IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA-13-0812

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

ROBERT AARON ZUNICK,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

ON APPEAL FROM MONTANA'S FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY, THE HONORABLE ROBERT L. DESCHAMPS III PRESIDING

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Filed _____, **2014,**
_____, **Clerk**

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STATEMENT OF THE CASE

On February 14, 2012, Missoula County law enforcement charged Appellant / Defendant (hereinafter "Zunick") with Criminal Endangerment (Fel.), and DUI (misd.). On June 19, 2012, the parties submitted an executed plea agreement, pursuant to Mont. Code Ann. § 46-12-211(1)(b), limiting the scope of the arguments of the State (maximum of 6 years Department of Corrections, with at least 3 suspended), and the defense (which could argue for deferred imposition of sentence). Ten weeks after the change of plea, the Court imposed a 10-year commitment to the Montana D.O.C., with all suspended, on the grounds that "You won't be rewarded if this happens again. You'll be punished. And that's why I went with the 10 years instead of the 6 that was bargained for, because you might end up with 10 years in prison."

The Court exceeded the bounds of the plea agreement, which, as a (1)(b) agreement, made various statutory requirements of the Court under § 46-12-211(4), some of which were not adhered to. Most materially, the Court never informed Zunick (per said statute) that he could still withdraw his guilty plea and go to trial, nor was he "afforded" the opportunity to withdraw his plea. Not understanding the sentence imposed, Zunick did not object at that time. He

subsequently hired new counsel, and ultimately filed a timely motion to withdraw the guilty plea that led to his sentence. After briefing, the Court issued an ORDER - denying Zunick's motion to withdraw his plea. Zunick now appeals from that Order.

SUMMARY OF THE ARGUMENT

The Court sentenced Zunick to 10 years D.O.C., suspended. The Court never explained to Zunick what that meant. Nothing in the record indicates that Zunick understood the nature of a suspended sentence, how it is distinguished from a deferred sentence, nor the statutory differences between the two in the process of petitioning for early termination from probation. Zunick did not understand that he was being sentenced to a felony record, for life. The Court made no effort to make this evident to him. As a result, when all became clear to Zunick, he did not know what to do, and ultimately hired new counsel. Transcripts of proceedings were ordered. The transcripts made plain that the reason why Zunick did not understand what had happened to him, was that the Court did not make it clear that it was sentencing outside the bounds of the plea agreement, and that Zunick still had options. More importantly, in doing so, the Court did not remind him that he could still withdraw his plea, and go to trial. Given the nature of the offense, and the harsh punishment imposed upon Zunick as a first-time, non-violent felony offender, Zunick would have exercised this option. But, as the option was not presented at the sentencing hearing, it was not accepted. Zunick timely filed a subsequent motion to withdraw his plea, on the grounds stated above, but the same Court denied the motion. Denial of the motion constituted reversible error. Zunick now seeks relief in the form of a remand, with this Court's instructions to the lower court to permit him to withdraw his plea, based on the grounds as previously alleged.

STATEMENT OF THE FACTS

On or about February 14, 2012, Zunick was placed under arrest for driving under the influence of alcohol (3rd Offense), and for Criminal Endangerment (felony). The criminal endangerment charge was substantiated, by the charging documents, for Zunick allegedly endangering "others in the vicinity of that roadway" (outside Lolo - Montana). (Exhibit 3: Affidavit and Motion for Leave to File Information, D.C. Doc. 1) He was charged by Information in Montana's Fourth Judicial District Court. (Exhibit 4: Information, D.C. Doc. 3)

On June 19, 2012, Zunick appeared in Court for the purpose of changing his plea. In spite of the fact that no specific person could be identified as a victim of Zunick's "criminal endangerment," Zunick entered into a Plea Agreement by which he agreed to enter guilty pleas to the charges of Criminal Endangerment, and Aggravated DUI. (Exhibit 5: Plea Offer & Agreement, D.C. Doc. 15)

In this case, the plea agreement was entered pursuant to Mont. Code Ann. § 46-12-211(1)(b). Pursuant to subsection of (4) of that statute:

> (4) **If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea,** and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

In this case, the subsection (b) plea agreement called for the State to be permitted to argue for up to a six-year commitment to the Department of Corrections, with 3 suspended. "The Defendant will be entitled to recommend any sentence allowed by law." (see p. 2 of the PLEA AGREEMENT) In this case, Zunick's counsel recommended a deferred imposition of sentence.

