

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0497

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD JAMES SORIA,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Gregory R. Todd, Presiding

COUNSEL FOR APPELLANT

PETE WOOD
1604 N. 30th St.
Boise, ID 83703
petewood_333@hotmail.com

COUNSEL FOR APPELLEE

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K. PLUBELL
Bureau Chief
215 N. Sanders Street
P.O. Box 201401
Helena, MT 59601

SCOTT TWITO
Yellowstone County Attorney
JACOB YERGER
Deputy County Attorney
217 North 27th St., 7th Floor
Billings, MT 59101

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE & FACTS 2

STANDARDS OF REVIEW 10

SUMMARY OF THE ARGUMENT 12

ARGUMENT 14

I. The District Court violated Soria’s procedural due process rights by relying on material misinformation at sentencing 15

 A. Because Soria rebutted B.H.’s unsupported allegations pursuant to the holdings in *Mason, Walker, et al.*, the Court violated his procedural due process rights by adopting them 17

 1. Soria rebutted B.H.’s unsupported strangulation allegation 17

 2. Soria rebutted B.H.’s unsupported allegation that he injured her vagina 19

 3. Soria rebutted B.H.’s unsupported revenge porn allegation 21

 4. Soria rebutted B.H.’s unsupported allegation that he busted through her sliding glass door 22

 B. In the alternative, should the Court find that Soria failed to sufficiently rebut B.H.’s unsupported allegations pursuant to *Mason, Walker, et al.*, then Soria asserts this line of precedent violated his procedural due process rights for a litany of reasons 23

1.	The State failed to meet its initial evidentiary burden by a preponderance of evidence	23
2.	Requiring rebuttal evidence undermined Soria’s presumption of innocence and constituted impermissible burden shifting	25
3.	Requiring rebuttal evidence improperly subverted Soria’s right to remain silent	26
4.	Saddling Soria with the burden of proving the negative was fundamentally unfair	27
5.	Requiring Soria to rebut allegations not included in the PSI amounted to sentence by ambush	28
6.	Lastly, if necessary, this Court should distinguish, modify, or outright overrule the overly broad and wrongfully decided precedent in <i>Mason, Walker, et. al.</i>	30
II.	In the alternative, as applied in his case, Montana’s statutory charging and sentencing scheme violated Soria’s substantive due process rights	32
A.	Montana’s statutory charging and sentencing scheme as applied in Soria’s case	33
B.	Because Montana’s statutory charging and sentencing scheme interfered with Soria’s fundamental right to liberty, strict scrutiny applies	36
C.	As applied in Soria’s case, Montana’s statutory charging and sentencing scheme cannot survive strict scrutiny	38
III.	The State breached its plea agreement	39

IV.	Should this Court determine that Soria’s counsel had grounds to object to the District Court’s considering B.H.’s unsupported allegations at sentencing, then Soria’s counsel was ineffective for not doing so	42
V.	The Court erred in designating Soria a Level III Offender	44
	A. As a matter of law the Court’s Level III designation was erroneous	45
	B. In the alternative, the Court’s Level III designation was an abuse of discretion	48
VI.	The Court erred in awarding B.H.’s unsworn restitution request	49
	CONCLUSION	50
	CERTIFICATE OF COMPLIANCE	51
	APPENDIX	52

TABLE OF AUTHORITIES

Cases

<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	48
<i>Bauer v. State</i> , 1999 MT 185, 295 Mont. 306, 983 P.2d 955	16
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	27
<i>Clark Fork Coalition v. Mont. Dep't of Natural Res. & Conservation</i> , 2021 MT 44, 403 Mont. 225, 481 P.3d 198	38
<i>Driscoll v. Stapleton</i> , 2020 MT 247, 401 Mont. 405, 473 P.3d 386	36
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992)	15
<i>Gryczan v. State</i> , 283 Mont. 433, 942 P.2d 112 (1997)	38
<i>Hiebert v. Cascade County</i> , 2002 MT 233, 311 Mont. 471, 56 P.3d 848	10, 34
<i>In re A.F.-C.</i> , 2001 MT 283, 307 Mont. 358, 37 P.3d 724	16
<i>In re Best</i> , 2010 MT 59, 355 Mont. 365, 229 P.3d 1201	28
<i>In re Seizure of 1988 Chevrolet Van</i> , 251 Mont. 180, 823 P.2d 858 (1991)	26
<i>In re Winship</i> , 397 U.S. 358 (1970)	25, 26

<i>Jones v. United States</i> , 135 S. Ct. 8 (2014)	31
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012)	13
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999)	27
<i>Mont. State University-Northern v. Bachmeier</i> , 2021 MT 26, 403 Mont. 136, 480 P.3d 233	16
<i>Nelson v. Colorado</i> , 137 S. Ct. 1249 (2017)	25
<i>People v. Beck</i> , 504 Mich. 605 (2019)	16, 32
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020)	30
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	36, 37
<i>Smith v. United States</i> , 568 U.S. 106 (2013)	28
<i>State v. Aragon</i> , 2014 MT 89, 374 Mont. 391, 321 P.3d 841	25
<i>State v. Baldwin</i> , 192 Mont. 521, 629 P.2d 222 (1981)	16
<i>State v. Bar Jonah</i> , 2004 MT 344, 324 Mont. 278, 102 P.3d 1229	42, 43, 44

<i>State v. Chafee</i> , 2014 MT 226, 376 Mont. 267, 332 P.3d 240	11, 42
<i>State v. Chaussee</i> , 2011 MT 203, 361 Mont. 433, 259 P.3d	24, 26
<i>State v. Cote</i> , 530 A.2d 775 (N.H. 1987)	16, 32
<i>State v. Dodge</i> , 2017 MT 318, 390 Mont. 69, 408 P.3d 510	11, 49
<i>State v. Dunn</i> , 155 Mont. 319, 472 P.2d 288 (1970)	34
<i>State v. Ellerbee</i> , 2019 MT 37, 394 Mont. 289, 434 P.3d. 910	32
<i>States v. Felix</i> , 561 F.3d 1036 (9th Cir. 2009)	16
<i>State v. Fuller</i> , 276 Mont. 155, 915 P.2d 809 (1996)	10
<i>State v. Gable</i> , 2015 MT 200, 380 Mont. 101, 354 P.3d 566	11
<i>State v. Herd</i> , 2004 MT 85, 320 Mont. 490, 87 P.3d 1017	10
<i>State v. Keefe</i> , 2021 MT 8, 403 Mont. 1, 478 P.3d 830	10
<i>State v. Knapp</i> , 174 Mont. 373, 570 P.2d 1138 (1977)	16
<i>State v. Higley</i> , 90 Mont. 412, 621 P.2d 1043	36

<i>State v. Hill,</i> 2009 MT 134, 350 Mont. 296, 207 P.3d 307	11, 35, 39
<i>State v. Hocevar,</i> 2000 MT 157, 300 Mont. 167, 7 P.3d 329	15, 16, 23
<i>State v. Hunt,</i> 2009 MT 265, 352 Mont. 70, 214 P.3d 1234	33
<i>State v. Kelly,</i> 876 P.2d 641, 265 Mont. 298 (1994)	27
<i>State v. Lewis,</i> 2012 MT 157, 365 Mont. 431, 282 P.3d 679	10, 11
<i>State v. Mackie,</i> 191 Mont. 138, 622 P.2d 673 (1980)	25
<i>State v. Mason,</i> 2003 MT 371, 319 Mont. 117, 82 P.3d 903.....	<i>passim</i>
<i>State v. McDowell,</i> 2011 MT 75, 360 Mont. 83, 253 P.3d 812	40
<i>State v. Rardon,</i> 2002 MT 345, 313 Mont. 321, 61 P.3d 132	40
<i>State v. Samples,</i> 2008 MT 416, 347 Mont. 292, 98 P.3d 803	44, 45
<i>State v. Shreves,</i> 2002 MT 333, 313 Mont. 252, 60 P.3d 991	26, 27
<i>State v. Van Haele,</i> 207 Mont. 162, 675 P.2d 79 (1983)	17

