

Robert S. Pierce  
AO# 3013080  
MONTANA STATE PRISON  
700 Conley LAKE ROAD  
Deer Lodge, MT 59722

23 September 2024

Montana Legislators:

P.O. Box 201706

Helena, MT 59620

Dear Montana Legislators:

On 17 September 2024, An Article 'JSC Ignores Legal Deadline, expected to Comply with Subpoena'.

I found This Article quite interesting, not only Because, The JSC is the entity charged in The State Constitution with investigating Complaints Against Judges, state law requires The JSC to provide a detailed Report to The Legislature about its policing of Judicial misconduct every two years by September 1, As of Tuesday The JSC has ignored that statutory deadline And not provided its Required Report to The legislature,

The JSC Never Rules Against A Judge when The Complaint is made by A Prisoner And Therefore, That Avenue is Futile.

As The Attached exhibits ~~are~~ show, I had to take The Sentence Review Judges to Federal Court instead.

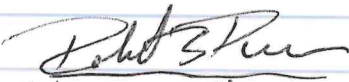
Sentence Review Judges opined "In total... The Division's supposed failure to Adhere to its own Rules (on state law And statutes) are based on the defendants mistaken belief that The Division is governed by something other Than its current Rules. Because The Defendants objections are based on a number of Rules which do not apply in proceedings before The Division... He cannot show The Division committed error by declining to Adhere to the same. (non-existent Rule.) (see Doc 18 at 8 of 11 on Page 2, Doc 18),

The Sentence Review failed to follow MCA 46-18-901 Assigned by The governor And current through The 2019 Regular session 66th Legislature. (Doc 15, page 2)

I Accused Senate Review of legislating Through The Bench,  
(see Doc 18, page 3)

on October 5<sup>th</sup>, 2020, The Honorable Kathleen DeSoto granted  
Judicial Notice on Documents 15 & 18, with The Statement; The Court will  
however, take Judicial Notice of and Review the documents and exhibits filed  
by Pience. (Doc 19, Page 3, order)

Please Review The Attached documents and if "no one in Montana  
is Above The Law" and Jason Ellesworth, claimed that includes  
Judges and The Commission charged with policing Judicial misconduct,  
Then Why Am I under these False Conditions  
Legislators need to look into this.

Sincerely   
Robert S. Pience

**Wells, Elvie**

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**From:** MTD\_CMECF@mtd.uscourts.gov  
**Sent:** Friday, September 4, 2020 9:38 AM  
**To:** MTD\_CMECF@mtd.uscourts.gov  
**Subject:** [EXTERNAL] Activity in Case 2:19-cv-00058-BMM-KLD Pierce v. Guyer et al Supplement

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U.S. District Court

District of Montana

### Notice of Electronic Filing

The following transaction was entered on 9/4/2020 at 9:37 AM MDT and filed on 9/4/2020

**Case Name:** Pierce v. Guyer et al  
**Case Number:** 2:19-cv-00058-BMM-KLD [ecf.mtd.uscourts.gov]  
**Filer:** Robert S. Pierce  
**Document Number:** 18 [ecf.mtd.uscourts.gov]

#### Docket Text:

SUPPLEMENT (5 pgs.) re [15] MOTION to Notify by Robert S. Pierce. (Attachments: # (1) Exhibits (14 pgs.)) (TAG)

2:19-cv-00058-BMM-KLD Notice has been electronically mailed to:

2:19-cv-00058-BMM-KLD Notice has been delivered by other means to:

Robert S. Pierce  
3013080  
MONTANA STATE PRISON  
700 Conley Lake Road  
Deer Lodge, MT 59722

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1105468959 [Date=9/4/2020] [FileNumber=2451821-0]  
[97cf932250432b20e8fd3dc9c657b6585b6c42f474502e290013e495e6ef97c91cf1]

3d3d74af50b0acf94ae47dfa1ee84a32e9e8d1282de1daccb375ff7533e4]]

**Document description:**Exhibit

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1105468959 [Date=9/4/2020] [FileNumber=2451821-1]

[424ad53a3d393668c5d58c1ec50aa17285500a208b86e343863a7fbcbe9e30372e22

d2c07186aa5f806e93a9a53c0564310722778fcc174281aeab883d363e25]]

Robert S Pierce AO# 3013080  
700 Conley Lake Road  
Deer Lodge, Mt 59722

IN THE UNITED STATE DISTRICT COURT  
DISTRICT OF MONTANA  
BUTTE DIVISION

Robert S Pierce,  
Petitioner,  
-vs-  
Lynn Guyer,  
Respondent.

Cause No: CV-19-058-BU-BMM-KLD  
SUPPLIMENT TO DOCUMENT 15; MOTION  
TO NOTIFY DISTRICT COURT THAT  
SENTENCE REVIEW FAILED TO ADHERE  
TO THEIR OWN RULES OR STATE LAW  
AND STATUTES.

NOW COMES, Robert S Pierce, Pro Se Petitioner in the above entitled matter, with this SUPPLIMENT TO DOCUMENT 15; MOTION TO NOTIFY DISTRICT COURT THAT SENTENCE REVIEW FAILED TO ADHERE TO THEIR OWN RULES OR STATE LAW AND STATUTES, in affirming conviction and sentencing.

PROCEDURAL HISTORY

The Petitioner filed a motion with this court entitled motion to lift stay and abeyance, pursuant to 28 U.S.C 2251(1)(doc 14) , on August 25, 2020.

Also filed was document 15, Motion to notify District Court that Sentence Review failed to adhere to their own rules or state law and statutes.

STATEMENT OF FACTS

The Sentence Review Division issued a written decision affirming the Defendant's sentence on August 14, 2020. On August 24, 2020, the Defendant filed, pro se, both his "notice of inadequate counsel and Motions to address Divisions failure to adhere to their own rules.

and his "Brief in support of Notice of Inadequate Counsel and Motion to address Divisions Failure to adhere to their rules." (Brief)

The Division documented, "the Motion will be addressed on its merits."  
(Doc 18 at 3 of 11)

The division further articulated that, concerning the issues addressed, rules 15 and 16: "A search of the Division's archives shows that the language of rules 15 and 16, as quoted by the Defendant in his motion and brief, appeared in the division's rule between 1999 and 2013, before the current Division Rules were adopted on October 20, 2013 pursuant to the authority granted by the legislature under section 46-18-901(4), MCA (providing that the review division may adopt any rules that will expedite its review of sentences.)"

The Division further stated: "When the Division adopted its current rules in 2013, neither Rule 15 nor Rule 16 carried over. Plainly, both Rule 15 and Rule 16, as cited by the Defendant, have no application in proceedings before the Division (See Doc 18, page 5 of 11)."

The Division then opined: "In total... The Division's supposed failure to adhere to its own rules are based on the defendants mistaken belief that the Division is governed by something other than its current Rules. Because the Defendant's objections are based on a number of rules which do not apply in proceedings before the Division... He cannot show the Division committed error by declining to adhere to the same (non existent rules) (See Doc 18 at 8 of 11)."

The Division further stated, in Conclusion: "The defendant is not entitled to any relief under rule 15 or 16 of the rules of the Division adopted in 1999. Those rules have been superseded and replaced by the current Division Rules, none of which contains the substance of former Rule 15 and 16." (See doc 18 at 9 of 11)

#### LEGAL AUTHORITY

As was pointed out in document 15, page 2, in ARGUMENT: Rules for Sentence Review fall under MCA 46-18-901 to 46-18-905. The verbage of MCA 46-18-901 is current through the 2019 regular session, 66th Legislature. MCA 46-18-901 was last updated in March 2013, with Montana House Bill 149 and approved by the governoor on March 17, 2013. See Ch 69 L 2013.

This section was a codification of part of Section 95-2501 RCM 1947. Section 46-18-902 is also derived from Section 95-2501. The Commission comments to section 95-2501 are printed in their entirety under 46-18-901. Source: General Statutes of Connecticut, Section 51-94.

