No. _____

In The
Supreme Court of the United States

Duane Ronald Belanus - Petitioner,

V.S.

State of Montana - Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court Sentence Review Division

Appendix To
Petition For A Writ Of Certiorari

Pro Se
Duane Ronald Belanus
#0 #300349
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

Table of Contents

Table of Contents, Cont.

Appendix A

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

SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA

STATE OF MONTANA,	)	Cause No. DC-08-309
	)	
Plaintiff,	)	Lewis & Clark County District Court
	)	Montana First Judicial District
-vs-	)	
	)	**DECISION**
DUANE RONALD BELANUS,	)	
	)	
Defendant.	)	

On August 13, 2009, the Defendant was sentenced as follows: Counts I and II: Life in Prison, without the possibility of parole, for the offense of Sexual Intercourse Without Consent as Aggravated by the Defendant's Infliction of Bodily Injury While Committing the Offense, a Felony, in violation of §§45-5-503 and 45-5-503(3)(a) MCA;

Count III: Life in Prison, without the possibility of parole, for the offense of Aggravated Kidnapping, a Felony, in violation of §45-5-30(1)(d);

Count IV: A commitment to prison for ten (10) years, for the offense of Burglary, a Felony, in violation of §45-6-204, MCA;

Count V: A commitment to the Lewis and Clark County Jail for six (6) months, all suspended, for the offense of Theft, a Misdemeanor, in violation of §45-6-301(1)(c), MCA;

Count VI: A commitment to prison for ten (10) years, for the offense of Tampering With or Fabricating Physical Evidence, a Felony, in violation of §45-7-207(1)(a), MCA.

The sentences in Counts I - VI were ordered to run concurrently with each other. The Defendant was ordered to pay restitution to the victim of his offenses in the amount of $2,864.01; pay the Montana Crime Victim's Compensation Fund $1,136.60; and pay the Lewis and Clark County Detention Center $4,070.72 for the cost of his medical care relating to medical conditions

or injuries that were not the result of the actions of other inmates, plus an administrative handling fee. The Defendant was designated a Level 2 Sex Offender. The Defendant was granted credit for time served from August 2, 2008 – August 13, 2009.

On August 7, 2020, the Defendant's Application for review of that sentence was heard by the Sentence Review Division of the Montana Supreme Court (hereafter "the Division"). The Defendant appeared by video from the Montana State Prison and was represented by David Maldonado, Defense Counsel, who appeared by video from Missoula, Montana. The State was represented by Leo Gallagher, Lewis and Clark County Attorney, who appeared by video from Helena, Montana. The Defendant provided a statement.

Before hearing the Application, the Defendant was advised that the Division has the authority not only to reduce the sentence or affirm it, but also to increase it. The Defendant was further advised that there is no appeal from a decision of the Division. The Defendant acknowledged that he understood this and stated that he wished to proceed.

At the hearing, the Division informed the Defendant that before David Maldonado was appointed to represent him there were various filings submitted by the Defendant for the Division's consideration. The filings were dated October 15, 2019. A review of those filings indicate various challenges to the convictions underlying the District Court's sentencing in this matter. To the extent the Defendant's filings sought to the challenge the basis for his underlying convictions, the Defendant was further informed that the Division lacks authority to consider the same and the Defendant's request to challenge any basis of any of the Defendant's underlying convictions was DENIED at the outset of the hearing.

Rule 12, Rules of the Sentence Review Division of the Supreme Court of Montana, provides that, "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." (Section 46-18-904(3), MCA).

The Division finds that the reasons advanced for modification are insufficient to hold that the sentence imposed by the District Court is either clearly inadequate or clearly excessive.

Therefore, it is the unanimous decision of the Division that the sentence is **AFFIRMED**.

Done in open Court this 7th day of August, 2020.

DATED this 25th day of August, 2020.

