

**APPENDIX**

Judgment.....App. A

Oral Ruling Denying Defendant’s Motion to Compel.....App. B

Order Denying Motion for New Trial .....App. C

APPENDIX A



IT IS FURTHER ORDERED that for COUNT III: INCEST (FELONY) the Defendant is committed to the Montana State Prison under § 46-18-201, MCA, for ONE HUNDRED (100) YEARS with a TWENTY-FIVE (25) YEAR PAROLE RESTRICTION, to run concurrently with Counts I and II.

IT IS FURTHER ORDERED that for COUNT IV: SOLICITATION OF INCEST (FELONY) the Defendant is committed to the Montana State Prison under § 46-18-201, MCA, for ONE HUNDRED (100) YEARS with a TWENTY-FIVE (25) YEAR PAROLE RESTRICTION, to run concurrently with Counts I, II and III.

IT IS FURTHER ORDERED that Defendant will receive credit for time spent in pre-trial incarceration as follows: September 8, 2015 through September 18, 2015, February 26, 2016 through March 21, 2016 and October 19, 2016 through October 24, 2016.

The Court found that an exception to the mandatory minimum under § 46-18-222(6) does **not** apply.

The Defendant's request for bail pending appeal to the Montana Supreme Court is DENIED.

IT IS FURTHER ORDERED that Defendant is designated as a Level 2 Sexual Offender under § 46-23-509(3)(b), MCA.

IT IS FURTHER RECOMMENDED that for any period of community supervision, the following conditions will apply:

1. The Defendant shall be placed under the supervision of the Department of Corrections, subject to all rules and regulations of Adult Probation & Parole.
2. The Defendant must obtain prior written approval from his/her supervising officer before taking up residence in any location. The Defendant shall not change his/her place of residence without first obtaining written permission from his/her supervising officer or the officer's designee. The Defendant must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The Defendant will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.
3. The Defendant must obtain permission from his/her supervising officer or the officer's designee before leaving his/her assigned district.
4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his/her supervising officer, the Defendant must inform his/her employer and any other person or entity, as determined by the supervising officer, of his/her status on probation, parole, or other community supervision.

5. Unless otherwise directed, the Defendant must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The Defendant must personally contact his/her supervising officer or designee when directed by the officer.
6. The Defendant is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.
7. The Defendant must obtain permission from his/her supervising officer before engaging in a business, purchasing real property, purchasing an automobile, or incurring a debt.
8. Upon reasonable suspicion that the Defendant has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, residence of the Defendant, and the Defendant must submit to such search. A probation and parole officer may authorize a law enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the Defendant has violated the conditions of supervision.
9. The Defendant must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen. The Defendant is required, within 72 hours, to report any arrest or contact with law enforcement to his/her supervising officer or designee. The Defendant must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.
10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The Defendant is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.
11. The Defendant is prohibited from gambling.
12. The Defendant shall pay all fines, fees, and restitution ordered by the sentencing court.
13. The Defendant shall pay the following fees and/or charges:
  - a. The Probation & Parole Officer shall determine the amount of supervision fees (§46-23-1031, MCA) to be paid each month in the form of money order or cashier's check to the Department of Corrections Collection Unit, P.O. Box 201350, Helena, MT 59620 (\$50 per month if the Defendant is sentenced under §45-9-202, MCA, dangerous drug felony offense and placed on ISP). The DOC shall take a portion of the Defendant's inmate account if the Defendant is incarcerated.
  - b. Surcharge of the greater of \$20 or 10% of the fine for each felony offense. [§46-18-236(1)(b), MCA]