To make the claim that the rules, that were current through the 66th legislation session and 2019, were null and void, or non-existent as of October 20, 2013, especially after the revised legislation was signed into law on March 17, 2013, is a statement that in effect allows the Division to legislate from the bench.

we cannot legislate from the bench to make a statute into something it is not, either in its plain language or in its historical application. We leave such matters to Montana's legislative process. Miller v Snavely (in Re Snavely), 314 B.R. 808 Bankr. Lexis 1372(B.A.P 9th Cir 2004)

If the legislative scheme requires time frames that are difficult to negotiate and which are unrealistic, than Proponents' remedy is to challenge the constitutionality of the statutory scheme or to seek legislative amendment of the offending statutes. Proponents may not seek to have the District Court simply legislate from the bench and ignore statutes not to Proponents benefit or liking. As stated above, this approach simply allow courts to be activists and result-oriented. Stop overspending Mont. v State, 2006 Mt 178, 333 Mont 42, 139 P.3d 788(2006 Mont Lexis)

— "If the intent can be determined from the plain language of a statute, a court (or Division) may not go further and apply any other means of interpretation." This court (Nor Division) may not insert language which has been omitted or omitted language which has been inserted. Section 1-2-101 MCA. Wood v Steadman's Hardware 2012 Mont Dist Lexis 26(Quoting Stop Overspending Mont v State 2006 MT 178, 62, 233 Mont 42, 139 P.3d 788. In other words, the Court must reject any construction which leaves part of the language of the statute without effect and must correspondingly give all relevant statutory provisions. Section 1-2-101 MCA; Spiklie v Mont Dep't of fish, wildlife & parks, 2002 MT 228, 24, 311 Mont 427, 56 P.3d 349; Montco v Simonich, 285 Mont 280, 287, 947 P.2d 1047, 1051(1997); Darby Spar Ltd v Dept of Revenue 217 Mont 376, 379, 705 P.2d 111, 113(1985)

And in 1-2-101 MCA: Role of the Judge - preference to construction giving each provision meaning, states: In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such as a construction is, if possible, to be adopted as will give effect to all.

Reviewing court was required to interpret and apply the sentencing statutes as written and consistent with legislative intent in determining whether the trial court had the authority to increase the sex offender's designation from Level 1 to level 3 upon revocation of his suspended sentence for sexual abuse of children. State v Claassen 2012 MT 313, 367 Mont 478, 291 P.3d 1176, 2012 Mont Lexis 379(Mont 2012)

#### CONCLUSION

— For the Sentence Review to state that any rules that was adopted on October 20, 2013 supercede the legislated intent of the law signed by the governor

on March 17, 2013, is legislating from the bench. Although Section 46-18-901(4) allows the Division to adopt any rule that will expedite its review of sentence, it does not allow for any rule made by the Division to supercede the legislative intent and verbage of the law.

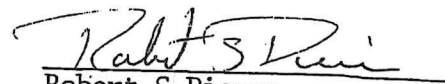
When the Sentence Review Division will write an Order such as they did and make the statements that their October 20, 2013 rules supercede rules 15 and 16, then their disregard for the language of the statute, then they prove they violated their own rules, as legislated into law and disregard the laws to suit their own desires. This is more than likely due to the selection of the judges on the Division.

Jessica Fehr, one of the 3 judge panel, was appointed to be responsible for an election in area.H for nomination of three resident bar members whose names shall be submitted to the Supreme Court. This appointment was In the matter of the appointment of a member to the Commission on practice of the Supreme Court of the State of Montana. See In re Appointment of a Member to the Comm'n on Practice of the Supreme Court of Mont, 2020 Mont Lexis 1335.

Because of the relationship with the Commission on Practice and my attempt to file my "without prejudice" option because Ms Cochenour provided false statements to ODC when she responded and made false statements to a branch of the Montana State bar, which is itself, a violation of State bar rules.

This complaint was sent to and received by the office of disciplinary Counsel on April 28, 2020 and dismissed by the ODC on May 6, 2020(See Doc 16). The relief requested would be to override the Sentence Review Division and remand back to District Court for resentencing or dismissal of the underlying charges.

Dated this 3 day of September, 2020

  
Robert S Pierce  
Pro Se Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that participation in the e-filing Pilot Project is mandatory for all prisoner's in all custody levels at MSP. That Pursuant to STANDING ORDER No. DLC-46, is complied with.

Per STANDING ORDER No. DLC-46, once the document is filed in the court system, the document is automatically served upon opposing counsel (If counsel has entered an appearance) so there will be no need for the prisoner litigant to mail copies to other parties. If there are other parties to the case that are not registered CM/ECF users, the Clerk will mail a copy of the prisoner litigant's electronically filed documents to each non-registered party on behalf of the prison litigant, via the United States Postal System. Other parties are as followed:

Montana Attorney General  
Tim Fox, Attorney General  
P.O. Box 201401  
Helena, Mt 59620-1401

Dated 9/3/20

Lynn Guyer  
MSP Warden  
400 Conley Lake Road  
Deer Lodge, Mt 59722

PETITIONERS DECLARATION

Robert S Pierce  
Robert S Pierce

- A. I understand that I must keep the court informed of my current mailing address and that my failure to do so may result in dismissal of this petition without actual notice.
- B. I understand that submission of a false statement or answer to any question in this action, declare under penalties of perjury that I have read the above petition and that the information I have set forth in it is true and correct. 28 U.S.C. 1746; 18 U.S.C. 1621.
- C. This petition was filed electronically by STANDING ORDER No. DLC-46. The STANDING ORDER makes participation in the e-filing Pilot Project mandatory for all prisoners in all custody levels at MSP.

Dated this 3 day of September 2020

Robert S Pierce  
Robert S Pierce  
Pro se Petitioner

Sentence Review Division  
301 S. Park, Suite 328  
P.O. Box 203005  
Helena, MT 59620-3005  
Phone: (406) 841-2976  
Email: [srd@mtcourts.gov](mailto:srd@mtcourts.gov)

SENTENCE REVIEW DIVISION  
OF THE SUPREME COURT  
STATE OF MONTANA

AUG 26 2020

SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA

STATE OF MONTANA,

Plaintiff,

-vs-

ROBERT PIERCE,

Defendant,

) Cause No. DC-12-029

)

) Deer Lodge County District Court

) Montana Third Judicial District

)

) ORDER ON DEFENDANT'S

) "NOTICE OF INADEQUATE

) COUNSEL AND MOTION TO

) ADDRESS DIVISIONS FAILURE

) TO ADHERE TO THEIR OWN

) RULES"

)

On August 6, 2020, the Defendant's application for sentence review was heard by the Sentence Review Division of the Montana Supreme Court (the "Division"). The Defendant appeared by video from the Montana State Prison, and was represented by attorney David Maldonado, who appeared by video from Missoula, Montana. The State was represented by Dan Guzynski, PSB Bureau Chief of the Attorney General's Office, who appeared by video from Helena, Montana. Melissa Raasakka, mother of the victim, and Mykala Raasakka, the victim, appeared by video and gave statements. The Defendant gave a statement.

The Division issued its written decision affirming the Defendant's sentence on August 14, 2020.

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Order on Defendant's "Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules"

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On August 24, 2020, the Defendant filed, *pro se*, both his “Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules” (the Motion) and his “Brief in Support of Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules” (the Brief).

The Defendant’s Motion and Brief alleges a number of inadequacies on the part of the Defendant’s appointed counsel, including the following:

- Counsel failed to attach an appendix to the Defendant’s hearing memorandum or brief, as requested by the Defendant. The appendix, according to the Defendant, would have shown that the presentence report contained incorrect information. Further according to the Defendant, the appendix would have been offered pursuant to Rule 12(5) of the rules which, the Defendant contends, are applicable to proceedings in the Division.
- Counsel allegedly informed the Defendant that he (counsel) would not advance the arguments raised in the Defendant’s prehearing motion and brief. The prehearing motion requested that the Defendant’s case be remanded to the District Court for resentencing or, in the alternative, that his conviction be vacated and the case dismissed based on “invalid charging documents”.
- According to the Defendant, the arguments made by counsel at the hearing “pale in comparison” to the arguments the Defendant raised in his prehearing motion and brief (filed *pro se*) and the Defendant did not receive a fair hearing, because the Division wrongly determined it did not have the authority to vacate and remand the case for resentencing.

- Counsel and the Defendant allegedly took part in only a “[a] ten minute phone call, two days before a sentence review hearing, where no stratagy (sic) is discussed” and, as the Defendant further contends, this “is simply not reasonable under prevailing professional norms.”

The Defendant’s Motion requests that his arguments be considered before the Division issues a written decision on his sentence review application and, further, that it remand the case to the District Court as requested in the Defendant’s prehearing motion and brief “that was filed and based on rule 15 of the Sentence Review Division rules.” However, the Division issued its written decision affirming the District Court’s sentence on August 14, 2020, more than a week before the instant Motion was filed. Nonetheless, because the Defendant may not have received a copy of the Division’s written decision affirming his sentence before he submitted the instant Motion for filing, the Motion will be addressed on its merits.

#### ANALYSIS

In his Motion, the Defendant relies on Rules 15 and 16, which he contends are the governing rules for the Division and the rules which, he also contends, support his request for the relief requested in both his prehearing motion and the instant Motion. The Defendant also contends that his prehearing motion and the instant Motion set out arguments which are superior to the arguments advanced by his counsel.

