IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0469

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHESTER RAYMOND BAUER,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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2. Should this Court review Bauer's claim that his sentence is an abuse of discretion under the plain error doctrine?

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4. Should this Court review Bauer's claim that his sentence is cruel and unusual under the plain error doctrine and, if so, does his sentence shock the conscience?

STATEMENT OF THE CASE

Bauer was convicted of incest in 2000 after he raped his adult, disabled daughter. *State v. Bauer*, 2002 MT 7, ¶ 14, 308 Mont. 99, 39 P.3d 689 (*Bauer II*). The court imposed a life sentence for the offense of incest, in addition to a 20-year

sentence for the persistent felony offender (PFO) designation and prohibited the possibility of parole. (Doc. 103 at 2.)

Bauer obtained reversal of his sentence in 2019 because it improperly imposed two sentences. *Bauer v. Guyer*, OP 19-0358, 2019 Mont. LEXIS 926 (Mont. Sup Ct. March 18, 2020) (*Bauer III*). Upon remand, the court sentenced Bauer to 100 years in prison with a 30-year parole restriction and with the requirement that he complete phases I and II of sexual offender treatment before being eligible for parole. (Doc. 136, available at Appellant's App. B.)

STATEMENT OF THE FACTS

I. Bauer's history

In 1983, Bauer was sentenced to the Montana State Prison for aggravated assault and sexual intercourse without consent. *State v. Bauer*, 2002 MT 7, ¶ 7, 308 Mont. 99, 39 P.3d 689 (*Bauer II*). On September 22, 1997, both convictions were vacated on the basis of DNA test results that excluded Bauer as the assailant and other 'newly discovered evidence' of actual innocence. *Id*.

Bauer continued to be incarcerated after his 1983 convictions were reversed because he was convicted of intimidation while he was incarcerated. *Id*. That conviction stemmed from an incident in which Bauer intimidated a prison employee's spouse. *Id*. Additionally, Bauer was convicted in 1996 of sexual

intercourse without consent, intimidation, and escape based on an incident where Bauer had sexual intercourse with a female inmate in the Blaine County Jail. *Bauer v. State*, 1999 MT 185, ¶ 5, 295 Mont. 306, 983 P.2d 955 (*Bauer I*).

After Bauer's 1983 convictions were reversed, this Court ordered that Bauer be resentenced for the 1996 Blaine County offenses "as a matter of fundamental fairness" to ensure that he was not sentenced based on false information. *Bauer I*, ¶¶ 30-32. On remand, the district court imposed a shorter sentence so that Bauer would be released from prison on November 26, 1999, shortly after the sentencing hearing, and would begin then serving the suspended portion of his sentence at that time. (Doc. 94, attached Amended Judgment and Sentence). The court explained that it was imposing the shorter sentence because Bauer had already served 16 years in prison and had "done sufficient prison time in connection with the present offenses to teach him that the rules must be followed. It is reasonable to believe that the public will be adequately protected by supervision of the defendant." (*Id*.)

II. Bauer's conviction for incest

Approximately one month after he was released from prison on the Blaine County offenses, Bauer committed incest against his daughter, which is the offense at issue in this case. *Bauer II*, ¶ 13. In December 1999, Bauer arranged to spend Christmas with family in Anaconda. *Bauer II*, ¶ 8. Bauer obtained a probationary

travel permit based on his representation that he was staying with his sister. He instead stayed at the apartment of his 18-year-old daughter, Amanda, who was physically disabled and mildly developmentally disabled. *Id*.

According to Amanda's testimony,

> Bauer had non-consensual sex with Amanda two times during the evening of December 24, 1999. Afterward, Bauer told Amanda that the family would ostracize her and he would be returned to prison if she told anyone what had happened. The next day, Amanda's mother noticed that Amanda was unusually withdrawn . . . and appeared angry and upset. Amanda told no one of the alleged incest during the subsequent weeks.

Bauer II, ¶ 10.

Bauer returned to Anaconda on January 21, 2000. *Bauer II*, ¶ 11. He again stated on his travel permit that he would stay with his sister, but he again went to Amanda's apartment. *Id*. According to Amanda's testimony,

> Bauer arrived at her apartment in the late afternoon with a case of beer, travel bag and television set. Amanda testified Bauer touched her sexually, poured beer down her clothes and coerced her to drink alcohol and take pills. In anticipation of Bauer's visit, Amanda arranged for a number of friends to come by her apartment and check on her that evening. Bauer refused to let anyone in the apartment and posted a note on the door stating that Amanda wanted no visitors. As an excuse to get Bauer out of her apartment, Amanda asked him to buy her a cappuccino at a convenience store located on the edge of town. Once alone, Amanda immediately telephoned her mother, who directed her to call the police.