<i>State v. Walker</i> , 2007 MT 205, 338 Mont. 529, 167 P.3d 879	<i>passim</i>
<i>State v. Winter</i> , 2014 MT 235, 376 Mont. 284, 333 P.3d 222	16
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	42
<i>United States v. Bell</i> , 808 F.3d 926 (D.C. Cir. 2015)	31
<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019)	33
<i>United States v. Sabillon-Umana</i> , 772 F.3d 1328 (10 th Cir. 2014)	31
<i>United States v. Watts</i> , 519 U.S. 148, 156 (1997)	15, 23
<i>Wadsworth v. State</i> , 911 P.2d 1165, 275 Mont. 287 (1996)	10

Montana Code

§ 1-3-219, MCA	37
§ 26-1-602, MCA	26
§ 26-10-101, MCA	25, 33, 43, 44
§ 26-10-611, MCA	33, 36
§ 45-5-206, MCA	4
§ 45-5-503, MCA	4, 41

§ 45-5-508, MCA	41
§ 45-6-204, MCA	4
§ 46-10-105, MCA	33
§ 46-11-101, MCA	33, 34
§ 46-11-201, MCA	33
§ 46-18-101, MCA	33, 36
§ 46-18-102, MCA	17
§ 46-18-111, MCA	33, 35, 43
§ 46-18-112, MCA	33, 34
§ 46-18-115, MCA	17, 33, 35
§ 46-18-242, MCA	49
§ 46-18-903, MCA	10
§ 46-23-502, MCA	45, 46, 47
§ 46-23-509, MCA	45

Montana Constitution

Mont. Const. Art. II, § 17	15, 36
Mont. Const. Art. II, § 24	42
Mont. Const. Art. II, § 25	26

United States Constitution

U.S. Const. Amend. V 26

U.S. Const. Amend. VI 42

U.S. Const. Amend. XIV 15, 36, 42

Other Authorities

Tile Mate Website,
<https://www.thetileapp.com/en-us/store/tiles/mate> 30

Uniform District Court Rule 2 48

STATEMENT OF THE ISSUES

1. Whether the District Court violated Mr. Soria's procedural due process rights by relying on material misinformation at sentencing?
2. Whether, as applied, Montana's statutory charging and sentencing statutes violated Mr. Soria's substantive due process rights?
3. Whether the State breached the plea agreement?
4. Whether Mr. Soria received ineffective assistance of counsel?
5. Whether the Court erred in designating Mr. Soria a Level III Sex Offender?
6. Whether the Court erred in awarding restitution to the victim?

STATEMENT OF THE CASE & FACTS

After getting into a car accident in the early morning hours of July 20, 2018, Mr. Soria unlawfully entered the home of B.H. in Billings, Montana. (D.C. Doc. 70, 4-5.) Soria and B.H. had previously been in a long-term relationship and had two children together. (7/1/21 Tr., 10-11.) The parties do not dispute that, after unlawfully entering B.H.'s home, Soria digitally penetrated B.H. without her consent, hit her, and caused B.H. reasonable apprehension of bodily harm. (3/2/2020 Tr., 9-11; & D.C. Doc. 59, ¶ 32.) After the incident, B.H. was transported to the Billings Clinic where she was examined by an ER doctor, SANE nurse, and interviewed by several law enforcement officers including Detective Denise Baum. (7/1/20 Tr., 9-11; & D.C. Doc. 1, 8-9.) Soria was arrested on July 29 and his bail was set at \$500,000. (D.C. Docs. 2 & 85 (attached as App. A) at 2.)

Soria's arraignment was held on August 16, 2018. (D.C. Doc. 3.) During Soria's 4-minute arraignment the prosecutor motioned the Court for leave to file an Information, charging Soria with the following nine counts: Aggravated SIWOC; Attempted SIWOC; Aggravated Burglary; Burglary, Strangulation; Criminal Destruction of a

Communication Device; and three counts of violating a No Contact Order. (D.C. Docs. 1 & 3.) The motion was supported by an affidavit sworn by the prosecutor himself, the bulk of which was comprised of hearsay statements from B.H. to the officers. (D.C. Doc. 1, 8-10.) Based solely on the prosecutor's affidavit, the Court granted the State's motion for leave to file all nine counts. (D.C. Docs. 1, 3, & 4.) Soria remained incarcerated for the next 18 months or so as trial dates came and went for various reasons. (See D.C. Docs. 15-39.)

Finally, it appeared a firm trial date of March 16, 2020, was in place. (D.C. Doc. 39.) A few weeks before the trial was set to begin the State filed various motions in limine. (D.C. Doc. 54.) One of the State's limine motions sought an Order precluding Soria from eliciting testimony concerning B.H.'s significant history with the system, including a recent disorderly conduct conviction for yelling racial epithets at bar patrons and damaging property. (D.C. Doc. 54, 1-6.) The State also sought an Order limiting the testimony of Dr. Felice Gersh, a Board-Certified Gynecologist and former OB / GYN professor at the USC School of Medicine, who had prepared an Expert Report for the defense debunking B.H.'s most serious allegations. (D.C. Doc. 54, 6-

8; & Ex. D to D.C. Doc. 67.)

The March 16 trial never happened, however, because on March 2 the parties reached an agreement and Soria pled guilty to the following three charges: An amended charge of SIWOC (§ 45-5-503); Aggravated Burglary (§ 45-6-204(2)); and PFMA 2nd Offense (§ 45-5-206(1)(c))—all other charges were dismissed. (3/2/2020 Tr., 9-11; see also D.C. Docs. 59 & 63.) The only charge Soria pled to from the original Information was Aggravated Burglary. (D.C. Docs., 4 at 1, 63 at 1-2, & 59, at ¶ 32; see also 3/2/2020 Tr., 5-11.) As a factual basis for his three guilty pleas, Soria admitted that on the night of July 20, 2018, he unlawfully entered B.H.'s home, digitally penetrated her with his fingers without her consent, hit her, and caused her reasonable apprehension of bodily injury. (3/2/2020 Tr., 9-11.) The Court accepted Soria's guilty pleas on those facts, and the State offered no objection. (3/2/2020 Tr., 9-11; & D.C. Doc. 59, ¶ 32.)

On April 15, 2020, Soria filed a sentencing memorandum which included various exhibits including Dr. Gersh's Expert Report, as well as Psychosexual Evaluation prepared by Lisa Hjelmstad ("1st PSE"). (Ex. C & D to D.C. Doc. 67.) In compiling Soria's 1st PSE, Ms.

Hjelmstad diagnosed him with borderline psychopathy (30 on Hare Test) and recommended a Level II Sex Offender designation. (Ex. C. to D.C. Doc. 67, at 33 & 47.)

A presentence investigation (“PSI”) was compiled by Probation Officer Heather Edwards, who likewise recommended a Level II designation based on Soria’s 1st PSE. (D.C. Doc. 70, 8-9.) The portion of the PSI entitled “circumstances of the offense” consisted almost entirely of a verbatim “copy and pasting” of the affidavit the prosecutor filed to support the State’s motion for leave to file the original Information. (*Compare* D.C. Doc. 1, 8-19; *with* D.C. Doc. 70, 3-5.) The PSI did not include Dr. Gersh’s findings that the medical evidence contradicted B.H.’s version of the event. (*Compare* D.C. Doc. 70; *with* Ex. D to D.C. Doc. 67.)

On May 1, the State filed a motion to have a different sociologist, Michael Sullivan, conduct a 2nd PSE—Soria objected. (D.C. Doc. 71.) Despite Soria’s objection, just six days later (May 6) the Court granted the State’s motion for a 2nd PSE, which Mr. Sullivan conducted on May 15, 2020. (D.C. Doc. 72; & D.C. Doc. 79, 5.) Like Ms. Hjelmstad, Mr. Sullivan diagnosed Soria with borderline psychopathy (30 on Hare

Test); but unlike Ms. Hjelmstad, Mr. Sullivan recommended a Level III designation. (*Compare* D.C. Doc. 79, 14 & 20; *with* Ex. C. to D.C. Doc. 67, 33 & 47.)

Soria's sentencing was held on July 1, 2020. (7/1/20 Tr., 1.) The State called two witnesses: Detective Baum and Mr. Sullivan. (D.C. Doc. 75.) Detective Baum's testimony consisted primarily of her parroting the conversations she had had with B.H. back in July of 2018. (See 7/1/20 Tr., 8-47.) Mr. Sullivan testified primarily about his findings in compiling Soria's 2nd PSE. (See 7/1/20 Tr., 47-76.) The State's victim coordinator also read a brief unsworn statement submitted by B.H., who was not present at the sentencing hearing. (7/1/20 Tr., 76-79.) The State also submitted 10 photographs as exhibits: 6 photographs were of blood stains in the bedroom, then 1 photograph each of the bedroom's sliding glass door, bedding, a clump of hair, and a "Tile Mate" device.¹ (D.C. Docs. 75 & 76.)

