

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0469

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CHESTER BAUER,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

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APPELLANT'S OPENING BRIEF

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On Appeal from the Montana Third Judicial District Court  
Anaconda-Deer Lodge County, Honorable Ray J. Dayton

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## **I. STATEMENT OF THE ISSUES**

- A. Did the Lower Court err in sentencing Mr. Bauer to 100 years on the incest charge, utilizing outdated information, such the Sentence Violates Federal and State Due process of Law?**
- B. Did the Lower Court err in utilizing the Prior District Court's Sentencing findings in its Sentencing Decision, and in failing to require that the PSI and Psychosexual evaluation be suitably updated, and did it discriminate against Mr. Bauer, a/k/a Ms. Lee as a transgender person?**
- C. Did the Lower Court Violate Mr. Bauer's Constitutional privilege against Self Incrimination by Finding as a basis for the exceptionally lengthy sentence, that He failed to accept responsibility for his criminal behavior?**
- D. Is the 100 year Sentence for Incest, with a 35 year parole restriction, Cruel and Unusual Punishment, on the Particular Facts of This Case?**

## **II. COMBINED STATEMENT OF THE CASE FACTS AND PROCEDURE**

### **A. Facts.**

#### **1. The Prior False convictions and Sentence.**

On July 11, 1983, Mr. Bauer, at the age of 26, was convicted, after trial by jury, of serious felony crimes he didn't commit-sexual intercourse without consent, and aggravated assault. App. A, DC# 99-Defense Sentencing Memorandum, 1-18-01.

During that latter term of incarceration, on September 22, 1991, Mr. Bauer was severely assaulted in the 1991 "Riot at Max," was sodomized brutally, and severely beaten with head injuries. Id, p. 5, Exhibit B-Descriptive Damages Summary.

His conviction was premised on fabricated evidence, promoted by State of Montana authorities. Id, p. 2. His innocence was vindicated on September 22, 1997, when those charges were dismissed with prejudice. Id. Thus he served 8 years plus 354 days in prison for crimes he didn't commit. Id, p. 3.

## **2. The Intervening Intimidation and SIVOC Convictions and Appeal.**

Then, while in prison he was charged and plead guilty to felony intimidation in 1991, and was sentenced to a 5-year prison term, concurrent to his previous sentences. *Chester Bauer v. State*, 1999 MT 194, ¶ 4. Another set of charges ensued on October 10, 1995, when the State charged Bauer with three offenses-Sexual Intercourse Without Consent, Intimidation, and Escape-arising out of an incident with a female inmate at the Blaine County Jail. Following a jury trial, Bauer was convicted on all three charges in March of 1996, and was sentenced to 20 years, with 10 years suspended, after an agreement was reached in which he also relinquished his right to challenge the jury's verdict in a motion for a new trial. *Bauer*, supra at ¶10-12.

The facts of the SIVOC case with the female inmate as victim were that in 1995, he served as a trustee at the Blaine County jail, and became reacquainted with a female inmate he previously knew. App. A, DC# 46- Defendant's reply to the State's Brief in Support of Just Notice,

p. 3. She went to his cell, undressed willingly and they had sexual intercourse. Id, p. 11. He was convicted, after a jury trial . Id.

The sentence in that case was reversed by the Montana Supreme Court on August 3, 1999 and he was resentenced on November 5, 1999, to 5 years on the Intimidation conviction, concurrent to the 9 years, with 4 years and 9 months suspended sentence on the SIVOC (Sexual Intercourse without Consent) charge. Cause DC 95-012, Amended Judgement.

Before resentencing Mr. Bauer, the Hill County District Court, the Honorable John Warner, ordered an updated PSI report and considered the same in the new sentencing proceeding. Id, p. 2. As a basis for those sentences, the district court ruled that Mr. Bauer had served about 16 years in prison and was not the same person he was in 1983, when he began that sentence. Id, p. 5. The court also found that that time in prison was sufficient to teach Mr. Bauer that rules must be followed and the public safety would be protected by supervision of Mr. Bauer. Id, p. 6. *Bauer v. State*, 1999 MT 185, ¶ 5, 295 Mont. 306, 307–08, 983 P.2d 955, 956.

### **3. The 2000 Incest Conviction.**

On April 19, 2000, incest charges were filed against Mr. Bauer, alleging that he had committed that crime against his disabled daughter. App A, DC# 2 & 4, Affidavit for Leave to file Information and Information.

The crimes occurred on December 24, 1999, at his daughter's home where he was temporarily staying, while out on probation. App. A, DC# 95, Psychosexual Evaluation (attached to DC# 95- PSI report). He fondled her and then had unconsented vaginal sex with her. Id, p. 11.