As part of the agreement, "the State agrees to recommend sentences no more severe than specified in the sentencing grid." (see above) "The Defendant will be entitled to recommend any sentence allowed by law." (Id.) Zunick appeared for sentencing on the date of September 4, 2012. (Sentencing Hearing, Tr. at 35) At sentencing, the defense requested a deferred imposition of sentence, which type of sentence can be no longer than six years. The Court did not follow the plea agreement. The Court imposed a ten-year term to the Department of Corrections, all suspended. (Tr. at 50, l. 2-5) Written Judgment was issued on September 17, 2012. (Exhibit 1: Judgment. D.C. Doc. 23)

The Court's sentence exceeded the bounds of the plea agreement. The Court even articulated its reasons for imposition of the ten-year, rather than six-year term: "You won't be rewarded if this happens again. You'll be punished. And that's why I went with the 10 years instead of the 6 that was bargained for, because you might end up with 10 years in prison." (Tr. at 53, l. 4-7) At no time (during the Sentencing hearing) did the Court inform Zunick that as a result of the terms of the plea agreement (46-12-211(1)(b)), and the Court having exceeded the bounds of the agreement, that he had a right to withdraw his plea and go to trial.

Zunick left the courtroom, on September 4, 2012, not really understanding what had happened, or what sentence was imposed. He did not understand the difference between a deferred and a suspended sentence. Regardless, he retained new counsel in the spring of 2013. Transcripts of proceedings were produced in March of 2013. (D.C. Doc. 24) Zunick discussed various options with counsel, and attempts were made, in Court, to at least reduce the severity of the probation conditions imposed upon him. (D.C. Doc. 25-29) With no form of relief being granted to Zunick, and in consideration of the indications within the transcripts of proceedings - that 46-12-211(1)(b) was not adhered to, the decision was made to file a motion - permitting Zunick to withdraw the guilty plea - into which he had

entered during the previous year. (Exhibit 6: Motion for Order - Permitting Defendant to Withdraw Plea of Guilty and Internal Brief in Support, D.C. Doc. 30) A guilty plea may be withdrawn for good cause, including involuntariness. Section 46-16-105(2), MCA

The motion (above) was timely, as it fell within the time frame of "one year after the Judgment becomes final," pursuant to Mont. Code Ann. 45-15-105. The basis of the motion - permitting Zunick to withdraw his plea - was that the Court had failed to give Zunick the opportunity to withdraw his plea, after having imposed a sentence outside the boundaries permitted by the plea agreement. The State objected. (Exhibit 7: State's Response to Defendant's Motion for Order Permitting Withdrawal of Plea of Guilty, D.C. Doc. 36.2) The basis of the State's objections was, in essence, that "it was unmistakable that the plea agreement was not going to be followed," that he signed a "guilty plea and waiver of rights" form, and that said document, and the Court - at the time of the change of plea (2 2/1 months earlier) "all advised Mr. Zunick that the Court was not obligated to follow the terms of the plea agreement." (Id. at 9-10) The State further relied on the fact that the "waiver" form, signed 2 1/2 months prior to sentencing indicated (by Zunick) that "I understand that if a specific sentence is agreed upon by myself and the State which is rejected by the Court, the Court shall inform me and afford me the opportunity to withdraw the plea." (Id. at 10, l. 17-20)

Moreover, in its arguments that the statutory obligations to so inform a defendant had been met, the State referred back to the colloquy of the District Court Judge, to Zunick, at the change of plea, made 2 1/2 months prior to the sentencing: "And if I decide to give you something more severe than what is called for in the plea agreement, I'll tell you what I'm going to do, give you a chance to think about it. And I'll let you withdraw your plea if you want. Do you understand that?" (State's Response at 10-11: Citing Trans. of Change of Plea, June 19, 2012,

p. 29, l. 2-7) Finally, the State argued (in its Response Brief) "what value would have been served by the judge explicitly stating (at Zunick's sentencing) I'm not going to follow the plea agreement?' Answer: None." (State's Response at 9, l. 11-15)

At no point in its Response Brief did the State argue that the Judge, at Zunick's sentencing, ever actually informed him that "I'm not following the plea." More importantly, the State did not argue that the Judge "gave Zunick a chance to think about it," (as he said he would), or that the Court informed Zunick that he would "let him withdraw the plea" if he wanted to. The State simply argued that because of the existing record, resulting from the June 19, 2012 change of plea hearing (and the accompanying waiver form), Zunick was in effect "on notice" that he could withdraw his plea (2 1/2 months later), and that as a result, the Court's failure to actually give Zunick the opportunity to withdraw his plea was non-consequential.