- c. Surcharge for victim and witness advocate programs of \$50 for each misdemeanor or felony charge under Title 45, Crimes; §61-8-401 (DUI); §61-8-406 (DUI-alcohol); or §61-8-411 (DUI-delta-9-tetrahydrocannabinol). [§46-18-236(1)(c), MCA]
  - d. \$10.00 per count for court information technology fee. (§3-1-317, MCA)
  - e. Costs of assigned counsel, paid to clerk of court: (§46-8-113, MCA)
    - i. offender shall pay costs incurred by the Office of Public Defender for providing counsel in the criminal trial. Costs incurred: \$ TBD.
  - f. A \$50 fee at the time a PSI report is completed, unless the court determines the Defendant is not able to pay the fee within a reasonable time (§46-18-111, MCA). The Defendant shall submit this payment to the Department of Corrections Collection Unit, P.O. Box 201350, Helena, MT 59620. The Defendant **did not** pay the PSI fee.
  - g. The Defendant shall pay costs of legal fees and expenses defined in §25-10-201, MCA, plus costs of jury service, prosecution, and pretrial, probation, or community service supervision or \$100 per felony case or \$50 per misdemeanor case, whichever is greater. (§46-18-232, MCA)
14. If the Defendant is convicted of a crime listed in §46-23-502(9), MCA, he/she shall register as a sex offender. [§46-18-201(7), MCA]
15. The Defendant, required to register as a sexual or violent offender under §46-23-504, MCA, shall submit to DNA testing. (§44-6-103, MCA)
16. The Defendant shall be given credit against the time served in jail prior to or after conviction. (§46-18-403, MCA)
17. The Defendant shall be given credit against the fine for time served in jail prior to conviction. (§46-18-403, MCA)
18. The Defendant will surrender to the court any registry identification card issued under the Medical Marijuana Act. [§46-18-202(1)(f), MCA]
19. The Defendant shall successfully complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program.
20. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.
21. The Defendant shall not enter any bars.
22. The Defendant shall not enter any casinos.

23. The Defendant shall not knowingly associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation & Parole Officer. The Defendant shall not associate with persons as ordered by the court or BOPP.
24. The Defendant shall not knowingly have any contact, oral, written, electronic or through a third party, with the victim(s) unless such contact is voluntarily initiated by the victim(s) through the Department of Corrections. DOC staff may notify victims about the availability of opportunities for facilitated contact with their offenders without being considered "third parties."
25. The Defendant shall attend self-help meetings at the direction of the Probation & Parole Officer.
26. The Defendant shall advise all medical personnel of addiction history/conviction, including all prescribed narcotics and/or medical marijuana.
27. The Defendant shall inform the Probation & Parole Officer of all prescriptions obtained from medical personnel prior to filling them. The Defendant shall take all prescription medications as prescribed and in the manner in which they were prescribed.
28. The Defendant may not be a registered card holder and may not obtain or possess a registry identification card under the Montana Medical Marijuana Act while in the custody or under the supervision of the Department of Corrections or a youth court. [§50-46-307(4), MCA]
29. The Defendant shall comply with all sanctions given as a result of an intervention, on-site (preliminary), or disciplinary hearing.
30. The Defendant shall enter and complete a parenting class to provide him/her with the proper tools to become a more appropriate parent and role model.
31. The Defendant shall enter and successfully complete sexual offender treatment with a clinical provider who is a member in good standing with MSOTA or its equivalent, and who is approved by the Probation & Parole Officer. The Defendant shall pay for the costs of the treatment and abide by all treatment rules and recommendations of the provider.
32. The Defendant shall obtain a psychosexual evaluation by a clinical provider who is a member in good standing with MSOTA or its equivalent and who is approved by the Probation & Parole Officer. The Defendant shall pay the costs of the evaluation and follow all recommendations of said evaluation. **The evaluation completed by Mike Sullivan, LCSW, shall fulfill this condition.**
33. The Defendant shall not knowingly have contact, oral, written, electronic or through a third party, with the victim(s) or the immediate family unless such contact is voluntarily initiated by

the victim(s) through the Department of Corrections. DOC staff may notify victims about the availability of opportunities for facilitated contact with their offenders without being considered "third parties."