Id.

When police officers arrived, Amanda was highly distraught and wanted them to make Bauer leave. *Bauer II*, ¶ 12. Amanda did not mention the inappropriate touching at that time. *Id*. Officers took Bauer to the police station because he was not allowed to consume alcohol, and he failed field sobriety tests. *Id*. Although Bauer denied drinking alcohol, a breath test demonstrated that Bauer had a blood alcohol content of .07. *Id*.

Days later, Bauer sent Amanda and her mother letters accusing Amanda of drug abuse, threatening to sever all contact between Amanda and his family, discussing suicide, blaming Amanda for his decision to withhold gifts he had promised her and her sister, and encouraging Amanda to visit him. *Bauer II*, ¶ 13.

Amanda disclosed the incest to her mother several days later. *Id*. At trial, the jury found him guilty of committing incest on December 24, 1999, and acquitted him committing incest in January 2000. *Bauer II*, ¶ 14.

A presentence investigation report (PSI) was prepared in December 2000. (Doc. 94.) Because Bauer had already been exonerated for the 1983 offenses, those convictions were not included in his criminal history. (*Id*. at 2.) The report listed Bauer's prior felony offenses as the 1991 intimidation conviction and the 1996 convictions for sexual intercourse without consent, intimidation, and misdemeanor escape. (*Id*.)

A letter written by Dr. Virginia Hill, the staff psychiatrist at the Montana State Hospital (MSH), in October 2000, was attached to the PSI. (Doc. 94, Dr. Hill letter.) Dr. Hill explained in the letter that Bauer had been admitted to the MSH six months earlier because he stated that he was suicidal after he was arrested. After observing Bauer for six months, Dr. Hill concluded that his "suicidal threats are manipulative (to assure a non-correctional placement), and not the product of a mental disorder, such as major depression." (*Id*.) Dr. Hill explained that Bauer had not "exhibited signs or symptoms of a mental disorder requiring commitment." (*Id*.) Instead, she stated that he "exploited an unfortunate jail situation by repeatedly threatening to kill himself if sent back to a jail incapable of monitoring for suicidal behaviors." (*Id*.) Dr. Hill recommended that Bauer be sent "to a correctional setting capable of supervising manipulative suicidal behaviors," such as the prison. (*Id*.) Dr. Hill did note that Bauer was very concerned that he would be harmed by individuals involved in the 1991 prison riots because he had testified for the State after the riot. (*Id*.)

The PSI also contained a sexual offender evaluation from Ron Silvers. (Doc. 94, Silvers Eval.) Silvers explained that he compared Bauer's responses to a previous sexual offender evaluation that had been conducted on Bauer earlier that year, and Silvers concluded that the "discrepancies noted between the two evaluations indicate a significant level of deception." (*Id*. at 15.) Silvers

concluded that it was likely that Bauer "routinely uses deception when discussing himself, his past history, or his relationships with others." (*Id*.) Silvers concluded that Bauer was "a level 3 extremely high risk for re-offense sexual offender." (*Id*. at 16.) Silvers explained that there was "little indication that Mr. Bauer would be amenable for either out patient or in patient sexual offender therapy owing to his current stance. Mr. Bauer obviously was deceptive during the initial process in that he failed to disclose his offense activity committed against his daughter in late 1999." (*Id*.) Silvers concluded that Bauer "obviously requires incarceration." (*Id*.) Silvers opined that therapy would "have negligible value without Mr. Bauer's commitment to honesty and full accountability for the sexual assault perpetrated against his victims." (*Id*. at 16-17.)

Bauer provided a sentencing memorandum in which he argued that his life would be in danger if he were placed back in the prison based on his testimony about the 1991 prison riots. (Doc. 99.)

At a January 2001 sentencing hearing, the Honorable Ted L. Mizner imposed a life sentence for the offense of incest, in addition to 20 years for the persistent felony offender designation, and designated Bauer ineligible for parole. (Doc. 103 at 2.) The court found that the parole restriction was "necessary for the protection of society because of the Defendant's lengthy criminal history which includes predatory sexual behavior even while incarcerated, and on supervision,

and such sexually predatory behavior cannot be controlled outside of confinement." (*Id*.) Based on the sexual offender evaluation, the court found that Bauer was "an extremely high risk to re-offend," and designated Bauer "a Level 3 Classification." (*Id*.) The court then explained that its reasons for the sentence were "the age and criminal history of the Defendant, the mental condition of the Defendant, and the ability of the prison to provide the services the Defendant needs." (*Id*.) The court explained that it had

> considered the Defendant's particularly manipulative personality, and his inability to accept any responsibility for his criminal behavior, his sexual predatory nature, and his lack of ability to gain insight or understanding from sex offender treatment or to control his criminal or sexual behavior when in or out of confinement. Finally, the Court has considered the particularly heinous circumstance of the present offense, including the level of manipulation involved and the victim's vulnerabilities, and the predatory, and threatening acts of the Defendant while committing the crime of incest.

