

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0355

STATE OF MONTANA,

Plaintiff and Appellee,

v.

COLE MICHAEL JACOB,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Molly Owen, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court infringed on Appellant's due process rights at sentencing by allowing the State to read a victim impact statement explaining how Appellant's crime impacted both the victim and her father.

2. Whether this Court should exercise plain error review of Appellant's claim that he is entitled to the benefit of the plea agreement he rejected the first time on appeal because he did not have the mental capacity to reject the plea agreement.

STATEMENT OF THE CASE

On February 8, 2023, the State charged Appellant Cole Michael Jacob (Jacob) with indecent exposure, a felony, in violation of Mont. Code Ann. § 45-5-504(1) and (3). (Doc. 4.) On May 31, 2023, the State filed notice pursuant to Mont. Code Ann. § 46-13-108 that it intended to seek persistent felony offender (PFO) status for Jacob under Mont. Code Ann. § 46-18-501. (Doc. 13.) The district court set a jury trial for March 4, 2024. (Doc. 26.)

On January 30, 2024, the parties filed a fully executed plea agreement with the district court. (Doc. 31, attached to Appellant's Br. as App. 1.) The agreement called for Jacob to plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25

(1970), in exchange for a ten-year sentence to the Montana State Prison (MSP) with six years suspended. (*Id.*) The State agreed to withdraw the PFO notice. (*Id.*)

The district court held a hearing to allow Jacob to change his plea. (Doc. 32.) Jacob requested more time to speak with his counsel regarding the agreement. (*Id.*) The district court set a second change of plea hearing for February 14, 2024. (*Id.*) At the February 14, 2024 hearing, Jacob indicated that he was not changing his plea. (Doc. 38.) The district court maintained the March 4, 2024 jury trial date. (*Id.*)

On March 4, 2024, on what was supposed to be the first day of trial, Jacob requested a change of plea hearing. (Doc. 50.) The parties filed a new plea agreement.¹ (Doc. 52, attached as App. A.) The terms of the new agreement allowed the State to argue for 20 years at MSP with no time suspended. (*Id.*) Jacob was allowed to argue for any legal sentence. (*Id.*) The State agreed to withdraw the PFO designation. (*Id.*)

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¹ Jacob intended to attach the March 4, 2024 plea agreement (Doc. 52) to his brief as App. B. Jacob inadvertently attached the January 30, 2024 plea agreement as his App. B.

STATEMENT OF THE FACTS

I. The offense

On January 30, 2023, 13-year-old P.C. was walking home from school in Ronan, Montana, when she was approached by a man later identified as Jacob. (Doc. 2.) Jacob stopped the car and asked P.C. if she wanted a ride. (*Id.*) P.C. declined and continued walking. (*Id.*) Jacob again approached P.C. in the car and asked again. (*Id.*) P.C. declined. (*Id.*) Jacob continued driving to the end of the cul-de-sac and turned back toward P.C. (*Id.*) He stopped the vehicle, pulled out his penis, and exposed himself to P.C. (*Id.*)

II. The sentencing hearing

On May 8, 2024, the district court held a sentencing hearing. (Doc. 60.) Jacob was personally present with his counsel for the hearing. (5/8/2024 Sent. Transcript (Tr.) at 6.) As there was no agreed-upon sentence in the filed plea agreement, the State called Jacob's prior probation officer, Ron Linn (Linn), to testify about Jacob's inability to remain law abiding in the community. (*Id.* at 7-15.) Jacob's counsel cross-examined Linn as to Jacob's methamphetamine addiction and treatment opportunities. (*Id.* at 15-21.)

The State then read a victim impact statement from P.C.'s father, K.C., into the record. (*Id.* at 21-23.) Jacob objected to the statement being read as he had not

been provided a copy. (*Id.* at 21.) The district court ordered the State to provide a copy of the statement to Jacob. (*Id.*) The statement relayed the effect the crime had on both the victim and her father. (*Id.* at 22.) K.C.’s statement told the district court of P.C.’s need to be driven to and from school because she no longer felt safe walking. (*Id.*) K.C. stated that he felt sick when he thought about the offense. (*Id.*) He said he routinely thought about what could have happened to P.C. (*Id.*) He noted the worry he felt when his kids walked somewhere. (*Id.* at 23.) K.C. asked the district court to punish Jacob for “as much time” as the district court could. (*Id.*)