SENTENCE REVIEW DIVISION

Hon. Dan Wilson, Chairperson

Hon. Luke Berger, Member

Hon. Jessica Fehr, Member

Copies mailed or emailed this 25th day of August, 2020, to:

Clerk of District Court – *via email*
Duane Ronald Belanus #3003449, Defendant
Hon. Michael McMahon – *via email*
David Maldonado, Defense Counsel – *via email*
State Office of the Public Defender – *via email*
Leo Gallagher, Esq. – *via email*
Montana State Prison Records Dept. - *via email*
Board of Pardons and Parole - *via email*

Shelly Smith, Office Administrator
Sentence Review Division

Appendix B

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301 S. Park, Suite 328
P.O. Box 203005
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SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA

STATE OF MONTANA,	)	Cause No. DC-08-309
	)	
Plaintiff,	)	Lewis & Clark County District Court
-vs-	)	Montana First Judicial District
	)	
DUANE RONALD BELANUS,	)	ORDER DENYING DEFENDANT'S
	)	POST-HEARING "MOTION FOR
Defendant.	)	REHEARING AND/OR
	)	RECONSIDERATION"
	)	

The Sentence Review Division (Division) heard Defendant Duane Ronald Belanus's application for sentence review on August 7, 2020. The Defendant appeared by video conference and was represented by attorney David Maldonado, who also appeared by video conference. The State was represented by Lewis & Clark County Attorney Leo Gallagher, who appeared by video conference. Mr. Maldonado presented an argument on the Defendant's behalf. The Defendant advanced his own legal arguments and made a statement. Attorney Gallagher presented the State's argument. At the conclusion of the hearing the Defendant's application was submitted for decision.

Following the hearing and prior to the Division issuing a written decision on the Defendant's application, the Defendant filed his "Motion for Rehearing and/or Reconsideration."

Because the Division has not yet rendered a decision on the Defendant's sentence review application, his motion for reconsideration is untimely and will be denied. The Defendant's motion for rehearing, made in the alternative to his motion for reconsideration, will be addressed on its merits.

ANALYSIS

On August 14, 2020, the Defendant filed, *pro se*, his "Motion for Rehearing and/or Reconsideration" and supporting brief.

The Defendant contends, in his request for relief, that his interest in seeking a second hearing on his application for sentence review involves issues . . .

> under both Constitutions under Equal Protection, Due Process of Law, Ex Post Facto, and Effective Assistance of Counsel which directly implements my liberties and Freedoms and the Cruel and Unusual Punishment Clauses; and therefrom my motion for Rehearing and/or Reconsideration should be granted in light of my sentencing claims I presented in my Sentence Review Proceeding.

In spite of this rather broad ranging explication of the rights the Defendant contends are at stake in the outcome for his motion for rehearing, he presents no authority for the proposition that a sentence review applicant may move for rehearing. Neither the statutes nor the rules which govern the Division provide any basis for a party to seek rehearing.

Nonetheless, the Division will take up the merits of the Defendant's motion.

In the Defendant's first allegation of error, he believes he may have heard the Division inform him at the outset of the hearing that the Division does not review a sentence if the District Court imposed the maximum sentence. If such advice were given, the Defendant states, he would "object to the Division's authority limiting review of a sentence imposed at the maximum[.]" On this issue, the Defendant's belief is based on his misapprehension of the advice given by the Division at the outset of the hearing and apparently reconstrued by the Defendant in his memory

after the fact. The advice given to the Defendant at the outset of the hearing is the same advice given at the outset of every hearing with every defendant. They are told that, although the Division has the statutory authority to increase a sentence, the Division does not have the authority to increase a sentence imposed by a District Court when the District Court has already imposed the maximum sentence allowed by law. See § 46-18-904 (1)(a)(ii), MCA (Division can impose any sentence which could have been imposed in the District Court). Accordingly, the limits on maximum sentences which may be imposed by district courts are the same limits on maximum sentences which may be imposed by the Division following its review of a sentence. The Defendant's misapprehension that the Division will not review a sentence because a district court has imposed the maximum possible sentence rests entirely on the Defendant's misapprehension of the record and his request for rehearing will not be granted on that basis.