(*Id*.) The court concluded that Bauer had "virtually no prospects of rehabilitation. He must be confined in order to protect society." (*Id*.)

On appeal, Bauer unsuccessfully challenged his conviction, but did not challenge his sentence. *Bauer II*.

III. Resentencing

In 2019, Bauer filed a writ of habeas corpus in this Court. *Bauer III*. The State conceded, and this Court agreed, that Bauer's sentence was illegal. *Under*

State v. Gunderson, 2010 MT 166, 357 Mont. 142, 237 P.3d 74, the PFO sentence replaces, rather than supplements, the sentence for the underlying offense, so the district court erred when it imposed a sentence for both incest and the PFO. *Bauer III*. This Court remanded the case to the district court for resentencing in accordance with *Gunderson*.

Prior to the new sentencing hearing, both parties filed sentencing memorandums. The State explained that evidence had been lost in the 19 years since Bauer had been sentenced and argued that the court should rely on the evidence from the prior sentencing hearing. (Doc. 125 at 2.) The State explained that the court had the authority to sentence Bauer as a PFO to a minimum of 5 years and a maximum of 100 years. (*Id*. at 3.)

In Bauer's sentencing memorandum, he asserted that he was "a completely different individual" than he was in 2001. (Doc. 126 at 3.) He explained that he was in the process of transitioning to a female and was disabled due to a health disorder, which prevented him from walking any significant distance. (*Id*. at 2-3.) He also claimed that he had signed up for sexual offender treatment, but had not been admitted. (*Id*. at 3.) Bauer asked to be given an opportunity to be released, claiming that he was "a physically broken and sick man" who was "no danger to society." (*Id*. at 4.) Bauer also offered to be chemically castrated. (*Id*. at 3.) Bauer attached three one-page reports briefly summarizing psychiatric visits he

had with a doctor in the prison in 2019 and 2020. (Doc. 127.) These reports describe his mood and demeanor and assess his medications. (*Id*.) Bauer also attached certificates from programs he had completed in the prison. (Doc. 128-29.)

A sentencing hearing was held July 8, 2020, with the Honorable Ray J. Dayton presiding. The State requested that the court impose a sentence of 100 years with no possibility of parole for 35 years because the State believed that that sentence would best mimic the sentence the district court had imposed in 2001.[1] (7/8/20 Tr. (Tr.) at 19.) The State relied on the sexual offender evaluation and Dr. Hill's letter from 2000, noting that Silvers and Dr. Hill agreed that Bauer was dishonest. (*Id*. at 13-14.) The State explained that Silvers had classified Bauer as a level three offender, and Bauer had previously been found to be a level three sexual offender when he was sentenced for sexual intercourse without consent. (*Id*. at 15.) The State noted that Bauer had prior convictions for sexual intercourse without consent and intimidation, which the State asserted involved Bauer seeking a sexual relationship. (*Id*.) Based on these factors, the State argued that Bauer was "an extraordinarily dangerous individual" who had engaged in or attempted to engage in sexual offenses on three occasions. (*Id*. at 16.)

[1] It appears that the State was not aware until later in the hearing that the 2001 sentence prohibited the possibility of parole. (Tr. at 19, 47.)

The State noted that the sexual offender evaluator concluded that Bauer could not be effectively treated in or out of custody. (*Id*.) The State also noted that because Bauer had not completed sexual offender therapy, there was no evidence that he could be successfully released into the community. (*Id*. at 17.)

Bauer asked instead for a 40-year sentence and to be eligible for parole. (*Id*. at 45.)[2] Bauer argued that he had changed significantly while he was in prison. (*Id*. at 29, 44.) He explained that he had a rare genetic disorder that required him to use a breathing machine, to have an apparatus to write or eat, and to have a hospital bed in his cell. (*Id*. at 22-23.) He also explained that he had realized that he was transgender and was receiving hormone replacement therapy at the prison. (*Id*. at 23, 38.)

Bauer explained that he had not had any behavioral violations in the past three years. He also stated that he was waiting to be admitted to anger management and sexual offender treatment. The court clarified that he had not been admitted because he had not been eligible for pending release. (*Id*. at 25, 27.)