The State did not call a single witness with personal knowledge regarding B.H.'s most significant accusations i.e. the aggravated rape

¹ It is unclear whether the bloodstains were from Mr. Soria (who was injured in a car accident before arriving at B.H.'s residence), or whether the bloodstains were from B.H., or both.

and strangulation allegations. For example, the State did not call B.H. herself, or the SANE Nurse, or the ER Doctor who examined B.H. after the incident. (D.C. Docs. 75 & 76.) Nor did the State provide any physical evidence supporting B.H.'s most serious allegations e.g. medical records or injury photographs. (D.C. Docs. 75 & 76.) Soria did not call any witnesses, although he did make a brief statement apologizing to B.H. and their children. (7/1/20 Tr., 90.)

The State argued Soria should receive a net 40-year sentence (none suspended). (7/1/20, Tr., 79-80.) In making its recommendation, the State urged the Court to “consider everything brought to light by the investigation and not simply the charges that the defendant ultimately pled guilty to...” (7/1/20, Tr., 82.) Soria argued for a 40-year sentence as well, but requested that 20 of those years be suspended. (7/1/20, Tr., 85.) The District Court followed the State’s recommendation and sentenced Soria to 40-years in the Montana State Prison—none suspended. (7/1/20, Tr., 92; & D.C. Doc. 85 (attached as App. A).)

In justifying its 40-year sentence, the Court specifically referenced Soria’s having committed the following acts of misconduct:

You busted down the door. You'd already been in there. You knew where she lived, and you'd been in and taken clothes. You grabbed her in the genital area, said she would never cum again. You couldn't get an erection. But there was digital penetration. You cut her hair. You choked her until she was unconscious. You put a tracking device in her car.

You're a bright man. That was emphasized several times by Mr. Sullivan. Bright enough to take her phone and electronic devices and send matters to her and send revenge porn to her employers and other people.

Your phone was found outside the glass door that evening or that early morning. When you went to Mr. Belcourt's, you had one of the children's bicycles.

Three days later, you sent this porn to her employers, and it was through her Facebook so the world could see it. You had a ledger that had her passwords and phone numbers...

It may be true that you didn't use a weapon. But you used your hands and you almost killed her. You strangled her until she passed out. Plus, her hair was cut... (7/1/21 Tr., 90-91.)

Of the purported misconduct the Court relied on in justifying Soria's 40-year sentence, only the digital penetration without consent and unlawful entry were acts Soria admitted to in his guilty pleas.

(Compare 3/2/21 Tr., 9-11; with 7/1/21 Tr., 90-92.)

The Court also designated Soria a Level III Sex Offender, specifically referencing Mr. Sullivan's determination that he was at the

low end of the psychopath range, which the Court opined was “a significant psychological finding.” (7/1/21 Tr., 90-92.) The Court did not mention Doctor Gersh’s Expert Report nor Soria’s 1st PSE, which recommended a Level II designation. (See 7/1/21 Tr., 90-92.) The Court also ordered Soria to pay *inter alia* \$608.14 in restitution to B.H. (D.C. Doc. 78.)

STANDARDS OF REVIEW

When an offender is eligible for sentence review pursuant to § 46-18-903, a sentence will be reviewed for legality only. *State v. Herd*, 2004 MT 85, ¶¶ 22-24, 320 Mont. 490, 87 P.3d 1017. Whether a district court violated a defendant's constitutional rights at sentencing is reviewed de novo. *State v. Keefe*, 2021 MT 8, ¶ 11, 403 Mont. 1, 478 P.3d 830. In considering a denial of due process claim, whether evidence is material is a question of law reviewed de novo. *Hiebert v. Cascade County*, 2002 MT 233, ¶ 23, 311 Mont. 471, 56 P.3d 848. Whether a defendant's privilege against self-incrimination was triggered is also a conclusion of law reviewed de novo. *State v. Fuller*, 276 Mont. 155, 159, 915 P.2d 809 (1996).

Whether a right is fundamental, whether a statute interferes with a fundamental right, and whether the government has demonstrated a compelling interest to intrude upon that right are questions of law reviewed de novo. *Wadsworth v. State*, 911 P.2d 1165, 15, 275 Mont. 287 (1996).

A plea agreement is a contract and whether the State has breached the agreement is a question of law reviewed de novo. *State v.*

Lewis, 2012 MT 157, ¶ 13, 365 Mont. 431, 282 P.3d 679. Record-based ineffective assistance of counsel claims are likewise reviewed de novo; *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240; as are restitution awards. *State v. Dodge*, 2017 MT 318, ¶ 6, 390 Mont. 69, 408 P.3d 510.

Whether the Court properly applied a sentencing provision receives de novo review as well. *State v. Gable*, 2015 MT 200, ¶ 6, 380 Mont. 101, 354 P.3d 56. Although whether the Court improperly designated a sex offender's level is reviewed for an abuse of discretion. *State v. Hill*, 2009 MT 134, ¶ 22, 350 Mont. 296, 207 P.3d 307.

SUMMARY OF THE ARGUMENT

This case involves one of the most pernicious trends in criminal law: Sentence by ambush. Here's how it happened: The prosecutor massively overcharged Mr. Soria at the outset, but because Montana ostensibly allows prosecutors to file felony charges by Information supported by an affidavit, Soria was never provided an opportunity to challenge the weaker charges at a preliminary examination. Next, after a lengthy pre-trial incarceration given his inability to post a \$500,000 bail, the prosecutor agreed to dismiss the majority of charges to induce Soria to plead guilty. At his change of plea hearing, Soria admitted to the misconduct he *actually committed*. The prosecutor sat quietly back, offering *no objection*, and the Court likewise accepted Soria's factual basis without complaint. (3/2/20 Tr.; see also D.C. Doc. 59, ¶ 32.)

But the same prosecutor who sat silently by at Soria's change of plea roared to life at sentencing, parading out all the dismissed accusations and then some, and explicitly urged the Court to "... consider everything brought to light by the investigation and not simply the charges that the defendant ultimately pled guilty to..." (7/1/20 Tr., 82.) If that weren't bad enough, existing Montana case law suggests

Soria bore the burden of *disproving* the dismissed allegations—euphemistically referred to at sentencing as “aggravating circumstances.” The result was foregone: Soria received a 40-year prison sentence based mostly on unproven allegations with no evidentiary support.

In the end, Mr. Soria’s sentencing was more akin to an unwinnable carnival game than a due process hearing. Sadly, with 94% of state convictions stemming from guilty pleas, Soria’s experience is anything but unusual.² This ecosystem of unfairness is wrong both morally and legally. We are better than this. The Montana Supreme Court prohibits trial by ambush—it ought not allow sentencing by ambush either.

² *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

ARGUMENT

The crux of Soria's argument is that the District Court violated his constitutional rights by basing his sentencing on unproven allegations that were either dismissed or never charged. For the purposes of this appeal, the allegations B.H.'s leveled against Soria can be divided into two groups: misconduct the Court properly relied on at sentencing, and alleged misconduct the Court improperly relied on.

As it pertains to the properly relied on misconduct, Soria agrees the Court was correct in relying on the conduct he admitted to in his guilty plea; namely, digitally penetrating B.H. without consent (Count I: SIWOC); unlawfully entering B.H.'s home and hitting her (Count II: Aggravated Burglary); and causing B.H. reasonable apprehension of bodily harm (Count III: PFMA). (3//2/20 Tr., 9-11; & D.C. Doc. 59, ¶ 32.)

As it pertains to the improperly relied on conduct, Soria asserts that for a legion of reasons the District Court erred in relying on B.H.'s unsupported allegations that he: choked her; caused physical injury to her vagina; posted revenge porn on her Facebook; busted down her sliding glass door; and put a Tracking Tile in her vehicle. Soria never admitted to committing any of these acts, nor did the State

provide any physical evidence in support, the only “evidence” being B.H.’s unsworn out of court statements. For clarity, Soria will refer collectively to these improperly relied on allegations as “B.H.’s unsupported allegations.” The reference to “B.H.’s unsupported allegations” does not of course include the properly relied on misconduct that Soria admitted to in his guilty pleas.