In the Defendant's second allegation of error, he contends the Division inappropriately limited the scope of its review to matters pertaining to his sentence and, further, inappropriately determined that it would not consider issues pertaining to the Defendant's underlying convictions. In support of this allegation of error, the Defendant makes this statement:

> In accordance with the Laws and Rules in effect at the time my Sentence Review proceedings began, my Sentence Review Hearing is to provide for an appropriately broad review of the totality of the facts and circumstances of my case in their entirety (Driver v. Sentence Review Division, 2010 MT 43, ¶ 20). MCA 46-18-904(1)(a)(i) states that the Division's review is of my judgment as it relates to my sentence; and MCA 46-1-202(11) defines judgment as an adjudication that the defendant is guilty or not guilty, and if the defendant is guilty, it includes the sentence pronounced by the court (citation omitted).

It was not error for the Division to limit its review to consideration of matters pertaining to the Defendant's sentence and not to consider issues pertaining to the Defendant's underlying convictions. For sentence review purposes, the judgment in a criminal case has two components: the finding of guilt (the conviction) and the sentence. § 46-1-202(11), MCA. By statute, the

Division is authorized only to consider matters pertaining to a sentence and not the underlying conviction. § 46-18-904(1)(a)(i) ("... the review division ... shall review the judgment *as it relates to the sentence imposed* ...") (emphasis added)). Further, the Defendant recites in his brief that he did, in fact, present his own argument to the Division about matters he believes are relevant to consider with respect to his sentence, including the victim's "loving and apologetic message left on my home phone months after the night in question." The Defendant's motion indicates that he was able and permitted to present this information to the Division at the hearing, and there is no showing in the Defendant's motion that he was denied the opportunity to present matters he believes were relevant to the Division's consideration concerning the appropriateness of the sentence imposed in the District Court. Finally, in support of his second allegation of error, the Defendant cites *Rogers v. Ferriter*, 796 F.3d 1009, 1011 (9th Cir. 2015) for this proposition:

> [T]he Division has the authority to affirm, decrease, increase, or otherwise alter a sentence, subject to those limitations applicable to the original sentencing judge ... and the state district court that imposed a criminal sentence has the power to vacate, set aside, or correct the sentence.

The Defendant's reliance on *Rogers v. Ferriter* is misplaced. There, the Ninth Circuit observed that petitions for post-conviction relief are filed in Montana district courts and that, under the statutes prescribing the remedies available in post-conviction proceedings, district courts have authority "to vacate, set aside, or correct the sentence." *Rogers*, 796 F.3d 1010 (citing § 46-21-101(1), MCA). The Defendant cites *Rogers* for the proposition that the Division has the authority "to vacate, set aside, or correct the sentence" because district courts – which also impose the sentences the Division reviews – have authority to vacate, set aside, and correct sentences. The Defendant's conclusion is incorrect. District Courts have the authority "to vacate,

set aside, or correct the sentence" when a defendant has filed a petition for post-conviction relief. Absent such a filing, the district court may not "vacate, set aside, or correct the sentence" that it previously imposed. The Division's Rule 3 underscores this point. 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." In sum, the Division is not merely an alternative forum for defendants to bring petitions to vacate, set aside, or correct their sentences, and the Defendant is incorrect contending that the Division has the authority to vacate, set aside, or correct a sentence. The appropriate method for the review of a criminal conviction is by appeal to the Supreme Court. § 46-20-104(1), MCA. The purpose of the Sentence Review Division is not to provide an alternative appellate division of the Montana Supreme Court. Finally, neither the Defendant's counsel nor the Defendant, himself, was prevented or foreclosed at the hearing from presenting argument concerning the Defendant's sentence under § 45-5-303(2) or (3)(a), MCA. While the Defendant and his counsel offered differing views of those statutory provisions as they concerned the Defendant's sentence, there was no error in the Division's determination announced at the outset of the hearing that it would not consider issues pertaining to the Defendant's underlying convictions. The Defendant's allegations of error to the contrary are meritless.

The Defendant also contends that he "filed arguments overcoming the presumption of correctness" of his sentence and that the State's attorney, Leo Gallagher, failed to contest these arguments and, consequently, the Division is required to "correct" what the Defendant believes was his unlawful sentencing under § 45-5-303(2), (3)(a), MCA. First, under the Division's Rule 9, "Proceedings shall be informal to the extent possible." There is no 'default' provision in the governing statutes or rules which require the Division to grant relief requested by a defendant if

the State does not offer rebuttal argument or briefing on the same issue.