On October 21, 2013, Zunick filed a 5-page reply brief, augmenting his argument, including additional law (to what had already been argued), and putting the Court fully on notice of the substance of both the factual, and legal basis behind the argument. (Exhibit 8: Reply to State's Response Re: Motion for Order Permitting Defendant to Withdraw Plea of Guilty, D.C. Doc. 38) On October 28, 2013, the Court issued an ORDER - denying Zunick's motion to be permitted to withdraw his guilty plea, which motion was based entirely on the argument (above) that the Court procedurally erred (effecting Zunick's constitutional rights), when the Court failed to follow the mandates of 46-18-211(4). (Exhibit 9: Order, D.C. Doc. 40) Zunick now appeals the District Court's order - denying his motion. In the October 28 ORDER, the Court made the following summation: "the Court acknowledges that a better record could have been made to memorialize the Defendant's acceptance of the sentence . . . but a fair reading of sentencing

proceedings, giving precedence to substance over form, leads to an inescapable conclusion that the Defendant understood the decision and knowingly and intelligently agreed to accept it." (Exhibit 9: October 28 ORDER, p. 3, l. 21-27)

STANDARDS OF REVIEW

With respect to appeals from denials of motions to withdraw guilty pleas, this Court generally reviews the trial court's findings of fact to determine if they are clearly erroneous and the court's conclusions of law to determine if they are correct. *State v. Warclub*, 2005 MT 149, ¶ 24, 327 Mont. 352, ¶ 24, 114 P.3d 254, ¶ 24. However as, in this case, where the basis of the motion to withdraw the guilty plea is made pursuant to an assertion that the motion should be well-taken directly as a result of the Court's actual error, the Standard of Review appears to switch to de novo review. The motion in this case claimed that the Court erred when it failed to enter into the appropriate colloquy pursuant to Mont. Code Ann. § 45-12-211 (4), which colloquy is required when a district court rejects a plea agreement entered into by the parties, pursuant to Mont. Code Ann. § 45-12-211 (1)(b). This Court appears to categorize such errors under the "voluntariness" standard, which standard - involving mixed questions of law and fact - are reviewed de novo. *State v. Bullplume*, 2009 MT 145, ¶ 20, 350 Mont. 350, 208 P. 3d 37; (citing *State v. Muhammad*, 2005 MT 234, ¶ 12, 328 Mont. 397, 121 P.3d 521.)

In similar cases, this Court has been willing to review the record de novo for plain error, in the event that the Court first finds that the lower court erred in failing to inform a defendant of his or her right to withdraw their plea (specifically when the Court refuses to follow a plea agreement entered into pursuant to § 45-12-211 (1)(b)). (see *State v. Olson*, 2014 MT 8, ¶ 16) As such errors (if true) may "result in a manifest miscarriage of justice, leave unsettled the fundamental

fairness of the trial or proceeding, or compromise the integrity of the judicial process," Zunick urges this Court to apply the same standard of review in this case.

ARGUMENT

I. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT DID NOT PROVIDE ZUNICK THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA, PURSUANT TO MONT. CODE ANN. § 46-12-211 (4), AND FOR SUBSEQUENTLY DENYING HIS MOTION TO WITHDRAW HIS PLEA (BASED ON THE SAME GROUNDS), FILED UNDER § 46-16-105.

Zunick entered into a plea agreement pursuant to Mont. Code Ann. § 46-12-211(1)(b). Specific provisions exist for the express purpose of permitting a Defendant to withdraw his plea if the Court does not follow the plea agreement. A Court can always reject a plea agreement, but with a (1)(b)-type plea agreement, if the Court rejects the plea agreement (as in Zunick's case): then the following requirements under Mont. Code Ann. § 46-12-211(4) are mandated:

> 1) "then
> 2) the court shall, on the record, inform the parties of this fact and
> 3) advise the defendant that the court is not bound by the agreement,
> 4) afford the defendant an opportunity to withdraw the plea, and
> 5) advise the defendant that if the defendant persists in the guilty or nolo contendre plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

