IN THE SUPREME COURT OF THE STATE OF MONTANA

No.: DA 24-0355

STATE OF MONTANA, Plaintiff and Appellee, vs. COLE MICHAEL JACOB, Defendant and Appellant.	DEFENDANT / APPELLANT'S REPLY BRIEF

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STANDARD OF REVIEW

In the State's Standard of Review section it cites the case of *State v. McLeod*, 2000 MT348, ¶12, 313 Mont. 358, 61 P.3d 126 , stating that this Court reviews criminal sentences is limited to legality only; that is, whether the sentence is within the parameters provided by statute."

This State's Standard is too limited and a better standard concerning review of sentencing was enunciated in the later case of *State v. Rosling* , 2008 MT 62, ¶ 59, 342 Mont. 1, 180 P.3d 1102 where this Court stated: "Our review is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, *and whether the court adhered to the affirmative mandates of the applicable sentencing statutes."* Emphasis added. As the first issue raised in Cole's Brief concerned whether the State and the District Court adhered to the requirements of § 46-18-115, MCA, a sentencing statute regulating victim impact statements, the emphasized portion of the *Rosling* standard of review empowers this Court to review the issues in Cole's first issue. In such a review this Court should conclude that the State and the Court did not adhere to the requirements of § 46-18-115, MCA, to Cole's prejudice.

Cole's statement of the Standards of Review in his Brief is also more accurate than that of the State.

SUMMARY OF THE ARGUMENT

The State's Summary of the Argument contains an erroneous and unsupported statement of fact which, when corrected, renders the State's attack of Cole's first issue meritless. That erroneous statement is that "the State provided Jacob the victim impact statement prior to imposition of the sentence, as required under Mont. Code Ann. § 46-18-115." As shown in the Argument, the States statement is untrue. Delivery of the statement to Cole prior to the imposition of sentence is not supported anywhere on the hearing transcript or elsewhere in the record.

A timely defense objection was made based on the failure to provide the inflammatory written statement of K.C. to the defense beforehand, as required by § 46-18-115(4)(b), MCA. Trans, p. 2, lines 16-17. The District Court overruled the objection by stating that the prosecutor "can provide it to him when you can." Such a feeble ruling allowed the prosecutor to delay providing a copy to the defense until after sentencing. As a gatekeeper on the admission of evidence, the Court should have at least allowed defense counsel to review the statement before it was admitted and, if necessary, allowed additional time for the defendant to respond to it.

Since the statement contained new material facts, such as the effect of the incident on the father and not P.C., and Cole's potentiality for kidnapping, rape and

murder, the District Court had an obligation under § 46-18-115(4)(b), MCA to allow the defense adequate opportunity to respond and may continue the sentencing hearing if necessary. Due to the tardy notice to the Court and the defense, and the irregularity of not first presenting it to the Court so it could provide copies to the defense as required by the statute, a more appropriate ruling would have been to exclude the statement from consideration. Instead, the District Court erroneously allowed the prosecution to "provide it to him when you can" and allowed the prosecutor to read the statement into the record over Cole's timely objection.

The State maintains that it is necessary to exercise "plain error review" of Cole's assertion that he is entitled to the plea agreement which was rejected due to a disease and mental defect rending him incapable of making a knowing, voluntary, and intelligent decision concerning the rejected plea agreement. This position was raised at the hearing so plain error review is unnecessary. As a matter of compassion and in the exercise of sound discretion, the District Court should have sentenced Cole in accordance with the plea bargain agreement that Cole had previously rejected.

ARGUMENT

I. The State's Argument concerning Due Process.

While conceding that "due process protections apply in sentencing hearings", the State cites *State v. Nichols*, 222 Mont. 71, 76, 720 P.2d 1157, 1161 (1986) for its holding that "a convicted defendant's liberty interest at sentencing does not rise to the level of an accused's liberty interest at trial." State's Brief, Page 9. However, "[t]he Due Process Clause protects defendants against fundamentally unfair treatment by the government in criminal proceedings." *State v. Betterman*, 2015 MT 39, ¶ 27, 37 Mont. 182, 342 P.3d 971. The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty.

The State concedes that 'the 1991 Commission Comments to § 46-1 8-115, MCA states that the statute "embodies due process constitutional law that has been developed in the federal courts and by the Montana Supreme Court." State's Brief, page 10. This Court has established that due process requires a defendant have the opportunity to "explain, argue, and rebut any information, including any 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.2d 955 (citing *Bauer v. State,* 1999 MT 185, ¶ 22, 295 Mont. 306, 983 P.2d 955). Federally, as stated in the Opening Brief, the Fourteenth Amendment Due Process Clause requires the exclusion of victim impact evidence if its admission would render the sentencing hearing fundamentally unfair. *Payne v. Tennessee,* 501 U.S. 808, 825 (1991). It has been held that failure to provide adequate pre-sentencing

notice and opportunity to analyze and address information used in sentencing violates due process. *United States v, Baldrich,* 471 f.3d 1110, 1114 (9th Circuit 2006) Fair treatment consistent with due process requires that all the protections of § 46-1 8-115, MCA be provided to a defendant.

