one that fails to accurately detail the law under which the Appellant is being prosecuted under? A person with common sense cannot effectively use their common sense if he has been misdirected as to the law.

This matter is now appropriately before this Court because of the nature of the constitutional questions raised but also under the "Plain Error" review doctrine. In *State v. Wells 2021 MT 103,* described this doctrine of review to be used whether the alleged error may result in, "a manifest miscarriage of justice, leaves unsettled questions of fundamental fairness or compromises the integrity of the judicial process".

Any omission of this magnitude or error on the part of the State regardless of whether it's intentional, result of poor work performance or negligence, always leaves a question of the fairness of the judicial process. The issues raised throughout this appeal, if not resolved by this Court, will leave unsettled questions of the fundamental fairness of the system. Many of the issues raised here are for the most part issues of

first impression for this Court as the relationship between a partially unconstitutional statute and the system's duty to prosecute only on enforceable law has had little of or no review by this Court. The *Coleman* case *supra* seems to be the only case of note that has looked at a similar question.

The Defendant in a criminal case does not control the focus of the case in its early stages. The presumed innocent defendant is entitled to fair, accurate and enforceable, as a matter of law, prosecution. He should not be placed in the position of correcting the State's errors to ensure that he receives fair treatment from the system. It also leaves the door open to an unscrupulous prosecutor to abuse the system for his own benefit at the expense of the defendant.

ISSUE: 2

The error of law not only taints the beginning of the judicial process but carries all the way through the process through sentencing. As in this case no one rectified the record to advise the Court or the Appellant at sentencing of the correct statute that the Court was sentencing under. The Court also failed to state that portion of the statute that it was using to fashion the sentence of the Appellant.

It is a long-held position of the law in this state that a sentence based upon an unconstitutional statute is an illegal sentence. *State v. BerLee Yang 2019 Mt 266.* This Court has held in the case of *State v. Lenihan, 184 Mont. 338, 602 P2d. 997 (1997*) that a sentence can be challenged for its legality at any time. It will review sentences when they are outside statutory authority or are illegal. *Lenihan supra.*

The content requirements for sentence pronouncements by the trial Court is found 46-18-115 (6) MCA. It reads: "(6) In felony cases, the Court shall specifically state all reasons for the sentence…. in open court on the record and in the written judgement." All the reasons for the sentence should include the statute. If the sentence is outside the statutory parameters, it is an illegal sentence.

There are multiple supreme court cases, such as *State v. Rambold 2014 MT 116,* which have held that a sentence made under the already determined unconstitutional, unenforceable, void language of the statute is illegal. The Court in *Rambold* clearly states "A sentence is… illegal when the court acts without statutory authority for a sentence." *(citing cases)* A review of the earlier cited cases herein only emphasizes this Court's unchallenged position that law determined to be unconstitutional

is void and has no effect, which applies to the unconstitutional portions of the statute at bar. From these cases it can be concluded that a sentence made under that partial language of statute that has been determined unenforceable is an illegal sentence, also.

Because we cannot with certainty the portion of the statute that the sentencing court used as its basis to pronounce the sentence either at the hearing or from that the judgment itself, the sentence itself is in fact illegal and needs to be set aside.

There are a line of cases including State *v. Lenihan, 184 Mont. 338* and continuing through State *v. Bull, 2017 MT 24* and others that can be characterized as the "catch all" (this author's words) cases for errors in sentencing. Those cases advance the theory that if the district court had been provided the opportunity to consider the error brought on appeal, it could nevertheless have imposed the same sentence. *Bull supra.* In contrast, the historical list of cases is lengthy upholding that the constitutional rights of due process and equal protection of the Appellant are not some trifles that can be superseded or minimized by some error because, as *Bull* supra line of cases suggest, "NO harm NO foul", when the Appellant's rights are at issue. It is the reason this issue is before this

Court, as the appearance of the judicial system for fairness is at issue here.

This Court has held that a sentence cannot be based upon "misinformation." and there is a constitutional right to a sentence based upon correct information *State v. Hocevar 2000 MT 157. Hocevar* dealt with misinformation that came to the Court through the pre-sentence report. (*See also, State v. Bauer, 199 MT 185)* Misinformation can also be the lack of correct information, or insufficient information such as found in the case at bar. The correct information at the case at bar would be the constitutional portion of the statute being the basis for the prosecution all the way through the sentencing. A simple reliance on a statutory reference is a misleading and mis statement of the law for the purpose of the sentencing in this matter and thus the sentence itself is illegal.

