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STATE OF MONTANA
Case Number: DA 25-0069

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0069

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN PATRICK SULLIVAN,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

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

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

I. The Court should respectfully remand with instruction to correct the facially illegal portion of Sullivan's sentence because it subjects him to collateral consequences. 5

a. Although Sullivan's illegal sentence is expired, the issue is not moot because it subjects him to the collateral consequence of an enhanced sentence under the federal sentencing guidelines. 6

b. Prior convictions used for federally sentencing purposes cannot be collaterally attacked in federal court. 10

c. The appropriate remedy is remand with instructions to amend the Judgment's sentence for each VOP conviction to six months 12

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

APPENDIX 15

TABLE OF AUTHORITIES

Cases

City of Kalispell v. Salsgiver,
2019 MT 126, 396 Mont. 57, 443 P.3d 504 ....5, 6

Custis v. United States,
511 U.S. 485, 114 S. Ct. 1732 (1994)...11

Herrington v. Rogers,
No. DA 19-0600, 2020 Mont. LEXIS 1464 (May 19, 2020) 7

Jellison v. Kirkegard,
No. OP 12-0596, 2013 Mont. LEXIS 81, 369 Mont. 540 (2013)......................6, 7

Reichert v. State,
2012 MT 111, 365 Mont. 92, 278 P.3d 455 6

State v. Hatfield,
256 Mont. 340, 846 P.2d 1025 (1993)...5

State v. Heafner,
2010 MT 87, 356 Mont. 128, 231 P.3d 1087 .... 12, 13

State v. Lenihan,
184 Mont. 338, 602 P.2d 997 (1979)...5

State v. Liefert,
2002 MT 48, 309 Mont. 19, 43 P.3d 329... 7, 8, 9

State v. Nelson,
274 Mont. 11, 906 P.2d 663 (1995)...5

State v. Reynolds,
2017 MT 317, 390 Mont. 58, 408 P.3d 503. 3

State v. Southwick,
2007 MT 257, 339 Mont. 281, 169 P.3d 698. ....4, 5

State v. Standley,
192 Mont. 54, 626 P.2d 248 (1981)...6, 9

Thomas v. Dep't of Corr.,
422 Mont. 552, 570 P.3d 532 (2025) 13

Town of White Sulphur Springs v. Voise,
136 Mont. 1, 343 P.2d 855 (1959) 7

Williams v. Green,
2025 MT 102, 422 Mont. 17, 568 P.3d 549 5

Statutes

21 U.S.C. § 851 .... 11, 12

Mont. Code Ann. § 45-5-626 5

Other Authorities

United States Sentencing Commission, *Guidelines Manual* (2025) .... passim

STATEMENT OF THE ISSUE

Whether a fully served, facially illegal sentence of one year and one hundred eighty-five days for an offense with a six-month maximum is moot when the written judgment exposes Appellant Ryan Sullivan to collateral consequences under the federal sentencing guidelines?

STATEMENT OF THE CASE

The State originally charged Sullivan by way of Information in Montana's Thirteenth Judicial District Court of Yellowstone County ("District Court") with three counts of Violation of Order of Protection ("VOP"); two were charged as misdemeanors with six-month maximum terms of imprisonment, and the third was charged as a felony. (D.C. Doc. 3.) Citing Sullivan's prior felony convictions, the State also filed notice that it intended to treat Sullivan as a Persistent Felony Offender ("PFO"). (D.C. Doc. 12.) The State subsequently and by way of Amended Information added two felony counts of Stalking in the alternative. (D.C. Doc. 29.) After Sullivan was incarcerated for over 450 days on these charges, the parties executed and filed an Acknowledgement of Rights and Plea Agreement, by which: Sullivan agreed to plead guilty to the two misdemeanor VOP charges and waive all waivable rights; the State agreed to dismiss the three felony charges and withdraw the PFO designation; and the parties would jointly recommend a sentence of "TIME SERVED". (D.C. Doc. 133 at 2–3.)