Mr. Bauer maintained his innocence at trial and at sentencing, claiming she fabricated the charges, as he refused to allow her boyfriend to visit her, but ultimately was convicted after a jury trial. Id, p. 11. He submitted a letter for sentencing, in which he recounted at length, his debacle of being violently assaulted in the 1991 "Riot at Max" and then experiencing serious retaliation from both MSP staff and Inmates, when he was returned to that prison, after a stay at a Texas prison. App. A- DC# 95, PSI, Letter of Chester Bauer .

In the 1999 psychosexual evaluation, ordered by the Court, the examiner, Mr. Silvers noted Mr. Bauer evinced an interest in a “male/female” identity, in the Abel & Becker Sexual Interest Card Sort. Id, Psy Sex. Eval, p. 14. While he administered two well known psychological tests, the Minnesota Multiphasic Personality Inventory II (MMPI) and the Million Clinical Multiaxial Inventory- III (MCMI- III), Mr. Silvers didn’t diagnose any mental disorders, although Mr. Bauer certainly presented with demonstrated PTSD symptoms, after his harrowing experiences, and violent assaults in the Riot at Max.

In his final recommendation, Mr. Silvers noted that Mr. Bauer was “cooperative with the notable exception” of denying committing the crime of incest against his daughter. Id, p. 15. Mr. Silvers also found this one of several “Negative Indicators,” supporting his harsh recommendation for incarceration in a secure setting and a level 3 tier designation. Id.

Defense counsel filed a sentencing memorandum advocating for a non-custodial sentence, contending that given the threats against Mr. Bauer’s life and vicious attacks, and the substantial and permanent injuries suffered in the prison riot, that any prison sentence would

constitute a death sentence. App. A- DC# 99 -Defense Sentencing Memorandum, p. 8. Exhibit B, "Summary of Damages" reveals that Dr. Will Stratford, psychiatrist employed at Montana State Prison, and Mike Skorude, a psychology specialist, diagnosed Mr. Bauer with severe PTSD, and flashbacks, noting he was reliving the gruesome murders committed during the riot, and his own anal rape that occurred during that event.

His physical injuries consisted of numerous neurological injuries, and one surgery required incising his head almost from ear to ear, to repair the extreme injuries to his head, face and nasal cavities. Id.

On January 24, 2001, the district court, the Honorable Ted Mizner presiding, sentenced Mr. Bauer to a life sentence, and also imposed a 20 years persistent felony offender sentence, consecutive to the life sentence for incest. App. A, DC# 103. The District Court gave the following reasons for its harsh sentence:

- Age, criminal history and mental condition of the Defendant;
- Inability to accept any responsibility for his criminal behavior;
- Particularly manipulative personality and sexually predatory nature;

- Inability to control his sexual and criminal behavior- in or out of confinement;
- Heinous nature of the offense and the victim's vulnerabilities;
- Virtually no prospects of rehabilitation for the Defendant, so he must be confined to protect society. *Id.*

Mr. Bauer appealed this conviction, but was unsuccessful. *State v. Bauer*, 2002 MT 7. In 1999, Mr. Bauer subsequently filed a pro se petition for a writ of habeas corpus in the Montana Supreme Court; OP 19-0358. The Court granted him extraordinary relief and remanded his case back to the district court for sentencing, as under the holding of *State v. Gunderson*, 2010 MT 166, the separate PFO sentence for the twenty year consecutive prison term was illegal on its face. March 17, 2020, decision in *Bauer v. Lynn Guyer*, OP 19-0358.

#### **4. The July 2020, Resentencing Proceeding.**

Prior to the sentencing hearing, the lower court requested that both state and defense counsel file sentencing memoranda, before the hearing. Those were duly filed. App. A, DC## 125 & 126 ( State's Sent memo & Def Sent Memo). The Defense attached three recent psychiatric reports to its filing, which stated Mr. Bauer was not at risk



for violence or suicide , had been diagnosed with gender dysphoria, and was undergoing hormone replacement therapy. Also, during the sentencing hearing, the defense counsel submitted Mr. Bauer's most recent Classification Summary from the Montana State Prison, which rated him at a medium level, and noted he was used mobility devices and had a hospital bed in his cell. Exhibit G, 7/20/20 Sent. Hrg.

The State contended that any evidence occurring after the original sentencing date should not be considered, arguing that the remand was simply to correct the facially invalid PFO sentence. *Id.*, p. 2. It further stated that evidence from the trial "was buried by the sands of time," but the PSI and Psychosexual report were available. *Id.*, p. 3. The State then argued that given the Defendant's outrageous conduct and "horrible" criminal history, the Court should issue a sentence that protects the community and should impose proper parole restrictions. *Id.*, p. 4.