A search of the Division’s archives shows that the language of Rules 15 and 16, as quoted by the Defendant in his Motion and Brief, appeared in the Division’s rules between 1999 and 2013 before the current Division Rules were adopted on October 20, 2013, pursuant to the

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*Order on Defendant’s “Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules”*

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authority granted by the Legislature under Section 46-18-901(4), MCA.<sup>1</sup>

The Defendant quotes both Rules 15 and 16 from the Division's former rules adopted in 1999. They read as follows:

Rule 15. The record from which the Sentence Review Division shall conduct its review shall consist of the following:

- A. A copy of the information and affidavit in support of the motion for leave to file;
- B. A copy of any written plea agreement or a transcript setting forth the terms of any oral agreement;
- C. A copy of the pre-sentence report;
- D. A copy of the sentence and judgment and the reasons for the same, or the transcript containing the oral pronouncement of the reasons if not contained in the judgment;
- E. Other documents relied upon by the sentencing judge.

Failure to include any of the foregoing items may be cause for the Sentence Review Division to decline to conduct the sentence review, and the Sentence Review Division may remand the same to the Clerk of the District Court for compilation of the necessary documents. If the sentencing judge did not set forth his reasons for sentence, or did not consider a pre-sentence report, or if there are critical matters which should have been presented at the sentencing hearing, the Sentence Review Division may vacate the sentence and remand it for re-sentencing based upon proper documentation. In the event the sentence and judgment contain clerical errors, the Sentence Review Division may vacate the sentence and remand for re-sentencing or may correct such clerical errors in the interest of judicial economy.

RULE 16. The primary objective of the Sentence Review Division is to provide for uniformity in sentencing when appropriate and to ensure that the interest of the public and the defendant are adequately addressed by the sentence. In reviewing the sentences, the Sentence Review Division shall consider the correctional policy of the State of Montana as set forth in Section 46-18-101 to protect society by preventing crime through punishment and rehabilitation of the convicted. The Sentence Review Division will hold an individual responsible and accountable for his/her actions and shall ensure that persons convicted of crime are dealt with in accordance with their individual characteristics, circumstances, needs and potentialities. The review shall be undertaken to assure that the sentence imposed is based on the following:

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<sup>1</sup> Section 46-18-901(4), MCA, provides, "The review division may adopt any rules that will expedite its review of sentences."

- A. The crime committed;
- B. The prospects of rehabilitation of the offenders;
- C. The circumstances under which the crime was committed;
- D. The criminal history of the offender.

The Sentence Review Division shall further review the sentences, with a view to removing dangerous and habitual offenders from society and providing corrective treatment for such long terms as needed. In other cases, the Sentence Review Division shall consider whether the offender could have been dealt with adequately by probation, suspended sentence or fine where such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

When the Division adopted its current rules in 2013, neither Rule 15 nor Rule 16 carried over. Plainly, both Rule 15 and Rule 16, as cited by the Defendant, have no application in proceedings before the Division.<sup>2</sup> The rules have been superseded and replaced by the current Division Rules and there is no equivalent of either Rule 15 or Rule 16 from the 1999 rules in the current Rules.

The basis for the Defendant's prehearing motion and the basis for his objection about his counsel's performance turn on the Defendant's application of the now *non-existent* Rules 15 and 16. The Defendant's motion to remand his case to the District Court for resentencing under Rules 15 or 16 (or any other provision in the 1999 rules) requests relief which the Division is not authorized to grant. In relevant part, Rule 12 of the current Division Rules provides that the following relief is available to a defendant in the Division: "The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive." Because the Division does not have the authority under its rules to remand the Defendant's case for resentencing in the District Court, the Defendant's request that the Division grant such relief will be denied.

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<sup>2</sup> In any event, the Defendant was sentenced in December 2013, approximately two months after the Division adopted its current Rules.

With respect to the Defendant's objection to his counsel's performance, we have adopted the same standard for measuring the effectiveness of defense counsel in their representation before the Division which applies to a claim of ineffective assistance by counsel in an appeal. Adopted in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the standard requires the defendant to demonstrate that "counsel's advice fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the petitioner would have prevailed on appeal." *Adgerson v. State*, 2007 MT 336, ¶ 17, 340 Mont. 242, 174 P.3d 475 (quoting *Dawson v. State*, 2000 MT 219, ¶ 147, 301 Mont. 135, 10 P.3d 49, overruled on other grounds by *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 86). Both prongs of the *Strickland* test must be met, and a court is not required to address both prongs where a defendant makes an insufficient showing on one. *Id.* (citing *State v. Vaughn*, 2007 MT 164, ¶ 30, 338 Mont. 97, 164 P.3d 873). It is well established that, to render effective assistance of counsel, appellate counsel need not raise every colorable issue. *Rose v. State*, 2013 MT 161, ¶ 28, 370 Mont. 398, 304 P.3d 387 (citing *Rosling v. State*, 2012 MT 179, ¶ 32, 366 Mont. 50, 285 P.3d 486). Further, the presumption of effective assistance of appellate counsel will be overcome only when ignored issues are clearly stronger than those presented. *Id.* (citing *DuBray v. State*, 2008 MT 121, ¶ 31, 342 Mont. 520, 182 P.3d 753 (other citations omitted)).

The Defendant's various allegations of ineffective assistance by counsel include an allegation that counsel failed to attach an appendix to his memorandum or brief that would have shown that the presentence report contained incorrect information which, under Rule 12(5) of the Division's rules, would have entitled the Defendant to relief – or so he contends. Neither the current version of the Division Rules nor the previous version of the rules in effect between 1999

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*Order on Defendant's "Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules"*

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and 2013 contain any such provision numbered 12(5).<sup>3</sup> Rule 12 in the current Division Rules states, in its entirety, "The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive." To the extent the Defendant claims his presentence report contains incorrect information rendering his sentence unlawful, the appropriate method for reviewing the claim is through direct appeal or in petition for postconviction relief. See e.g., *State v. McLeod*, 2002 MT 348, ¶ 16, 313 Mont. 358, 61 P.3d 126 (direct appeal by defendant contending sentence predicated on misinformation in presentence report); *State v. Allen*, 2001 MT 266, ¶ 18, 307 Mont. 253, 37 P.3d 655 (postconviction petition filed seeking relief based on sentencing court's reliance on allegedly materially false information). Finally, Rule 3 of the current Division Rules states: "The Division shall not consider issues which could have been or should have been addressed in District Court by appeal or post conviction relief." The Defendant's claim that his presentence report contained false or incorrect information is one that could have been addressed through either a direct appeal or a petition for postconviction relief, and Rule 3 operates to foreclose the Division's consideration of the claim. For this same reason, Defendant cannot show his counsel was ineffective for choosing not to advance a claim that the presentence report contained inaccurate information or that the Defendant's case should be remanded for resentencing before the District Court.

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<sup>3</sup> Under the Division's 1999 rules, Rule 12 stated, "The Sentence Review Division shall meet at the Montana State Prison at Deer Lodge, Montana, or at the Montana Women's Prison in Billings, Montana. The secretary shall notify each member of the place and dates of the meetings."

In total, the Defendant's objections about his counsel's performance and the Division's supposed failures to adhere to its own rules are based on the Defendant's mistaken belief that the Division is governed by something other than its current Rules. Because the Defendant's objections are based on a number of rules which do not apply in proceedings before the Division, he cannot show that his counsel was ineffective for declining to make arguments based on such non-existent rules and he cannot show the Division committed error by declining to adhere to the same.

Next, the allegation that the Defendant had only 10 minutes to speak with his counsel prior to the hearing provides no basis for finding that counsel was ineffective. Before the hearing commenced, the Defendant confirmed he had spoken with his attorney and wished to go forward with his sentence review hearing. It is before the hearing starts that a defendant is given the opportunity to request additional time to confer with counsel or indicate that counsel is not sufficiently prepared. Neither occurred. Finally, whether it is true that the Defendant and his counsel spent only 10 minutes speaking with one another during counsel's final communication with the Defendant before the hearing commenced is immaterial. The allegation does not demonstrate that counsel's preparation for the hearing or his representation of the Defendant at the hearing fell below the relevant standard or that had counsel spent more time speaking with the Defendant in their final communication there is a reasonable probability the outcome of the Defendant's sentence review application would have been different.

The Defendant contends that his counsel was ineffective for not presenting the argument (or assisting the Defendant in advancing the argument) that his twin convictions for sexual intercourse without consent and sexual assault should be dismissed because the convictions were

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*Order on Defendant's "Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules"*

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based on "invalid charging documents." The Division properly rejected this aspect of the Defendant's request for relief because the Division does not have the authority to make rulings with respect to a defendant's convictions. By legislative mandate, the Division is vested only with the authority to review "the judgment as it relates to the sentence imposed["] § 46-18-904(1)(a)(i), MCA (emphasis added). Nothing in the Division Rules provides any basis for the Division to consider alleged defects in a defendant's convictions. As noted above, Rule 3 of the Division Rules makes this point plainly. It provides, "The Division shall not consider issues which could have been or should have been addressed in District Court by appeal or post conviction relief."