Next, the Defendant alleges error in his attorney's argument which urged the Division to reduce the Defendant's sentence from life without parole to 80 years. On this argument, first, the Defendant asserts that, although his attorney's "verbal addressments (sic) were continuously in and out and hard to follow, it was clear he tried arguing for an 80-year sentence of imprisonment in the state prison with parole in my case." During the hearing the Defendant did not request that his attorney repeat any statement or argument, and the Division will not now assume, without such a record or showing, that the Defendant was sufficiently unable to hear his attorney's presentation to grant the Defendant's motion for rehearing. The balance of the Defendant's third allegation of error concerns, primarily, allegations that his attorney rendered ineffective assistance of counsel by presenting an argument to which the Defendant did not agree and which he did not authorize. The Defendant contends his attorney's argument that the Defendant's sentence should be reduced from life without parole to 80 years (with no parole restriction),

> clearly goes against all of my legal arguments and critical matters presented before the Division pertaining to my invoked corrected sentence to be imposed in my case.

The Defendant further alleges that his attorney did not assist him in presenting his case and went against the Defendant in presenting his case. The Defendant also alleges his attorney's performance was deficient in that the attorney did not "forward my case's arguments that went uncontested by the opposing parties" and that "he asserted his own arguments and contravened the purpose of my application which cannot be considered trial strategy or a tactical decision when he did not confer with me."

We deem it appropriate to adopt the same standard for measuring the effectiveness of defense counsel in their representation before the Division which applies when evaluating a

claim of ineffective assistance by appellate counsel. We do so for several reasons. First, like an appellate court, the Division is not a fact finding body tasked with determining whether a defendant has committed a criminal offense. Second, similar to the range of issues which may be presented in an appeal, the range of considerations and arguments which may be advanced before the Division is both wide and varied. Third, and finally, because the work of the Division requires that it consider issues more akin to legal than factual ones – as with an appellate court – appellate counsel's decisions to advance certain arguments and not others is a determination more appropriately consigned to counsel's professional judgment.

Though *Strickland v. Washington*, 466 U.S. 668, 687 (1984) provides the same standard for measuring the effectiveness of both trial counsel and appellate counsel, the standard applies differently in the appellate context than in evaluating the effectiveness of trial counsel. Courts apply the same two-prong test when considering a claim of ineffective assistance of appellate counsel, requiring 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). However, 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). When a defendant's complaint centers on appellate counsel's decision to raise or advance one argument and not to advance others, it is well established that to render effective assistance of counsel on appeal, 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). 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 asserts a great number of particularized complaints about his attorney's performance. They include the following:

1) Counsel's argument that the Defendant's sentence should be reduced from life without parole to 80 years, with no parole restriction, went against all of the Defendant's legal arguments and critical matters presented before the Division pertaining to the Defendant's argument that his sentence was unlawful and, therefore, should be "corrected".
2) Counsel argued that an 80-year sentence with no parole restriction would render the Defendant eligible for parole when he would not be so eligible.
3) Counsel conceded that the Defendant has been designated a vexatious litigant, which seemed "to defeat any and all purposes why [the Defendant is] before the Sentence Review Division".
4) Counsel's arguments were inconsistent and difficult to follow.
5) Counsel filed a memorandum for consideration by the Division without first obtaining the Defendant's knowledge, approval, and express authorization of the contents of the memorandum.
6) Counsel filed a brief with references to equitable cases without informing the Defendant or providing him a copy of the same.

7) Counsel failed to object to County Attorney Gallagher's recitation of aspects of the appellate decision of the Montana Supreme Court which affirmed the Defendant's convictions.

8) Counsel failed to object to the Division's statement, plainly misapprehended by the Defendant, that the Division does not review maximum sentences imposed by the District Court.

9) Counsel failed to argue that the Defendant's sentence exceeded the maximum allowed by statute.