Later, during the July 8, 2020, sentencing hearing, the State corrected its position that subsequent conduct and events should not be considered by the Court. Sentencing Transcript (Sent. Tr.), pp. 30-31. It advocated for a 100 year sentence with no parole for 35 years, and

stated that was intended to “mimic” Judge Mizner’s previous sentence of life. Id, p. 19, l. 18-21.

The Defense Sentencing Memorandum advises of significant changes in Mr. Bauer’s personal and health status, including his diagnosis of gender dysphoria, and as a transgender person, and also that he suffered from Ramsay Hunt Syndrome, a fatal genetic disease, and could not walk any distance and used braces on his arms to write or use utensils. App. A-DC# 126, p. 2 (unpaginated document); Exhibit B - facts sheet.

Attached to that memorandum were numerous certificates of classes and courses; Exhibits C&D, that Mr. Bauer had taken during his decades long imprisonment, as well as recent psychiatric evaluations that indicated he didn’t suffer from suicidal ideation any longer, and was not at risk for violence. Id, Exhibit A.

At the sentencing hearing, defense counsel presented policies and procedures from the federal prison system for transgender persons, and Montana DOC policies on that topic, and advocated for a 40 year sentence for Ms. Lee, indicating to the Court that was how Mr. Bauer now preferred to be addressed. Sent. Tr., p. 45. He further emphasized

that his client, Ms. Lee, was again maintaining her innocence, as previously asserted. Id, p.44, ll. 15-22.

The lower court sentenced Ms. Lee, a/k/a, Mr. Bauer to a 100 year sentence, with no possibility of parole for 35 years, and before issuing that sentence, asked to review the prior sentencing judgment. Id, p. 41.

It cited these reasons for the lengthy sentence:

- His inability to accept responsibility and that he persists in his innocence. Id, p. 53, ll. 10-12;

- His sexually predatory nature and particularly heinous offense, Id, ll. 17.

The lower court also adopted Judge Mizner's conclusions that the Defendant has virtually no prospect of rehabilitation, and must be confined, in order to protect society. Id, ll. 21-24. It then commented that the only factor that had changed without dispute from the state was his health status. Id, p. 54, stating:

"Uh, I'm not talking about whether he digs chicks anymore....his sexual orientation...I don't mean to be facetious but we're talking about a sexual predator... he may, that may well have changed. I don't know to what extent it has?....I don't know that's part of his manipulation, and part of his way of getting along in prison?

Continuing the lower court further noted Mr. Bauer was a “crippled up guy,” but still a sexual predator and then found him once again, like Judge Mizner, a level 3 risk to reoffend. Id, p. 54, ll. 17-20. It also commented that the court had not been presented with a new sex offender evaluation that changed his tier level Id, ll. 22-23.

Again, the court lamented it didn’t have any evidence or expert testimony about his risk to reoffend. Id, p. 55, ll 1-5. The court then found that the prison policies and U.S. Supreme Court opinion<sup>1</sup> presented that very day, didn’t provide sufficient evidence to refute the level 3 designation. Id, p. 55.

The lower court then stated if he got paroled, that it wanted him to complete the educational portion of sex offender treatment before being eligible, phase one. Id, p. 56. It then stated that while it could have given him 100 years without parole, it shouldn’t do that because of his physical inability to be as dangerous, noting:

*“He- guy can’t even stand before me. He’s a different guy, his self is different. I think to a certain extent that makes him less*

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<sup>1</sup> Attached to the Defense Sentencing Memorandum was the SCOTUS opinion of Bostock v. Clayton County, 590 U.S. \_\_\_, 140 S. Ct. 1731, 207 L.Ed 218 ( 2020)..

dangerous, not that he wouldn't try to hurt somebody." Id, ll. 11-19.

Again, the court repeated that it had no information that he was less dangerous now than he was then. Id, p. 57, ll. 9-10. The lower court imposed a 100 year sentence, with no parole for 30 years. Id, p. 57, ll. 20-25. Additionally, he'd have to complete SOP I and II, before being paroled. Id, p. 58.

The lower court then said:

" My reasons for the parole restrictions are the same that were articulated by judge Mizner....." Id, ll. 21-22.

After quizzing both counsel about including anything else in the proclamation, defense counsel responded by requesting an order for chemical castration, which the lower court denied, stating:

"Not going to get into that." Id, pg. 59.

The Sentencing Order issued by the Court stated that the reasons for the sentence were the age, criminal history and mental condition of the Defendant, his particularly manipulative personality, in ability to accept responsibility for his criminal behavior, and the heinous circumstances of the offense, and that the Defendant has virtually no

prospects of rehabilitation and must be confined to protect society. App. B, DC# 136.

No notice of appeal was filed by Mr. Bauer, but this matter has been filed as an out of time appeal.