### CONCLUSION

The Division is not an alternative forum for defendants seeking to vacate their convictions and dismiss their charges, nor is it a forum for defendants seeking to correct what they believe are unlawful sentences. The appropriate method for seeking to vacate a conviction or correct an unlawful sentence is through direct appeal or postconviction relief.

The Division has no authority to remand a case to the District Court for resentencing, and it is neither ineffectiveness on the part of Defendant's counsel to advance such an argument nor an error by the Division to decline to entertain such a claim. The Defendant is not entitled to any relief under Rules 15 or 16 of the rules of the Division adopted in 1999. Those rules have been superseded and replaced by the current Division Rules, none of which contains the substance of former Rules 15 and 16. Defendant's counsel was not ineffective for not advancing the Defendant's preferred arguments based on these previous rules no longer in effect.

The Defendant's counsel was not ineffective for declining to argue that the Defendant's convictions should be vacated or that the case should be dismissed based on "invalid charging documents" or that the Defendant's sentencing was based on incorrect information. None of counsel's decisions to avoid making these arguments before the Division constitutes ineffective assistance, because the Defendant cannot demonstrate his preferred arguments are clearly stronger than the arguments presented by his counsel or that, if counsel had advanced the Defendant's preferred arguments or claims, there is a reasonable probability that the outcome of the Defendant's sentence review application would have been different.

For the reasons discussed above, the Defendant's "Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules" is DENIED.

The Division requests that a copy of its current rules accompany the copy of this Order provided to the Defendant.

DATED this 26<sup>th</sup> day of August, 2020.

SENTENCE REVIEW DIVISION

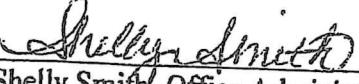
Hon. Dan Wilson, Chairperson

Hon. Luke Berger, Member

Hon. Jessica Fehr, Member

Copies mailed or emailed this 26<sup>th</sup> day of August, 2020, to:

Clerk of District Court – *via email*  
Robert Pierce #3013080, Defendant  
Hon. Robert J. Whelan – *via email*  
Dan Guzynski – PSB Bureau Chief – *via email*  
David Maldonado, Defense Counsel – *via email*  
State Office of the Public Defender – *via email*

  
\_\_\_\_\_  
Shelly Smith, Office Administrator  
Sentence Review Division

DC-12-029

*Order on Defendant's "Notice of Inadequate Counsel and Motion to Address Divisions Failure to Adhere to Their Own Rules"*

*Page 11 of 11*

**STATE OF MONTANA**  
**SENTENCE REVIEW DIVISION OF THE SUPREME COURT**

**RULES**

In accord with Title 46, Chapter 18, Part 9 of the Montana Code Annotated, the Sentence Review Division of the Supreme Court (hereinafter Division) hereby adopts the following rules which supersede all previous rules.

**RULE 1.** The Clerk of District Court (hereinafter Clerk) shall serve upon persons who have been sentenced to a term of 1 year or more in the State prison or to the custody of the Department of Corrections:

- 1) A copy of the Sentence and Judgment
- 2) Notice of the Right to Apply for Sentence Review
- 3) Two copies of the Application for Sentence Review

Forms shall be approved by the Division.

**RULE 2.** Within sixty (60) days after sentence was imposed, a defendant may apply for the sentence to be reviewed by the Division.

If an appeal to the Supreme Court or petition for post conviction relief is filed, the 60 day period commences when the appeal or petition is complete.

Application for review of sentence does not stay execution of the sentence.

**RULE 3.** The Division shall not consider issues which could have been or should have been addressed in District Court by appeal or post conviction relief.

**RULE 4.** Application for Sentence Review shall be filed with the Clerk for the county from which the defendant was sentenced. In the event the defendant has been sentenced in more than one county, separate applications shall be filed with each Clerk if defendant requests each sentence to be reviewed.

**RULE 5.** Upon filing the application for Sentence Review, the Clerk shall complete and file the Clerk's certificate of service and shall within ten (10) business days, serve a copy of the Application for Sentence Review upon the Judge who imposed the sentence, the County Attorney of the County from which the defendant was sentenced and defendant's counsel of record. The Clerk shall mail the original Certificate of Service and deliver all required documents to the Secretary for the Division (hereinafter Secretary).

**RULE 6.** Defendant, the State, and the sentencing Judge may file briefs within 30 days after notice of the application for review is served by the Clerk.

**RULE 7.** The Secretary shall record the date the application for review was received by the Clerk. If the application is untimely, the Secretary shall promptly notify the defendant to file within thirty (30) days a statement of reasons why the Division should hear a late application. The Division will review late applications only upon good cause shown.

**RULE 8.** The Secretary shall serve notice of the time and place for Review at least thirty (30) days before such hearing to each of the following:

- 1) The Judge who imposed the sentence;
- 2) The County Attorney for the county from which the defendant was sentenced;
- 3) The defendant;
- 4) The defendant's attorney of record;
- 5) Any other person who has requested notice.

**RULE 9.** Proceedings shall be informal to the extent possible. The Rules of Evidence do not apply.

**RULE 10.** The defendant shall have the right to appear and to be represented by counsel.

**RULE 11.** The Secretary shall provide to the Division from the District Court file such documents as the Division may require.

The Division shall consider only information which was available to the sentencing Judge at the time of sentencing.

**RULE 12.** The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive.

**RULE 13.** The Secretary shall file the original decision of the Division with the Clerk where defendant was sentenced and mail copies of the decision to:

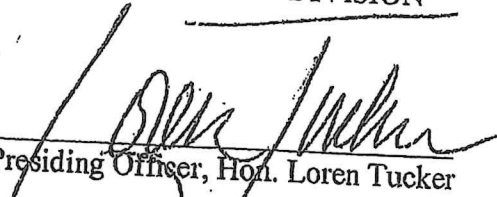
- 1) The Judge who imposed sentence;
- 2) The County Attorney;
- 3) The criminal history repository of the Montana Department of Justice;
- 4) The defendant;
- 5) The defendant's attorney if represented by counsel;
- 6) The principal officer of the institution where defendant is incarcerated.


**RULE 14.** A record of proceedings before the Division shall be made by recording or otherwise and shall be retained for two years after a written decision is rendered.

**RULE 15.** Without convening the entire Division, the Presiding Officer may rule on procedural issues not affecting the substance of a review.

These rules are effective the 20<sup>th</sup> day of October, 2013.

SENTENCE REVIEW DIVISION

  
Presiding Officer, Hon. Loren Tucker

  
Member, Hon. Bradley G. Newman

  
Member, Hon. Kathy Seeley

Robert S Pierce AO#3013080  
700 Conley Lake Road  
Deer Lodge, MT. 59722

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MONTANA  
BUTTE DIVISION

Robert S. Pierce,  
Petitioner,  
-vs-  
LYNN GUYER,  
Respondent.

Cause No: CV-19-058-BU-BMM-KLD  
MOTION TO NOTIFY DISTRICT COURT THAT  
SENTENCE REVIEW FAILED TO ADHERE TO THEIR  
OWN RULES OR STATE LAW AND STATUTES

NOW COMES, Robert S Pierce, Pro Se Petitioner in the above entitled matter, with this MOTION TO NOTIFY DISTRICT COURT THAT SENTENCE REVIEW FAILED TO ADHERE TO THEIR OWN RULES OR STATE LAW AND STATUTES, in affirming conviction.

PROCEDURAL HISTORY

The Petitioner filed a motion with this court and was granted a Stay and extension of CV-19-058-BU-BMM-KLD(Doc10 & 13), to exhaust any sentence related claims with the Sentence Review Division.

The Sentence Review Division AFFIRMED the sentencing on August 14, 2020.

The Petitioner as sent a companion MOTION TO LIFT STAY AND ABEYANCE, PURSUANT TO 28 U.S.C. 2251(1).

STATEMENT OF FACTS

The Sentence Review Division administrator received a brief and motion

dated April 12, 2020 and those were later provided to the three judges.

The Sentence Review Division held a hearing on August 6, 2020 that was not a fair hearing and the Sentence Review Division articulated that they received and reviewed the April 12, 2020 brief and motion entitled MOTION TO REMAND BACK TO DISTRICT COURT FOR RESENTENCING OR DISMISSAL.(See PDF's 44. 45 and 46)

The division also received an "addendum to brief and Motion to Remand back to District court for resentencing or dismissal, including circumstances of the crime, mailed July 31, 2020(See Pfd 47, pages 17 through 51)(See also pages 22 through 27 of filed Habeas Corpus and PDF 16 @ 16 and pdf 16 @ 2).