In *State v. Olson*, this Court declined to apply plain error review, because the Court first found that Olson's plea agreement was, in fact, not a (1)(b) plea agreement, but was, instead, a (1)(c)-type agreement. Because (1)(c) agreements

make no requirement of the Court to permit a defendant to withdraw his plea in the event that the Court does not follow the plea agreement, this Court (in *Olson*) had no reason to further analyze whether the lower court failed to adhere to the requirements of § 46-12-211(4) (above). *Olson*, 2014 MT 8 @ ¶ 16. Thus, there was no "review for plain error," in *Olson* because this Court found no requirement for (the above) "211(4)" colloquy in the first place.

However, in Zunick's case, the State is not arguing whether the plea was a (1)(b) or (1)(c) agreement. It was clearly a (1)(b), and the State will not (therefore) argue against the fact that the requirements of § 46-12-211(4) must be met. In this case, the State is simply arguing that the requirements of the above statute have been met.

"After the court rejects a plea agreement entered under § 46-12-211(1)(a) or (b), MCA, even if the withdrawal of the defendant's guilty or nolo contendere plea does not involve a waiver of constitutional rights, it does involve the waiver of a statutory right. Waiver is defined as the voluntary abandonment of a known right. A waiver cannot be presumed. There can be no waiver by one who does not know his rights or what he is waiving." *Bullplume*, ¶ 29; (Citing: *State v. Bird*, 2001 MT 2, ¶¶ 35-36, 308 Mont. 75, 43 P.3d 266.)

In *Bullplume*, this Court "decline(d) to impose the same stringent requirements for accepting a plea withdrawal as are mandated by § 46-12-210, MCA, for accepting the entry of the guilty or nolo contendere plea in the first instance. Nevertheless, when a court rejects a plea agreement of the type set forth in § 46-12-211(1)(a) or (b), MCA, before accepting the withdrawal of the defendant's plea of guilty or nolo contendere, the court must be satisfied that the defendant understands his or her statutory right to stand on the guilty plea and understands the possible consequences of waiving that right." ¶ 30

"The facts of this case are that before the purported plea withdrawal, the court gave Bullplume conflicting, inaccurate, and incomplete information about the consequences of withdrawing his plea. No questions were asked of Bullplume to assess his understanding of the consequences of withdrawing his nolo contendere plea, and he did not sign a written acknowledgment of his understanding. Under the unique facts of this case, before accepting Bullplume's withdrawal of his nolo contendere plea, the court erred in not obtaining an acknowledgment from Bullplume that he understood his rights and was making an intentional and voluntary waiver of his statutory right to stand on his nolo contendere plea to the charge of mitigated deliberate homicide." *Bullplume*, ¶ 32-33.

While the case at bar is dissimilar to the extent that Bullplume was seeking to reverse an order - permitting him to withdraw his plea (unlike this case, in which Zunick is seeking relief from an order denying his motion to withdraw his plea) , the same basic principles apply. The issue is whether, in the context of statutory requirements after a Court rejects a (1)(b) plea agreement, the Court subsequently makes an adequate record - memorializing that a Defendant has been made aware of his or her options (if any) at the moment in time following a Court's refusal to follow a plea agreement. In *Bullplume*, this Court found reversible error in that the lower court "erred in not obtaining an acknowledgment." In Bullplume's case, the Court should have "made a record" that Bullplume "was making an intentional and voluntary waiver of his statutory right" to stand on his no contest plea, and not go to trial. In Zunick's case, the Court should have "made a record" that Zunick was making an intentional and voluntary waiver of his right TO GO TO TRIAL, as an alternative to accepting the sentence imposed by the Court (outside the bounds of the plea agreement).

The usual remedy for a guilty plea that is not voluntarily or knowingly made is to allow the defendant to withdraw the plea. *Benjamin v. McCormick* (1990), 243 Mont. 252, 256, 792 P.2d 7, 10. If there is any doubt that a guilty plea was not

voluntarily or intelligently made, the doubt must be resolved in favor of the defendant. *State ex rel. Gladue* v. *Eighth Judicial Dist.* (1978), 175 Mont. 509, 575 P.2d 65. Because a general and piecemeal review of the record is inadequate to substitute for this Court's own (required) colloquy, AT SENTENCING, 46-16-105(1)(b), "doubt" exists as to what Zunick understood his sentence to be, at the conclusion of sentencing.