I. The District Court violated Soria’s procedural due process rights by relying on material misinformation at sentencing.

Both the United States and Montana Constitutions protect citizens from the deprivation of life, *liberty*, or property without due process. U.S. Const. Amend. XIV; & Mont. Const. Art. II, § 17 (emphasis added). “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). To satisfy due process, judicial factual findings at sentencing must be found by at least a preponderance of evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997); *see also State v. Hocevar*, 2000 MT 157, ¶103, 300 Mont.

167, 7 P.3d 329.³ “A preponderance of evidence means more likely than not. *Mont. State University-Northern v. Bachmeier*, 2021 MT 26, ¶ 61, 403 Mont. 136, 480 P.3d 233.

While the term “due process” is imprecise, at its core it’s means fundamental fairness. *In re A.F.-C.*, 2001 MT 283, ¶ 50, 307 Mont. 358, 37 P.3d 724. In the sentencing context, this means a “defendant is entitled to have his sentence predicated on substantially correct information.” *State v. Baldwin*, 192 Mont. 521, 524, 629 P.2d 222 (1981). A defendant’s sentence should only be based on “concrete and accurate information before the sentencing judge.” *Bauer v. State*, 1999 MT 185, ¶ 31, 295 Mont. 306, 316, 983 P.2d 955. A sentencing court must therefore abide by “rigorous standards” when using information in a PSI. *State v. Knapp*, 174 Mont. 373, 379, 570 P.2d 1138 (1977).

Appellate review of due process violations at sentencing are proper even when no contemporaneous objection was made. *State v. Winter*, 2014 MT 235, ¶ 27, 376 Mont. 284, 333 P.3d 222. If a defendant’s sentence is predicated on substantially incorrect

³ In certain situations, some courts require judicial fact finding at the clear and convincing standard; *See United States v. Felix*, 561 F.3d 1036, 1045 (9th Cir. 2009); and some Courts prohibit judicial fact finding at sentencing all together. *See People v. Beck*, 504 Mich. 605, 629 (2019); & *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987).

information, the defendant has a right to be resentenced. *State v. Van Haele*, 207 Mont. 162, 169, 675 P.2d 79 (1983). A sentencing court must specifically state the justifications for its sentence. §§ 46-18-115(6), MCA; & 46-18-102(3)(b), MCA.

A. Because Soria rebutted B.H.’s unsupported allegations pursuant to the holdings in *Mason, Walker, et al.*, the Court violated his procedural due process rights by adopting them.

This Court has held that a defendant who contests allegations in a PSI or testimony at sentencing has an affirmative duty to present rebuttal evidence establishing the inaccuracies. *State v. Mason*, 2003 MT 371, ¶ 25, 319 Mont. 117, 82 P.3d 903; *see also State v. Walker*, 2007 MT 205, ¶ 22, 338 Mont. 529, 167 P.3d 879 (holding that a defendant has an affirmative duty to present evidence establishing inaccuracies in the PSI—mere denial being insufficient).

1. Soria rebutted B.H.’s unsupported strangulation allegation.

At Soria’s sentencing, Detective Baum testified that B.H. told her Soria had “placed both hands around her neck and choked her until she became unconscious... [and] that she thought... the defendant was going to kill her right there...” (7/1/20 Tr., 16.) The victim coordinator

also read a brief unsworn statement submitted by B.H. wherein she appeared to vaguely reference the strangulation allegation noting that “[w]hen I finally came to, he was gone.” (7/1/20 Tr., 78; & D.C. Doc. 78.) B.H. was not present at the sentencing and was never subjected to cross-examination. The State provided no physical evidence to support the strangulation allegation—the most serious of all—which had been dismissed pursuant to the plea agreement. (D.C. Doc. 59.)

Soria rebutted the false strangulation allegation by providing the Court a detailed Expert Report written by Dr. Gersh, who, after thoroughly evaluating the medical evidence, opined, *inter alia* that:

There was absolutely no findings consistent with hand/finger strangulation. When strangulation occurs, there are finger marks and bruises on the neck and petechia (small red dots) seen on the face. None were found to even a small degree. This contradicts rendition of events by Ms. Hutson...

Ms. Hutson returned to the hospital emergency department 3 days after the incident requesting pain medications. She was asked to have a CT of her neck, as she complained of pain. She refused to have the CT scan and departed AMA. This behavior was inconsistent with an individual fearful of damage to her neck structures from a strangulation...

The complete lack of physical findings acknowledged as indicative of hand/finger strangulation, makes the medical probability of strangulation extremely low. (Ex. D to D.C. Doc. 67, 3-4.)

The State did not call a medical doctor to rebut Dr. Gersh's report, nor did the State present B.H.'s medical records from the ER doctor or SANE Nurse who examined her after the incident. (See D.C. Docs. 75 & 76.) It must also be remembered that prior to trial the State filed a motion in limine attempting to silence Dr. Gersh, given the State's own assessment that Dr. Gersh's "conclusions amount to a determination[] that the victim's testimony is not worthy of belief." (D.C. Doc. 54, 8.)

Yet despite the overwhelming rebuttal evidence presented by Soria, the Court, in justifying his 40-year prison sentence, explicitly referenced the strangulation allegation asserting that Soria had "choked her until she was unconscious" and "you almost killed her." (7/1/20 Tr., 90-91.) The Court did not mention Dr. Gersh's report or that the State had dismissed the strangulation charge.

2. Soria rebutted B.H.'s unsupported allegation that he injured her vagina.

Detective Baum also testified that B.H. told her that in addition to digitally penetrating her without her consent (which he pled to), Soria also "grabbed on to her clitoris and kept pulling it repeatedly and saying, 'I'll make it so you never cum again.'" (7/1/20 Tr., 16.) Soria never admitted to this allegation, and it must be remembered that the

Aggravated SIWOC (with force) charge had been amended to SIWOC (without force). (D.C. Docs. 4; 59; & 63.)

To rebut this false allegation, Soria again provided the Court with Dr. Gersh's Expert Report:

An examination was also performed by the SANE nurse... [whose] examination revealed no visual injury to that [vaginal] area.

The genital findings were not abnormal for any woman, and particularly for one who is apparently sexually active... The visualized and toluidine blue dye findings were minimal and non-specific. They were what can be found for any woman, as simply voiding and wiping with toilet paper can create slight tissue trauma to allow a small amount of the dye to stain the labia. Of course, intercourse can do that as well. The amount of toluidine blue staining was less than would be expected had forceful digital rape occurred... [the physical evidence is therefore] inconsistent with Ms. Hutson's rendition of events. (Ex. D to D.C. Doc. 67, 3-4.)

The State did not call a medical doctor to rebut Dr. Gersh's Expert Report, nor did the State present copies of the medical reports from the ER doctor or SANE Nurse—whose examination, according to Dr. Gersh, “revealed no visual injury to that [vaginal] area.” (See D.C. Docs. 75 & 76; see also Ex. D to D.C. Doc. 67, 3.)

Yet despite Soria's powerful rebuttal evidence, in justifying its 40-

year sentence the Court specifically reference B.H.'s unsupported allegation that Soria "grabbed her in the genital area[] [and] said she would never cum again." (7/1/20 Tr., 90.) The Court did not mention Dr. Gersh's report, or that the State had amended the Aggravated SIWOC charge to SIWOC.

3. Soria rebutted B.H.'s unsupported revenge porn allegation.

Detective Baum also testified that B.H. told her that Soria had posted "revenge porn" on her Facebook and sent it to her employers, which the prosecutor argued Soria had done to "humiliat[e]" B.H. (7/1/20 Tr., 32-33 & 82.) Yet the State provided no affirmative evidence to support the revenge porn accusation. For example, the State did not call a single witness with personal knowledge to prove the truth of the revenge porn allegation e.g. a person who actually saw the alleged pornography; nor did the Sate present any physical evidence (e.g. pornographic images or videos). (D.C. Docs. 75 & 76.)

Moreover, Soria was never charged for sending revenge porn, nor was it included in his PSI. And when asked by Mr. Sullivan about the allegation during his 2nd PSE, Soria explicitly denied ever posting pornography on B.H.'s Facebook. (D.C. Doc. 79, 11-12.) Yet despite

Soria's explicit denial and the State's providing no affirmative evidence, in justifying its 40-year sentence the District Court specifically referenced the unfounded revenge porn allegation. (7/1/20 Tr., 91.)