The State cites *State v. McLeod*, 2002 MT 348, 313 Mont. 358, 61 P.3d 126 and other cases for the proposition that "[f]or a sentence to be overturned on due process grounds, the sentence must be based 'at least in part upon misinformation of constitutional magnitude,'" (State's Brief, page 11). The State further argues that the statement the Court allowed to be read into the record by the State was not "inflammatory" and "fundamentally unfair". State's Brief, page 16. The statement of K.C. allowed into evidence expressed K.C.'s unfounded belief that Cole had the propensity to kidnap, rape and murder his daughter. Such inflammatory allegations have no place in a victim impact statement as they serve no other purpose than to raise passions, even in usually fair individuals. Contrary to the State's argument, this statement contained "misinformation of constitutional magnitude" and was highly inflammatory. Allowance of the statement into the record over the defense's objection was error.

A proper objection was made and the District Court, by doing nothing but requiring the prosecution to provide the information "when you can", deprived

Cole of adequate notice and time to prepare to "explain, argue, and rebut" the inflammatory and unfair comments contained in the statement, His due process rights were deprived to his extreme prejudice.

The State repeats the assertion that Cole "was made aware of the victim's statement prior to the imposition of sentence." State's Brief, page 18. This is false. The State cites to three sources to support this assertion, these are "Tr. at 21 – 23, 49 – 50 Mont Code Ann. § 46-18-15(4)(b)." None of these three sources establish that a copy of the victim impact statement was ever given to the defense, The statute the State relies upon, § 46-18=15(4)(b), MCA, provides that: "The court shall give copies of any written statements of the victim to the prosecutor and the defendant prior to imposing sentence." The record does not show that the District Court ever fulfilled this mandatory duty. In fact, the record establishes that the Court improperly delegated the responsibility to the prosecutor by flippantly telling the prosecutor that she "can provide it to him when you can," Trans. page 21, lines 16 – 24. The Court should have either disallowed the statement as being untimely, or immediately ordered that the defense be given a copy and be provided adequate time to analyze the statement and prepare any further objections and necessary defenses. The Court should have ordered a continuance, if necessary.

While the sentencing hearing transcript and record do not provide any support for the State's position that the defense was provided a copy of the victim

impact statement, the transcript does support the contrary position that the defense was not provided a copy prior to pronouncement of the sentence.

As previously stated, the delivery of a copy to Cole's counsel at any time during the hearing was not preserved in the transcript or other record. If such a delivery had occurred it would be incumbent on the prosecutor to make a verbal record stating that "the record should reflect that I am delivering a copy of the victim impact statement to the defense counsel", or similar verbiage, While it is stated in Cole's Opening Brief that the statement "had not been provided to Cole or his counsel until the middle of the sentencing hearing", Opening Brief, page 10, that comment concerned the disclosure of the content of the written plea agreement, not provision of a copy of the written plea bargain itself. Nowhere in the transcript was there a pause in the proceedings showing that Cole and his attorney had been given and were reviewing a copy of the document after the prosecution informed the Court and the defense of its existence. If a copy of the written plea agreement were provided prior to pronouncement of sentence, the Court would have certainly paused the proceedings to allow time to review the statement. Elsewhere in the Opening Brief, counsel complains that the prosecutor waited "until the middle of the of the sentencing hearing before springing K.C.'s statement on Cole and his counsel…." Opening Brief, page 16. This shows that counsel was referring to the fact that the prosecutor had not informed counsel of

the existence of the statement, although she had it at least two days before the hearing and should have provided a copy at the earlies time. . In the Opening Brief, Cole's counsel discusses part (b) of subsection (4) of § 46-18-115, MCA, which requires *the court, not the prosecutor*, to "give copies of any written statements of the victim to the prosecutor and the defendant prior to imposing sentence." It appears that the Court was unable to do so as the prosecutor had even failed to file a copy with the District Court. The Court improperly allowed the prosecutor the discretion to determine when the statement would be provided to the defense. To preserve Cole's rights, the Court should not have allowed the prosecution to read the statement into the record until Cole was given the opportunity to review the statement. The transcript shows that the Court did not do so. While discussing § 46-18-115(4)(b), MCA, Cole's counsel states that "K.C.'s statement was not given to Cole until after the sentencing hearing had concluded." Opening Brief, page 19. Finally, as proof that the copy of the statement had not been provided to Cole or his counsel during the hearing, immediately *before* the court imposed sentence, after the Court asked if counsel had anything further to say, Cole's counsel, still upset about not having been given a copy, stated that, had he been provided a copy, "we could have possibly had a better rebuttal…" Despite this objection, the Court proceeded to impose sentence, citing that the sentence

"takes into account the position and input of the victim". Trans., page 50, lines 8 – 9.