State's Arument that the "Record" is Adequate to Support the Court's Order - Denying the Motion to be Permitted to Withdraw Plea:

Again, when a Court rejects a § 46-12-211 (1)(b) plea agreement, then § 46-12-211(4) mandates the following:

> 1) "then
> 2) the court shall, on the record, inform the parties of this fact and
> 3) advise the defendant that the court is not bound by the agreement,
> 4) afford the defendant an opportunity to withdraw the plea, and
> 5) advise the defendant that if the defendant persists in the guilty or nolo contendre plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

Thus far, the State has conceded the plea agreement is a (1)(b), but that "the record" is adequate to substantiate that section (4) (above) was adhered to. As indicated in the verbatim recitation of the statute, there are 5 different ways in which the Court may fail in delivering its colloquy. In meeting the above requirements, the State has previously, and correctly pointed out in its October 15, 2013 Response Brief, that "neither the statute nor any case construing it species any mandatory protocol to be followed in fulfilling these requirements." (Exhibit 7: State's Response Brief, D.C. Doc. 36.2, at 8, l. 12-13)

The State did not oppose the motion to withdraw plea (filed October of 2013) on the grounds that the defense was operating under a mistake of law. In fact, the State concedes that: "Since the plea agreement in Mr. Zunick's case was for an "appropriate disposition," the presiding judge was obligated to:

* "advise the parties he was rejecting the plea agreement;
* advise the Defendant he was not bound by the plea agreement; and
* give the Defendant a chance to withdraw his guilty plea." (Id.)

The State's argument is fact driven: Zunick has a legally correct argument, he simply does not possess the requisite facts - in his particular case - to give substance to his legal argument. However, regarding the record relevant to conformity with the requirements of MCA § 46-12-211(4), AT THE SENTENCING HEARING, the State cited (in its October 2013 Response Brief) to only the following two quotations from the Court:

1) "Do you have any questions about any of those conditions," and;
2) "Sir, do you agree with what I've done here today?"

(Exhibit 7: State's Response to Defendant's Motion for Order Permitting Withdrawal of Plea of Guilty at 5, D.C. Doc. 36.2)

The record makes clear that Zunick was, in fact, "informed" that the Court was not going to follow the plea agreement, to the extent that he was "on notice." As Zunick concedes that no mandatory "form" exists by which the Court must go about the business of informing a defendant that the plea agreement will not be followed, a review of the record makes clear that in this regard, Zunick was "informed." Zunick concedes that imposing a binary formula by which the Court meets the requirements under § 46-12-211(4) would lead to absurd results.

Therefore, the issue is simply whether the Court reasonably provided requisite information to Zunick, either pro forma, or by a reasonably equivalent method.

However, it appears to be incontrovertible that at no point (at sentencing) did the Court "advise the defendant (Zunick) that if the defendant persists in the guilty or nolo contendre plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement," or "afford (Zunick) an opportunity to withdraw the plea." The State cannot reasonably cite to any language from the sentencing hearing that meets this requirement, even if such requirement can be achieved informally, or via any number of reasonably effective methods of verbalizing this information to Zunick.

The main problem with the State's argument is that it relies, almost exclusively, on filings (in the Court file), and discussion from the change of plea, as argument that the Court complied with MCA § 46-16-105(1)(b), AT SENTENCING. Zunick changed plea on June 19 (2012), and was sentenced on September 4, TEN WEEKS LATER. However, this Court has already ruled on the issue of whether prospective admonitions to defendants, via a record outside of the admonitions of the Court, satisfy the specific requirements under MCA § 46-16-105:

> **"Just prior to the court's oral questioning of Melone, the prosecutor stated that '[Melone] would still face the potential penalty as a repeat offender.' This statement is insufficient to meet the requirements of § 46-16-105, MCA. The plain language of § MCA § 46-16-105(1)(b), MCA, expressly requires that the court inform the defendant of the maximum penalty that might be imposed as a result of the plea. The prosecutor's statement was insufficient because it was not information provided by the court, nor did it inform Melone of the maximum penalty he faced."** *State v. Melone*, 2000 MT 118, ¶ 18, 299 Mont. 442, 2 P. 3d 233 (internal quotations omitted).