Jacob called Dr. Vincent River, a psychologist, to testify. (*Id.* at 23.) Dr. River testified that he met with Jacob in the jail approximately 12-15 times over the course of a year. (*Id.*) Dr. River stated that Jacob had developed an “impulse-ridden, substance-using, ungovernable kind of personality” because of his upbringing. (*Id.* at 26.) Dr. River also diagnosed Jacob with schizophrenia and anti-social personality disorder with paranoid traits. (*Id.* at 27.) The doctor opined that none of the diagnoses “let [Jacob] off the hook for responsibility of his actions, socially or legally.” (*Id.* at 33-34.)

Jacob’s counsel asked Dr. River if any of the diagnoses would have led Jacob to reject the January 2024 plea offer. (*Id.* at 34.) Dr. River stated:

I—I’m hesitant to speculate about his thought process and motivations, other than to say that during that time, as I understand it,

he was in this kind of chronic stance toward life of being an island unto himself and he was going to fight this charge, is my memory, and he was in denial.

(Id.)

The State argued the 20-year MSP sentence was appropriate based on Jacob's "disastrous history on probation and parole since 2008," and his need for additional supervision and treatment in the community after being granted parole. *(Id. at 40.)* The State pointed out that the presentence investigation report (PSI) and the psychosexual evaluation had both concluded that Jacob was not fit for community supervision. *(Id. at 42.)*

The State discussed the circumstances of the repeated plea negotiations in the case. *(Id. at 41.)* It offered the original ten-year MSP agreement in August 2023. *(Id.)* The State recounted how Jacob had rejected that agreement repeatedly, even after filing the signed agreement on January 30, 2024, and the effect of that on K.C. and P.C. *(Id. at 41; see also Doc. 31; Appellant's Br., App. A.)*

Jacob argued that the district court should impose the original ten-year sentence to MSP with six years suspended based on the testimony from Dr. River. *(Tr. at 45.)* Specifically, Jacob argued that he was "operating under . . . a process that perhaps wasn't the best thought process" at the time of the original offers. *(Id.)* No testimony or argument established that Jacob's capacity to appreciate his

position or make rational and intelligent decisions was impacted by his diagnoses. (*See generally id.* at 1-51.)

Prior to the imposition of sentence, Jacob renewed his objection to the late notice of the victim impact statement, claiming “we would have possibly had a better rebuttal to that” with more notice. (*Id.* at 45-46.) Jacob failed to ask for any additional time to review the letter or a continuance to address the contents. (*See generally id.* at 1-51.)

Jacob acknowledged during his statement to the district court that he typically would try to get out of a bad situation, rather than address it. (*Id.* at 48.) That included thoughts of beating the charge at trial. (*Id.*) After Jacob’s statement, his counsel confirmed that there was no reason not to impose sentence. (*Id.* at 49.)

The district court sentenced Jacob to 15 years at MSP with none of that time suspended. (*Id.*) It restricted Jacob’s parole until he completed sex offender treatment. (*Id.*) The judge stated her reasons for the sentence, which included the recommendation of the State, Jacob’s past criminal history, and the position and input of the victim. (*Id.* at 50.) The judge also stated that her sentence would provide punishment commensurate with the offense and the potential for treatment and rehabilitation. (*Id.*)

Furthermore, the district court found that Jacob had expressed “sincere remorse” and deserved some level of mitigation based on Dr. River’s testimony.

(*Id.*) Specifically, the district court said that Dr. River’s testimony was “why [the district court] did not go with the 20 years that the State recommended. (*Id.*)

STANDARD OF REVIEW

Whether a district court violated a defendant’s constitutional rights at sentencing is a question of law this Court reviews de novo. *State v. Simmons*, 2011 MT 264, ¶ 9, 362 Mont. 306, 264 P.3d 706.

This Court reviews criminal sentences for legality only; that is, whether the sentence is within the parameters provided by statute. *State v. McLeod*, 2002 MT 348, ¶ 12, 313 Mont. 358, 61 P.3d 126 (citation omitted).