4. Soria rebutted B.H.'s unsupported allegation that he busted through her sliding glass door.

Detective Baum also testified that B.H. told her that prior to Soria's entering her home, she had locked her sliding glass door and placed a baseball bat in the bottom slide; meaning to gain entry Soria had to bust "through the... sliding glass door." (7/1/20 Tr., 14-15.) Yet in compiling Soria's 2nd PSE, Mr. Sullivan, citing a supplemental report drafted by Detective Baum herself, indicated that Soria gained entry "via her bedroom sliding door[] using a Swiss Army knife to defeat the latch which was locked." (D.C. Doc. 79, 2.)

But when Soria was asked by Mr. Sullivan about the unlawful entry during his 2nd PSE, Soria denied using a knife or breaking down the glass door (to his former home), telling Mr. Sullivan he simply opened the "slider." (D.C. Doc. 79, 18.) Additionally, the State provided no physical evidence to support the allegation; to the contrary, the State provided a photograph at sentencing which clearly showed B.H.'s

perfectly intact glass door. (Ex. 4 to D.C. Doc. 76.)

Despite the overwhelming rebuttal evidence that Soria did not “bust down” B.H.’s glass door, the Court, in justifying Soria’s 40-year prison sentence, specifically referenced the false allegation that he busted down B.H.’s glass door. (7/1/20 Tr., 90.)

B. In the alternative, should the Court find that Soria failed to sufficiently rebut B.H.’s unsupported allegations pursuant to *Mason, Walker, et al.*, then Soria asserts this line of precedent violated his procedural due process rights for a litany of reasons.

1. The State failed to meet its initial evidentiary burden by a preponderance of evidence.

To satisfy due process, judicial findings of fact at sentencing must at a minimum be found by a preponderance of evidence. *See Watts*, 519 U.S. at 156; *see also Hocevar*, ¶103. This means *before* it would ever be proper to require Soria to present rebuttal evidence, the State must first present a sufficient quantum and quality of affirmative evidence establishing that B.H.’s unsupported allegations were more likely true than not. This is why the prosecutor’s assertion that the Court can “consider everything brought to light by the investigation and not simply the charges that the defendant ultimately pled guilty to...” is

incorrect. (7/1/20 Tr., 82.)

Because the State’s assertion presupposes that it has already established its initial burden of proving whatever was “brought to light by the investigation” by a preponderance of evidence. This appears to be much of the problem with this Court’s precedent in *Mason, Walker, et. al.*, in that the notion that the defendant must present affirmative rebuttal evidence incorrectly presumes that the State has already met its evidentiary burden—this is erroneous.

In *State v. Chaussee*, this Court explained that as the moving party, a defendant challenging the validity of a previous conviction must establish by a preponderance of evidence that the challenged conviction was infirm. 2011 MT 203, ¶ 17, 361 Mont. 433, 259 P.3d. And to meet this initial burden, the defendant must present “affirmative evidence” defined as evidence that was more than “conclusory... inferences... Affirmative evidence is evidence which demonstrates that... in the context of a collateral challenge, that certain facts *actually existed* at some point in the past...” *Chaussee*, ¶¶ 17-18 (emphasis added). The requirement for *affirmative evidence* makes sense because hearsay testimony by definition is unreliable as it

“cannot be tested for reliability...” *State v. Mackie*, 191 Mont. 138, 144, 622 P.2d 673 (1980).⁴

The same is true here. And while the rules of evidence do not apply at sentencing hearings per § 26-10-101(c)(3), MCA, this does not alleviate the State from satisfying its initial burden by a preponderance of evidence. Stated simply, before the non-moving party (Soria) would ever be required to provide rebuttal evidence, the moving party (State) must present sufficient *affirmative evidence* proving B.H.’s unsupported allegations by a preponderance of evidence. Here, the State failed to meet its initial burden.

2. Requiring rebuttal evidence undermined Soria’s presumption of innocence and constituted impermissible burden shifting.

“Absent conviction of a crime, one is presumed innocent.” *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017). At the core of due process lies the “presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” *In re Winship*, 397 U.S. 358, 363

⁴ It is further noteworthy that because the proponent of the accusations (B.H.) did not testify under oath in open court, the District Court’s factual determinations are not entitled to deference on appeal. *See State v. Aragon*, 2014 MT 89, ¶ 17, 374 Mont. 391, 321 P.3d 841.

(1970) (internal citations and quotations omitted.) Criminal defendants in Montana also enjoy a statutory presumption of innocence. § 26-1-602(1), MCA.

To overcome Soria’s presumption of innocence, the State (moving party) must present *affirmative evidence*—not conclusory allegations. See *Chaussee*, ¶ 17. “It has long been held... that a presumption remains until rebutted by preponderance of contrary evidence and disappears only when the party to whom it is opposed produces sufficient evidence to preponderate against it.” *In re Seizure of 1988 Chevrolet Van*, 251 Mont. 180, 183, 823 P.2d 858 (1991).

Here, the State presented no *affirmative evidence* to support B.H.’s unsupported, unsworn, conclusory allegations. Thus, the State failed to overcome the presumption that Soria’s is innocent.⁵

3. Requiring rebuttal evidence improperly subverted Soria’s right to remain silent.

Criminal defendants in Montana have a constitutional right to remain silent. U.S. Const. Amend. V; & Mont. Const. Art. II, § 25. A “criminal case” includes the sentencing phase. *State v. Shreves*, 2002

⁵ The State’s failure to present affirmative evidence creates a further presumption in Soria’s favor; namely, that no such affirmative evidence exists. See § 26-1-602(6), MCA.

MT 333, ¶ 18, 313 Mont. 252. Accordingly, punishing a defendant for remaining silent at sentencing violates basic due process. *State v. Kelly*, 876 P.2d 641, 644, 265 Mont. 298 (1994); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” It is therefore improper for a Court to even draw negative inferences from a defendant’s silence even during the “sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.” *Mitchell v. United States*, 526 U.S. 314, 328 (1999).

Here, it was factually and legally impossible for Soria to have both a constitutional right to remain silent, as well as an affirmative duty to rebut B.H.’s unsupported allegations as suggested in *Mason, Walker, et al.* It is simply not possible to square that circle. Soria had a right to remain silent which he invoked on the advice of counsel. (D.C. Doc. 70, at 5-6.) Yet to now assert that Soria has failed to rebut B.H.’s unsupported allegations by definition is punishing him for invoking his constitutional right to silence—an unequivocal due process violation.

4. Saddling Soria with the burden of proving the negative was fundamentally unfair.

In *Smith v. United States*, the United States Supreme Court explained that “[w]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.” 568 U.S. 106, 112 (2013) (internal quotations omitted). This explains why a defendant raising the affirmative defense of withdrawal in a conspiracy charge bears the burden of proof as “[i]t would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened.” *Smith*, 568 U.S. at 112. For the same reason, it is fundamentally unfair to saddle Soria with the impossible burden of proving the negative i.e. that B.H.’s unsupported allegations *never happened*.

5. Requiring Soria to rebut allegations not included in the PSI amounted to sentence by ambush.

“[D]ue process requires notice of the alleged misconduct charged.” *In re Best*, 2010 MT 59, ¶ 25, 355 Mont. 365, 229 P.3d 1201. Here, at Soria’s sentencing the State elicited testimony from Detective Baum that, according to B.H., Soria had posted revenge porn on her Facebook and put a tracking device called a “Tile Mate” in her car. (7/1/20 Tr., 19, 20, 32, & 33.) Detective Baum testified that she first heard about the

Tile Mate from Detective Lapham, who heard about it from an unnamed friend of B.H.'s, who supposedly found it in a sock inside B.H.'s car. (7/1/20 Tr., 19-20.) The State also offered a picture of the Tile Mate device as an exhibit at sentencing. (Ex. 10 to D.C. Doc. 76.) And in justifying his 40-year sentence, the Court specifically referenced the allegation that Soria put a "tracking device" in B.H.'s car as well as the unsupported allegation that Soria's posted revenge porn on B.H.'s Facebook. (7/1/20 Tr., 90-91.)