The State cites the cases of *State v. Trangsrud*, 200 Mont. 303, 651 P.2d 37 1982, and *State v. Roedel*, 2007 MT 291, 339 Mont. 489, 171 P.3d 694, for the proposition that it was the obligation of the Defendant to request a continuance and that "district court has no affirmative obligation to provide a continuance or take other action on a Defendants behalf." These cases are clearly distinguishable as the District Court has statutory duties under § 46-18-115. Under subsection (4) (b) of this statute "the court shall give copies of any written statements of the victim to the prosecutor and the defendant prior to imposing sentence." If the court fails to fulfil this obligation, and allows the prosecution to read a statement into the record, the defendant has no knowledge of the content of the statement until it is erroneously read. The time for seeking a continuance is after the statement is provided and the defendant has knowledge of the content. Once the statement is erroneously read into the record, there is no value to be had in seeking a continuance. The bell cannot be unrung.

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. Sherman, 2017 MT 39, ¶ 12, 386 Mont. 363, 390 P.3d 158. "Due 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. Webb*, 2005 MT 5, ¶ 18, 325 Mont. 317, 106 P.3d 521; *Sherman*, ¶ 12. Montana law requires a court to provide both parties a reasonable "opportunity to be heard on any matter relevant to the disposition…." §46-18-115(1), (3), MCA. The requirement of §46-18-115(4)(a), MCA that written victim impact statements be provided before a hearing is obviously designed to ensure that an accused have an opportunity to review the same prior to the hearing so that he can fairly address the contents of the statement. Cole was denied this due process right.

2. **Appropriate Sentence**

The State is incorrect in its assertion that it is necessary to exercise "plain error review" of Cole's assertion that he should have been sentenced to the plea agreement which was rejected by him due to a disease and mental defect rendering him incapable of making a knowing, voluntary and intelligent decision to reject the plea agreement. This position was raised at the hearing so "plain error review" is unnecessary. Trans, pg's 45-46.

Cole's mental disease and mental defect were testified to by Dr. Vincent River, the psychologist who treated Cole for over a year while at the Lake

County jail, and diagnosed Cole with Schizophrenia and Anti-Social Personality Disorder with paranoid traits. Trans. pg. 27. Dr. River testified that Cole was operating under a mental disability known as "Fragmented Personality Disorder" resulting from very extensive trauma, which Cole experienced during his childhood. Trans, pg's. 26, lines 10 -12. Dr. River testified that Coles fragmented personality structure caused him to suddenly shift from one state of awareness to another, where he would respond to internal stimuli and disconnect from shared social reality without being aware of it. Trans. pg. 33, lines 1 - 8. As a result of these conditions Dr. River testified that when he first began working with Cole, he found him to be "in a very intense state of paranoia and could find no sense of security except for the effort to control his environment." Dr. River testified that, due to Coles rapidly shifting awareness, he often had to bring Cole back to reality. Trans. pg. 33, lines 8-11. Dr. River explained that Cole had no self awareness of the lapses between his different states of consciousness. Trans. pg. 33, lines 13-15. Only after months of therapy with Dr. River did Cole come to an understanding that he had likely committed the act he was accused of, at which time he took full responsibility for it. Trans. pg. 35, lines 9-18. Cole did not reject the prior plea agreement of 10 years with 6 suspended voluntarily, knowingly and intelligently. Cole's rejection of the plea agreement was "in ignorance of his rights and the consequences of his act, or influences unduly or improperly, either by hope or fear

in making it." It appears that the rejection of the plea agreement was entered under mistake or apprehension. In *State v. Knox*, 2001 MT 232 ¶¶ 9-10, 307 Mont. 1, 36 P.3d 383, this standard renders a defendant incapable of making a valid decision. This Court should reverse the District Court with instructions to sentence Cole in accordance with the previously rejected plea agreement of 10 years with 6 suspended.

CONCLUSION

For all the above reasons the sentencing judgement of the Lake County District Court should be reversed and remanded for resentencing before a new judge.

Dated this 10th day of April, 2025

/s/ Kevin E. Vainio
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the reply brief is printed with the proportionately spaced Times New Roman text typeface of 14 points; double-spaced except for footnotes quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3038,

excluding the Certificate of Service and Certificate of Compliance, and Table of Authorities.

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I, Kevin E. Vainio, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-11-2025:

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