Melone (above) essentially stands for the proposition that scouring the record for evidence that a Defendant "knew what was going on" cannot substitute

for "information provided by the Court," at the specific place and time the Court is required to provide such information. Failure of the Court to inform a Defendant, at a specific time and place, under MCA § 46-16-105 led to reversible error. Similarly, per § 46-12-211(4), when a Court imposes a sentence outside the plea agreement:

> 1) "then
> 2) the court shall, on the record, inform the parties of this fact and
> 3) advise the defendant that the court is not bound by the agreement,
> 4) afford the defendant an opportunity to withdraw the plea, and
> 5) advise the defendant that if the defendant persists in the guilty or nolo contendre plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

This issue (above) in combination with the genuine lack of "opportunity" to withdraw the plea, is at the heart of Zunick's argument. The Court must "afford the defendant an opportunity to withdraw the plea," and none was given. The Court just imposed sentence, and went about the business of reciting conditions of probation. This is particularly ironic, considering that at the change of plea hearing (2 1/2 months earlier) the Court specifically told Zunick that ["And if I decide to give you something more severe than what is called for in the plea agreement, I'll tell you what I'm going to do, give you a chance to think about it. And I'll let you withdraw your plea if you want to. Do you understand that?" (Tr. of Change of Plea, June 19, 2012 at 28, l. 2-7) The record shows absolutely no indication that the Judge "gave (Zunick) a chance to think about it," or in any way reminded him that he had a chance to withdraw his plea and go to trial if he wanted to.

The Court's failure to adhere to these (above) requirements led to the October, 2013 motion to withdraw Zunick's plea. In its Order - denying Zunick's motion to withdraw said plea - the Court "acknowledges that a better record could

have been made to memorialize the Defendant's acceptance of the sentence." But the Court nowhere claims that Zunick was "reminded" that he could withdraw his plea, or that he was "given a chance to think about it" as promised. Instead, the Court basically sums up its justification as follows: "a fair reading of the sentencing proceedings, giving precedence to substance over form, leads to an inescapable conclusion that the defendant understood the decision and knowingly and intelligently agreed to accept it." (Id. at 3, l. 24-27) What the judge effectively did in this summation was to say "It appears that the mandates of § 46-12-211(4) were not followed, but because I believe that Zunick 'knew what he was doing,' my error was harmless." Unfortunately for the State, speculation regarding what Zunick did, or did not know about his own sentence cannot, under the Statute, substitute for information that the judge is required to convey - under the statute - and at the sentencing hearing. The requirements were not met, and the State can point to no law that says that speculation about Zunick's state of mind, on the date of sentencing, will legally substitute for statutory requirements (made of the judge).

A plain reading of the statute makes clear that the requirements of the statute cannot be substituted for, via a retroactive, piecemeal puzzling together of the record, in speculation of a defendant's understanding of his situation, on the day of his sentencing. The requirement is that if the Judge rejects a (1)(b) plea agreement, he must "then" meet the requirements of § 46-12-211(4). A plain reading of the statute leads to the inescapable conclusion that it makes absolutely no difference what a defendant was "put on notice of" prior to the date of his sentencing. If a (1)(b) plea agreement is rejected by the Court, § 46-12-211(4) imposes a procedural safeguard, guaranteeing the "fundamental fairness of the proceedings," that the Court has just made clear its refusal to follow the plea agreement, that whatever a defendant thought they had bargained for is now out the door, and that

the defendant now finds himself in a situation that he had not expected. At that point, § 46-12-211(4) imposes upon the Court a basic, good-faith requirement to ensure that a defendant understands the implications of the Court's decision. Specifically, when § 46-12-211(4) is implicated, it imposes upon the Court the requirement to remind a defendant that they may now either accept the sentence of the Court, or they may reject the sentence of the Court, and proceed to trial. If this is done, the Court must then remind the defendant of the risks, including mandatory minimum and / or maximum penalties in the event of conviction at trial. None of this was done, either informally, or pro forma, in Zunick's case.

In the case at bar, Zunick was given 10-years DOC, all suspended. Nothing on the record indicates that he had any idea what that meant, and in fact, he had no idea what that meant. Defense counsel argued for a deferred, and Zunick understood what that meant. But there was no argument for a straight "suspended term" by either the State, or the defense. The plea agreement made no mention of a straight "suspended term." There is no reason to speculate that Zunick and his attorney discussed the differences between MSP, DOC, suspended terms, and deferred imposition of sentence. The key distinction between a deferred and suspended sentence is, of course, that a deferred creates an opportunity for a defendant that, with good behavior, a conviction (deferred imposition of sentence) will (ultimately) be dismissed. A person "given" a suspended term on a felony conviction is condemned to be a felon for life, as no legal mechanism exists to permit a suspended sentence to be removed from a person's criminal history (in the future).