34. The Defendant shall not have contact with any individual under the age of 18 unless accompanied by an appropriately trained, responsible adult who is aware of the Defendant's sexual conviction and is approved by the Probation & Parole Officer and sexual offender treatment provider. The Defendant shall sign a "No Contact" contract and abide by all conditions of the contract.
35. The Defendant shall not frequent places where children congregate unless accompanied by an appropriately trained, responsible adult who is aware of the Defendant's sexual conviction and is approved by the Probation & Parole Officer and sexual offender treatment provider. This includes, but is not limited to, schools, parks, playgrounds, malls, movies, fairs, parades, swimming pools, carnivals, arcades, parties, family functions, holiday festivities, or any other place or function where children are present or reasonably expected to be present. The Defendant shall obtain permission from the Officer prior to going to any of the above places.
36. The Defendant shall not access or have in his/her possession or under his/her control any material that describes or depicts human nudity, the exploitation of children, consensual sexual acts, non-consensual sexual acts, sexual acts involving force or violence, including but not limited to computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc., without prior written approval of the Probation & Parole Officer and therapist. The Defendant shall not frequent adult book stores, topless bars, massage parlors, or use the services of prostitutes.
37. The Defendant shall not view television shows or motion pictures geared toward his/her sexual offending cycle, or as a stimulus to arouse deviant thoughts or fantasies (i.e., shows based on sexualization of underage girls or boys, etc.).
38. The Defendant shall not have access to the internet without prior permission from the Probation & Parole Officer and sexual offender therapist, nor can the Defendant have on any computer he/she owns any software that is intended for data elimination, encryption or hiding data. If Internet access is allowed, the Defendant must allow the Department to install rating control software and conduct random searches of the hard drive for pornography or other inappropriate material.
39. The Defendant shall not possess or use any computer or other device with access to any on-line computer service including, but not limited to "Cloud" data storage, without the prior written approval of the Probation & Parole Officer. The Defendant shall allow the Probation & Parole Officer to make unannounced examinations of his/her computer, hardware, and software, which may include the retrieval and copying of all data from his/her computer and computing and data storage devices. The Defendant shall allow the Probation & Parole Officer to install software to restrict the Defendant's computer access or to monitor the Defendant's computer

access. The Defendant shall not possess encryption or steganography software. The Defendant shall not utilize software designed to eliminate traces of internet activity. The Defendant shall provide records of all passwords, internet service, and user identifications (both past and present) to the Probation & Parole Officer and immediately report changes. The defendant shall sign releases to allow the Probation & Parole Officer to access phone, wireless, internet, and utility records.

40. The court shall designate the Defendant as a **Level 2** sexual offender based on the psychosexual evaluation and other pertinent documentation. (§46-23-509, MCA)
41. The Defendant's chaperone/supervisor shall sign a statement of responsibility and be approved by both the Probation & Parole Officer and the treatment provider.
42. The Defendant shall not be involved in any type of employment, service or recreational pursuit which involves the supervision of children. Under no circumstances should the Defendant be in a position of power and authority over children.
43. The Defendant shall be subject to reasonable employment or occupational prohibitions and restrictions designed to protect the class or classes of persons containing the likely victims of further offenses. [§46-18-255(1), MCA]
44. The Defendant's residence, changes and any co-habitants must have prior approval of the Probation & Parole Officer. The Defendant shall not reside in a residence where there are any children under the age of 18 without the written approval of the therapist and the Officer.
45. The Defendant shall not access "900" number telephone sex lines and shall have a "900" number block on his/her telephone.
46. The Defendant shall not have a cell phone, or such other technology/device with photo, video, or Internet capabilities.
47. If cell phone use is allowed, all bills and records shall be made available to the Probation & Parole Officer.
48. The Defendant shall remain in Aftercare or Relapse Prevention Class for the entirety of his/her supervision unless released at the discretion of the Probation & Parole Officer and therapist.
49. The Defendant shall reenter treatment at any time if deemed appropriate by the Probation & Parole Officer and therapist.
50. The Defendant shall submit to annual polygraph testing.
51. The Defendant shall not date, live with, or otherwise be aligned with any person with children under the age of 18 without the express prior approval of the therapist and Probation & Parole

Officer. If this approval is granted, they shall both be involved with the Defendant's treatment to the extent recommended by the treatment provider.

52. The PSI report shall be released by the Department, per Court order, to certain persons, such as treatment providers, mental health providers, and/or medical providers, as needed for the Defendant's rehabilitation.