The District Court accordingly conducted a change of plea and sentencing hearing, at which the parties performed their obligations under the Plea Agreement: Sullivan waived all waivable rights, (Oct. 18, 2024 Tr. 3:7–22, attached as App. A;) he pleaded guilty to the two misdemeanor VOP charges, (*Id.* at 5:1–12;) the State dismissed the felony charges and withdrew the PFO designation, (*Id.* at 9:16–23;) and the parties jointly recommended a sentence of time served, (*Id.* at 8:19–9:15, 9:24–10:1.) Sullivan and the State agreed that he had been incarcerated for 499 days on these charges and was entitled to time served for the same time. (*Id.* at 9:6–10.) The District Court specifically asked if the parties wanted a sentence of sixth months or time served. (*Id.* at 9:11–12.) The parties confirmed they wanted a time served sentence. (*Id.* at 9:13–15.)

The District Court accepted the parties' recommended sentence: "As to Count II, the Court will sentence to time served . . . For Count III, the Court will sentence you to time served[.]" (*Id.* at 11:10–13.) The written Judgment, in pertinent part, set forth:

> IT IS ORDERED that for COUNT II: VIOLATION OF ORDER OF PROTECTION 2ND OFFENSE (MISDEMEANOR) the Defendant is committed to the Yellowstone County Detention Facility under § 46-18-201, MCA, for **ONE (1) YEAR ONE HUNDRED EIGHTY-FIVE (185) DAYS**, to run concurrently with DC 19-0829.
>
> IT IS FURTHER ORDERED that for COUNT III: VIOLATION OF ORDER OF PROTECTION 1ST OFFENSE (MISDEMEANOR) the Defendant is committed to the Yellowstone County Detention Facility under § 46-18-201, MCA, for **ONE (1)**

> **YEAR ONE HUNDRED EIGHTYFIVE (185) DAYS**, to run concurrently with Count II.
>
> IT IS FURTHER ORDERED that Defendant will receive credit for time spent in pre-trial incarceration as follows: October 5, 2021, through October 12, 2021, April 13, 2023, through May 25, 2023, and June 8, 2023, through October 18, 2024.

(D.C. Doc. 135 at 1–2 (emphasis added), attached as App. B.) Sullivan accordingly did not serve another day of imprisonment for these two convictions.

Neither party sought to rectify with the District Court the Judgment's facially illegal sentence. However, Sullivan timely filed a Notice of Appeal to this Court. (D.C. Doc. 138.)

STATEMENT OF THE FACTS

While the facts supporting Sullivan's convictions are not material to the issue presented, Sullivan admitted at the change of plea and sentencing hearing that he was aware of a permanent order of protection barring any contact with M.A. and that he nevertheless twice initiated contact with M.A. through third parties. (App. A at 5:16–8:7.)

STANDARD OF REVIEW

"A sentence outside the statutory parameters is illegal. Our standard of review of that question of law is de novo." *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503.

SUMMARY OF THE ARGUMENT

Sullivan's one year and one hundred eighty-five day sentences for each of the two VOP convictions are facially illegal because they exceed the statutory maximum of six months. Although Sullivan fully served the sentences, the issue is not moot because there is a possibility the illegally long sentences could subject Sullivan to collateral consequences. Specifically, in a federal prosecution, the sentences would be counted as three criminal history points instead of two if the six-month maximum sentence was imposed and would be subject to a fifteen-year lookback period instead of ten. While no federal prosecution currently exists, if one does in the next fifteen years, Sullivan would not be able to collaterally attack his illegal sentences in federal court. The time to remedy the error is now. Respectfully, the Court should therefore remand and direct the District Court to amend the written Judgment's sentences to six months.