10) Counsel failed to object to the Division's determination and announcement that it would not consider matters pertaining to the Defendant's underlying convictions and would consider only such issues pertaining to the Defendant's sentencing.

11) Counsel failed to mention the victim's "apologetic and loving message left on [the Defendant's] home phone months after the night in question".

12) Counsel failed to argue the County Attorney's "commitment to seek a conviction and sentence of punishment for misdemeanor partner or family member assault when [he] was forced to enter a plea without constitutionally invoked counsel's assistance as [he] was deprived of this Fundamental Right".

13) Counsel advanced arguments that were in conflict with the Defendant's arguments that the Defendant made, in fact, at the hearing, and counsel's arguments "actually undermined [the Defendant's] whole reason and purpose going before the Division, rendering [his] Sentence Review Proceedings Fundamentally unfair".

14) Finally, counsel failed to present at the hearing the testimony of two witnesses "who wholly believed that they were going to testify at [the Defendant's] trial and at [his]

sentencing" and also failed to offer the same witnesses' letters of support for the Defendant to the Division. These failures, according to the Defendant, constitute ineffective assistance of counsel.

*****

Evaluating the Defendant's various complaints about his counsel in accordance with the rules of law set out above yields the following conclusions.

The Defendant's allegation of ineffective assistance by his counsel based on his counsel's argument that the Defendant's sentence should be reduced from life without parole to 80 years, with no parole restriction, when the Defendant wished only to argue that his sentences were unlawful and, therefore, must be corrected was not ineffective assistance of counsel. The Division does not have the authority to correct an unlawful sentence. Unlawful sentences must be corrected on appeal or in postconviction proceedings. Unlike the Defendant's argument made at the hearing, counsel did not request relief from the Division that it is not authorized to grant. It is not ineffective assistance for counsel to make a stronger argument and ignore a weaker argument.

Next, the Defendant asserts that his counsel argued that an 80-year sentence with no parole restriction would render the Defendant eligible for parole, presently, when he would not be so eligible. Whether counsel misspoke in this respect – or not – is immaterial. Counsel was clearly advocating appropriately for the Defendant's legal interests when he advocated for a sentence reduction that would allow the Defendant to be eligible for parole during his lifetime rather than being ineligible for parole for his lifetime. This allegation of ineffective assistance, assuming that such a statement was made by counsel, does not, in the broader context of counsel's performance and argument, fall below an objective standard of reasonableness or

render the entirety of counsel's argument so deficient that, but for such a misstatement, the outcome of the Division's consideration of the Defendant's application would likely be different.

Counsel conceded the Defendant has been designated a vexatious litigant and the Defendant believes this concession operated "to defeat any and all purposes why [he is] before the Sentence Review Division". Counsel's concession does not amount to an error satisfying either prong of the *Strickland* test. Within the broad contours of the issues the Division may take into account in deciding the merits of a sentence review application, a statement by counsel, such as this, is not one which so departs from an objective standard of reasonable advocacy by counsel or is likely to change the outcome of the Division's consideration of the Defendant's application that it could be held to constitute ineffective assistance of counsel. The Defendant's allegation that his counsel's concession defeated every purpose for the Defendant to be before the Division amounts to little more than hyperbole.

The Defendant alleges his counsel was ineffective for making arguments which were inconsistent and difficult to follow. Whether the Defendant's allegation in this respect is based on his supposed inability to hear sufficiently the audio transmission of his attorney's voice or whether it is based on the allegation that his counsel's arguments were illogical, poorly conceived, or poorly delivered makes no difference. As further addressed above, the Division will not grant a rehearing based on an allegation the Defendant could not hear the proceedings sufficiently when the Defendant did not bring to the Division's attention or his attorney's attorney during the hearing that he could neither hear nor understand what was being said or seek clarification of his counsel's argument. From the Division's perspective, counsel's arguments were presented logically and thoughtfully and he delivered, perhaps, the strongest argument available to the Defendant on the merits.