SUMMARY OF THE ARGUMENT

The district court did not violate Jacob’s due process rights at sentencing because Jacob had the opportunity to explain, argue, or rebut any information that might impact his liberty interests because the State provided Jacob the victim impact statement prior to imposition of the sentence, as required under Mont. Code Ann. § 46-18-115. Jacob was represented by counsel throughout the proceedings, he had the opportunity to rebut the information, but instead, he failed to challenge the content of the statement or ask for additional time to rebut the information. A district court has no obligation to take action on a defendant’s behalf. Additionally,

Jacob has not met the high burden of showing that his sentence was premised upon materially inaccurate or prejudicial information. Finally, the content of the statement was about how Jacob's criminal conduct impacted the victim and her father. There was no meaningful way for Jacob to counter the information provided in the victim impact statement.

This Court should decline to exercise plain error review of Jacob's assertion that he is entitled to the benefit of the first plea agreement, which he rejected, because he did not have the mental capacity to reject the plea agreement. Jacob has not asserted plain error review is warranted and consequently has failed to meet his burden for this Court to invoke it to review his claim. Even if Jacob had requested plain error review of his unpreserved claim, he could not meet the heavy burden of proving plain error review is needed for several reasons.

First, Jacob has no constitutional right to a plea agreement, including the agreement he now regrets rejecting. Second, Jacob is not challenging the voluntary nature of his guilty plea. Rather, he is asking for the more favorable sentence set forth in the plea agreement he rejected. Since the district court imposed a legal sentence and Jacob has not moved to withdraw his guilty plea, there is nothing for this Court to review.

Third, because Jacob voluntarily entered his guilty plea, he waived all nonjurisdictional defects in his case, including his assertion that he is entitled to a

more lenient sentence. Finally, despite Jacob's claim to the contrary, Dr. River's testimony at sentencing does not support Jacob's unpreserved theory that he did not have the mental capacity to reject the first plea agreement. While Dr. River testified that Jacob had mental disorders, those mental disorders in no way excused his criminal conduct.

ARGUMENT

I. Jacob's due process rights were not violated during his sentencing hearing.

Both the Montana and United States constitutions guarantee against depriving a person of liberty without due process of law, and these protections apply in sentencing hearings. U.S. Const. amend. XIV, § 1; Mont. Const. art. II, § 17; *State v. Webb*, 2005 MT 5, ¶ 18, 325 Mont. 317, 106 P.3d 521. However, this Court has held that a convicted defendant's liberty interest at sentencing does not rise to the level of an accused's liberty interest at trial. *State v. Nichols*, 222 Mont. 71, 76, 720 P.2d 1157, 1161 (1986).

During sentencing, “[d]ue process requires that an offender be given an opportunity to explain, argue, and rebut any information, including pre-sentencing information[,] that may lead to a deprivation of life, liberty, or property.” *State v. Mainwaring*, 2007 MT 14, ¶ 16, 335 Mont. 322, 151 P.3d 53 (citing *Bauer v. State*, 1999 MT 185, ¶ 22, 295 Mont. 306, 983 P.2d 955). A

district court has no affirmative obligation to provide a continuance or take other action on a defendant's behalf, provided that a defendant has an opportunity to rebut the information. *State v. Roedel*, 2007 MT 291, ¶¶ 67-68, 339 Mont. 489, 171 P.3d 694.

The 1991 Commission Comments to Mont. Code Ann. § 46-18-115 provide that the statute “embodies due process constitutional law that has been developed in the federal courts and by the Montana Supreme Court.” The comment implies that no additional protections are offered under Mont. Code Ann. § 46-18-115 as the statute is merely a codification of already existing law. Due to this, as well as Jacob's overlapping arguments, the State will address these issues together.

Montana Code Annotated § 46-18-115 orders that a district court shall permit a victim to present a statement concerning the effect of the crime on the victim, the circumstances of the crime, the way the crime was perpetrated, and the victim's opinion regarding the sentence. The statute allows the victim to provide a written statement, an oral statement under oath, or both. Mont. Code Ann. § 46-18-115.

Should the statement be presented in written form, the district court shall provide copies to the State and the defendant “*prior to imposing sentence.*” *Id.* (emphasis added). The statute requires a district court to consider the victim's statement, along with other factors. *Id.* If the statement provides new material facts

the district court intends to rely on for sentencing, the defendant is allowed “adequate opportunity to respond and may continue the sentencing hearing if necessary.” *Id.*

This Court has held:

It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by services which counsel would provide, that renders the proceedings lacking in due process.