Bauer's counsel provided prison policies related to transgender inmates and cited a United States Supreme Court case, *Bostock v. Clayton County Georgia*, 140

[2] Bauer's counsel explained to the court that he was referring to Bauer as Ms. Lee because Bauer was in the process of transitioning to Ms. Lee, and he preferred to be referred to as Ms. Lee. His counsel acknowledged that his legal name was still Chester Bauer. The State refers to Bauer by that name throughout this brief because the State does not believe that his name has been legally changed.

S. Ct. 1731 (2020), which held that the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender. (Tr. at 32-33.) The court admitted the exhibits, but questioned how they would help it determine the appropriate sentence. (*Id*. at 34, 36.)

In his statement to the court, Bauer emphasized his poor health. (*Id*. at 49.) He asked the court to give him the opportunity to be released after completing the first phase of sexual offender treatment. (*Id*.)

The court discussed the reasons Judge Mizner gave when imposing the 2001 sentence, and concluded that many of those factors had been established. (*Id*. at 53.) The court recounted that

> Judge Mizner's reasons for sentencing include his particularly manipulative personality, that's before me as well, it's talked about in the PSI, it's talked about in the Psychosexual Evaluation, it was talked about by Dr. Hill. His inability to accept any responsibility for his criminal behavior. Uh, he was convicted by the jury. He persists that he's an innocent man. His sexual predatory nature established by his history. His lack of ability to gain insight or understanding from sex offender treatment or to control his criminal sexual behavior when in or out of confinement. That's all been established for me. The particularly heinous circumstance of the offense, still applicable. The level of manipulation involved in the victim[']s vulnerabilities. Well, that certainly hasn't changed. The predatory and threatening acts of the Defendant while committing the crime of Incest. Judge Mizner also indicated that the Defendant has virtually no prospects of rehabilitation. He must be confined in order to protect society.

(*Id*. at 53.) The court agreed that the evidence in this case "establishes most of what Judge Mizner said there." (*Id*. at 54.)

But the court also acknowledged that Bauer's physical health had deteriorated. (*Id*.) The court acknowledged that Bauer may be less dangerous because he was "crippled up," but the court concluded that he was still "a sexual predator" and a "Level 3 risk to reoffend." (*Id*.) The court pointed out that Bauer had not presented any evidence, such as a new sexual offender evaluation, indicating that he was not a level 3 offender. (*Id*.)

The court explained that when it referred to Bauer's health status, it was not referring to his sexual orientation, but rather his physical health. (*Id*.) The court explained that the health difference that mattered to the court was Bauer's physical limitations. (*Id*.) The court noted that it needed to protect potential future victims, and it did not know how much that threat had changed. (*Id*.)

Referring to Bauer's transition to female, the court stated that it did not know "to what extent that's part of his manipulation," and "his way of getting along in prison." (*Id*. at 54.) But more importantly, the court noted that it did not have any evidence indicating that Bauer's gender reassignment would change his risk of reoffending, and the court did not know that it would. (*Id*. at 55.) The court also explained that the information Bauer's counsel had provided about the Prison Rape Elimination Act and the *Bostock* case did not provide the court "with evidence that he's anything other than a Level 3 risk to reoffend, and I so classify him. He's a, he's a high risk to reoffend." (*Id*.)

The court then discussed the length of the sentence, noting that it did not want to impose life without parole as Judge Mizner had done. The court explained that Bauer might not be as dangerous due to his physical limitations. Noting that Bauer could not even stand up, the court stated, "I think to a certain extent it makes him less dangerous, not that he wouldn't try to hurt somebody." (*Id*. at 56.) But the court also noted that the factors Judge Mizner had relied on, including Bauer's "history, his dangerousness, [and] his poor amenability to treatment," still applied. (*Id*.) The court noted that Bauer had not had the opportunity to participate in sexual offender treatment, but the court also noted that it did not "have any information that he's any less dangerous now than he was then. That he's anymore amenable to treatment now than he was then." (*Id*. at 57.) The court further noted that it had to be concerned about the safety of the community, punishment, and deterrence. (*Id*.)

Based on the principles of sentencing that the court had articulated, the court imposed a 100-year sentence with a 30-year parole restriction. (*Id*.) The court also ordered that Bauer not be parole eligible until he has completed phases I and II of sexual offender treatment. (*Id*. at 58.) The court noted that with that sentence, Bauer, who had already served about 20 years of the sentence, would not be eligible for parole for another 10 years. (*Id*. at 57.) The court noted that with Bauer's degenerative disorder, he would likely be even less dangerous in 10 years.