The Defendant alleges that his counsel filed a memorandum for consideration by the Division without first obtaining the Defendant's approval and express authorization for its contents. It is well established that counsel's performance is not ineffective merely because counsel chooses to ignore weaker arguments in favor of stronger ones. None of the arguments asserted by the Defendant in his voluminous pre-hearing filings or post-hearing motions have more merit than the argument presented by his counsel before the Division. Aside from that, all attorneys have duties to a court which they are bound to respect in addition to their duties to their clients. An attorney's obligation to a court includes the duty of candor and the duty to avoid asserting meritless arguments. In its proper application, the *Strickland* standard means that attorneys are – and they must remain – professionals operating within a sphere of reasoned and independent judgments and not merely conscripted errand-runners and task-hands for litigants who might otherwise demand fealty and submission to meritless positions.

For the same reasons, the Defendant's allegation that his counsel was ineffective for filing a brief containing references to equitable cases without informing the Defendant or providing him a copy of the same is without merit.

The Defendant complains that his counsel failed to object to County Attorney Gallagher reading parts of the Montana Supreme Court's decision that affirmed the Defendant's convictions. Counsel's failure to object to a brief recitation of the facts underlying the Defendant's convictions does not constitute ineffective assistance of counsel. It neither falls below an objective standard of reasonableness nor constitutes an error likely to affect the outcome of this proceeding that the County Attorney read a brief summary from the Supreme Court's recitation of facts gathered from the same record that is now before the Division. It is proper for the Division to consider the record available to the District Court at the time of

sentencing, including the presentence report. § 46-18-904(2), MCA. The presentence report was filed in the Division record prior to the hearing, and the presentence report sets out a statement of the facts underlying the Defendant's convictions in much greater detail than the facts described during the brief recital of facts by the County Attorney from the Supreme Court's opinion. The Defendant suffered no prejudice by the County Attorney's brief recital, considering that the record properly before the Division is replete with information describing the Defendant's criminal conduct. Counsel was not ineffective in choosing not to object to the County Attorney's brief recitation of facts.

The Defendant complains that his counsel was ineffective for failing to object to the Division's statement, plainly misapprehended by him, that the Division does not review maximum sentences imposed by a district court. No such statement was made. Further, the Division will not grant a request for a rehearing for supposed defects in the quality of the audio transmission heard by an applicant when it is not apparent during the hearing that the defendant is suffering such a difficulty and no timely objection is made. Both the Defendant and his counsel were able and permitted to make their arguments before the Division without interruption or time restriction, and the Division will render a decision on the merits in this matter in which the District Court imposed the maximum sentence. The Defendant's complaint on this issue is meritless.

The Defendant alleges that his counsel's failure to argue that his sentence exceeded the maximum allowed by statute constitutes ineffective assistance of counsel. The argument is meritless. As the analysis above establishes, the Division is not the appropriate forum for 'correcting' allegedly unlawful sentences. The law which governs the Division's work presumes that a sentence imposed by a district court is correct. § 46-18-904(3), MCA. Further, the Division

is charged under its own Rule 12 with decreasing only those sentences which are clearly excessive and increasing only those sentences which are clearly inadequate. Counsel was not ineffective for choosing to make an argument which adhered to these standards rather than advancing a weaker (and meritless) argument preferred by the Defendant that his sentence must be 'corrected' because it is unlawful.

The Defendant complains of his counsel's failure to object to the Division's announcement at the outset of the hearing that it would not consider matters pertaining to the Defendant's underlying convictions and would consider only such issues pertaining to the Defendant's sentence. The Defendant's allegation of error – however strong his foundational belief in the matter – cannot overcome the law. 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). Counsel's failure to make a meritless objection on the Defendant's behalf does not constitute ineffective assistance of counsel.

Further, counsel's alleged failure to mention the victim's "apologetic and loving message left on [the Defendant's] home phone months after the night in question" neither falls below an objective standard of reasonableness nor constitutes an error likely to affect the outcome of the Defendant's application. Considering the broad record before the District Court at sentencing, it was not unreasonable for counsel to choose to focus on other aspects of the record rather than this isolated fact. Further, omitting mention of the phone message at the hearing, if it could be considered an objective or material failing on counsel's part, is not the sort of omission likely to affect the outcome of the Defendant's application.