McLeod, ¶ 19 (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). For a sentence to be overturned on due process grounds, the sentence must be based “at least in part upon misinformation of constitutional magnitude.” *McLeod*, ¶ 20 (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972)).

“[W]here a sentencing court is found not to have relied on improper or erroneous information in sentencing a criminal defendant, there is “nothing to correct or rebut” and, therefore, the defendant is not entitled to resentencing on due process grounds.” *Bauer*, ¶ 24 (citations omitted). The defendant has an “affirmative duty” to show that the sentence was premised upon “materially inaccurate or prejudicial” information. *Id.* ¶ 22.

In *State v. Orsborn*, 170 Mont. 480, 486, 555 P.2d 509 (1976), this Court held that due process was not offended when three conditions were met: first, the defendant was represented by counsel during the time the sentencing information

was made known; second, the defendant was provided an opportunity to rebut the information; and third, the defendant, rather than rebutting the information, chose to affirm its accuracy. *Id.* at 486, 555 P.2d at 513.

In *McLeod*, the defendant's PSI indicated a higher number of felony convictions than McLeod had committed. *McLeod*, ¶ 9. McLeod represented that he had reviewed the PSI "extensively" with his counsel. *Id.* ¶ 24. McLeod's counsel indicated they had no objections, changes, corrections, or additions to the PSI. *Id.* Additionally, counsel represented that there was no reason not to go to sentencing. *Id.* ¶ 14. This Court held that because McLeod was given proper notice of the information in the PSI, was given the opportunity to review it, was represented by counsel, and had the opportunity to rebut the information, but chose not to, his affirmation of the information constituted a waiver. *Id.* ¶¶ 25-26.

This Court held that it "cannot predicate error on the basis of a defendant's failure to object when given full opportunity to do so," and affirmed McLeod's sentence because the district court had provided the due process necessary to avert or correct the misinformation and the sentence imposed did not exceed the statutory limitations. *Id.* ¶ 26; *see also State v. Hubble*, 2001 MT 31, ¶ 25, 304 Mont. 184, 20 P.3d 111 ("Where a sentence is within the statutory parameters established by the legislature, this Court will generally affirm it.").

In *State v. Winkle*, 2002 MT 312, ¶ 6, 313 Mont. 111, 60 P.3d 465, the State presented several letters at the sentencing hearing, however it failed to provide a copy of the last letter in advance of the hearing. *Id.* ¶ 6. The letter asserted that Winkle had violated the terms of his release. *Id.* ¶ 5. Defense counsel indicated that Winkle denied the allegations, but did not want to rebut the information and asked to go to sentencing. *Id.* ¶ 7. After the district court orally pronounced Winkle's custodial sentence, he asked for a stay of the sentence, arguing that a continuance should have been granted. *Id.* ¶ 11. Winkle alleged due process violations based on the district court's consideration of the late-disclosed letter. *Id.*

This Court had previously held that if a defendant feels he or she has had insufficient time to bring in witnesses or other evidence to adequately rebut the contested information, the defendant should request a continuance. *State v. Trangsrud*, 200 Mont. 303, 308, 651 P.2d 37, 40 (1982). A district court has no affirmative obligation to provide a continuance or take other action on a defendant's behalf. *Roedel*, ¶ 68.

Winkle's assertion that a continuance should have been granted was made only after the district court had inquired whether there was any reason why the sentence should not be imposed, received negative replies from both counsel, and proceeded to orally impose sentence. *Winkle*, ¶ 16. This Court concluded Winkle's failure to timely move for a continuance precluded consideration of his additional,

purely speculative, assertion that the sentencing court would have denied a timely motion had one been made. *Id.* ¶ 19.

In *McDowell*, the State and the defendant entered into a plea agreement binding the State to a net sentence recommendation of 30 years with 20 suspended. *State v. McDowell*, 2011 MT 75, ¶ 4, 360 Mont. 83, 253 P.3d 812. On the day of the sentencing hearing, the victim decided she wanted to provide a statement. *Id.* ¶ 6. The State called her to the stand and asked her to give her statement. *Id.* The prosecutor did not ask the victim to compare sentences or attempt to elicit any inflammatory testimony. *Id.* ¶ 19. The prosecutor merely provided the victim with the opportunity to assert her opinion. *Id.* After sentencing, McDowell alleged that the State breached the plea agreement by eliciting testimony that undermined its recommendation. *Id.* ¶¶ 15-16.