Sentence was imposed for the following reasons:

1. The Court heard all of the testimony and evidence presented at Trial.
2. The Court considered the contents and recommendation of the pre-sentence report and the psychosexual evaluation, along with any corrections/modifications made at the Sentencing Hearing.
3. The Court considered the testimony presented at the Sentencing Hearing, the State's Sentencing Memorandum, Defendant's Sentencing Memorandum, and letters submitted.
4. The Court considered Defendant's statement at the Sentencing Hearing.
5. The Court considered the following criteria for sentencing: the violent circumstances and facts of the offense involving Defendant's daughter and step-daughter; Defendant's age, employment, lack of criminal history, and difficult family history in addition to his obvious dishonesty with self and others; Defendant's risk to re-offend; the need to hold Defendant accountable; the amount of pre-trial incarceration; and the recommendations and arguments of counsel.
6. The Court, for the above-stated reasons, finds the interests of justice and the needs of the public truly require the level of security provided by imprisonment. The needs of Defendant are better served in the state prison as his continued denial makes him ineligible for treatment in the community and inappropriate for community placement. Defendant needs to be incarcerated for the safety of the community and the victims, whose lives Defendant changed irrevocably. Imprisonment of Defendant will not create an excessive hardship on Defendant or Defendant's family. This type of sentence/commitment provides numerous programs to assist Defendant should he choose to be treated and the authority to place offender in community-based programs upon eligibility.

The Bond, if any, is exonerated.

If the written Judgment differs from the sentence the Judge pronounced orally, then the State or Defendant has only One Hundred Twenty (120) days to contest the written Judgment as set forth in § 46-18-116, MCA. If no party contests the written judgment within One Hundred Twenty (120) days, the written Judgment is presumed correct.

DONE IN OPEN COURT on December 6, 2016,

SIGNED this 10<sup>th</sup> day of January 2017.

  
DISTRICT COURT JUDGE

cc: YCAO - Mary Leffers Barry/acm  
Billings Police Department (C&O 14-53715)  
PROBATION & PAROLE  
DEFENSE COUNSEL - Elizabeth L. Honaker

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served upon the parties or their counsel of record at their last-known address this 11 day of January, 2017.

By: Deanne Bushnell  
Judicial Assistant to the Honorable Michael G. Moses

## APPENDIX B

1           With respect to the mental health of C. S., I'm not  
2 sure how that's relevant under the circumstances of here, but  
3 I'm going to hold my decision on the mental health of C. S.,  
4 whether that comes in or doesn't come in concerning C. S.

5           I haven't seen anything and I -- there may need to be  
6 an offer of proof as to what would be used in terms of mental  
7 health cross-examination, I assume of C. S. And there may  
8 need to be an offer of proof for me to make a sound decision  
9 as to whether it's admissible or not.

10           With respect to the mental health of E. A. R., it's  
11 been suggested that there are three counselors;  
12 Mr. Larry Fritz, who provided family counseling prior to any  
13 of these charges; Ms. Wagner, I'm not sure of the time that  
14 she provided counseling, but there is no indication in any  
15 reports by either Mr. Fritz or Ms. Wagner that there was any  
16 allegations of sexual contact by this defendant as against  
17 anyone, but I'm not sure how that's relevant. Once again,  
18 that may require an offer of proof before the Court makes a  
19 determination on whether it is admissible.

20           As to Ms. Gruntz, who is a counselor for E. A. R., we  
21 have got a problem with Ms. Gruntz as well as Ms. Wagner and  
22 Mr. Fritz. You may be able to get around the privilege issue  
23 with respect to Mr. Fritz or Ms. Wagner, but I'm not sure how  
24 you get around the privilege issue with Ms. Gruntz.

25           There's an allegation that there has been disclosure

1 and, therefore, a waiver of the privilege; those disclosures,  
2 I assume, were a result of the DN matters, and all of the  
3 evidence including notes would have been provided in the  
4 discovery of the DN matters that ultimately got to the State  
5 of Montana for appropriate disclosure in the criminal matter,  
6 but those are disclosures that only can be made in a DN case.