### **III. SUMMARY OF ARGUMENT**

Defense counsel failed to enter any objection to an illegal sentence which was predicated on materially false information, and additionally, violated Mr. Bauer's Fifth Amendment right, as he constantly maintained his innocence. As these errors are of constitutional dimension, they implicate Mr. Bauer's fundamental due process right to be sentenced on accurate information, and to not be subjected to cruel and unusual punishment. Thus, the common law doctrine of plain error must activate to allow appellate review.

The lower court's failure to order an updated PSI and the companion psychosexual evaluation wholly deprived Mr. Bauer of his right to be sentenced on accurate information at this critical resentencing proceeding.

The 100 year sentence with a 35 year parole restriction, was on its face, excessive, and was unsupported by any evidence at the hearing. The victim had died. Mr. Bauer, a/k/a Ms. Lee was transitioning to the female sex, and couldn't use his hands, or arms without braces. He couldn't walk normally. His ability to commit new crimes was functionally limited by his physical disabilities. He enrolled in sex offender treatment but had to take other courses instead, as his life sentence had disqualified him for SOP treatment. Dr. Hill didn't reappear to corroborate her previous view with updated testing or anecdotes to show that Mr. Bauer was still "highly manipulative."

The lower court consciously ignored those new material facts, after promising to look at all the facts. Then, it reversed course, and incorporated the prior judgment and all its findings, but for the downturn in Mr. Bauer's physical health, in fashioning its sentence. The court's untoward comments about Mr. Bauer, a/k/a Ms. Lee's new gender status being manipulative and a way to exist in prison, as opposed to being a genuine life path, constituted a violation of that protected class, that is, being a transgender individual.

This resulted in an excessive, discriminatory, and unconstitutional sentence, a virtual life sentence, given that Mr. Bauer , a/k/a, Ms. Lee was 63 years old when sentenced, and numerous circumstances pertinent to the earlier life sentence had changed or dissipated.

## **IV. ARGUMENT**

### **A. Standards of Review.**

#### **1.Plain Error.**

*State v. Finley* (1996), 276 Mont. 126, 137, 915 P.2d 208, 215, acknowledged the inherent power of the Court to protect the rights set forth in the Montana Constitution, and held that the Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46-20-701(2), MCA, criteria. Common law plain error is to be employed sparingly, on a case-by-case basis. *Finley*, 276 Mont. at 137, 915 P.2d at 215.

#### **2. Review of Illegal and/ or Unconstitutional Sentences.**



A sentence of incarceration of a year or more is reviewed for legality. *State v. Champagne*, 2013 MT 190, ¶ 17, 371 Mont. 35, 305 P.3d 61. De novo review applies to whether a district court violated a defendant's constitutional rights at sentencing. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657. An appellate court may “review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing.” *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

**B. Mr. Bauer’s Fundamental Due Process Rights to a Fair Sentencing Proceedings Were Violated.**

The Highest Court of our country has held that a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are “materially false,” *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, [1255,] 92 L.Ed. 1690[, 1693] (1948);

*Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 311, 983 P.2d 955, 959; *See also United States v. Messer*(9th Cir.1986), 785 F.2d 832, 834 (noting that a defendant's due process rights are violated when a

court relies on “materially false or unreliable information in sentencing”).

In Montana, a convicted defendant has a due process guarantee against a sentence predicated on misinformation.” *State v. Osborn* (1976), 170 Mont. 480, 486, 555 P.2d 509, 513; *accord State v. Redding* (1984), 208 Mont. 24, 27, 675 P.2d 974, 976 (affirming that “due process precludes a sentence from being predicated on misinformation”).

Here, the lower court ordered sentencing memoranda from both sides, but failed to order updated PSI report and Psychosexual evaluations. Sent Tr, p. 9. Both reports are statutorily mandated, and serve a vital function of providing accurate and material information on which a court relies to sentence a felony offender. see, Sec. 46-18-111, M.C.A.

Prior to imposing sentence upon a sex offender, a district court is mandated to order, and to consider a psychosexual evaluation as well as a PSI. Section 46–18–111(1), MCA. *State v. Hill*, 2009 MT 134, ¶¶ 31-32, 350 Mont. 296, 304, 207 P.3d 307, 313.

A PSI includes the circumstances of the offense and the defendant's history (including his criminal record and social history). Section 46-18-112, MCA. Psychosexual evaluations can include as much, if not more, in-depth information on a defendant's sexual history. *Hill*, supra.

The content of the PSI report is also specified by statute, and now requires very specific information, including a risk assessment, which was not required for the previous sentencing. Mont. Code Ann. § 46-18-112(a).