But the allegations that Soria put a Tile Mate device in B.H.'s car and posted revenge porn on her Facebook were not included in Soria's PSI. (See D.C. Doc. 70.) Accordingly, to sentence Soria based on these unsupported allegations violates due process as he was not on notice that he would have to rebut them at sentencing. This is especially true for the unfounded allegation that Soria put a Tile Mate device in B.H.'s car, which the State insinuated Soria had done to track her movements. (See 7/1/20 Tr., 19-20.) Because had the Tracking Tile allegation been included in his PSI, Soria's counsel could have easily rebutted the falsity with a simple google search revealing that Tile Mate devices have a maximum range of a few hundred feet—rendering them useless

for tracking an individual's movements.⁶

6. Lastly, if necessary, this Court should distinguish, modify, or outright overrule the overly broad and wrongfully decided precedent in *Mason, Walker, et. al.*

The United State Supreme Court recently re-iterated in *Ramos v. Louisiana* that “stare decisis has never been treated as an inexorable command. And the doctrine is at its weakest when we interpret the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means.” 140 S. Ct. 1390, 1405 (2020) (internal quotations omitted).

It is also worth remembering that *Mason* and *Walker* were split decisions with fiery and passionate dissents. For example, in *Mason*, Justice Leaphart lamented that:

[T]he panoply of rights guaranteed by the United States and Montana Constitutions ... can be conveniently circumvented by the artifice of having a sentencing judge impose punishment for what is euphemistically referred to as ‘other’ or ‘relevant’ conduct... The State is even encouraged to exploit this artifice by filing multiple charges for purposes of gaining psychological leverage, then dropping all but one or two of the charges as an inducement to the defendant to enter a guilty plea. Then, once the plea is

⁶ Tile Mate Website, <https://www.thetileapp.com/en-us/store/tiles/mate>, (last visited November 3, 2021.)

entered, the State, through the backdoor of ‘other’ conduct, can introduce evidence relating to all the charges which were dismissed. In a procedure more befitting a French tribunal where the defendant is presumed guilty... the presumption of innocence is jettisoned and the burden is placed on the defendant to show that the information is inaccurate. *Mason* ¶ 43 (Leapart, J., dissenting).

Echoing Justice Leapart’s courageous dissent in *Mason*, a growing cacophony from the highest echelons of the federal bench has emerged condemning judicial fact finding at sentencing:

- “[Lower courts] have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range... This has gone on long enough.” *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).
- “It is far from certain whether the Constitution allows” judges to enhance a defendant’s sentence “based on facts the judge finds without the aid of jury or the defendant’s consent.” *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014), an opinion authored by then-Judge Gorsuch.
- “Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.” *United States v. Bell*, 808 F.3d 926, at 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

Several State Supreme Courts have already determined that

judicial factfinding at sentencing violates due process including

Michigan and New Hampshire:

- “We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” *People v. Beck*, 504 Mich. 605, 629 (2019).
- “We think it disingenuous at best to uphold the presumption of innocence until proven guilty, a principle that is axiomatic and elementary, and whose enforcement lies at the foundation of the administration of our criminal law, while at the same time punishing a defendant based upon charges in which that presumption has not been overcome.” *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (internal citations omitted).

In sum, should this Court find that Soria has failed to sufficiently rebut B.H.’s unsupported allegations pursuant to the precedent in *Mason, Walker, et. al.*, Soria requests that this Court distinguish, modify, or outright overrule these cases. Doing so would not only ensure the protection of Mr. Soria’s due process rights, but also comport with Montana’s long and proud tradition of providing greater protection under the state constitution. *See State v. Ellerbee*, 2019 MT 37, ¶ 19, 394 Mont. 289, 434 P.3d. 910.

II. In the alternative, as applied in his case, Montana’s statutory charging and sentencing scheme violated Soria’s substantive due process rights.

Montana’s charging and sentencing procedure is largely governed

by a hodgepodge of statutes including *inter alia* §§ 46-10-105, 46-11-101, 46-11-201, 46-18-101, 46-18-111, 46-18-112, 46-18-115, 26-10-101, and § 26-10-611.⁷ As addressed below, the application of this statutory scheme violated Soria’s substantive due process rights by unconstitutionally interfering with his fundamental right to bodily liberty.

A. Montana’s statutory charging and sentencing scheme as applied in Soria’s case.

Sections 46-10-105(2) and 46-11-201(1)-(2) purportedly authorized the State to file a motion for leave to file a 9-count Information against Soria, with nothing but an affidavit from the prosecutor in support.

(D.C. Doc. 1.) The affidavit consisted almost entirely of a parroting of what B.H. supposedly told police.⁸ (See D.C. Doc. 1, 7-10.) The Court

⁷ Because the statutes at issue here are criminal, it violates due process and the separation of powers to cloak them with a presumption of constitutionality. *United States v. Davis*, 139 S. Ct. 2319, 2332-33 (2019). Soria acknowledges this Court’s recent decision in *State v. Christensen*, wherein the Court asserted that criminal statutes were presumed constitutional. 2020 MT 237, ¶ 131, 401 Mont. 247, 472 P.3d 622. This is erroneous pursuant to the holding in *Davis*.

⁸ The prosecutor’s filing an affidavit without personal knowledge (as occurred here) seemingly violates the requirement that “an affidavit must be sworn to on the basis of personal knowledge. Failure to do so renders the affidavit invalid.” *State v. Hunt*, 2009 MT 265, ¶ 20, 352 Mont. 70, 214 P.3d 1234 (internal citations omitted). Personal knowledge is defined as “knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said... [And thus] an attorney’s affidavit is admissible only to prove facts that are within

granted the State’s motion for leave to file at Soria’s 4-minute arraignment on August 16, 2018. (D.C. Doc. 3.) And pursuant to § 46-11-101(3), the State filed its 9-Count Information within hours. (D.C. Doc 4.) By using the motion for leave to file process, the prosecutor circumvented a preliminary examination, where Soria could have challenged the State’s evidence on each count and cross-examined his accusers per § 46-10-202, MCA.

After spending approximately 18 months in jail awaiting trial, Soria pled guilty to three charges, only one of which (aggravated burglary) was contained in the original Information. (3/2/21 Tr., 9-11; & D.C. Docs. 4; 59; & 85 (attached as App. A) at 2.) Soria’s guilty pleas triggered—per § 46-18-112—a requirement that probation compile a PSI, which included a provision entitled “circumstances of the offense.” In Soria’s PSI, the “circumstances of the offense” consisted almost entirely of a verbatim “copy and pasting” of the affidavit the prosecutor

his personal knowledge and as to which he is competent to testify; an affidavit stating what the attorney believes or intends to prove at trial will be disregarded.” *Hiebert*, ¶ 30 (internal quotations and citations omitted). Soria acknowledges, however, that older Montana cases purport to authorize a prosecutor (who lacks personal knowledge) to file an affidavit supporting a motion for leave to file an Information. *See State v. Dunn*, 155 Mont. 319, 472 P.2d 288 (1970).

filed to support his motion for leave to file. (*Compare* D.C. Doc. 1, 8-9; *with* D.C. Doc. 70, 3-5.) In other words, the “circumstances of the offense” was not modified to reflect that the majority of charges had been dismissed; nor did it include Dr. Gersh’s findings that B.H.’s unsupported allegations were medically implausible.⁹ (D.C. Doc. 1, 8-9; D.C. Doc. 70, 3-5; & Ex. D. to D.C. Doc. 67.)

Once complete, § 46-18-111(1)(a)(iii) required the District Court to consider the “circumstances of the offense” as written in Soria’s PSI, which as noted were merely a copy and pasting of the prosecutor’s affidavit. (*Compare* D.C. Doc. 1, 8-9; *with* D.C. Doc 70, 3-5.) The District Court was then required per § 46-18-115(1) to afford any party with “relevant” information the opportunity to testify at sentencing. This purportedly opened the door for the State to parade B.H.’s unsupported allegations before the Court via Detective Baum and Mr. Sullivan—neither of whom had any personal knowledge of B.H.’s

⁹ This Court has stated that “[a] probation... officer who prepares a PSI does not function as an agent of the prosecutor.” *Hill*, ¶ 28. While this may be true de jure, the de facto reality here is that the probation officer was acting as the prosecutor’s agent as evidenced by the probation officer’s verbatim copy and pasting of the prosecutor’s affidavit into the PSI. (*Compare* D.C. Doc. 1, 8-9; *with* D.C. Doc. 70, 3-5.) This is particularly noteworthy given that Soria only pled guilty to 1 of the original 9 charges, and that the PSI makes no mention of Dr. Gersh’s report debunking B.H.’s allegations.

unsupported accusations. (7/1/20 Tr., 8-84.) Meanwhile, Soria was powerless to preclude the hearsay or cross examine his accuser (B.H.) per §§ 26-10- 101(c)(3), MCA; 26-10-611(e), MCA; see also *State v. Higley*, 90 Mont. 412, 431, 621 P.2d 1043.