7           There is no -- there is no privilege in a DN case for  
8 counselor notes and/or reports. There is, however, a  
9 privilege in criminal cases as to those, and that privilege  
10 has not been waived. So unless that privilege is waived the  
11 testimony of Ms. Gruntz is not allowed, and I know of no  
12 waiver.

13           So with respect to that Motion in Limine as it  
14 relates to Counselor Gruntz under the circumstances here I  
15 find that there has not been a waiver of the privilege, and  
16 privilege pursuant to Section 26-1-807 applies, and unless  
17 that privilege is waived, she may not testify.

18           Those are the issues in limine. Anything further  
19 before the Court before we start picking a jury?

20           MS. LEFFERS BARRY: Yes, Your Honor, just a few  
21 housekeeping things, and then one additional issue really.

22           Because this is -- there is a lot of witnesses and  
23 people will be referring to a lot of other witnesses, the  
24 State intends to use this family tree. I am going to pass it  
25 around the room -- I have more copies in there -- just during

## APPENDIX C

CLERK OF THE  
DISTRICT COURT  
KRISTIE LEE BOELTER

2016 OCT 28 PM 4 19

FILED  
BY *[Signature]*

DEPUTY

*(116)*

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY

<p>STATE OF MONTANA,  Plaintiff,  vs.  EDWARD LEVI KEYES,  Defendants.</p>	<p>Cause No.: DC 15-0887  Judge Michael G. Moses  <b>MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL</b></p>
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This matter comes before the Court on Defendant Edward Keyes's ("Keyes") Motion for New Trial pursuant to Montana Code Annotated ("M.C.A.") § 46-16-702 filed on August 1, 2016. Plaintiff, State of Montana ("the State"), filed a brief in

1 opposition to the motion on September 23, 2016. Keyes filed a reply brief on October 12,  
2 2016.

3 The Court has considered all the papers and briefs on file. The Court, being fully  
4 informed, makes the following decision:

5 **IT IS HEREBY ORDERED** that Defendant's Motion for New Trial is **DENIED**.

6 DATED this 28<sup>th</sup> day of October, 2016.

7   
8 \_\_\_\_\_  
DISTRICT JUDGE

9 **MEMORANDUM**

10 **I. BACKGROUND**

11 On July 1, 2016, a unanimous jury found Keyes guilty of three counts of Incest  
12 per M.C.A. § 45-5-507 and one count of Solicitation of Incest under M.C.A. § 45-4-101.  
13 On the second day of trial, June 28, 2016, E.A.R., one of the child victim-witnesses,  
14 testified for over an hour. E.A.R.'s foster mother ("F.M.") stood the entirety of the  
15 testimony, arms crossed, and leaned against the partial wall separating the gallery from  
16 the bar. Keyes's motion for new trial is based on F.M.'s courtroom conduct; Keyes avers  
17 that E.A.R. watched F.M. intently while giving her testimony, and that "it was  
18 inherently prejudicial for a child witness on the witness stand to be visibly influenced  
19 by her supporter in the spectator section." Def.'s Reply to State's Response 3:16-18 (Oct.  
20 12, 2016). Keyes argues that as a result of F.M.'s alleged influence on E.A.R. he was

1 denied his right to a fair trial, and therefore the minimal standards of due process were  
2 violated.

### 3 II. LEGAL STANDARD

4 Section 46-16-702 M.C.A. provides in pertinent part that:

- 5 (1) Following a verdict of guilty, the court may grant the defendant a new  
6 trial if required in the interest of justice. A new trial may be ordered by  
7 the court without a motion or may be granted after motion and  
8 hearing.
- 9 (2) ...
- 10 (3) On hearing the motion for new trial, if justified by law and the weight  
11 of the evidence, the court may:
- 12 (a) deny the motion;
  - 13 (b) grant a new trial;
  - 14 (c) ...