This Court has held that a presentence investigation report “is a vital tool of the district judge in arriving at what it considers a proper sentence.” *State v. Radi*, (1978), Mont., 578 P.2d 1169, 35 St.Rep. 489,. The primary function of the presentence investigation is to assist the judge in making his determination as to the disposition after conviction. *People v. Edwards* (1976), 18 Cal.3d 796, 135 Cal.Rptr. 411, 557 P.2d 995. *State v. Radi*, 185 Mont. 38, 40, 604 P.2d 318, 320 (1979).

This purpose was annihilated when the lower court only had before it, the outdated and nearly irrelevant PSI report. While certain demographic data, i.e., date, place of birth, family, and the historical

information was accurate, more importantly, Mr. Bauer's mental and physical health were not accurate as of July 8, 2020, the date of his resentencing.

Clearly, the lower court struggled with this deficiency when it repeatedly said:

"Judge Mizner did that( sic ) he's a level 3 risk to offend. No, uh, nobody's said anything to me that causes me to think otherwise....I haven't been presented with a new sex offender evaluation that says, no now the guys a level 2 or soothing like that....." Sent. Tr., p. 54.

"I don't have, uh, any expert, expert testimony or anything about that." Id, p. 55.

"But on the specific issue of, uh, amenability to sex offender treatment,.....**I don't have any information that's he's less dangerous as a sex offender now than he was then.**" Id, p. 57 (emphasis supplied).

Even more important was the psychosexual evaluation, which was done in December 2000. It was the underpinning for not only the tier level for Mr. Bauer, pursuant to Sec. 46-23-509, M. C. A. but also set out for the sentencing court the type and length of sentence, as well as the sex offender treatment to be imposed. App. A- DC# 94 (PSI report, psychosexual attached).

Mr. Bauer had undergone drastic health and personal life change, including transitioning to the female gender, as described in the

psychiatric evaluations attached to his defense sentencing memo. App.

A- DC# 126. He voluntarily took numerous classes and courses, embarking on self-improvement, as he was barred from partaking in SOP treatment at Montana State Prison, due to his lengthy sentence.

Thus, due process “prohibits a court from relying on materially false information when sentencing a defendant.” *Bishop v. State* (1992), 254 Mont. 100, 110, 835 P.2d 732, 738; *Bauer v. State*, 1999 MT 185, ¶ 21, 295 Mont. 306, 312, 983 P.2d 955, 959.

Here, the lower court found Mr. Bauer didn’t take advantage of sex offender treatment. Sent Tr, p. 53. This conclusion was erroneous, for he had enrolled but ironically, his long sentence precluded entry into that supposedly important phase of his sentence. Exhibit G-Sent Hrg. On this crucial point, the Court, the State and the Defense all agreed this was the long standing practice at Montana State Prison.

The lower court still maintained the damaging, psychological finding that Mr. Bauer was highly manipulative, a personality trait that was not provided up at the hearing or by any new evidence the State presented. It found he was a “sexual predator” but even the outdated psychosexual evaluation did not support that pejorative label.

Mr. Bauer was sentenced on materially false and outdated information.

**C. The Lower Court Abused its Sentencing Discretion in Largely Adopting the Prior Court's Sentencing Scheme and Rationale.**

This Court remanded Mr. Bauer's case for him to be resentenced, after his prior bifurcated sentence of life plus 20 years on the PFO was invalidated. *Bauer v. Lynn Guyer*, OP 19-0358.

This remand contemplated that the new judge, would exercise anew his discretion and judgment in fashioning a new sentence, not rubber stamping the prior sentence and findings of fact and law.

Here, the lower court actually, after much back and forth and on the record deliberation as to what sentence and what terms to impose, shortly before he imposing sentence, requested to review the prior sentencing judgment . Sent. Tr., p. 46-47. It then imposed a virtually identical sentence of 100 years, with no parole for 35 years, and left intact the level 3 tier determination.

This was a conscious disregard of material facts, presented by the defense, that several of the factual grounds for the Mizner sentence had dissipated or outright disappeared.

First, the victim had deceased, at a young age, as she suffered from the same rare genetic disorder that her father had. Sent. Tr. p. 48. Consequently, any need to protect her was defunct. Secondly, the lower court completely disregarded Mr. Bauer's very recent classification summary from MSP, that showed he had at least 3 years of clear conduct, and was functionally barred from fulfilling his SOP treatment condition, because of the exceptionally long sentence. Sent Tr. p. 27.

Previously, Judge Mizner had found, as a basis for his sentence that Mr. Bauer was a "highly manipulative individual." App. A, DC# 103 (Sent Order). That was premised on Dr. Virginia Hill's testimony and her October 23, 2000, letter. She had submitted that scathing letter for the original sentencing in 2000, in which she excoriated Mr. Bauer for being a highly manipulative individual, without any demonstrable mental disease or disorders. App. A- DC# 94 (V. Hill 10/23/20 letter, attached to PSI).