During the August 6, 2020<sup>th</sup> hearing, The Sentence Review Division articulated that it did not have the authority to remand the case back to the district court and therefore denied ruling on the filed brief and motion.

This document was vital to show the disparity in sentencing when the State fails to prove every element of the charging document and conceded(By failing to respond or object to the filing and that there was no probable cause, and the case should be dismissed for invalid charging documents. The determination that the division lacked authority violated sentencing issues that would have affected equity and disparity of any sentence.

The division also received circumstances of the crime and an order from the Supreme Court showing that the State neither responded nor objected to a filing that the State of Montana failed to prove every element and that perjury infected the trial, not only then sentencing as was brought out during the hearing

#### ARGUMENT

The Division disregarded it's own rules when it stated it did not have authority to remand the case back to District Court.

Rules for Sentence review fall under MCA 46-18-901 to 46-18-905. The verbage of MCA 46-18-901 is current through the 2019 regular session, 66th legislature.

MCA 46-18-901 was last updated in March 2013, with Montana House Bill 149 and approved by the governor on March 17, 2013. See Ch 69 L 2013.

This section is a codification of Part of Section 95-2501 RCM 1947. Section 46-128-902 is also derived from Section 95-2501. The Commission comments to section 95-2501 are printed in their entirety under 46-18-901. Source: General Statutes of Connecticut, Section 51-94.

This provision establishes a Review Division of the Supreme Court and sets forth the composition of this Review Division, the qualifications and manner of selection of the members of the Review Division, and how often it will meet.

In order to provide for the more effective administration of the Review of Sentence imposed on convicted felons in the State of Montana, in accordance with title 46, chapter 18, of the Montana Code Annotated 1985. The Sentence Review Division of the Supreme Court by this Order hereby adopted the following rules, thereby superseding all previous such rules:

**Rule 15:** The record from which the sentence Review Division shall conduct it's review shall consist of the following:

- A: A copy of the information and affidavit in support of the Motion for leave to file (and all amended informations-provided)
- B: Copy of Plea agreement or transcripts setting forth the same.
- C: Presentence Report.
- D: Sentence and Judgement and reasons for same, or transcripts containing said reasons.
- E: Other documents relied on by the sentencing judge.
- F: Transcripts of sentencing hearing.

(All these records were addressed in the brief and motion and attached as exhibits. See Pdf's 44, 45 and 46)

Failure to have any of the foregoing items may be cause for the Sentence Review Division to decline to conduct the Sentence Review and the Sentence Review Division may remand the same to the clerk of the District Court for compilation of the necessary documents.. If the Sentencing Judge did not set forth his reasons for sentence or did not consider a pre-sentence report, or if there are critical matters which should have been presented at the Sentence or Judgement contains clerical errors, the Sentence review division may vacate the sentence and remand for resentencing.

**Rule 16:** The primary objective of the Sentence Review Division is to provide for uniformity in sentencing when appropriate and to ensure that the interest of the public and the defendant are adequately addressed by the sentencing.

In Reviewing the sentence, the Sentence Review Division shall consider the correctional policy of the State of Montana as set forth in Section 46-18-101 to protect society by preventing crime through punishment and rehabilitation of the convicted. The Sentence Review Division will hold that persons convicted of crimes are dealt with in accordance with their individual characteristics, circumstances, needs and potentialities. The review shall be undertaken to assure that the sentence imposed is based on the following:

- A: The crime committed.
- B: The prospects of rehabilitation of the offender.
- C: The circumstances under which the crime was committed.
- D: Criminal History of the offender.

The Sentence Review Division shall further review the sentence with a view to removing dangerous and habitual offenders from society and providing corrective treatment for such long terms as needed. In other cases, the Sentence Review Division shall consider whether the offender could have been dealt with adequately by probation, suspended sentence, or fine where such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

By the Sentence Review Division disregarding these two rules, not addressing the issues provided which included false information in the PSI and double Jeopardy, failure to prove every element of the charging documents and the State conceding the case should be dismissed.

#### LEGAL AUTHORITY

The Montana Sentence Review Division is a creature of Statute and is governed by the scheme set forth in Mont. Code Annotated, title 46, chapter 18, part 9. The Division is an arm of the Montana Supreme Court and is tasked with providing appellate review of legal sentences.

A Sentence imposed by the Sentence review Division(SRD) steps into the stead of the previous District Court sentence and in effect, becomes the original sentence. The SRD is the final review of legal sentence on equitable grounds.(Ranta v State 1998 Mt 95 p.12 285 Mont 391, 958 P.2d 670)

Because the PSI was based on the information to file leave, originally used for charging the defendant and the charging statements were selected to be inadmissible for the States own reasons, without so much as a valid reason, other than knowing they were false statement, the paragraphs 3, 4, 5, 7, 9 and 11 have to be excised out of the charging document and replaced with admissible material evidence that proves the same facts.

Mont Const. Art II, Sec 24 (and US const Amendment 6) guarantees a criminal defendant the right to counsel in criminal proceedings. This right attaches at every critical stage of the proceedings against the Defendant. Sentence Review is a critical stage of the proceedings against the Defendant. Accordingly a criminal defendant has a constitutional right to counsel at sentence review. *Avery v Batista* 2014 Mt 266, 376 Mont 404, 336 P.3d 924, 2014 Mont Lexis 601.

Under both the Fourteenth Amendment to the United States Constitution and the Montana Constitution, Article II, Section 17: a Defendant is protected from a sentence predicated on misinformation about the criminal history. Pursuant to the Federal Constitution, while not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning defendants record, that are materially false, or if it is founded in part upon misinformation of constitutional magnitude. *Bauer v State* 1999, Mt 185 P.2d 295 Mont 306.

In the cases noted under Mont. Code Ann 48-18-901: Defendants petition for Supervisory control by the supreme Court, and the petition was granted pursuant to the courts authority to ensure that the Division complies with applicable Constitutional and statutory rules. The Court noted that the legislature did not articulate a specific standard of review, but instead granted the Division the authority to adopt rules to expedite Sentence review. The court concluded that the Division rules provide for appropriate broad review of the totality of the facts and circumstances of each case, including review equity, disparity of consideration of justice. *Driver v Sentence Review Div.* 2010 Mt 213, 277 P.3d 1018.

The filed brief and motion (PDF 44 @ 20 & 21) clearly showed that the state failed to prove every element of the charging document and it was the charging document that was used for the PSI information, and based on the rulings in *State v Nanoff* 160 Mont 344, 348, 502: "We cannot uphold warrants which are not based on probable cause and probable cause cannot be established by the use of incorrect information...it is apparent the warrant was not based on probable cause since the testimony given to support the warrant was incorrect."

There can be no equity or disparity for sentencing where there is no probable cause for the warrant used for charging.

No one can be convicted on the basis of facts different from those on which charges were based. *Russell v United States* 369 US 749, 82 S.Ct 1038 (1962).

Montana Code Annotated 46-16-104 states: the plea of not guilty puts in issue every material allegation of the indictment, information or complaint.

Sentence review disregarded Mont Code Ann 46-18-242(1)(b) and *State v Hunt* 2009 Mt 265, 353 Mont 70 214 P.3d 1234 (2009). In that case, Hunt maintained that the restitution condition should be stricken from his sentence, either by the supreme court, or remanded to the district court. However, the proper remedy is to reverse the portion of the judgement or ordering restitution and remand the case to the district court for reconsideration of the restitution

order after the affidavit requirements of 46-18-242 have been satisfied. See State v Ariegwe, 2007 Mt 204 P. 182, 338 Mont 442, 167 P.3d 815. (case remanded to the District Court for restitution hearing pursuant to correct and complete application of 46-18-241 through 249 MCA): State v Smietanka 2008 Mt 357 PP9-10, 15, 346 Mont 353, 185 P.3d.

As justice Karla Grey stated in her dissenting opinion in State v Carter 2005 Mt 87, 326 Mont 427, 114 P.3d 1001, P.47: "But a fair reading makes it clear that the court intends to recognize no bounds in reaching an issue it wants to reach at any time and in any case. I suppose this unsupported statement will be quoted in future cases when the court does not wish to conduct itself within any applicable parameters.

#### ARGUMENT

The Sentence review Division had total disregard for MCA 46-18-242(1)(b), requiring an affidavit in the courtroom to support restitution, when in this case, such affidavit was left in the Butte Parole and Probation office. The division also disregarded the argument that restitution was based on Shodair Hospital treating the alleged victim with Nicotine and to pay restitution would violate both federal laws and state statutes, as was orally argued: "Treatment for nicotine does not equate to a valid suicide attempt, by this document showing what treatment was provided, but not in court until the last minute, the court was without this information and by ordering restitution for this trip to Shodair, the Judge ordered the Defendant to pay for nicotine for a minor child. This violated 45-5-637 MCA:Tabacco possession or consumption under 18 years of age prohibited (see PDF 42 @ 36)

The Sentence review disregarded that the PSI being based on false statements, from the inadmissible charging statement that did not match trial testimony was a violation of the 14th Amendment and Bauer v State 1999 Mt 185, P.20, 295 Mont 306, 985 P.2d 995.