The Defendant also complains that his counsel failed to argue the County Attorney's "commitment to seek a conviction and sentence of punishment for misdemeanor partner or

family member assault when [the Defendant] was forced to enter a plea without constitutionally invoked counsel's assistance as [he] was deprived of this Fundamental Right". The Defendant's sentence includes the imposition by the District Court of three, concurrent life terms without the possibility of parole for two counts of Sexual Intercourse Without Consent and one count of Aggravated Kidnapping. The presentence report includes this recount of the evidence from trial:

> After choking [the victim], the Defendant took her to his bedroom where he handcuffed her with a pair of silver colored handcuffs that were lined with white fur. He then used a plastic "anal rod" to forcefully and repeatedly penetrate her anus as the Defendant forced her to kneel on the floor in the corner of the bedroom. The anal rod tore a significant laceration near [the victim's] rectum that bled heavily. As the Defendant penetrated [the victim's] anus with the anal rod, she defecated. [The victim] begged the Defendant to stop, but he did not. The repeated insertion of the anal rod into or near [the victim's] rectum was so violent that there were at least three trails of blood spatter on the Defendant's bedroom wall, and onto the ceiling caused by the cast off blood. There appeared to be feces in the bedroom carpet and on the anal rod. When the Defendant finished raping [the victim] with the anal rod, he told her she was disgusting and that she needed to clean up the mess, and that if she didn't, he would make her clean it with her mouth. He brought her cleaning solution, and she used it and towels to clean up the blood and feces. [The victim] testified the Defendant forced her to eat her feces[.]

In light of the factual record underlying the Defendant's convictions before both the District Court and the Division in this matter, it was not objectively unreasonable for counsel to decline to emphasize or focus on an argument that the Defendant entered an uncounseled guilty plea to a charge of partner/family member assault in some other matter. Neither is counsel's failure to advance such an argument such an egregious failing that the omission of this information would be likely to affect the outcome of the Division's consideration of the Defendant's application.

Defendant alleges that his counsel advanced arguments that were in conflict with the arguments the Defendant chose to make on his own behalf at the hearing. He contends that his counsel's arguments "actually undermined [his] whole reason and purpose going before the Division, rendering [his] Sentence Review Proceedings Fundamentally unfair". The Defendant

has not shown in his motion that any of the arguments he wished to be the focus of his presentation before the Division either had any merit or, in any event, were stronger arguments than his counsel actually presented on his behalf. The Defendant cannot show that he was prejudiced by his counsel's decision to advance arguments which were stronger than the arguments the Defendant would have preferred his counsel make.

Finally, the Defendant complains of his counsel's failure to present at the hearing the testimony of two witnesses "who wholly believed that they were going to testify at [the Defendant's] trial and at [his] sentencing" in the District Court and counsel's failure to present the same witnesses' letters of support for the Defendant to the Division. Nothing in this aspect of the Defendant's complaint indicates that the witnesses actually testified at his trial or that their letters or statements were offered to the District Court for sentencing purposes. The Division's Rule 11 provides: "The Division shall consider only information which was available to the sentencing Judge at the time of sentencing." Counsel's decision not to call witnesses at the hearing or to offer their letters of support does not fall below an objective standard of reasonableness when the Defendant's own motion fails to demonstrate that the witnesses actually testified at the trial or offered their letters or statements of support to the Defendant at sentencing.

CONCLUSION

For the reasons discussed above, the Defendant's "Motion for Rehearing and/or Reconsideration" is DENIED.

DATED this 24th day of August, 2020.

//

SENTENCE REVIEW DIVISION

Hon. Dan Wilson, Chairperson

Hon. Luke Berger, Member

Hon. Jessica Fehr, Member

Copies mailed or emailed this 24th day of August, 2020, to:

Clerk of District Court – *via email*
Duane Ronald Belanus #3003449, Defendant
Hon. Michael McMahon – *via email*
David Maldonado, Defense Counsel – *via email*
State Office of the Public Defender – *via email*
Leo Gallagher, Esq. – *via email*

Shelly Smith, Office Administrator
Sentence Review Division

Additional material from this filing is available in the Clerk's Office.