(*Id*. at 58.) The court explained that its reasons for its sentence where "the same that were articulated by Judge Mizner, particularly the heinous nature of the offense, the danger to the community, . . . he's demonstrated difficulty in terms of amenability to treatment uh, and so forth." (*Id*.)

At the end of the sentencing hearing, Bauer asked the court to order chemical castration. (*Id*. at 59.) The court declined to do so. (*Id*.)

Consistent with the oral pronouncement of the sentence, the court issued a judgment imposing a 100-year sentence without the possibility of parole for 30 years and requiring Bauer to complete phases I and II of sexual offender treatment before being parole eligible. (Appellant's App. B.) Contrary to Bauer's representation throughout his brief, the court did not sentence him to 100 years with no parole for 35 years, either orally or in the written judgment.

SUMMARY OF THE ARGUMENT

This Court should not review any of Bauer's claims under the plain error doctrine because he has failed to meet his burden to demonstrate that failing to review the claims would result in a manifest miscarriage of justice. If this Court reviews any of Bauer's claims, the claims should be rejected on the merits.

Bauer did not request an updated PSI or psychosexual evaluation, and the court was not required to obtain them. Instead, the court correctly relied on the PSI

and psychosexual evaluation that had previously been conducted and considered new evidence Bauer provided. Bauer failed to demonstrate that he was sentenced based on materially false information, so his due process claim fails.

Bauer's claim that his sentence is an abuse of discretion is similarly without merit. Sentences are not reviewed for an abuse of discretion, so the claim is facially invalid. Further, the record demonstrates that the court's sentence is appropriate and based on valid considerations. The court acknowledged that Bauer might be less of a danger now that his physical health had deteriorated, but the court correctly concluded that Bauer still remained a risk to reoffend. The court correctly determined that a lengthy sentence was necessary based on the nature of the offense, Bauer's character, his criminal history, and his poor prospects for rehabilitation through treatment. Although the court referenced Bauer's failure to accept responsibility, the court did not inappropriately base its sentence on that factor.

Finally, Bauer's sentence does not shock the conscience, and is therefore not cruel and unusual, because the sentence is reasonable based on the circumstances of the offense and the evidence that Bauer is a significant risk to reoffend.

STANDARD OF REVIEW

This Court reviews for legality a criminal sentence imposing over one year of incarceration. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. This Court reviews whether the district court adhered to the applicable sentencing statutes *de novo*. *Id*.

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g.*, *State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and establishes failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

ARGUMENT

I. Bauer's claim that the court erred in relying on the PSI and psychosexual evaluation report produced after his conviction should not be reviewed under the plain error doctrine; if it is reviewed, it should be denied on the merits.

Because Bauer did not request that the district court obtain an updated PSI or psychosexual evaluation, he cannot obtain review of this claim unless he demonstrates that he is entitled to plain error review. Bauer has failed to demonstrate that failing to review this claim under the plain error doctrine would result in a manifest miscarriage of justice because neither the sentencing statutes nor due process considerations required an updated PSI and psychosexual evaluation.

A. The sentencing statutes did not require the court to obtain an updated PSI or psychosexual evaluation.

The sentencing statutes did not require the district court to obtain an updated PSI or psychosexual evaluation when both reports had already been produced following Bauer's conviction. The statute governing presentence investigation reports was amended in 2019 to make obtaining a PSI discretionary. Under the law in effect at the time of the 2020 sentencing, district courts had the discretion, but were not required, to obtain a PSI after a defendant was found guilty. Montana Code Annotated § 46-18-111(1)(a)(i) (2019) provides that upon a "finding of guilty to one or more felony offenses . . . the district court may request and direct

the probation and parole officer to make a presentence investigation and report unless an investigation and report has been provided to the court prior to the plea or the verdict or finding of guilty." Mont. Code Ann. § 46-18-111(1)(a)(i) (2019). Even the earlier version of the PSI statute, which did not apply during the 2020 sentencing hearing, did not require an updated PSI to be produced if a defendant was resentenced. Instead, the statute merely required that a PSI be obtained after the defendant was found guilty. Mont. Code Ann. § 46-18-111(1)(a)(i) (2017).

Unlike the PSI, which is optional, a court is required to order a psychosexual evaluation of an offender convicted of incest and other enumerated sexual offenses. Mont. Code Ann. § 46-18-111(1)(b)(i) (2019). The psychosexual evaluation must include "a recommendation as to treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the community and the defendant's needs[.]" Mont. Code Ann. § 46-18-111(1)(b)(i) (2019). But there is no requirement that a court obtain an updated psychosexual evaluation if the defendant obtains a resentencing. Instead, Mont. Code Ann. § 46-18-111(1)(b) (2019) provides only that a psychosexual evaluation must be ordered if the defendant is convicted of one of the enumerated sexual offenses. Similarly, Mont. Code Ann. § 46-23-509(2) (2019) requires that a psychosexual evaluation be obtained prior to sentencing a person convicted of a sexual offense, but it does not

require that an updated psychosexual evaluation be obtained if the defendant obtains a resentencing.