15 The grant or denial of a motion for a new trial is within the discretion of the trial  
16 court. Absent a showing of manifest abuse of that discretion, a court's decision will be  
17 affirmed. *State v. Gambrel*, 246 Mont. 84, 803 P.2d 1071 (1990); *State v. Goettle*, 253 Mont.  
18 111, 831 P.2d 595 (1992); and *Jim's Excavating Serv. V. HKM Assocs.*, 265 Mont. 494, 878  
19 P.2d 248 (1994). The Montana Supreme Court has ruled that when a District Court has  
20 considered the matter, "whether on a question for mistrial or motion for new trial, [the  
Montana Supreme Court] will not lightly disturb that ruling." *State v. Wright*, 2002 MT  
275, 312 Mont. 352, 59 P.3d 432 (citing *Mason v. Ditzel*, 255 Mont. 364, 842 P.2d 707  
(1992)). To reverse a District Court's ruling on this matter, the Montana Supreme Court  
"must be shown by evidence that is clear, convincing, and practically free from doubt,  
of the error of the trial court's ruling." *Mason*, 255 Mont. at 376.

1 III. DISCUSSION

2 Keyes contends that his right to a fair trial was prejudiced by F.M.'s alleged  
3 interference with E.A.R.'s testimony. On the second day of trial, E.A.R. was called to the  
4 witness stand to testify against her step-father. She was so emotionally distraught she  
5 was unable to provide testimony. Observing this, the Court, *sua sponte*, suggested she  
6 take a break. Subsequent to the break, E.A.R. returned to the witness stand and  
7 provided focused and compelling testimony on the sexual abuse she suffered at the  
8 hands of her step-father. During this testimony, Keyes alleges, E.A.R. focused intently  
9 on F.M., as if she was being directly influenced by F.M. standing in the gallery. Keyes's  
10 interpretation of the events is wholly inconsistent with the Court's own personal  
11 observations, as well as the video recording of the testimony.

12 The Court obtained, and forwarded to both parties, video feed of the courtroom  
13 camera. The camera, which points directly at the gallery, provides the clearest evidence  
14 of what unfolded during E.A.R.'s June 28, 2016, testimony. The video recording, while  
15 not considered high-resolution, plainly shows nothing out of the ordinary. F.M. does  
16 indeed stand the entirety of E.A.R.'s testimony; however, there is nothing overtly  
17 demonstrative about her. F.M. stands quite stoically, only occasionally readjusting her  
18 stance. One of the biggest movements F.M. makes is when she puts her chin in her left  
19 hand, but this is during cross-examination of E.A.R. in which defense counsel is  
20 standing at the witness box. Surely the defense attorney would have been well aware of

1 the subject of E.A.R.'s focus. Keyes argued during the motion hearing that F.M. made  
2 many movements, head-moves, smiles, and grimaces. The video shows otherwise. F.M.  
3 smiled at a point when both prosecution and defense laughed about something. F.M.'s  
4 movements were, when compared to the movements and emoting of the courtroom as a  
5 whole, quite unremarkable.

6 Keyes fails to show any adequate evidence that F.M.'s courtroom behavior was  
7 sufficiently serious to cause a "manifest miscarriage of justice." *State v. Griffin*, 2016 MT  
8 231, 385 Mont. 1, 4. *Griffin* applies with special force here because the similarity of the  
9 charges to those in the case at bar. The Montana Supreme Court very clearly declined a  
10 plain error review of the district court judge's response to a spectator's outburst. *Griffin*  
11 argued that his presumption of innocence was eroded when a spectator implicated  
12 "him as sinner who should confess" because the spectator stated, "Well I'd like to say  
13 that God is faithful and just to those who confess their sins." *Griffin*, 385 Mont. at 2. The  
14 Montana Supreme Court described the spectator's outburst as brief and isolated, and  
15 categorized it as being more of an "expression of the spectator's personal beliefs."  
16 *Griffin*, 385 Mont. at 3. Even where a onlooker spoke out loud during the defense's  
17 closing argument the Supreme Court found that the district court judge's response to  
18 the conduct was appropriate.