In particular, she accused him of threatening suicide on multiple occasions, in an effort to avoid incarceration at Montana State Prison. Id. Given that he was sodomized, beaten severely, and left with permanent brain injuries and Post Traumatic Stress Disorder as a result of the 1991 "Riot At Max;" See. App. A, DC# 99 (Def. Sent Memo – Exhibit B- Damage Summary), justifiably he was loathe to return to MSP, where inmates had put contracts out on his life, for cooperating with investigating authorities. Suicidal thoughts would be a normal result of such a life altering experience- and coincidentally, if Mr. Bauer had never been wrongfully convicted by the state of Montana in his prior case, he never would have been imprisoned and attacked so brutally.

The only other expert content on Mr. Bauer's psychological conditions and personality traits was found in the psychosexual report, by Mr. Silvers. App. A, DC# 94 (Psychosexual Eval, attached to PSI). Yet the testing results on pages 13-14 do not support the conclusion that he was a highly manipulative individual. No such personality disorder was found, despite two personality tests being administered for that evaluation .



By contrast, after the passage of nearly two decades, the updated psychiatric reports submitted by defense counsel as part of their sentencing memorandum, which were undisputed by the State, demonstrate that Mr. Bauer not only no longer had any suicidal ideation, but also, for violence risk assessment purposes, no risk factors were identified. App. A-DC# 126 (Exhibit A-reports dated 3/20/20, 1/21/20 & 11/20/19).

Thus, for the lower court to still persist in the factual finding that Mr. Bauer was a sexual predator, whom had to be confined to protect society, when his classification action summary (Exhibit G to DC# 126) showed he was confined to assisted walking devices and a hospital bed in his cell, was a premise based on materially false facts.

The same is true of the finding that he was highly manipulative, and that he had a lack of ability to gain insight from sex offender treatment or control his criminal sexual behavior in or out of confinement, and as the court said, “that all been established for me.” Sent.Tr., p. 53. ll. 13-16.

This finding was particularly cruel, for as the court observed several times during the sentencing hearing, Mr. Bauer could not enter

SOP treatment- because of the lengthy sentence. He enrolled and was put on a waiting list for those courses. Exhibit G-Sent hrg.

Thus, for the court to chastise him for not completing that specialized treatment, when obviously it was unavailable to him because of a judicial decision - is a due process violation of the highest order.

One very significant change for Mr. Bauer/Ms. Lee, was that on or about November, 2019, she announced that she was transgender, and reporting to the psychiatrist a history of engaging in feminine activities and wearing female clothing. Id. This tracked the test result from the psychosexual that the Abel & Becker Assessment that found he had a mixed male and female sexual identity. App. A- DC# 94 (Psych. Sex. Eval, p. 14). Thereafter he was prescribed hormone therapy by prison authorities and additionally, was officially “diagnosed” with Gender dysphoria disorder. App. A-DC# 126 (Exhibit A-reports dated 3/20/20, 1/21/20 & 11/20/19).

The State didn’t dispute these life altering changes. Nor did it dispute that Mr. Bauer suffered from a severe genetic disorder, which was physically disabling, to wit, Ramsay Hunt Syndrome Type II, a

degenerative, neurological disorder causing seizures and tremor and reduced muscle coordination. App. A- DC# 126 (Exh. B) In fact, the lower court saw for itself that at the July 8, 2020, sentencing hearing, Mr. Bauer could not even stand before the Court, referring to him as “all crippled up.” Sent Tr. p. 56.

However, in its sentencing pronouncement, the lower court failed to properly factor in all these significant changes, even after it indicated it was going to consider his circumstances up to the new sentencing date, and not retrospective to the original sentencing date. Sent. Tr., p. 31.

Moreover, it doubted that Mr. Bauer’s transition to the female gender was sincere, when it questioned that personal decision, and stated:

“...we’re talking about a sexual predator... Uh, , uh, he may, that may very well have changed. Don’t know to what extent it has ? I don’t know to what extent that’s part of his way of getting along in prison ?

*I don’t know to what extent that’s part of his manipulation.* “Sent. Tr., p. 54, ll. 8-14.

Sec. 46-18-101,( c ) M.C.A., states, in part:

“ Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.”

Being transgender, as Mr. Bauer a/k/a Ms. Lee was, is a classification that is constitutionally protected under federal law. An employer who fires an individual merely for being gay or transgender violates Title VII. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1734, 207 L. Ed. 2d 218 (2020).

The court’s previously noted comments that tied Mr. Bauer’s transgender status to being manipulative, are discriminatory and illegal. Although they appear to simply raise an issue, at the close of the sentencing hearing it can reasonably be concluded that such comments fed the finding of being highly manipulative, a negative trait and one widely associated with being a sexual predator.