The Court compared the conduct in *McDowell* to the conduct in *State v. Rardon*, 2002 MT 345, 313 Mont. 321, 61 P.3d 132 (*Rardon II*), and *State v. Rardon*, 2005 MT 129, 327 Mont. 228, 115 P.3d 182 (*Rardon III*). *Id.* ¶¶ 17-18. In *Rardon II*, this Court found that, although the prosecutor recommended the agreed upon sentence, the prosecutor actively elicited testimony and argued information that caused the district court to question the appropriateness of the recommended sentence. *Rardon II*, ¶¶ 19-22; *McDowell*, ¶ 17.

In *Rardon III*, this Court held that the manner and circumstances by which the problematic testimony was elicited were of primary consideration. *Rardon III*, ¶¶ 21-22; *McDowell*, ¶ 18. Contrary to *Rardon II*, the prosecutor in *Rardon III* did not elicit or use the witness and victim testimony to undercut the State's recommendation. *Rardon III*, ¶¶ 21-22.

This Court relied on the prior holdings in *Rardon II* and *Rardon III* to find that the prosecutor did not violate the plea agreement in *McDowell*. The Court held that the victim was entitled to testify, regardless of whether the prosecutor called her. *Id.* ¶ 19; *see also State v. Knox*, 2001 MT 232, ¶ 20, 307 Mont. 1, 36 P.3d 383 (finding that Mont. Code Ann. § 46-18-115(4)(a) requires a trial court to allow victims to voice their opinions on sentencing).

In this case, during the sentencing hearing, Jacob received the victim impact statement regarding the impact his offense had on P.C. (Tr. at 21-23.) At all times during the proceeding, Jacob was represented by counsel, including while the State read the victim impact statement to the district court. (*Id.* at 6.) The State provided the victim impact statement prior to imposition of the sentence, as provided by Mont. Code Ann. § 46-18-115, and, while Jacob objected to the introduction of the statement, he did not ask to review the statement further. (*Id.* at 21-23, 45-46, 49-50.)

If Jacob felt more time was necessary to adequately rebut the victim impact statement, he should have requested a continuance. *See Trangsrud*, 200 Mont. at 308, 651 P.3d at 40. He failed to do so. (*See generally* Tr. at 1-51.) Jacob had further opportunity to ask for additional time to rebut the victim impact statement, but provided no basis when the district court asked if there was any reason the sentence should not be imposed. (*Id.* at 49.)

Jacob attempts to classify the victim impact statement as “inflammatory,” claiming its admission was “fundamentally unfair.” (*See* Appellant’s Br. at 16.) He provides no basis for those allegations beyond his self-serving assertions. The statement provided by the victim’s father addressed the statutory considerations listed in Mont. Code Ann. § 46-18-115(4), including the effect of the crime on the victim, the circumstances of the crime, the way the crime was perpetrated, and the victim’s opinion regarding the sentence. (*See* Tr. at 21-23.)

P.C.’s father relayed that she could no longer walk to and from school because she felt unsafe. (*Id.* at 22.) The statement described the impact on P.C.’s father as well, including his recurring thoughts about what could have happened and his ongoing fear when his children walked somewhere. (*Id.* at 22-23.) The statement asked the district court to sentence Jacob with “as much time as [the district court] can.” (*Id.* at 23.) The district court was required, pursuant to

Mont. Code Ann. § 46-18-115(4), to consider the victim impact statement, and K.C.'s statement followed the parameters of the statute.

Although Jacob objected to the victim impact statement and later stated that he might have “possibly had a better rebuttal to that,” the record shows there was no information to rebut. (Tr. at 21, 46-47.) Jacob has not offered how he could have possibly rebutted K.C.'s fear of walking to school, her father's fears about what could have happened, or his concern over his children walking anywhere. The district court correctly considered the victim impact statement pursuant to Mont. Code Ann. § 46-18-115(4), as well as the “other factors” it announced during sentencing. (*Id.* at 49-50.) The district court considered the recommendations of the parties, Jacob's lengthy criminal record, Jacob's expressed remorse, and the testimony of Dr. River. (*Id.*)

Contrary to Jacob's assertion that K.C.'s statement “influenced the [d]istrict [c]ourt in formulating the sentence imposed,” the district court deviated down from the sentencing recommendation of the State. (*See* Appellant's Br. at 15; Tr. at 49.) Specifically, the district court found that “some level of mitigation” was deserved based on the testimony of Dr. River, and sentenced Jacob to 15 years at MSP, rather than the 20 years the State had requested. (Tr. at 50.)