19 Keyes relies on a Ninth Circuit habeas case in which appellant-prisoner was  
20 convicted in state trial court of aggravated kidnapping and sexual intercourse without

1 consent. *Norris v. Risely*, 878 F.2d 1178 (9th Cir. 1989). The *Norris* defendant contended  
2 that the conduct of the courtroom spectators deprived him of his right to a fair trial. The  
3 trial court denied his petition without a hearing. Subsequently, the Ninth Circuit  
4 reversed and remanded the case back to the district court to hold an evidentiary  
5 hearing. The instant case is easily distinguishable from *Norris*: the spectators in that case  
6 numbered twenty or more and were wearing large buttons on their clothing, perfectly  
7 visible to the jury, which read *Women Against Rape*. The Ninth Circuit spoke to how  
8 easily a juror's mind could be "impregnated by the environing atmosphere," and that a  
9 determination based on "reason, principle, and common human experience" needed to  
10 be made about whether the circumstances were inherently prejudicial. *Norris*, 878 F.2d  
11 at 1182. *Norris* featured twenty-to-twenty-five women wearing large buttons visible to a  
12 jury; the case was a matter of spectator-influence on a jury. Keyes relies on *Norris* in his  
13 Reply to State's Response to Defendant's Motion for New Trial, but *Norris* and the case  
14 at bar are hardly analogous. Here, unlike in *Norris*, we have one woman standing  
15 during the testimony of a witness. Keyes does not make an argument that the jury in his  
16 case was influenced by F.M.'s conduct; he claims that E.A.R. was able to testify to what  
17 she did after being previously "unwilling" because she had support in the gallery. The  
18 Court disagrees that there is anything inherently prejudicial about a child victim-  
19 witness having courtroom support so long as the support behaves in an innocuous  
20 manner, which is precisely how F.M.'s conduct can be characterized.

1 This Court instructed the jury and emphasized Keyes's presumption of  
2 innocence throughout the proceedings, including the fact that he was not required to  
3 prove his innocence or present any evidence. The jury was given explicit instructions  
4 that they were forbidden from being governed by "passion, prejudice, public opinion,  
5 or public feeling." MCJI 1-102 (2010). Under the circumstances of this case, and in  
6 accordance with existing precedent, absent a showing that F.M. coached the witness or  
7 influenced her testimony, there appears to be nothing "so inherently prejudicial as to  
8 pose an unacceptable threat to the defendant's right to a fair trial." *Norris*, 878 F.2d at  
9 1180. F.M.'s conduct in the courtroom was nowhere near "sufficiently serious that it  
10 caused a manifest miscarriage of justice, left unsettled fundamental fairness of the trial,  
11 or compromised the integrity of the judicial system." *Griffin*, 385 Mont. at 4.

#### 12 IV. CONCLUSION

13 Keyes's only witness at the evidentiary hearing on his motion for new trial, a  
14 member of the defense team (Ms. Strand) who sat in the well the entire trial, testified to  
15 her personal interpretations and observations about E.A.R and F.M.; her testimony, in  
16 addition to being contradictory, was 180 degrees opposite to the finding of the jury,  
17 who unanimously convicted Keyes of three counts of incest and one count of  
18 solicitation of incest. The jury not only found E.A.R's testimony compelling, but  
19 credible, a determination this Court does not take lightly. Completely lacking in Keyes's  
20 motion is any evidence that there was any outside influence on E.A.R.'s testimony. The

1 Court personally observed a witness who was engaged with the attorneys, responsive  
2 to their questions, and was unmistakably free from any outside influences. For the  
3 foregoing reasons, Defendant's Motion for New Trial is hereby denied.

4 DATED this 28<sup>th</sup> day of October, 2016.

5  
6   
7 DISTRICT JUDGE


8 cc:

9 Elizabeth J. Honaker  
10 HONAKER LAW FIRM  
11 208 N. 29th St., Ste. 206  
12 P.O. Box 2236  
13 Billings, MT 59103

14 Mary Leffers Barry, Deputy County Attorney  
15 Morgan Shaw, Deputy County Attorney  
16 Yellowstone County Attorney's Office

17  
18  
19  
20  
CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail/hand upon the parties or their attorneys of record at their last known addresses this 28 day of October, 2016.

BY   
Judicial Assistant to Hon. Michael G. Moses