Because the State determined the charging statements were inadmissible at trial, paragraphs 3, 4, 5, 7, 9 and 11 must be excised out and replaced with admissible evidence, or the state has failed to prove it's case. See State v Holt, 2006 Mt 151, 332 Mont.

The Sentence Review Division also disregard that the State convicted the defendant of sexual intercourse without consent and sexual assault for for the same alleged occurrence, which is a violation of the federal multiplicity doctrine of the under the 5th Amendment of the constitution and MCA 46-11-410(2)(a)

The Montana Supreme Court has held that 46-11-410(2)(a) precluded the State from convicting of both sexual assault and sexual intercourse without consent where the charges arose from the same attack as alleged in the information. See State v Williams 2010 Mt 58, 355 Mont 354, 228 P.3d 1127(2010). this is also a violation of the Montana Constitution, Article II, Section 25.(See Pdf 41 @ 13 - 31, also pages 111 to 113 of Habeas).

The Sentence review disregard the simple fact that a valid suicide attempt of the child living in Butte would beg for a trip to St James Hospital, in Butte rather than Shodiar psychiatric child care in Helena. A suicide attempt is a life and death matter, with a demand for urgent care, not an 80 mile trip for nicotine treatment. See State v Hilgers 1999 Mt 284, 297 Mont 23, 989 P.2d 866(See also PDF 42 @ 36 & 41)(See also habeas corpus at 115 and 116).

The Sentence review also disregarded the arguement that the court put a tier 3 restriction on a tier 1 defendant for parole conditions that voliated the defendants 5th amendment rights or compells the defendant to spend the entire 40 year sentence in prison for not being able to successfully complete phase II of the sex offender treatment, that would violate the holding in State v Imlay, 249 Mont 82, 813 p.2d 979(1991)and the 9th circuit ruling in U.S. v Antelope, 395 F.3d, 1128(9th Cir 2005).

#### CONCLUSION

It is obvious that the State of Montana is not treating the Petitioner the same as other citizens of Montana and is not providing equal protection.

In a case from the Twentieth Judical District Court, Lake county. In State of Montana vs Kelly Dale Clark, Cause No DC 02-99, the Honorable Deborah Kim Christopher issued an Order stating:: Inasmuch as Imlay is controlling, the court finds that the appropriate remedy is to deny the defendant's request that the Court's Judgement and Commitment Order of December 11, 2003 be amended.

Instead, the court hereby vacates it's judgement and Commitment Order of December 11, 2003 and sets this matter for a resentencing hearing September 7, 2006, Dated this 4th day of August, 2006.(See Exhibit 1)

In another case, the county attorney for the eleventh Judicial district court, in Kalispell, filed a motion in Cause No DC-18-171(c), on December 31, 2018, when this State's unopposed motion to dismiss stated: Comes Now. Plaintiff, State of Montana, by and through Travis R Ahner, Flathead County Attorney; and moves the Court to dismiss this matter. Given the evidence obtained through the investigation and by the parties, the self-defense issues presented in the case, statements made by witnesses that contradicted the forensic evidence, and the lack of cooperation by a critical witness in this case, the State no longer has a good faith basis for proceeding with this prosecution. The State has discussed this motion with counsel for the Defendant, Brian Smith, and he does not oppose the motion. dated this 31st day of December, 2018.(See Exhibit 2)

When the petitioner has to go to such lenthhs as to develop "the circumstances of the crime"(PDF 47 @ 35-51), that the State of Montana, from judicial district court, to the Office of disiplinary counsel, to the Commission on Practice, to the Supreme Count to the Sentence review, will not even comment on the due process violations, lack of probable cause, perjury, double jeopardy and other constitutional violations that took place and still there is not remedy for this petitioner.

The honorable Judge O. Rogeriee Thompson, Federal appeal-court judge, in a July 31, 2020 ruling that tossed out the death sentence facing Boston Marathon bomber Dzhokhar Tsarnaev and sent the case back to a lower court for resentencing, stated: "Even the very worst among us deserves to be fairly tried and lawfully punished."

The case of DC 12-029, State v Pierce, Must be vacated and the charges dismissed.

Dated this 24<sup>th</sup> date of August, 2020

Robert S Pierce  
Robert S Pierce, Pro se  
Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that participation in the e-filing Pilot Project is mandatory for all prisoner's in all custody levels at MSP. That pursuant to STANDING ORDER No. DLC-46, is complied with.

Per STANDING OERDER No. DLC-46, once the document is filed in the court system, the document is automatically served upon opposing counsel(if counsel has entered an appearance) so there will be no need for the prisoners litigent to mail copies to other parties. If there are no other parties to the case that are not registered CM/ECF users, the Clerk will mail a copy of the prisoner litigent's electronically filed documents to each non-registered party on behalf of the prison litigents, via the United States Postal System. Other parties are as followed:

Montana Attorney General  
Tim Fox, Attorney General  
P.O. Box 201401  
Helena, Mt 59620-1401

Lynn Guyer  
MSP Warden  
400 Conley Lake road  
Deer Lodge, Mt 59722

Dated this 24 day of August, 2020

Robert S Pierce  
Robert S Pierce, Pro Se  
Petitioner.

PETITIONERS DECLARATION

- A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in dismissal of this petition without actual notice.
- B. I understand that submission of a false statement or answer to any question in this petition may subject me to penalties for perjury. I, the petitioner in this action, declare under penalty of perjury that I have read the above petition and that the information I have set forth in it is true and correct. 28 U.S.C. 1746; 18 U.S.C. 1621.
- C. This petition was filed electronically by STANDING ORDER No. DLC-46. The STANDING ORDER makes participation in the e-filing Plilot Project mandatory for all prisoners in all custody levels at MSP.

Dated this 24<sup>th</sup> day of August, 2020.

Robert S Pierce  
Signature of Petitioner  
8/24/20  
date signed

Robert S Pierce AO#3013080  
700 Conley Lake Road  
Deer Lodge, Mt 59722

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MONTANA  
BUTTE DIVISION

Robert S Pierce,  
Petitioner,  
-vs-  
LYNN GUYER,  
Respondent.

Cause No: CV-19-058-BU-BMM-KLD  
MOTION OF INADEQUATE COUNSEL DURING  
THE CRITICAL STAGE OF SENTENCE REVIEW

NOW COMES, Robert S Pierce, Pro Se Petitioner in the above entitled matter, with this MOTION OF INADEQUATE COUNSEL DURING THE CRITICAL STAGE OF SENTENCE REVIEW, based on the Sentence Review hearing held August 6, 2020.

STATEMENT OF FACT

On April 17, 2020, the Sentence Review Division received a brief and Motion dated 12, 2020(See Pdf 44, 45 and 46) and this document was then presented to the 3 judge panel.

On July 10, 2020, Pierce was appointed counsel, being David Maldonado. Mr Maldonado documented: "my review of your file will be complete soon and I plan to set up a phone call with you in the next two weeks."(see exhibit 1)

On July 14, 2020, a copy of the brief and motion on file with the Sentence Review Division was sent to the State Public Defenders Office at 1917 South Higgins, Missoula, Montana 59801.

On July 17, 2020, Pierce sent a letter informing David Maldonado that the brief and motion were at the public defenders office that appointed him.

On this date, July 17, 2020, Mr Maldonado was also sent a document titled "circumstances of the crime" which was filed as an addendum with the Sentence Review Division.(See PDF 47, pages 35 to 51)

On July 27, 2020, after the time period when Maldonado was going to call the Petitioner and failed to, a document titled "request to file Second Separate Appendix Pursuant to Rule 12(5)" was mailed to Maldonado.(See Pdf 47, pages 17 to 34, and Pdf 16, pages 1 through 32) Maldonado was informed that this document was filed in the Montana Supreme court and on February 13, 2020, the Clerk of the Supreme Court was ordered to attach it to Pierce's opening brief. It was articulated that the State neither responded nor opposed this appendix information.

This "second appendix" is directly linked to the "circumstance of the crime" and the reasons the PSI was laced with false information, was based on the charging documents that the State decided, statements were inadmissible at trial, and addressed in the filed brief and motion(see Pdf 44, pages 19 to 22).

On August 4, 2020, Maldonado finally contacted Pierce to discuss his case. Maldonado stated that he would not address the filed brief and motion at the hearing, even though it contained vital information on the equity of sentencing. No other discussions on strategy were held and no issues were covered in this 10 minute conversation.