Here, similar to *McDowell*, P.C. and her father were entitled to provide the district court with their account of the crime and what they believed to be the

appropriate sentence. Although the State read the written statement during the sentencing hearing, Jacob was made aware of the victim's statement prior to the imposition of sentence, as the statute demands. (*See* Tr. at 21-23, 49-50; Mont. Code Ann. § 46-18-115(4)(b).) The State reading the victim impact statement at sentencing was no different than if the victim provided an oral statement at the same time, just as occurred in *McDowell*. *See McDowell*, ¶ 6.

Jacob has failed to show that the sentence was premised upon “materially inaccurate or prejudicial” information, let alone “misinformation of constitutional magnitude.” *See Bauer*, ¶ 22; *McLeod*, ¶ 20. The district court did not rely on improper or erroneous information during Jacob's sentencing, therefore, there is nothing to rebut, and Jacob is not entitled to resentencing on due process grounds. *See Bauer*, ¶ 24. This Court should affirm Jacob's sentence.

II. Jacob has failed to assert or prove that plain error review of his claim that he is entitled to the benefit of the first plea agreement is warranted.

Jacob has not asked this Court to invoke plain error review of his unpreserved claims below. Instead, he argues that he was operating under a mental disability at the time of the first plea agreement and was unable to waive his self-asserted constitutional right to a plea agreement. Jacob fails in his argument for the reasons discussed below.

A. Jacob fails to raise plain error review and is precluded from doing so in his reply.

Generally, this Court does not review issues raised for the first time on appeal. *State v. Favel*, 2015 MT 336, ¶ 13, 381 Mont. 472, 362 P.3d 1126. When a defendant's fundamental rights are at stake, this Court may choose to invoke plain error review where failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *Favel*, ¶ 13 (citation omitted). Plain error review is invoked "sparingly, on a case-by-case basis." *State v. Johns*, 2019 MT 292, ¶ 21, 398 Mont. 152, 454 P.3d 692 (citation omitted).

To invoke plain error review, this Court requires plain error to be raised and argued on appeal. *In re B.H.*, 2018 MT 282, ¶ 15, 393 Mont. 352, 430 P.3d 1006 (quoting *In re B.O.T.*, 2015 MT 40, ¶ 22, 378 Mont. 198, 342 P.3d 981). A request for plain error review may not be raised in a reply brief. *State v. Strizich*, 2021 MT 306, ¶ 33, 406 Mont. 391, 499 P.3d 575 (citations omitted).

In this case, Jacob changes his position on appeal. At the district court, Jacob argued that the diagnoses provided by Dr. River presented a basis for the court to sentence him according to the January plea agreement. (*See* Tr. at 45-46.) Jacob did not argue that he could not have accepted the plea agreement because of his diagnoses. (*See id.*)

Jacob also fails to request plain error review. He is precluded from doing so in his reply. *See Strizich*, ¶ 33. Regardless, Jacob cannot show how failing to review his claimed error may result in a manifest miscarriage of justice, question the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *See Favel*, ¶ 13.

B. Jacob does not have a fundamental right to a plea agreement.

Jacob’s argument that he is entitled to the benefit of the first plea agreement, which he repeatedly rejected, fails at the outset because there is no constitutional right to a plea agreement. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *see also Missouri v. Frye*, 566 U.S. 134, 148 (2012); *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). Nor is there a right that a judge must accept a plea offer. *Santobello v. New York*, 404 U.S. 257, 262, (1971) (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)). A court may reject a plea agreement in the exercise of sound judicial discretion. *Santobello*, 404 U.S. at 262.

When a defendant voluntarily chooses to reject or withdraw from a plea bargain, he retains no right to the rejected sentence. *United States v. Carter*, 804 F.2d 508, 513 (9th Cir. 1986); *accord United States v. Osif*, 789 F.2d 1404, 1405 (9th Cir. 1986). “Having rejected the offer of a lesser sentence, he assumes the risk of receiving a harsher sentence.” *Carter*, 804 F.2d at 513.. Moreover, the law unambiguously allows prosecutors to bring more severe charges after a

defendant rejects a plea agreement and chooses to exercise his constitutional rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978).