ARGUMENT

"Generally, the Court will not review issues that the appellant failed to raise at the district court level." *State v. Southwick*, 2007 MT 257, ¶ 21, 339 Mont. 281, 169 P.3d 698. There is however a narrow exception commonly called the *Lenihan* rule: "an appellate court may review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *State v. Nelson*, 274 Mont. 11, 18,

906 P.2d 663, 687 (1995) (citing *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979) and *State v. Hatfield*, 256 Mont. 340, 846 P.2d 1025 (1993)). "[A] defendant generally needs only to allege the court imposed an illegal sentence to invoke the *Lenihan* rule[.]" *Williams v. Green*, 2025 MT 102, ¶ 12, 422 Mont. 17, 568 P.3d 549.

This Court has repeatedly used the *Lenihan* rule to vacate illegal sentences despite no objection at the district court level. *E.g. Southwick*, ¶ 28 (unobjected-to ten-year and fifteen-year sentences held illegal because maximum sentences were five years when offenses were committed); *see also Hatfield*, 256 Mont. at 346–47, 746 P.2d at 1029 (holding illegal two unobjected-to sentencing conditions that (1) could result in more than the statutory maximum 180 days incarceration and (2) gave a probation officer discretion to incarcerate defendant); *see also City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (unobjected-to financial obligations held illegal).

I. The Court should respectfully remand with instructions to correct the facially illegal portion of Sullivan's sentence because it subjects him to collateral consequences.

"A district court only has the authority to impose a sentence based on the authority granted by the applicable statute. Any sentence that exceeds such authority is illegal and facially invalid." *Southwick*, ¶ 26. Section 45-5-626(3), MCA, sets forth the maximum sentence for a first and second VOP conviction:

> An offender convicted of [VOP] shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, for a first offense. Upon conviction for a second offense, an offender shall be fined not less than $200 and not more than $500 and be imprisoned in the county jail not less than 24 hours and not more than 6 months.

The maximum term of imprisonment for Sullivan's first and second VOP convictions here were six months each. The sentence of one year and one hundred eighty-five days for each are thus facially illegal. While Sullivan specifically asked for the time served sentence, "a party cannot acquiesce and tacitly accept a trial court's exercise of power that it does not have legal authority to impose." *Salsgiver*, ¶ 42.

a. Although Sullivan's illegal sentence is expired, the issue is not moot because it subjects him to the collateral consequence of an enhanced sentence under the federal sentencing guidelines.

Because Sullivan has fully served his sentence, the Court "must determine whether expiration of the [] sentence causes these issues to become moot." *Jellison v. Kirkegard*, No. OP 12-0596, 2013 Mont. LEXIS 81, at *3–4, 369 Mont. 540 (2013). "Note that standing may rest not only on past or present injury, but also on *threatened* injury." *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455. Indeed, "The United States Supreme Court has held that a criminal case is not moot if there is **a possibility** that any collateral legal consequence will be imposed on the basis of the challenged conviction." *State v. Standley*, 192 Mont. 54, 56, 626 P.2d 248, 249 (1981) (emphasis added) (citing cases). This Court has long held the

same. *Id.* (citing *Town of White Sulphur Springs v. Voise*, 136 Mont. 1, 343 P.2d 855 (1959)); *see also Herrington v. Rogers,* No. DA 19-0600, 2020 Mont. LEXIS 1464, at *1 (May 19, 2020). Accordingly, Sullivan "must show some concrete, continuing injury continues to exist which exposes him to collateral consequences." *Jellison*, 2013 Mont. LEXIS at *4.