On August 6, 2020, a Sentence Review Hearing was held. The division made a point that they received and reviewed the April 12th brief and motion entitled "MOTION TO REMAND BACK TO DISTRICT COURT FOR RESENTENCING OR DISMISSAL." the Division also received an "addendum to Brief and Motion to remand back to District Court for resentencing or dismissal, including "circumstance of the crime" mailed on July 31, 2020.

Appointed counsel raised an excessive sentence as a term of confinement and for a drop in parole restrictions, also addressed was invalid restitution.

The issues addressed by counsel paled in comparison to those not addressed, because the Division decided that did not have the authority to vacate and remand.

ARGUMENT

Counsel was ineffecting because he only spent 10 minutes on the phone, two days before the hearing and expected that to be sufficient time to discuss strategy. However, no strategy was discussed, rather Mr. Maldonado simply said that he would not raise the issues that were briefed and filed. He was much more concerned with why the Petitioner filed his own brief and motion and why the petitioner requested counsel if he was going to file something.

Mr. Maldonado was informed that the original SRD date was May 8, 2020 and at that time no counsel was appointed, so the issues were briefed ahead of time. He was then informed the SRD hearing date was re-scheduled to August 6, 2020 and he was appointed on July 10, 2020, 4 months after the filing of the brief.

Maldonado then asked the Petitioner if he wanted to waive his right to counsel and was told that Petitioner was not going to waive his right to counsel, but expected adequate assistance of counsel, of which Maldonado did not seem to want to provide.

On August 6, 2020, the hearing took place by video and Maldonado was present. His verbal was stumbling and he seemed distracted. While raising the issue on a tier three sanction for parole restriction, his argument failed to even cite any authority, when State v Imley (1991), 249 Mont. 82, 813 P.2d 979 is controlling, on the state level and United States v Antelope 359 F.3d 1128 (9th cir 2005) is controlling on the federal level.

On August 18, 2020. Mr. Maldonado sent the petitioner a letter that stated in part: "On August 6, 2020 I appeared with you by video in front of the Sentence Review Division and ask that they review and modify the sentence issued in your case out of Deer Lodge County, cause number dc-2012-29. Unfortunately, the Sentence Review Division affirmed the judgement laid out by the District Court, not finding(sp) sufficient evidence to make any modifications to your sentence." (see exhibit 2)

LEGAL AUTHORITY

Mont. Const. Art II, Sec. 24 and the United States Constitution, amendment 6 guarantee a criminal defendant the right to counsel in criminal proceedings. This

right attaches at every critical stage of the proceeding against the Defendant. Sentence Review is a critical stage of the proceedings against the Defendant, according a criminal defendant has a constitutional right to the right to counsel at sentence review.

It is self evident that the right to counsel carries with it a constitutional requirement that such counsel be effective. Absent effective assistance of counsel, the right to counsel is nothing more than a procedural formality. Therefore, a criminal defendant has the right to effective counsel at Sentence review Hearings. Avery v Batista 2014 Mt 266, 376 Mont 404, 336 P.3d 924, 2014 Mont Lexis 601.

Under both the fourteenth Amendment to the United States Constitution and the Montana Constitution, article II, Section 17: a defendant is protected from a sentence predicted on misinformation about the criminal history, Pursuant to the Federal Constitution, while not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning defendant record, that are materially false, or if it is founded in part upon misinformation of constitutional magnitude. Bauer v State 1999 Mt 185, P.2d 295 Mont 306.

The Montana Supreme Court has ruled in State v Nanoff 160 Mont 344, 348, 502 that: We cannot uphold warrants which are not based on probable cause and probable cause cannot be established by the use of incorrect information...it is apparent the warrant was not based on probable cause since the testimony given to support the warrant was incorrect.

The Montana Supreme Court has held in State v Holt 2006 MT 151, 332: It is not required that information in the affidavit supporting a charge, which might later be found inadmissible at trial, be excised before a determination of probable cause is made. If at trial, the State could not prove it's case against Holt with admissible evidence, Holt could move to dismiss at the close of the States case-in-chief and such motion would have to be granted. The state would have failed to prove every element.

The Montana supreme Court, in State v Holt, dermined that because Holt plea guilty, the State did not have to prove every element of the charging document.

However, in State v Pierce DC 12-29, Pierce plea not guilty and therefore paragraphs 3, 4, 5, 7, 9 and 11 would have to be excised out of the charging document and replaced with admissible evidence that prove the same facts as the inadmissable evidence.

The Supreme Court recognized that without pre-trial consultation with the Defendant, counsel cannot fullfill his or her duty to investigate. The court stated that "the reasonableness of counsel's actions may be determined of subsantially influenced by the defendants own statements or actions, Counsels actions are usually based quite properly on informed stratagic choices made by the defendant and on information supplied by the defendant...Becasue the Supreme Court has repeatedly made it clear that there is a duty incumbant on counsel to conduct an investigation, it necessarily follows that counsel cannot discharge this duty if he or she fails to consult with his or her client, Strickland v Washington 466 US 668, 104 S.Ct 2052, 80, L.Ed.2d 674 1984 US Lexis 79.

The Montana Supreme Court held that Montana Code Annotated 46-11-410(2) and 46-1-202(9) preclude the State from convicting defendants of both sexual intercourse without consent and sexual assault, because the charges arose from the same attack. Therefore defendants conviction for the lesser included sexual assault was reversed. State v Williams 2010 Mt 58, 355 Mont 354, 228 P.3d 1127(2010)

This matter also violates the Federal "Multiplicity Doctrine" as the rule against multiplicity stems from the fifth amendment, as well as the fourteenth Amendment, of the Federal Constution, which forbids placing a defendant twice in jeopardy for the same offense. The rule prohibits the government from charging a single offense, into several counts and is intended to prevent multiple punishments. See Blockbuster v United States 294 US 295 52 S.Ct 180, 76 L.Ed.2d 306(1932)

The Montana Supreme Court held that: the report containing a specified list of Ross's medical expenses was not sufficient in form and substance to serve as the victims submitted affidavit required by 46-18-242(1)(b). State v Hunt, 2009 Mt 265, 353 mont 70, 214 P.3d 1234(2009)

46-18-242(1)(b) states an affidavit that specifically describes the victims pecuniary loss and the replacement value of the loss at the time of sentencing.

The proper remedy is to reverse the portion of the judgement or ordering restitution and remand the case to the district court for reconsideration of the restitution order after the affidavit requirement of 46-18-242 have been satisfied. See State v Aruegwe, 2007 Mt 204 P 182, 338 Mont 442, 167 P.3d 815.

45-5-637 MCA states: Tabbaco possession or consumption under 18 years of age prohibited.

46-18-243(1)(a) states restitution must be substantiated by evidence in the record.

#### CONCLUSION:

The appointed Counsel was highly ineffective during sentence review. There was only a 10 minute hostile phone call, two days before the hearing. There is no shortage of statutes or authority that the counsel could have used to support arguments, rather than not using any authority. The Montana Supreme Court is very explicit ruling against no affidavit in court for restitution, against double jeopardy or multiplicity, against failure to prove every element, against false information used in the PSI for sentencing and against Tier 3 sanctions for tier 1 offenders for parole restrictions.

Everything filed with the Sentence Review Division was a viable claim that had supporting evidence as exhibits and was supported by case law, statutes and authority and for the counsel to not use the filed material, nor even argue it and then state is his letter that SRD did not find sufficient evidence to make any modifications to your sentence is way below adequate.

It appears that the appointed counsel is expecting the petitioner to simply accept his determination as "the way it is." (See PDF 44)  
An adequate counsel would not have gotten an "affirmed" from the Sentence review and should have at the very least, been able to eliminate the restitution for lack of an affidavit in court as required by state law, or should have been able to successfully argue State v Imley and United States v Antelope to eliminate SOP II as a parole restriction.

Dated this 14<sup>th</sup> day of August, 2020

  
Robert S Pierce  
Pro Se Petitioner

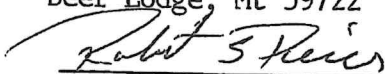
CERTIFICATE OF SERVICE

I do hereby certify that participation in the e-filing Pilot Project is mandatory for all Prisoner's in all custody levels at MSP. That Pursuant to STANDING ORDER No. DLG-46, once the document is filed in the Court system, the document is automatically served upon opposing counsel (if counsel has entered an appearance) so there will be no need for the prisoner litigant to mail copies to other parties. If there are other parties to the case that are not registered CM/ECF users, the clerk will mail a copy of the prisoner litigants electronically filed documents to each non-registered party on behalf of the prison litigant, via the United State Postal System. ~~Other parties are as follows:~~

Montana Attorney General  
Tim Fox, Attorney General  
P.O. Box 201401  
Helena, Mt 59620-1401

Lynn Guyer  
MSP Warden  
400 Conley Lake Road  
Deer Lodge, Mt 59722

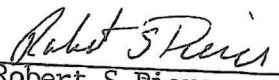
Dated this 24<sup>th</sup> date of August, 2020

  
Robert S Pierce  
Pro Se Petitioner

PETITIONER'S DECLARATION

- A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in dismissal of this petition without actual notice.
- B. I understand that submission of a false statement or answer to any question in this petition may subject me to penalties for perjury. I, the Petitioner in this action, declare under penalty of perjury that I have read the above petition and that the information I have set forth in it is true and correct. 28 U.S.C. 1746; 18 U.S.C. 1621.
- C. This petition was filed electronically by STANDING ORDER No: DLC-46. The STANDING ORDER makes participation in the e-filing Pilot Program mandatory for all prisoners in all custody levels at MSP.