Further, the Montana Code Annotated, *46-18-102(3*) specifically addresses the obligation of the sentencing court to give reasons on the record for the sentence imposed. This Court in *State v. Goulet, 277 Mont. 306* stated unequivocally that this statute "requires that when a sentence is pronounced, the court must "clearly state for the record (its) reason for imposing the sentence." The *Goulet* Court goes on the say unless the

reasons are stated, one is left to guess at the reasons and "cannot know whether the sentence was imposed in violation of due process or not." This statement is almost prophetic in nature. This is exactly the case before this Court.

What can be important as to protect the due process rights of the Appellant than a clear statement of the law, when the written statute is not in fact the constitutional statement of the law. Throughout the jurisprudence of this State there is case after case that supports the concept that courts are presumed right. The pronouncement of sentence on the record and its reasons is not for the benefit of the sentencing court but for the benefit of this Court and those who will review the findings of sentencing court for their legality, fairness and representative of the inherent fairness of the judicial system

There is nothing more important to the fundamental fairness of this judicial system than ensuring that the Appellant or anyone similarly situated be advised with certainty as to the statute and its elements to ensure that due process is served at sentencing. In the case at hand, one cannot determine what portion of, if not all, of the written statute was relied upon by the court in the sentencing of the Appellant. Because of

the above, this sentence needs to be set aside and this case returned to the district court for appropriate action.

ISSUE: 3

The illegality of this sentence is not only based upon the failure to disclose the corrected statute but also for the use of prior convictions based upon the same partially unconstitutional statute for the purpose of enhancing the sentence of the Appellant.

The use of the alleged prior convictions from the 1990's and earlier in this matter resulted in the sentencing of the Appellant on misinformation and non-qualifying convictions. The Appellant is protected from this kind of sentence by the due process provisions of the 14th amendment of the United States Constitution. *USCA Cont. Amend14; Mt, Const. Art. 2 Sec 17. State v. Winkle 313 Mont. 111 (2002*). This Court has *de novo* jurisdiction to review this issue as it is a question of law.

It is well established that a constitutionally infirmed conviction cannot be used to enhance the sentence of the Appellant. *State v. Munn 2006 MT 33.*

The "framework" for any court to use to analysis this type of question is found in the case of *State v. Maine, 2011 MT 90.* The "framework" a proof shifting first to the Appellant and then to the State. It starts with the Appellant having to show that the conviction is constitutionally infirmed, and the burden goes to the State to rebut the evidence offered by the Appellant.

In the case at bar the Appellant offered that the proof that all the alleged convictions offered by the State were based upon the same statute *45-8-213(1)(a) MCA.* The trial court and other offered records are consistent with that fact. The Statute used in those convictions was found to be partially unconstitutional by this Court in 2013. State v. Dugan 213 MT 38. That the statutory language that was the bases for the earlier convictions (the unconstitutional presumption based upon the use of words) was the same language that this Court found unconstitutional, and that the language of the statute would not been changed until 2019.

The evidence is record based and not speculative in nature. It is not a self-serving statement by the Appellant. It is direct evidence of irregularity. *State v. Snell 2004 MT 334.* This Court in *State v. Howard*, *2002 MT 276*, stated that, "…unequivocal and sworn statement… rebuts

the presumption of regularity." There is nothing speculative about the published law of this State and stands as unequivocal as any sworn statement as to what is the law in State. The *Howard* Court went on to characterize the defendant's affidavit as direct evidence. This position is carried forward in *State v. Chesterfield, 2018 MT 315N*. Even though this is a non-published opinion, it still shows that this position is still relevant today.

ISSUE: 4

According to the *Maine supra* framework, the obligation to refute the evidence of irregularity now shifts to the State. The State is without evidence to overcome the come the Appellant's offer of proof because the record is vague and empty as to the factual bases of the conviction. All the NCIC report will show is the conviction and nothing else. The records of the trial court, the same. The State cannot meet its burden.

Due to the uncontroverted proof made by the Appellant at the sentencing court, the sentencing court could not use the prior offered convictions to enhance the sentence of the Appellant.

Assuming for the sake of argument that the convictions are valid convictions, they are not competent convictions due to their

constitutional infirmity and thus cannot be used to enhance the sentence of the Appellant.