In this case, a PSI and psychosexual evaluation had been obtained after Bauer was found guilty of incest. Both were relied on at Bauer's first sentencing hearing. Bauer's first sentence was reversed because it was not a proper PFO sentence. Bauer did not request that a new PSI or psychosexual evaluation be obtained before his second sentencing hearing, so he waived any challenge to the court's failure to obtain new reports. *See State v. J.C.*, 2004 MT 75, ¶ 46, 320 Mont. 411, 87 P.3d 501. Further, the court's failure to do so was not plain error because new reports were not required by statute. The court properly relied on the reports that had been produced after the jury found Bauer guilty of incest.

B. Bauer has not demonstrated that he was sentenced based on information that is materially false.

Bauer's due process claim should not be reviewed under the plain error doctrine because he has not provided any evidence to demonstrate that he was sentenced based on materially false information. This Court addressed the requirement that a defendant not be sentenced based on materially false information in *Bauer I* when it reversed Bauer's Blaine County sentences that had been imposed before his 1983 convictions were reversed. This Court explained in *Bauer I* that the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article II, section 17 of the Montana Constitution prohibit a

court from relying on materially false information when sentencing a defendant. *Bauer I*, ¶¶ 20-22. But "due process does not protect against all misinformation in sentencing; the inquiry turns on whether the sentence was premised on materially false information." *Bauer I*, ¶ 22. Because "due process does not guard against insignificant or non-prejudicial misinformation introduced at sentencing, a defendant is under an affirmative duty to show that the alleged misinformation is materially inaccurate or prejudicial before a sentence will be overturned by this Court." *Id*. (internal quotation marks and citation omitted). Further, even if improper or erroneous information has been presented, the defendant's right to due process was not violated if the court is found not to have relied on the erroneous information. *Bauer I*, ¶ 24. To ensure that a defendant is sentenced based on accurate information, a defendant must be given an opportunity to explain, argue, and rebut any information that may lead to the deprivation of life, liberty, or property. *Bauer I*, ¶ 22.

Bauer has failed to demonstrate that any of the information the court relied on in imposing his sentence was materially false. Bauer's argument that the PSI and psychosexual evaluation were false because they did not account for changes that had occurred fails because he has not demonstrated that the changes that occurred rendered the prior reports materially false. Specifically, Bauer points out that he had "undergone drastic health and personal life change," (Appellant's Br.

at 20), but he did not demonstrate that, based on those changes, the prior reports were false.

The evidence supported the court's conclusion that Bauer was highly manipulative. Bauer argues that the court should not have relied on prior findings that Bauer was highly manipulative because there was not any new evidence to support that. But there was not any new evidence demonstrating that Bauer was not highly manipulative, so the court properly relied on prior evidence demonstrating that he was manipulative.

Most importantly, the circumstances of the offense demonstrated that Bauer was manipulative. In addition to preying on his vulnerable disabled daughter, Bauer lied to his probation officer about where he was going to stay, lied about his use of alcohol, and sent his daughter manipulative letters in which he threatened to sever contact between her and his family, discussed suicide, and blamed her for his decision to withhold birthday gifts for her and her sister. *Bauer II*, ¶¶ 9-13, 23. These facts all demonstrate that Bauer is manipulative. Additionally, Dr. Hill described Bauer as manipulative after observing him in the Montana State Hospital for six months. (Doc. 94, Dr. Hill letter.) Similarly, the sexual offender evaluator, Silvers, described Bauer as manipulative based on the differences in the answers Bauer gave during two different sexual offender evaluations conducted within a short time period. (Doc. 94, Silvers Eval. at 15.) The lack of updated evidence

addressing whether Bauer was manipulative does not establish that the prior evidence of his manipulation was false.