"A consequence is direct if it has a 'definite, immediate, and largely automatic effect' on the defendant." *State v. Liefert*, 2002 MT 48, ¶ 22, 309 Mont. 19, 43 P.3d 329 (quoting *United States v. Bouthot*, 878 F.2d 1506, 1511 (1st Cir. 1989)). "In contrast, a consequence is collateral if a defendant has control over whether or not the consequence occurs. . . . [or] if it is not under the control of the sentencing judge or it is a procedure under the control of a different sovereign or different agency." *Id.*

Under the federal sentencing guidelines, "criminal history category" and offense level respectively form the horizontal and vertical axes of the sentencing table used to calculate federal sentences of imprisonment. United States Sentencing Commission, *Guidelines Manual*, Ch. 5, Part A (2025) (hereinafter "USSG"). With some exceptions at the highest and lowest offense levels, a higher criminal history category means a greater length of imprisonment under the guidelines. *Id.* Criminal history category is determined by the sum of the points assigned to prior sentences

within the applicable lookback period. Zero or one point is Category I, two or three points is Category II, four through six points is Category III, and so on. *Id.*

The number of points per prior sentence is measured largely by the length of the incarceration imposed: "Add 3 points for each prior sentence of imprisonment exceeding one year and one month. . . . Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in subsection (a)." *Id.* at § 4A1.1(a), (b). The guidelines' definitions make it clear that "prior sentence of imprisonment" refers to the sentence actually imposed: "'prior sentence' means any sentence previously **imposed** upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense[;]" "The term 'sentence of imprisonment' means a sentence of incarceration and refers to the maximum sentence **imposed**." *Id.* at § 4A1.2(a)(1), (b)(1) (emphasis added). Indeed, USSG commentary explains that maximum imposed sentence was chosen as the measure of criminal history to minimize problems arising from jurisdictional variations in offense definitions, such as whether a conviction was designated a felony or a misdemeanor. *Id.* at § 4A1.1, *background* comment.

Under *Liefert*, a defendant's increased criminal history category under the federal sentencing guidelines is a collateral consequence of a Montana state conviction. The Montana sentencing court has no control over the federal sentencing guidelines or the sentence a federal court may impose after calculating

the criminal history category based on, *inter alia*, a Montana conviction. Moreover, the entire process of sentencing a defendant in federal court is plainly a "procedure under the control of a different sovereign[.]" *Liefert*, ¶ 10.

Here, Sullivan was sentenced to a term of over one year and one month for each of the two VOP convictions. (App. A at 11:10–13; App. B at 1–2.) The guidelines treat this as one sentence for criminal history points because "the sentences resulted from offenses contained in the same charging instrument" and "the sentences were imposed on the same day." USSG § 4A1.2(a)(2). The sentence for the VOP convictions here would thus be given three points total, when, under the maximum legal sentence of six months, it would be given two points total. *Id.* at § 4A1.1(a), (b). Given Sullivan's additional criminal history outside of this case, (*see* D.C. Doc. 12,) the erroneous one-point difference could increase his criminal history category from II to III, III to IV, etc. and subject him to a longer term of imprisonment.[1] As such, the issue here is not moot because "there is a possibility that a[] collateral legal consequence will be imposed on the basis of the challenged conviction." *Standley*, 192 Mont. at 56, 626 P.2d at 249.

Moreover, past sentences that would be counted as three points are not counted if the "sentence [was] imposed more than fifteen years prior to the

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[1] Calculating Sullivan's exact criminal history points today would require information not contained in the record.

defendant's commencement of the instant offense . . . unless the defendant's incarceration extended into this fifteen year period." USSG § 4A1.1, n. 1. In contrast, past sentences that would be counted as two points are no longer counted after only ten years. *Id.* at § 4A1.1, n. 2. If federally prosecuted between ten to fifteen years in the future, Sullivan's VOP sentence would be given three points—instead of zero under the lawful maximum sentence of six months. Given that no criminal history category has a greater than three-point range, Sullivan's criminal history category would axiomatically increase and would likely subject him to a longer term of imprisonment. This further demonstrates the issue here is not moot because "there is a possibility that a[] collateral legal consequence will be imposed on the basis of the challenged conviction." *Standley*, 192 Mont. at 56, 626 P.2d at 249.

b. Prior convictions used for federally sentencing purposes cannot be collaterally attacked in federal court.