Consequently, when in the Sentencing Order, the lower court stated the only significant change for Mr. Bauer was his health status, which had deteriorated; App. B, p. 4, it abused its discretion in consciously disregarding the other material changes, in Mr. Bauer’s situation, and in considering that given his physical limitations, the chance he’d commit additional hands-on sex crimes, was doubtful.

Sentences issued in criminal cases in Montana, furthermore, must be certain timely and understandable. Sec. 46-18-101 ( a ), M.C.A.

When a sentencing judge ruminates about such an important issue, as here, that statutory standard is not met and relief must be found for this unsettling level of uncertainty.

An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason. *State v. McLaughlin*, 2009 MT 211, ¶ 9, 351 Mont. 282, 210 P.3d 694.

Here, the lower court failed to factor the newest expert reports into its sentence, even after it acknowledged it had requested sentencing memorandum, with such information. Sent.Tr. p. 9. To Mr. Bauer's credit, the new psychiatric information showed that Dr. Hill's harsh opinions had dissipated. Notably, Mr. Bauer's accomplishing completion of no less than 40 courses of various types of self-improvement and reentry, showed initiative, a will to correct previous mistakes, and to atone for criminal behavior by whatever educational resources were available.

The MSP Classification summary (Def. Exh G) a reliable snapshot of how Mr. Bauer had done in a prison setting, showed he was classified to medium custody, with 10 points out of a 0-23 point scoring system, and had three years clear conduct.

Thus, the lower court severely abused its discretion in finding, again that Mr. Bauer was highly manipulative, was a sexual predator, and that such circumstances supported the lengthy prison sentence. It further discriminated against him/her on the basis of a protected class-sex and transgender status.

**D. Fifth Amendment Rights Were Violated by The Harsh Sentence Imposed.**

In its oral pronouncement of sentence and in the written sentencing judgment, the lower court chastised Mr. Bauer for “his inability to accept any responsibility for his criminal behavior.” Sent. Tr, p.53, ll. 10-11; App. B, p. 2. Mr. Bauer had consistently maintained his innocence on the incest charge, throughout the duration of the case. App. A, # 99, Defense Sent Memorandum no 1, p. 3; Id, DC. # 126, Defense Sent. Memorandum no. 2, p. 3 (document unpaginated); DC# 94, PSI, Psychosexual Report attached, p. 15.

This violated his fundamental constitutional right against Self Incrimination, under the U.S. and Montana Constitutions, the Fifth Amendment of the former, and Sec. 25, Art. II, of the latter. District courts are prohibited from “augmenting a defendant's sentence because a defendant refuses to confess a crime or invokes his privilege against self-incrimination.” *State v. Imlay*, 249 Mont. 82, 91, 813 P.2d 979, 985 (1991).

Courts may, however, consider a defendant's lack of remorse at sentencing. *State v. Shreves*, 2002 MT 333, ¶ 20, 313 Mont. 252, ¶ 20, 60 P.3d 991, ¶ 20. Here, however, the lower court didn't use that particular term. However, if such is construed in the record, and determined to be lack of remorse, the court **“must point to affirmative evidence in the record demonstrating lack of remorse.”** *State v. Rennaker*, 2007 MT 10, ¶ 51, 335 Mont. 274, 285–87, 150 P.3d 960, 968. Here, the lower court didn't rely on any such specified evidence. See also, *State v. Duncan*, 2008 MT 148, ¶¶ 52-55, 343 Mont. 220, 231–32, 183 P.3d 111, 120–21.

Lastly, even if such evidence may exist in the record (and Mr. Bauer does not so concede), that such evidence exists in the record does not cure the error. *Rennaker*, ¶ 51.

**E. The 100 Year Sentence, a Legal Impossibility, Is Cruel and Unusual Punishment.**

Mr. Bauer was 63 years old, crippled, broken by prior wrongful imprisonment, when the lower court sentenced him to 100 years in prison, with no parole for 35 years. This sentence functioned as not only a life sentence, but extended far beyond his normal life expectancy. It is a legal impossibility for him to serve all of this sentence and he will undoubtedly die in prison.

“The law never requires impossibilities.”

Mont. Code Ann. § 1-3-222

This sentence is illegal for it is impossible. It is unconstitutional as violating the Eighth Amendment of the U.S. Constitution and Section 22, of Article II, of the Montana Constitution, as it bears no rational relationship to the goals of sentencing, set out in Sec. 46-18-101, M.C.A. Under the unusual and particular facts of Mr. Bauer’s case,



it fits the exception that it shocks the societal and collective conscience we rely on to set norms and our mores.