Finally, § 46-18-101(2)(d) granted the District Court the discretion to consider “aggravating and mitigating circumstances” in rendering its sentence. Put simply, § 46-18-101(2)(d) purportedly greenlighted the Court to sentence Soria to 40-years in prison based on B.H.’s unsupported allegations under the euphemistic label “aggravating circumstances.” (7/1/20 Tr., 90-92.)

B. Because Montana’s statutory charging and sentencing scheme interfered with Soria’s fundamental right to liberty, strict scrutiny applies.

When statutes effect fundamental rights found in the Declaration of Rights, strict scrutiny applies. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18 , 401 Mont. 405, 473 P.3d 386. Liberty is a fundamental right under both the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution. As Justice O’Connor asserted in her concurrence in *Reno v. Flores*:

Freedom from bodily restraint has always been at the

core of the liberty protected by the Due Process Clause from arbitrary governmental action. Freedom from bodily restraint means more than freedom from handcuffs... A person's core liberty interest is also implicated when she is confined in a prison... This is clear beyond cavil, at least where adults are concerned. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration... which is the deprivation of liberty triggering the protections of the Due Process Clause... 507 U.S. 292, 315-316 (1993) (O'Connor, J., concurrence, internal citations and quotations omitted).

As addressed above, in this case Montana's statutory charging and sentencing scheme purportedly allowed the prosecution to massively overcharge Soria at the outset; then induce a plea by agreeing to dismiss the majority of charges; then at sentence parade the dismissed allegations before the Court without a single witness with personal knowledge or any physical evidence; then grant the District Court discretion to consider these unfounded accusations by labeling them "aggravating circumstances"—resulting in Soria's receiving a 40-year prison sentence.¹⁰ To paraphrase Justice O'Connor, it is "clear beyond cavil" that Montana's statutory charging and sentencing scheme interfered with Soria's fundamental right to bodily liberty. Thus, strict

¹⁰ The law respects form less than substance." § 1-3-219, MCA.

scrutiny applies.

C. As applied in Soria's case, Montana's statutory charging and sentencing scheme cannot survive strict scrutiny.

In a substantive due process challenge, the challenging party bears the initial burden of showing that the statute interferes with a fundamental right; upon meeting this threshold, the burden shifts to the government to show the statute is narrowly tailored to further a compelling government interest. *Clark Fork Coalition v. Mont. Dep't of Natural Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198. This requires the State to show the statutes are the least restrictive means to effectuate its compelling government interest. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, (1997).

Here, Soria concedes the State had a compelling interest in sentencing him for the three charges he admitted to committing in his guilty pleas. (3/2/20 Tr., 9-11; & D.C. Doc. 59, ¶ 32.) The State does not, however, have a compelling interest in sentencing him for conduct he did not admit to, concerning charges that were dismissed or never brought. Put simply, the State did not have a compelling interest in sentencing him based on B.H.'s unsupported allegations.

But even if *arguendo* the State did have a compelling reason to sentence Soria based on B.H.'s unsupported allegations, Montana's statutory scheme does not constitute "the least restrictive means" for doing so. Lest we not forget, not a single witness with personal knowledge concerning B.H.'s unsupported allegations testified under oath before the Court at any point in the proceedings. Nor did the prosecution provide any physical evidence supporting B.H.'s unfounded allegations.

At a minimum the least restrictive means would preclude the echo chamber of accusations that occurred here; meaning before infringing on Soria's fundamental right to liberty, the Court must hear from actual witnesses with personal knowledge, in open court, under oath, subjected to cross-examination, and with complementary physical evidence in tow. Because that did not happen, as applied Montana's charging and sentencing statutes violated Soria's substantive due process by unconstitutionally infringing on his fundamental right to bodily liberty.

III. The State breached its plea agreement.

"Prosecutors who engage in plea bargaining must meet strict and meticulous standards of both promise and performance." *Hill*, ¶ 29.

Even when done inadvertently and in good faith, prosecutorial violations of a plea agreement are not acceptable. *State v. McDowell*, 2011 MT 75, ¶ 14, 360 Mont. 83, 253 P.3d 812. A prosecutor breaches a plea agreement by tainting the fairness of a sentencing proceeding. *State v. Rardon*, 2002 MT 345, ¶ 17, 313 Mont. 321, 61 P.3d 132 (hereinafter “*Rardon II*”). A defendant is not required to object to the prosecutor’s breaching a plea agreement to preserve the issue for appeal. *See Rardon II*, ¶ 16. The remedy for a breached plea agreement is to allow the defendant to withdraw his guilty plea; or require specific performance before a different prosecutor and judge. *Rardon II*, ¶ 26.

In this case, the State breached its plea agreement in three ways: First, the State breached the plea agreement by accepting Soria’s guilty pleas on three counts, and thereafter proffering no objection to the factual basis at his COP hearing, then at sentencing explicitly urging the Court to “... consider everything brought to light by the investigation and not simply the charges that the defendant ultimately pled guilty to...” (3/2/20 Tr.; & 7/1/2 Tr., 82.) Put simply, this was sentence by ambush. If the prosecutor was unwilling to accept the

factual basis for Soria's pleas, he should have objected at Soria's COP hearing.

Second, the prosecutor breached the plea agreement by eliciting testimony at sentencing concerning the Tracking Tile and revenge porn allegations, neither of which were included in the PSI. (*Compare* See 7/1/20 Tr., 19, 20, 32, 33, & 88; *with* D.C. Docs. 4 & 70.) The State's ambushing Soria with these allegations at sentencing breached the plea agreement.

Third, the State breached the plea agreement by arguing for a de facto Aggravated SIWOC sentence. This was improper as the State initially charged Mr. Soria with *inter alia* Aggravated SIWOC (with force) per § 45-5-508, MCA; but pursuant to the parties' plea agreement amended to SIWCOC per § 45-5-503, MCA. (D.C. Docs. 4, at 1; 59 at ¶ 32; & 63, at 1.) Yet despite amending the charge from aggravated SIWOC to SIWOC, the prosecutor elicited testimony from Detective Baum that B.H. had purportedly told her that Soria "grabbed on to her clitoris and kept pulling it repeatedly and saying, 'I'll make it so you never cum again.'" (7/1/20 Tr., 16.) This in turn prompted the Court to ask Mr. Sullivan whether such conduct would result in injury, to which

Mr. Sullivan responded in the affirmative. (7/1/20 Tr., 75.) Setting aside Mr. Sullivan’s (a male social worker) lack of qualifications to speculate on physical injuries to B.H.’s vagina, what matters here is that the prosecutor elicited testimony which in effect converted the amended SIWOC back to Aggravated SIWOC—a direct breach of the plea agreement.

IV. Should this Court determine that Soria’s counsel had grounds to object to the District Court’s considering B.H.’s unsupported allegations at sentencing, then Soria’s counsel was ineffective for not doing so.

A criminal defendant has a constitutional right to effective assistance counsel. *Chafee*, ¶ 17; *see also* U.S. Const. Amend. VI & XIV; & Mont. Const. Art. II, § 24. IAC claims are analyzed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Chafee*, ¶ 19. To be successful in an IAC claim, the defendant must prove that his counsel’s performance was deficient, and that the deficient performance prejudiced his defense. *Chafee*, ¶¶ 19 & 23.

Here, Soria’s counsel did not object to the State’s including B.H.’s unsupported allegations in the PSI nor to the prosecutor’s eliciting testimony concerning the unsupported allegations at sentencing. It is unclear, however, that his attorney’s failure to object constitutes

deficient performance given the holding in *State v. Bar Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229. In that case, a defendant objected and moved to strike perceived inaccuracies in his PSI, which the District Court denied. *Bar Jonah*, ¶ 116. On appeal, this Court affirmed, holding that the district court was required to “consider” the PSI prior to sentencing (per § 46-18-111(1)(iii), MCA), but not necessarily adopt the PSI’s recommendations. *Bar Jonah*, ¶ 117. Additionally, because the rules of evidence do not apply at sentencing per § 26-10-101(c)(3), it is unclear on what grounds Soria was supposed to object to this double and triple hearsay in the first place?