This is significant, as when the judge (in this case) gave Zunick a "10-year suspended sentence," he did so with absolutely no indication to Zunick of what that meant. The judge made absolutely no effort to ascertain from Zunick whether he knew what that meant, what distinction existed between a deferred and suspended

term, what the differences exist in the periods of eligibility of early termination from probation (between deferred and suspended terms), etc. The judge just made clear to Zunick that he was walking out of the courtroom that day, asked him if he "agreed with what he had done" there that day, and sent him on his way. Again, Zunick is not arguing that there should be some "pro forma recitation" of the requirements of § 46-12-211(4), but some indication should exist on the record, pursuant to that statute, that Zunick had a clear understanding of what was happening to him, prior to making the choice NOT to withdraw his plea and go to trial. Nothing on the record, in this case, indicates any effort was made by the Court, under the statute, to ensure that Zunick knew what was happening to him. Therein lies the failure under § 46-12-211(4), the "good cause" for permitting Zunick to withdraw his plea (at a later date), and the Court's reversible error in refusing to permit him to do so.

Being reminded of this "choice" was particularly important in Zunick's case. Zunick was facing his first ever felony charge. He did have 2 prior DUI convictions, but was otherwise lacking in criminal convictions. Though charged with criminal endangerment, no specific "victims" of this "endangerment" were ever named by the State. Zunick was intoxicated, drove into a ditch on the side of the road, and was (shortly thereafter) approached by law enforcement. First-time felons, convicted of crimes on the low end of severity, with no ascertainable victims, typically are considered for 3-year deferred imposition of sentences. Moreover, with no victims to point to, Zunick clearly had reason to consider the prospect of trial. In consideration of the significant sentence (felon for life) imposed by the Court upon Zunick (a first time offender), and his prospective defense at trial, the Court's failure of the Court to follow the mandates of § 46-12-211(4), in Zunick's particular case, indicate a case where a defendant may have been particularly prejudiced (as a result of the failure). While the particulars of

Zunick's criminal history, and the factual basis underscoring the charges against him, are in no way central to this appeal, such factors do underscore (to the extent that it matters), the reality of prejudice (not being adequately reminded of the option of going to trial, rather than accepting the Court's sentence), in this case.

CONCLUSION

In the case at bar, Zunick and the State entered into an agreed-disposition (1)(b) plea agreement. Ten weeks later, the Court exceeded the bounds of the plea agreement. At that point, the Court had an obligation to inform Zunick of his right to withdraw his plea, and go to trial, if Zunick were so inclined. This is particularly true in light of the fact that nothing on the record indicates that Zunick understood the nature of the sentence imposed upon him by the Court. At a later date, with new counsel, Zunick became aware of the nature of the sentence imposed upon him, and he decided it was in his best interests to attempt to withdraw his plea, and go to trial. He filed a timely motion to withdraw his plea of guilty. Good cause was shown, and the same Court that sentenced him denied the motion. The Court erred in denying this motion. The denial constitutes reversible error. This matter should be remanded to the District Court, where the judge should be instructed to permit Zunick to withdraw his guilty plea, and for further proceedings.

Respectfully submitted this 12th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and accurate copy of the foregoing APPELLANT'S BRIEF to the following:

1) Tim Fox, Montana Attorney General, 215 North Sanders, Helena, MT 59620;

2) Fred Van Valkenberg, Missoula County Attorney, 200 West Broadway, Missoula, MT 59802;

3) Robert Zunick: 414 Bannack Court, Missoula, MT 59801.

Dated this 12th day of February, 2014.

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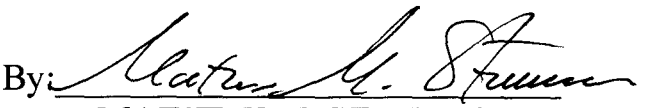
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Time New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material, and the work count as calculated by Microsoft Word is not more than 10,000 works, excluding certificate of service and certificate of compliance.

By: 

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