Additionally, our society, and specifically, noted advocacy groups like the Sentencing Project, are scrutinizing and questioning the public policies and wisdom as well as the financial costs of excessive prison sentences- particularly for the elderly aging population- as Mr. Bauer. that our legislatures, and our courts, state and federal, are in the habit of imposing on our citizenry, and of constantly validating by according law makers complete leeway in enacting draconian sentencing schemes.

The following facts from a recent report from the Sentencing Project illuminate and articulate this serious issue:

- One in 7 people in U.S. prisons is serving a life sentence, either life without parole (LWOP), life with parole (LWP) or virtual life (50 years or more), totaling 203,865 people;

- In 2020, 42,833 people were serving sentences that totaled a maximum of 50 years or longer. *We refer to this group as serving a virtual life sentence because the term of years they must serve is so long they are unlikely to survive it even though they are not statutorily sentenced to life.* (emphasis supplied )

- The unyielding expansion of life imprisonment in recent decades transpired because of changes in law, policy and practice that lengthened sentences and limited parole.....

- In 2020, 61,417 people who are at least 55 years old were serving life sentences, part of a growing trend of elderly imprisoned Americans. In fact, the number of people in prison today who are age 55 or older has tripled since 2000..... *"No End In Sight- America's Enduring*

*Reliance on Life Imprisonment.” The Sentencing Project, Ashley Nellis, Ph.D., 2021.*

Mr. Bauer is a virtual “lifer” and as he also is over 55 years of age, his sentence must be accorded heightened scrutiny, for the lifelong incarceration of the elderly and the infirm must end. They can be safely and economically confined in a community-based setting, utilizing modern penological technologies as home confinement, GPS devices, and other available alternative sentencing schemes.

Neither the Eighth Amendment to the United States Constitution, nor Article II, Section 22 of the Montana Constitution, contains explicit prohibitions against disproportionate sentences. Yet the United States Supreme Court has held that the cruel and unusual punishment clause of the Eighth Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. See *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L.Ed.2d 836 (1991).

It has been, therefore, a long held general precept in Montana that a sentence that falls within the statutory maximum guidelines does not violate the prohibition against cruel and unusual punishment.

*State v. Shults*, 2006 MT 100, ¶ 30, 332 Mont. 130, ¶ 30, 136 P.3d 507, ¶ 30. While courts are typically deferential to legislative judgments, this precept has served as a license to enact stiffer and longer prison sentences, that inevitably shock the conscience and serve no meaningful modern penological purposes, when objectively examined.

The Montana Supreme Court recognizes an exception to the general rule “when a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice.” *State v. Wardell*, 2005 MT 252, ¶ 28, 329 Mont. 9, ¶¶ 28, 122 P.3d 443, ¶ 28). The defendant bears the burden of proving his sentence falls within this exception. *State v.*, 277 Mont. 261, 271, 922 P.2d 463, 469 (1996). Mr. Chester Bauer, a/k/a Ms. Lillian Lee, contends he/she has met this burden.

#### **G. The Forgoing Errors Compel Plain Error Review.**

Common law plain error review is invoked when the alleged errors implicate Mr. Bauer’s fundamental constitutional rights. *Finley*, 276 Mont. at 137, 915 P.2d at 215; *State v. Weaver*, 1998 MT 167, ¶ 26, 290 Mont. 58, ¶ 26, 964 P.2d 713, ¶ 26.

Plain error review is a vital judicial tool, if mistakes, judgment lapses and errors result in a manifest miscarriage of justice or leave unsettled the question of fundamental fairness of the trial or proceeding, or compromise the integrity of the judicial process

Here, the previously outlined sentencing errors, are significant , and unsettling, given the gravity of the penalty imposed on a disabled, elderly, transgender person. If not corrected and subjected to plain error review, a miscarriage of justice on an extreme level, will occur for Mr. Bauer, a/k/a, Ms. Lee, and the administration of justice in Montana will be forever tainted, when a wrongfully convicted citizen, brutalized in a prison riot and left severely disabled, receives an unfair and excessive “virtual” life sentence that bears little to no relationship to penological goals.

## **V. CONCLUSION.**

Appellant requests that this case be remanded for sentencing, before a different judge, and that an updated psychosexual evaluation and PSI report be ordered before the sentencing hearing.

Respectfully submitted this 2<sup>nd</sup> day of December, 2021.

/s/ Penelope S. Strong  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced font of Century Schoolbook, 14 point; is double spaced; Microsoft Word 2010, and consists of 6,700 words, excluding the table of contents, table of authorities, certificates of service and of compliance.

Dated this 2<sup>nd</sup> day of December, 2021.

By: /s/ Penelope S. Strong  
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## **CERTIFICATE OF SERVICE**

I state that on the 2<sup>nd</sup> day of December, 2021, I served true and accurate

copies of the foregoing document upon each attorney of record, and each party not represented by attorney in the above-referenced District

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