This Court has adopted the *Bordenkircher* rationale in similar scenarios. See *State v. Johnson*, 179 Mont. 61, 68, 585 P.2d 1328, 1332 (1978); *State v. Killam*, 2005 MT 255, ¶¶ 17-18, 329 Mont. 50, 122 P.3d 439. Because there is no right to a plea agreement, a defendant is free to accept or reject a plea offer. Should a defendant reject the offer, the prosecutor is free to make any legal sentencing recommendation, and the judge is entitled to his or her discretion in imposing the sentence. See *Killam*, ¶ 18; *Santobello*, 404 U.S. at 262.

Jacob cites *Knox* in support of his argument. *Knox* relates to the waiver of constitutional rights in connection with a guilty plea, and a subsequent motion to withdraw the guilty plea. *Knox*, ¶¶ 9-10. Since there is no constitutional right to a plea agreement, Jacob's argument related to waiver of constitutional rights is misplaced. Jacob ultimately rejected the January 2024 plea offer by failing to change his plea. Although a signed plea agreement was filed, Jacob indicated that he was not changing his plea at the February 14, 2024 hearing. (See Docs. 31, 38.) Because Jacob rejected the January 2024 plea offer, he assumed the risk of receiving a higher sentence. This Court should reject Jacob's argument.

C. Jacob’s sentence is not subject to review because the district court imposed a legal sentence.

The only offense on which Jacob was sentenced to more than a year was the indecent exposure to a minor charge. For that offense, Jacob faced no less than 4 years or more than 100 years in prison, and a fine up to \$50,000. *See* Mont. Code Ann. § 45-5-504(1), (3). The district court imposed a 15-year prison sentence. (*See* Appellant’s Br., App. D; Tr. at 49.)

Jacob received a legal sentence as the imposed sentence was within the statutory parameters. *See McLeod*, ¶ 12. The district court entered sufficient findings to support its ruling. *See State v. Flanagan*, 2003 MT 123, ¶ 21, 316 Mont. 1, 68 P.3d 796 (this Court does “not insist on extensive statements of sentencing reasons under § 46-18-102(3)(b), MCA”). Here, the district court made it quite clear that it had considered Jacob’s past criminal history and recognized that Jacob was deserving of “some level of mitigation based on his mental health issues” before arriving at the imposed sentence. (*See* Tr. at 50.)

D. Jacob waived any claim concerning the first plea agreement by pleading guilty without the parameters of the first plea agreement.

“[D]efendants waive fundamental state and federal constitutional rights when they are induced to plead guilty by reason of a plea agreement.” *State v. Collins*, 2023 MT 78, ¶ 14, 412 Mont. 77, 528 P.3d 1106; *Rardon II*, ¶ 16. “As a general rule, a defendant may waive his right to appeal and/or collaterally to attack

his plea or sentence.” *United States v. Rodriguez*, 49 F.4th 1205, 1211-12 (9th Cir. 2022).

“Montana’s long standing jurisprudence holds that where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea.” *State v. Stone*, 2017 MT 189, ¶ 13, 388 Mont. 239, 400 P.3d 692 (quotation marks and citations omitted). After pleading guilty, a “defendant may only attack the voluntary and intelligent character of the guilty plea and may not raise independent claims relating to prior deprivations of constitutional rights.” *Stone*, ¶ 13; *State v. Gordon*, 1999 MT 169, ¶ 23, 295 Mont. 183, 983 P.2d 377; *see also United States v. Broce*, 488 U.S. 563, 570-74 (1989) (stating collateral relief is barred if the guilty pleas were voluntary and intelligent).

This Court has adopted a definition of “jurisdictional claims” from the Ninth Circuit, explaining that in the context of waiver, jurisdictional claims are limited “to those cases in which the district court could determine, at the time of accepting the guilty plea and from the face of the indictment or from the record, that the government lacked the power to bring the indictment.” *Gordon*, ¶ 25 (citing *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992)). In *Gordon*, the defendant argued that the district court erred in failing to sentence him in accordance

with an agreement he had reached with prosecutors in Idaho. *Gordon*, ¶ 21. This Court agreed with the State's argument that Gordon waived his right to challenge the court's denial of his motion to enforce the Idaho agreement when he pled guilty. *Id.* ¶¶ 22-29. In concluding that Gordon's claim was not jurisdictional, this Court noted that there was nothing in the record indicating that the State did not have the power to bring the charges in the Information. *Id.* ¶ 26.