The United State Supreme Court in 1931 stated what has become titled by some federal courts as the "Stromberg Rule", *United States v. Piolunek 74 M.J 107 2015; Wordl v. U.S., 2021 U.S, dist. LEXIS 197518.* This rule comes out of the federal case of *Stromberg v. California 283 US 359 (1931).* The rule calls for the setting aside a conviction that is based upon a statute that is partially unconstitutional, when it cannot be determined if the conviction is based upon the constitutional portion or the unconstitutional portion of the statute in question. As a result, the *Stromberg* conviction was set aside on constitutional grounds. This "rule" is no stranger to this Court's prior opinions. Judge Daniel Shea in his dissent in *State v. Price, 191 Mont. 1* cites the rule affirmatively in support of his dissenting opinion.

In this case, the same result must take place as to the use of the prior convictions to enhance the sentence of the Appellant. The facts are the same, as the record for all prior convictions is void of any basis to determine what portion of the infirmed portion of the statute resulted in

the conviction of the Appellant. The convictions cannot be considered competent for the purposes of enhancing the sentence of the Appellant.

The Montana Supreme Court confronted the same issue in *State v. Krebs, 2016 MT 288. Krebs* was a felony DUI case in which the defendant challenged at sentencing the use of a 1980's DUI conviction in North Dakota as a basis for enhancing his sentence. The question before the Court at that time was whether the conviction, which was not contested, was a competent conviction for enhancement purposes.

The conviction in North Dakota could have been just as likely for being a conviction as a DUI per se, that would have been expunged and a conviction as a standard DUI would not have been expunged and thus counted as a competent or qualified conviction. The *Krebs* court stated that the State has the burden to provide a qualifying conviction but "…. failed to do so here because the record was inadequate to demonstrate the prior conviction was for DUI."

This Court ruled in *State v. Mann, 2006 MT 33* that even though the defendant in Mann …" did not rebut the presumption of regularity, the inaccurate and confusing language of this particular 'right to counsel' advisory constitutes sufficient evidence or irregularity." Based upon this

finding the Court overturned and vacated the convictions. What can be more confusing to the defendant than trying to understand the existence of constitutional language and unconstitutional language in the same statute?

The facts are also very similar in *Krebs* and they are in the case at bar. The record before this sentencing court and thus this Court is inadequate to determine on what portion of the statute in question was the Appellant convicted. There was nothing presented to the Court in the form of the record that the earlier convictions were the result of the application of the constitutional portions of the statute or the unconstitutional portions of the statute. As a direct result of the State's failure to provide competent or qualified convictions to the sentencing court this Court must overturn and vacate the Appellant's earlier convictions and reverse the Appellant's felony convictions. As this Court ruled in *Mann,* this case must be remanded to the trial court for the purpose of resentencing on the appropriate misdemeanors.

ISSUE: 5

Before the sentencing took place, the Court was confronted with the change of plea hearing and the Plea Agreement agreed to by the State

and the Appellant. The overreaching issue both for the Plea Agreement and the acceptance by the Court of any change of plea is whether the Appellant entered into both the agreement and made statements at the hearing knowingly and voluntarily and did it contain all the elements of the crime?

The Appellant did file a timely motion to withdraw his plea, in which he raised the question of whether the plea was "knowingly and voluntarily" entered into.

Section 46-16-105(2) MCA allows for a court to allow the withdrawal of a plea for good cause shown. An involuntary plea can constitute good cause, but "good cause" can be found for reasons other than voluntariness, *State v. Wise 2009 MT 32* which cited *State v. Lone Elk, 2005 MT 56*. This Court in *State v. Schaff, 1998, MT 104*, which was cited by the *Wise* court, *supra*, stated clearly that any doubt must be resolved in the Appellant's favor, as to whether a plea was voluntarily entered into. The *Wise* court went on to say that "We consider "case specific considerations" in determining whether a plea was entered voluntarily, including the 'adequacy of the Court's interrogation. *Wise P16.*

The *Wise* case facts match much of the facts of this case. In *Wise*, the defendant, as this Court described the situation at *P 17*: "Wise simply did not 'own up' to a criminal intention required by the charge." The same is true in this case.