The State may argue that because Sullivan is not currently subject to federal prosecution, it would be better to wait and address the issue if he is. While this Court's case law permits review of the merits here on merely "a possibility" of collateral consequences—which was clearly shown above—it is also critical to understand that federal courts are prohibited from considering collateral attacks to prior convictions when sentencing:

> By challenging the previous conviction, the defendant is asking a district court to deprive the state-court judgment of its normal force and effect in a proceeding that has an independent purpose other than to overturn the prior judgment. These principles bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, the concern with finality served by the limitation on collateral attack has special force.
>
> We therefore hold that § 924(e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions.

Custis v. United States, 511 U.S. 485, 497, 114 S. Ct. 1732, 1739 (1994) (cleaned up) (citing cases). *Custis* involved a federal weapon enhancement statute, not the sentencing guidelines. However, the Court generally reasoned that because the United States Constitution does not grant a right to collaterally attack prior convictions used for sentencing enhancement, such attacks are only permitted if Congress specifically authorized them.[2] *Id.* at 491–492, 114 S. Ct. at 1736. "For example, 21 U.S.C. § 851(c), . . . sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense." *Id.* at 491, 114 S. Ct. at 1736.

Congress has not authorized collateral attacks of prior convictions used to calculate a defendant's criminal history category under the federal sentencing guidelines. Indeed, the USSG explicitly states "this guideline and commentary do

[2] The only exception to this rule is claims of denial of the right to counsel, which is not an issue here.

not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).” USSG § 4A1.2, n. 6. If Sullivan’s illegal sentence is not remedied by the Montana courts, he will be subject to the possibility of an enhanced federal sentence without any recourse before the federal court. The time to correct the error is now.

c. The proper remedy is remand with instructions to amend the Judgment’s sentence for each VOP conviction to six months.

In *State v. Heafner*, the Court resolved a history of inconsistent approaches to the remedy upon finding a portion of a sentence illegal, holding: “Remand to give the district court the opportunity to correct the illegal provision should be ordered unless, under the particular circumstances of the case, the illegal portion of the sentence cannot be corrected. If so, the case should be remanded to the district court with instructions to strike the illegal conditions.” 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087. The *Heafner* Court aptly recognized that various actors within the criminal justice system reference the written sentencing document for a variety of reasons. *Id.* Indeed, that is the exact concern here: a federal court could reference the written Judgment as it exists today and assign three criminal history points instead of two—or zero if in the ten-to-fifteen-year lookback period—to Sullivan’s VOP sentence. “The sentencing document should therefore accurately

reflect the sentence and any applicable conditions. This can best be accomplished by remanding to the district court to correct the illegal provision so that the sentencing document on file in the district court is accurate." *Id.* This Court, citing *Heafner*, very recently used this exact procedure when a defendant was sentenced to eight years instead of the maximum of five years. *Thomas v. Dep't of Corr*., 422 Mont. 552, 570 P.3d 532 (2025). The Court should therefore remand this case with instruction to the District Court to amend the Judgment's sentence for each VOP conviction to six months.

CONCLUSION

Sullivan's one year and one hundred eighty-five day sentences are facially illegal. The issue is not moot because there is a possibility that he would suffer the collateral consequence of an enhanced sentence if federally prosecuted in the next fifteen years. Respectfully, the Court should remand this case and direct the District Court to amend the Judgment's sentence for each VOP conviction to six months.

Respectfully submitted this 30th of January, 2026.

MURNION LAW

By: /s/ James C. Murnion
JAMES C. MURNION

ATTORNEY FOR APPELLANT
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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 typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, if any, the caption page, the table of contents, the table of authorities, the signature blocks, and the appendix; and the word count calculated by Microsoft Word for Windows is 3,139, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James C. Murnion
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APPENDIX

October 18, 2024 Transcript of Proceedings…………………………………...App. A

Judgment………………………...……………………………………………App. B

CERTIFICATE OF SERVICE

I, James Clarke Murnion, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-30-2026:

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