Dated this 24<sup>th</sup> day of August, 2020

  
Robert S Pierce  
Pro Se Petitioner

Law Offices of David Maldonado  
MALDONADO LAW, PLLC

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Missoula Office  
210 N Higgins, Ste #226  
Missoula, MT. 59802  
406.552.4653

Butte Office  
1667 Dewey Blvd, Ste A  
Butte, MT 59701  
406.299.2905

July 10, 2020

Robert Pierce, #3013080  
c/o Montana State Prison  
700 Conley Lake Road  
Deer Lodge, MT 59722

Re: Sentence Review Hearing

Dear Robert:

I have been appointed to represent you at your Sentence Review Hearing scheduled for August 6, 2020 at 11:30 a.m. Because of continued concerns surrounding COVID-19, all appearances will be by video. Therefore, I will not be there in person for the hearing.

My review of your file will be complete soon and I plan to set up a phone call with you in the next two weeks. Due to my heavy case load, these calls will be scheduled in advance so that we can maximize our time and properly discuss any questions or concerns you may have about the hearing. My paralegal, Cindy, will work with your case manager to find a time that works for everyone.

Please prepare any questions or concerns you may have about your case and the hearing for our phone meeting. I look forward to speaking with you.

Sincerely,



David M. Maldonado

Exhibit 1 PDF 49

**Law Offices of David Maldonado**  
MALDONADO LAW, PLLC

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Missoula Office  
210 N Higgins, Ste #226  
Missoula, MT. 59802  
406.552.4653

Butte Office  
1667 Dewey Blvd, Ste A  
Butte, MT 59701  
406.299.2905

August 18, 2020

**Robert Pierce, #3013080**  
**c/o Montana State Prison**  
700 Conley Lake Road  
Deer Lodge, MT 59722

Re: Sentence Review Decision

Dear Robert:

On August 6, 2020 I appeared with you by video in front of the Sentence Review Division to ask that they review and modify the sentence issued in your case out of Deer Lodge County, cause number DC-2012-29. Unfortunately, the Sentence Review Division affirmed the judgment laid out by the District Court, not finding sufficient evidence to make any modifications to your sentence.

A copy of the Decision is enclosed for your records and review. Should you have any questions regarding this information, please call my office at (406) 552-4653.

Sincerely,



David M. Maldonado

Exhibit 2

ATF 49 P28

**Wells, Elvie**

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**From:** MTD\_CMECF@mtd.uscourts.gov  
**Sent:** Monday, October 5, 2020 8:34 AM  
**To:** MTD\_CMECF@mtd.uscourts.gov  
**Subject:** [EXTERNAL] Activity in Case 2:19-cv-00058-BMM-KLD Pierce v. Guyer et al Order Setting

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Montana

### Notice of Electronic Filing

The following transaction was entered on 10/5/2020 at 8:33 AM MDT and filed on 10/5/2020

**Case Name:** Pierce v. Guyer et al

**Case Number:** 2:19-cv-00058-BMM-KLD [ecf.mtd.uscourts.gov]

**Filer:**

**Document Number:** 19 [ecf.mtd.uscourts.gov]

**Docket Text:**

**ORDER. [14] MOTION to Lift Stay granted; [15] MOTION denied. Brief due 10/30/20. Signed by Magistrate Judge Kathleen L. DeSoto on 10/5/2020. Transmitted electronically to prison for delivery to Plaintiff. (TAG)**

**2:19-cv-00058-BMM-KLD Notice has been electronically mailed to:**

**2:19-cv-00058-BMM-KLD Notice has been delivered by other means to:**

Robert S. Pierce  
3013080  
MONTANA STATE PRISON  
700 Conley Lake Road  
Deer Lodge, MT 59722

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1105468959 [Date=10/5/2020] [FileNumber=2467433-0]

] [2e70e5fe25f1e81768cc9aff564bd0837c71b7ea74466c04bd15ddc015dd3018cdd  
102311696f554d1f79aa36080bf80215679f7885c211d7179589a58ab7da9]]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

ROBERT S. PIERCE,

Petitioner,

vs.

LYNN GUYER; ATTORNEY  
GENERAL OF THE STATE OF  
MONTANA,

Respondents.

Cause No. CV 19-58-BU-BMM-KLD

ORDER

This matter comes before the Court on Pierce's Amended Petition seeking habeas corpus relief under 28 U.S.C. § 2254. (Doc. 5.) This Court previously imposed a stay of these proceedings, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to allow Pierce to exhaust his sentencing-related claims before the Montana Sentence Review Division (SRD). (Docs. 10 & 13.) Pierce advises his SRD proceedings are now concluded and he requests that the stay be lifted. (Doc. 14.) Pierce's motion will be granted.

Additionally, Pierce has filed a "Motion to Notify District Court that Sentence Review Failed to Adhere to their Own Rules or State Law and Statues." (Doc. 15). Pierce also has filed a supplement to this motion. (Doc. 18). Although

somewhat difficult to follow, it appears that Pierce believes various irregularities occurred in his SRD proceedings. As a result, he contends this Court should “override” the SRD and either remand his case back to the state district court for re-sentencing or order the dismissal of his state charges. But this Court is not able to provide Pierce the relief he seeks. Federal district courts, as courts of original jurisdiction, do not serve as appellate tribunals to review errors allegedly committed by state courts. *MacKay v. Pfeil*, 827 F. 2d 540, 543 (9<sup>th</sup> Cir. 1987); *see also Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970)(“lower federal courts possess no power whatever to sit in direct review of state court decisions”). It would be entirely inappropriate for this Court to review and intervene in the SRD proceedings as suggested by Pierce. While this Court will take notice of the filings made by Pierce, to the extent that he seeks additional relief, his Motion will be denied.

Pierce continues to file supplements, exhibits, and addendums to his Amended Petition. As an initial matter, Pierce is advised that this Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). (“A necessary predicate for the granting of federal habeas relief to respondents is a determination by the federal

court that their custody violates the Constitution, laws, or treaties of the United States.”). This Court may not grant Pierce relief for alleged errors of state law.

Also, Pierce’s filings must comply with the rules governing federal habeas proceedings. See, Rules Governing § 2254 Cases in the United States District Courts, Rule 2(c)(1)-(2) (federal habeas petitions must “specify all the grounds for relief available to petitioner” and “state the facts supporting each ground”); see also *Ross v. Williams*, 896 F. 3d 958, 969 (9<sup>th</sup> Cir. 2018) (even if proceeding pro se, all prisoners must comply with “demanding” habeas pleading standards so that “meritorious claims [can be] readily ascertainable.”). Habeas Rule 2(c) requires petitioner use specificity to “alleviate the court’s burden of deciphering lengthy poorly organized petitions.” Pierce will not be allowed to continue filing addendums and supplements to his amended petition. Accordingly, Pierce will be provided one opportunity to provide any additional claims or information. The Court will then continue prescreening Pierce’s petition.

Accordingly, IT IS HEREBY ORDERED:

1. Pierce’s Motion to Lift Stay (Doc. 14) is GRANTED. The Clerk of Court is directed to ensure the docket reflects that Pierce’s case is now active.

2. To the extent that Pierce seeks this Court’s intervention and/or relief in relation to his SRD proceedings (Doc. 15) his motion is DENIED. The Court will, however, take judicial notice of and review the documents and exhibits filed by

Pierce.

3. On or before **October 30, 2020**, Pierce will be provided an opportunity to file a brief of no more than 10 pages identifying any additional claims he wishes to advance. No further amendment or addition of claims will be allowed after that time. The Court will then complete prescreening of Pierce's petition.

As Pierce was advised in the Notice of Case Opening, (Doc. 2), habeas petitions must be prescreened. The process takes some time as many petitions are before the Court. When prescreening is completed, an Order and/or Findings and Recommendation will be issued and will prescribe the next step in the litigation.

Pierce must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address." Failure to do so may result in dismissal of this case without notice to him.

DATED this 5<sup>th</sup> day of October, 2020.

/s/ Kathleen L. DeSoto  
Kathleen L. DeSoto  
United States Magistrate Judge