Section 45-8-213(1)(a) states "(a) with the purpose of …." A review of the transcript of the change of plea hearing shows that that only the Appellant stated that he agreed that the victims were harassed, annoyed and offended. Never once is he asked if he intended such results. He was never "owned up", *Wise supra*, to harassing, annoying or offending the victims because both in the plea agreement and at the hearing he was never asked. He may have agreed that the victims felt that way, but he never admitted that he intended or purposely and knowingly intended the described result. The Appellant in the initial Presentence Investigation Report clearly stated in the "Defendant's Statement": "My intent was not to harass these women but to have people to talk with." (Dist. Ct. Doc. #163 Pg. 13)

This is the same situation in *Wise, supra.* The Court stated, as to the information and the colloquy: "… simply discussed the damage Wise caused, again without indicating that there was a criminal design to the

cause the damage." The *Wise* Court went on to indicate that the lower court incorrectly concluded that the statute was violated, which cast doubt on the voluntariness of the plea. The Court specifically stated that because the court resolves doubt about the voluntariness of a plea in a defendant's favor, the withdrawal was warranted. *Wise, P18*.

In a similar case to *Wise* in which the colloquy was found deficient is the case of State *v. Frazier, 2007 MT 40* in which the Court states that every element of the crime must be established in order for the colloquy to be sufficient. In the case at bar "purposefully" is an element of the offense.

The colloquy in this case is not only deficient as to the elements, but also as to whether the plea was entered into knowingly and thus voluntarily.

The only question that the Court asked is "COURT: and do you understand – are you making a free and voluntarily plea?" *COP Trans. P.4.* This is the sole question raised by the Court as to "knowingly and voluntarily" entering into the plea agreement or making supporting statements at the hearing. The issues raised by this statute were not ever raised by anyone at the change of plea hearing

In the case of *State v. Boucher*, *2002 MT 114*, this Court overturned a conviction when the lower court failed to advise the defendant that by pleading guilty, he waived his right to appeal. If a conviction can be overturned for failure to advise the defendant on his right to appeal, it is only consistent that the Appellant's conviction be overturned when he is not advised about his right to know the true nature of the statute he is being prosecuted under. As argued earlier in this brief, this failure is not a simple misstatement of the law but an error, if allowed to stand, is a constitutional violation.

Further this Court in *State v. Mahoney 264 Mont 89*, stated that one of the factors to be determined is whether the defendant, "understands the charge and possible punishment." It is not possible to understand the "charge", if he has not been given the correct statement of the law!

The Supreme Court of the United States has ruled on the issue of and set the standard to establish the validity of a plea. In the Case of *Brady v. United States 397 U.S. 742, 90 S. Ct. 1463 (1963*), which was restated by this Court in *State v. Warclub, 2005 MT 149*. A guilty plea should stand if the defendant was aware of the direct consequences of his

plea, and if the plea was **not**, (*emphasis added*) induced by *"... misrepresentation…". Warclub at P.32.* In Appellant's case the plea was based upon a misrepresentation of the law. This inaccurate at best, if not negligent, inadequate statement and misrepresentation of the actual law is enough to set this conviction aside.

ISSUE: 6

The void in scrutiny of the constitutional issues of the statute raises other questions as to the legality of the plea agreement, such as: did the Appellant enter into an illegal plea agreement and plead to an illegal statute. The Statute on the record, as the law of this State, which was referenced throughout all the pleadings and hearings in this matter, as well at the time of the change of plea still contained the unconstitutional portion of the original statute, The information and supporting charging documents referred to the statute without distinguishing the various parts. The plea agreement reflected and quoted the same error.

A review of the plea agreement, shows the Appellant made statements that the victims were annoyed or harassed etc. In fact, the statements made smack of the unconstitutional presumption that makes the use of the language proof of the crime. As argued above, there is no

purpose or intent statement that the Appellant makes or agrees to in the plea agreement or at the change of plea hearing that meets the "purposely" requirement portion/element of the statute.

The United States Federal Courts in *U.S. v. Burris (4th., Cir. 2008)* and *Baker v. Baro, 177 F.3d 149, 155 (3rd. Cir.*) hold that one cannot legally enter into a plea agreement based upon an unconstitutional statute and that a court cannot give effect to an illegal sentence even though agreed to by the parties. The Federal Courts have also held that a defendant is entitled to withdraw his plea if it is based upon an unconstitutional statute and would provide an illegal sentence. *Smith v. U.S. 321 F.2d 954, 955-956.*

Given the facts in this case it is obvious that the *"Zombie Law*" issue rears its ugly head. This is particularly true given the language in *State v. Dugan 2013 MT 38 at page 69*, the case from which these issues arise. The *Dugan* Court stated, when discussing statutory vagueness, "… so long as the meaning of the statute is clear and provides a defendant sufficient notice of what conduct is proscribed." Citing *Nye, 283 Mont. at 513.* One cannot conclude that the pleadings or questions at the various hearings and various agreements clearly and sufficiently gave notice to

the Appellant what conduct the statute proscribed. The vagueness of the statute as to what the law is and the treatment during the proceedings makes just as likely that the Appellant entered into an illegal plea agreement and thus his sentence resulting from it is illegal.