This Court explained that Gordon could only attack the voluntary and intelligent character of his guilty plea and noted that he had not done so. *Id.* ¶¶ 23-24. This Court also noted that Gordon could have negotiated to reserve his right to appeal the issue he raised, but he failed to do so. Consequently, he waived his ability to appeal the issue. *Id.* ¶¶ 30-32.

Although this Court has stated in *State v. Bartlett*, 282 Mont. 114, 935 P.2d 1114 (1997), that a claim of incompetency cannot be waived by a defendant or his attorney, that does not apply in this situation where the defendant pled guilty. In *Bartlett*, this Court addressed whether a defendant's failure to request an evaluation waived his right to challenge the competency evaluation. *Bartlett*, 282 Mont. at 119-20, 935 P.2d at 1117. That is different from the waiver that occurs when a defendant enters a guilty plea. A guilty plea waives all defects, including constitutional defects, that occurred prior to the entry of the plea. *Stone*, ¶ 13.

Jacob, like Gordon, waived his ability to appeal anything related to his case when he voluntarily pled guilty to the offenses. His claim that he should be entitled to a different sentence because he suffered from a mental disease, disorder, or defect is not a jurisdictional defect that may be raised after pleading guilty. As *Gordon* demonstrates, jurisdictional defects are defects in the ability to bring the initial charges. Jacob has not alleged a jurisdictional defect. Thus, his challenge to any allegation of mental disease related to an earlier plea offer is waived.

The State acknowledges that if Jacob had not been fit to proceed, that would raise a question about the voluntariness of his pleas. But that allegation was not raised, nor is it supported in the record. Jacob has not challenged the voluntariness of his plea of March 4, 2024. (*See generally* Appellant's Br.) Instead, Jacob seemingly asserts, without evidence, that because he was diagnosed with a mental disorder he was incapable of rejecting the first plea offer, and this Court should require the district court to impose the sentence the State agreed to recommend in the first plea agreement. This Court has held that a defendant must be mentally competent to enter a guilty plea in the same way a defendant must be competent to stand trial. *State v. Garner*, 2014 MT 312, ¶ 27, 377 Mont. 173, 339 P.3d 1 (citations omitted). Jacob's argument is circular and would require a district court to impose a sentence on a defendant who is not competent to change his plea.

In this case, Dr. River testified that none of Jacob’s diagnoses would “let him off the hook for responsibility of his actions, socially or legally.” (Tr. at 33-34.) Furthermore, when asked if any of the diagnoses would have led Jacob to reject the January 2024 plea offer, Dr. River stated:

I—I’m hesitant to speculate about his thought process and motivations, other than to say that during that time, as I understand it, he was in this kind of chronic stance toward life of being an island unto himself and he was going to fight this charge, is my memory, and he was in denial.

(*Id.* at 34.)

There is no testimony in the record that supports Jacob’s claim he was not competent to make a rational decision about either the January or March plea offers. Because Jacob has not challenged the voluntariness of his plea on March 4, 2024, demonstrated that it was involuntary, or even asked to withdraw his plea, he cannot now challenge his sentence. *Gordon*, ¶ 24.

CONCLUSION

The district court did not violate Jacob’s due process rights because the victim impact statement was provided to him prior to imposition of the sentence and did not contain any new material facts or misinformation of a constitutional magnitude. Jacob did not request plain error review and is precluded from doing so now. His sentence was legal, he has no constitutional right to a plea agreement, and

he waived any non-jurisdiction defect with his knowing, voluntary, and intelligent plea of guilty. Jacob is not entitled to the benefit of the January plea agreement.

The State respectfully requests that this Court affirm Jacob's sentence.

Respectfully submitted this 13th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,242 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Selene Koepke
SELENE KOEPKE

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0355

STATE OF MONTANA,

Plaintiff and Appellee,

v.

COLE MICHAEL JACOB,

Defendant and Appellant.

APPENDIX

March 4, 2024 Plea Agreement (Doc. 52) Appendix A

CERTIFICATE OF SERVICE

I, Selene Marie Koepke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-13-2025:

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