Bauer's claim that the district court "found Mr. Bauer didn't take advantage of sex offender treatment" (Appellant's Br. at 21), is inaccurate. While reciting Judge Mizner's reasons for the sentence, Judge Dayton observed, "[h]is lack of ability to gain insight or understanding from sex offender treatment or to control his criminal sexual behavior when in or out of confinement. That's all been established for me." (Tr. at 53.) It appears that Judge Mizner and Judge Dayton were referring to Bauer's failure to refrain from committing a sexual offense after already being convicted of and serving a sentence for another sexual offense. Judge Dayton may also have been simply acknowledging that Bauer had not completed sexual offender treatment, and therefore did not have the benefit of that. But Judge Dayton twice noted that Bauer had not had the opportunity to participate in sexual offender treatment, (Tr. at 27, 57), and Judge Dayton did not appear to be punishing Bauer for his failure to have completed sexual offender treatment.

Bauer also criticizes the court for referring to Bauer as a sexual predator, but Bauer has not demonstrated that that term was materially false. Indeed, both the psychosexual evaluation and Bauer's criminal history support the court's characterization of Bauer. This was Bauer's second felony sexual offense. He committed the offense of incest shortly after he was released from prison and while

he was on probation for sexual intercourse without consent. As both Judge Mizner and Judge Dayton noted, the circumstances of the incest offense were "heinous." (Doc. 103 at 2; Tr. at 53, 58.) Dayton preyed on his daughter, who was both mentally and physically disabled. These circumstances support the characterization of Bauer as a sexual predator.

Further, Judge Dayton's characterization of Bauer is supported by the sexual offender evaluation. Silvers found that Bauer was "a level 3 extremely high risk for re-offense." (Doc. 94, Silvers Eval. at 16.) Silvers observed that there was "little indication that Mr. Bauer would be amenable for either out patient or in patient sexual offender therapy owning to his current stance." (*Id*.) Silvers also noted that another sexual offender evaluator had previously found Bauer to be a "level 3 high re-offense risk sexual offender." (*Id*. at 15.) Bauer has not demonstrated that either Silvers's characterization of Bauer as a high risk of re-offense or the court's characterization of Bauer as a sexual predator were manifestly wrong.

Finally, the court was aware of the new information that existed, which was the decline of Bauer's physical health, his gender transition, and his completion of certificate programs in the prison. The court considered that information when sentencing Bauer and gave it the weight that it was due. The absence of that information in the PSI does not establish that the PSI was materially false.

Because Bauer has not met his burden to demonstrate that he was sentenced based on materially false information, this Court should decline to review his due process claim under the plain error doctrine. If this Court does review the claim, it should be rejected on the merits for the reasons set forth above.

II. Bauer's claim that the sentence is an abuse of discretion should not be reviewed under the plain error doctrine because sentences are not reviewed for abuse of discretion.

As Bauer acknowledges in his standard of review, this Court reviews sentences that impose more than one year of incarceration for legality only. *State v. Herd*, 2004 MT 85, ¶ 22, 320 Mont. 490, 87 P.3d 1017. A sentence is legal if it falls within statutory parameters and is constitutional. *State v. Martin*, 2019 MT 44, ¶ 12, 394 Mont. 351, 435 P.3d 73.

Because Bauer's 100-year sentence is a sentence of incarceration that renders him eligible for sentence review, this court does not review his sentence for an abuse of discretion. *Id*. Bauer cannot meet his burden to demonstrate that failing to review this claim under the plain error doctrine would result in a manifest miscarriage of justice because this claim is not even a claim that the court would review if an objection had been made. Claims about the equity of a sentence are instead appropriate for sentence review. *Herd*, ¶ 20. Bauer's claim that his

sentence is an abuse of discretion should therefore not be reviewed under the plain error doctrine.

Further, Bauer's arguments that his sentence is an abuse of discretion are incorrect for several reasons. First, Bauer incorrectly describes both his current sentence and his previous sentence when he criticizes the court for imposing "a virtually identical sentence of 100 years, with no parole for 35 years." (Appellant's Br. at 22.) As noted above, Judge Dayton imposed a 30-year parole restriction, not a 35-year parole restriction. (Appellant's App. B at 3.) Additionally, Bauer's previous sentence was significantly different because it prohibited him from ever being eligible for parole. (Doc. 103 at 2.) Judge Dayton's sentence gives Bauer the possibility of parole after serving approximately ten more years of his sentence, which is a possibility he would not have had with his prior sentence.

Second, Bauer's sentence was within the statutory parameters. Bauer acknowledged at the sentencing hearing that the court could impose a sentence of up to 100 years under the PFO statute. (Tr. at 11); Mont. Code Ann. § 46-18-502(1) (1999). Even if Bauer had not qualified as a PFO, the court could still have imposed a 100-year sentence for incest. Mont. Code Ann. § 45-5-507 (1999). The court had the authority to prohibit parole eligibility entirely under Mont. Code Ann. § 46-18-202(2) (1999).