ISSUE: 7

The final issues to consider is the action or inaction of the Appellant's initial attorney of record provided constitutionally effective assistance of counsel.

These issues of ineffective assistance of counsel are governed by the case of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).* This case establishes a two-prong test for this issue: 1. Was the counsel's efforts deficient: 2. Did his deficient effort result in prejudice to the Appellant. *Strickland* goes on to require that there be a fact based showing not just on conclusions and allegations. This Court in *McGarvey v. State 2014 MT 189* states that the Appellant must "identify the acts or omissions … that are alleged not to have been the result of reasonable judgment.' Citing, *Whitlow v. State 2008 MT 140.*

This Court in *State v. Olson, 2014 MT 8* stated 'Where no plausible reason exists to justify counsel's action or inaction, the claim is record

based and appropriate for direct appeal', (*Citing: State v. Briscoe, 2012 MT 219*).

The record in this matter is completely devoid of any effort by the Appellant's first counsel to address the issue of what really is the law that the Appellant was being prosecuted under. There is no motion or objection made at the initial hearing and all the way through the change of plea hearing attempting to clarify the law.

The record reflects a "Finley Hearing" during which the initial counsel for the Appellant was relieved and new lead counsel appointed. It is obvious that the Appellant and his then lead counsel were at odds and counsel had not met a standard that allowed for the continuing relationship of the parties. The issue was not raised at this hearing as no one present other than the relieved counsel knew or should have known of the real deficiencies of the representation, if he fully understood the constitutional error that the State had made. The State in its response could easily point out that the Appellant had two counsels, but the second counsel came on board well after the beginning of the proceedings and simply to assist the lead counsel. Given the adage that two wrongs do not

make a right, the second appointed counsel did not make any effort to resolve the issue either.

The second prong of the *Strickland* test is prejudice. The prejudice for this Appellant is obvious in that he could not prepare a defense or at best decide what avenue to pursue, either go to trial or accept a plea bargain. More importantly he was denied his constitutional rights.

As stated earlier in this brief, the sixth amendment of the United States Constitution demands that a citizen be appraised of the charge against him. That right is violated when the law and proscribed illegal conduct is not accurately given to the Defendant from the very beginning. There can be no explanation for the counsel's failure to do the obvious and that is research and subsequently advise the Appellant to protect those rights.

The denial of one's constitutional rights is prejudice enough to meet the burden in the second prong of *Stickland*. On this basis alone the conviction and sentence in this matter needs to be set aside due to ineffective assistance of counsel.

CONCLUSION

If there is an error in the State judicial system that affects the constitutional rights of the Appellant, that error must be and is resolved in favor of the defendant. As this Court in *State v. Sedler, 2020 MT 248,* when speaking about registration requirements for sex offenders, stated in its conclusion, when there …"is an unconstitutional provision in an otherwise legitimate act, it is appropriate to reverse … conviction and remand the matter to the district court to vacate the conviction…"

This Appellant is caught in a vacuum created by the pronouncement of this Court and the tardy actions of the legislature. In this vacuum, the State in its prosecution has the bigger duty to ensure that the judicial system is perceived as fair, and the rights of the Appellant are not trampled on. The State has the duty to accurately state the law at all stages. The Appellant has a right to expect that only competent convictions are used to enhance his sentence, A sentencing court has a duty to this system to ensure that its sentence rational is fully disclosed and is the result of the appropriate application of the correct law in consideration of all the facts. The Appellant is entitled to have his federally guaranteed rights protected at all stages of the process. He is

entitled to competent representation. This system must demand that it be seen as fair and impartial. The closure of the "Fallacy of Erasure and the Zombie Law pit" can be accomplished in a big way by demanding that only the constitutional portion of any statute be disclosure and utilized at all stages of the criminal proceeding. The failure of any of these imparatives must result in the setting aside of this conviction and sentence, and this case be remanded to the lower court for dismissal, with prejudice.

Respectfully submitted this 24th day of June, 2024

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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 9,964, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory E. Paskell
GREGORY E. PASKELL

APPENDIX

CERTIFICATE OF SERVICE

I, Gregory E. Paskell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-25-2024:

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