Finally, it must be remembered that both the PSI and testimony at sentencing were not presented as definitive proof of what actually happened by a witness with firsthand knowledge or through physical evidence, but rather couched in terms of what B.H. purportedly told police. For example, the PSI asserts *inter alia* that “B.H. stated that ...” and “B.H. related that” and “B.H. further reported that...” and “B.H. informed Detective Baum that ...” (D.C. Doc. 70, 4-5.)

In other words, the PSI and testimony at sentencing do not technically contain inaccuracies in that the unsupported allegations

were not stated as facts of what actually happened, but rather couched in terms of what B.H. told the police. And Soria does not dispute that B.H. embellished and lied to the police. Accordingly, it appears the “deficient performance” was the District Court’s for adopting B.H.’s unsupported allegation—not Soria’s for failing to object. *See Bar Jonah*, ¶ 117; *see also* § 26-10-101(c)(3), MCA.

But should the Court find that Soria did have grounds to object and that doing so would have prohibiting the Court from considering B.H.’s unsupported allegations, then the performance of Soria’s attorney was deficient for not doing so. As there was clearly no strategic reason to allow B.H.’s unsupported allegations to be paraded before the Court if it were possible to prohibit it. And it is beyond reproach that Soria was prejudiced as evidenced by the fact that the justifications the Court articulated for his 40-year sentence were primarily based on B.H.’s unsupported allegations—not the conduct he actually pled to. (7/1/20, Tr., 90-91.)

V. The Court erred in designating Soria a Level III Offender.

Given the significant lifetime impacts of sex offender designations, an offender has a due process right in obtaining an accurate

designation. *State v. Samples*, 2008 MT 416, ¶ 34, 347 Mont. 292, 98 P.3d 803.

A. As a matter of law the Court’s Level III designation was erroneous.

To receive a Level III designation, the Court must find that the defendant is a “sexually violent predator.” § 46-23-509(3)(c), MCA. A “Sexually violent predator” is as a person who: (1) was convicted of a sexual offense; (2) suffers from a mental abnormality or personality disorder; and (3) the mental abnormality or personality disorder makes the person likely to engage in predatory sexual offenses in the future. § 46-23-502(11)(a), MCA.

Soria pled guilty to a sexual offense (SIWOC), so the first prong is met. (3/2/2020 Tr., at 9.) As for the second prong, § 46-23-502(2)&(4) define “mental abnormality” and “personality disorder” as follows:

“Mental abnormality” means a congenital or acquired condition that affects the mental, emotional, or volitional capacity of a person in a manner that predisposes the person to the commission of one or more sexual offenses to a degree that makes the person a menace to the health and safety of other persons.

“Personality disorder” means a personality disorder as defined in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders adopted by the American psychiatric association.

Both Ms. Hjelmstad (1st PSE) and Mr. Sullivan (2nd PSE) diagnosed Soria with borderline psychopathy. (*Compare* Ex. C. to D.C. Doc. 67, at 33 & 47; *with* D.C. Doc. 79, 19-20.) Although each reached a different conclusion concerning Soria’s appropriate designation level, with Ms. Hjelmstad recommending a Level II and Mr. Sullivan recommending a Level III. (*Compare* Ex. C. to D.C. Doc. 67, at 33 & 47; *with* D.C. Doc. 79, 19-20.)

In justifying its designating Soria as a Level III Offender, the Court’s only reference to Soria’s mental status was the observation that “Mr. Sullivan found that you are at the low end of the psychopath range. That’s a significant psychological finding.” (7/1/20 Tr., 91.)

But psychopathy is not a personality disorder listed in the DSM-IV; thus, by definition Soria’s supposed psychopathy diagnosis is not a “personality disorder” justifying a Level III designation per § 46-23-502(4), MCA. (See DSM-IV-TR (attached as App. B) at 685.) Nor is there any indication that Soria’s (questionable) psychopathy diagnosis constitutes a “mental abnormality”—whatever that is. Nor did the Court make such a finding. Moreover, it must be remembered that Ms. Hjelmstad also diagnosed Soria with low-level psychopathy, yet she

recommended a Level II designation. (Ex. C. to D.C. Doc 67, at 33 & 47.)

Put simply, low-level psychopathy alone cannot, as a matter of law, satisfy the second prong justifying a Level III designation.

Concerning the third prong, the Court made no findings that even if Soria had psychopathy and even if psychopathy was a mental abnormality or personality disorder, that such a diagnosis would make Soria “likely to engage in predatory sexual offenses” in the future as required to satisfy the third prong.¹¹ Thus, as a matter of law the Court’s Level III designation was improper.

In the alternative, should this Court find that Soria’s low-level psychopathy does constitute a “mental abnormality” that would result in Soria’s being “likely” to partake in future predatory sexual offenses, then Soria’ asserts such vague standards without explanation from the District Court violate due process. Section 46-23-502(11)(a) provides no guidance concerning what constitutes a mental abnormality that

¹¹ It is further noteworthy that when asked the definition of a “predatory sexual offense” Mr. Sullivan answered that a predatory sexual offense occurs when a person “[e]stablish[ed] or further[ed] a relationship for the purpose of [committing] a sexual offense.” (7/1/20 Tr., 61.) But the correct definition is “a sexual offense committed... for the primary purpose of victimization.” § 46-23-502(5), MCA. Mr. Sullivan’s inability to properly define a predatory sexual offense should alone render his Level III recommendation facially invalid.

“predisposes” a person to “likely” commit future sexual offenses. For instance, what does the term “likely” mean?—5%, 51%, 90%? Nor does the statute provide a standard of proof that must be satisfied when, as in this case, the District Court was presented with conflicting recommendations. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

B. In the alternative, the Court’s Level III designation was an abuse of discretion.

First, in designating Soria a Level III Offender, the Court never mentioned Soria’s 1st PSE that recommended a Level II designation, nor that the PSI also recommended a Level II based on Soria’s 1st PSE. (7/1/20 Tr., 90-91; & D.C. Doc. 70, 8-9.)

Second, the Court’s Level III designation was based entirely on Soria’s 2nd PSE, which the Court erred in ordering in the first place given that it amounted to an ex parte request. Remembering that on May 1, 2020, the State filed a motion to have Mr. Sullivan conduct a 2nd PSE, which Soria objected to. (D.C. Doc 71.) Pursuant to U.D.C.R. 2(a), Soria had 14 days to file a response outlining the basis for his objection. Yet despite Soria’s objection, the Court granted the State’s request just six days later (on May 6), thereby depriving Soria of his right to respond. (D.C. Doc. 72.)

Finally, Soria who was 39 years old, had never previously been charged with a sexual crime, had no felony history, and in making its determination it was clear the Court relied on B.H.'s unsupported allegations. (See 7/1/20 Tr.) The Court's Level III designation was therefore an abuse of discretion.

VI. The Court erred in awarding B.H.'s unsworn restitution request.

To satisfy due process, a crime victim seeking restitution must testify under oath or submit a sworn affidavit describing her pecuniary loss. *Dodge*, ¶ 13, & § 46-18-242, MCA. The requirement for a sworn statement is to ensure reliability via accountability in the event the victim overstates her costs. *Dodge*, ¶ 13. In this case, the Court ordered Soria to pay B.H. \$608.14 in restitution for money she spent on hotel rooms—although B.H. did not testify under oath at the sentencing hearing nor did she provide a sworn affidavit describing her loss. (D.C. Doc. 78.) Thus, the Court erred in ordering Soria to pay B.H. \$ 608.14 in restitution.

In a distressing sidenote, it is worth pondering the following: How can it be that it violates black letter (due process) law for the District Court to award a crime victim \$608.14 in restitution because she didn't

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionally spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,918 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

/s/ Pete Wood
Pete Wood, Attorney for Appellant

APPENDIX

Judgement App. A
DSM-IV-TR App. B

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-12-2021:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Richard James Soria
Service Method: eService

Scott D. Twito (Govt Attorney)
Yellowstone County Attorney's Office
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically Signed By: Peter Allan Wood
Dated: 11-12-2021