Third, the court appropriately applied its discretion to impose a sentence based on the nature of the offense and evidence in the record. Montana law gives sentencing judges wide discretion to impose a sentence based on the circumstances of the case. *Driver v. Sentence Review Div.*, 2010 MT 43, ¶ 17, 355 Mont. 273, 227 P.3d 1018. A "sentencing court may consider any relevant evidence relating to the nature and circumstances of the crime, the character of the defendant, the defendant's background history, mental and physical condition, and any evidence the court considers to have probative force." *Driver*, ¶ 17. Similarly, Mont. Code Ann. § 46-18-101(2) provides that the sentencing policies include the need to punish the offender and protect the public. Mont. Code Ann. § 46-18-101(a)-(b).

The sentence Judge Dayton imposed was supported by the circumstances of the offense, Bauer's criminal history, and Bauer's psychosexual evaluation. Bauer was previously incarcerated for two separate instances of intimidation and for the offense of sexual intercourse without consent, which he had committed while incarcerated. His sentence for the Blaine County offenses was shortened based on his exoneration for his 1983 convictions out of Silver Bow County. (Doc. 94, attached Amended Judgment and Sentence.) But one month after Bauer's release, he committed incest against his mentally and physically disabled daughter. That offense demonstrated his predatory and manipulative tendencies. Based on those facts and the psychosexual evaluation, which found Bauer to be a high risk to

reoffend, the court was reasonably concerned that Bauer was a danger to the community. (Tr. at 56-57.)

The court acknowledged that some changes had occurred since Bauer was previously sentenced, but the court correctly observed that it did not have information demonstrating that Bauer was "any less dangerous now than he was then." (Tr. at 57.) Contrary to Bauer's claim, the psychiatric reports provided by Bauer did not demonstrate that Bauer was no longer manipulative. (*See* Appellant's Br. at 29; Doc. 127.) The reports merely provided a brief update on Bauer's mental health during 2019 and 2020. (Doc. 127.) The reports demonstrated that Bauer was no longer reporting that he was suicidal, but they did not address whether he was manipulative or demonstrate that he was not. (*Id*.)

Fourth, none of the court's references to Bauer's transgender status rendered the sentence illegal. The court explained that Bauer's gender transition did not change its sentence because there was no evidence Bauer's transition made him less of a threat to society. (Tr. at 55.) That court correctly focused on the sentencing factor that mattered—dangerousness to society—and reasonably determined that Bauer's gender transition was not relevant. Bauer seems to suggest that he is no longer a threat if he becomes a woman, but there is not evidence to support that assumption. Bauer also points out that the status of being transgender is protected under employment law, but that is irrelevant to the

imposition of his sentence, which has to be based on sentencing factors, including danger to society.

In sum, Bauer has failed to demonstrate that the court's sentence was illegal. The court appropriately relied on the necessary sentencing factors and imposed a sentence based on Bauer's criminal history, the heinous nature of the offense, his danger to the community, and his poor amenability to treatment. (Tr. at 58.) This claim challenging Bauer's sentence should not be reviewed under the plain error doctrine because the standard Bauer relies on is inappropriate and the sentence was legally imposed.

III. Bauer's claim that the court erred in sentencing him based on his failure to admit his guilt should not be reviewed under the plain error doctrine, and if this Court reviews the claim, it should be denied on the merits because his sentence was not based in large part on his failure to accept responsibility.

Bauer did not object when the court referred to his failure to accept responsibility when listing reasons for the sentence. He therefore cannot obtain review of this claim unless he demonstrates that failing to review the claim would result in a manifest miscarriage of justice. He has failed to make that showing. Even if this Court reviews the claim, it should be denied on the merits because he has not demonstrated that the sentence violates his right to remain silent.

"[A] sentencing court may not punish a defendant for failing to accept responsibility for the crime when that defendant has expressly maintained his innocence and has a right to appeal his conviction." *State v. Morris*, 2010 MT 259, ¶ 22, 358 Mont. 307, 245 P.3d 512 (citing *State v. Cesnik*, 2005 MT 257, ¶ 25, 329 Mont. 63, 122 P.3d 456). A sentencing court may not draw a negative inference of lack of remorse because of a defendant's invocation of his constitutional right to remain silent and refusal to admit guilt. *Morris*, ¶ 22 (citing *State v. Shreves*, 2002 MT 333, ¶ 22, 313 Mont. 252, 60 P.3d 991). However, a district court is permitted to sentence a defendant based on lack of remorse so long as there is affirmative evidence of the lack of remorse. *Morris*, ¶ 22 (citing *State v. Rennaker*, 2007 MT 10, ¶ 51, 335 Mont. 274, 150 P.3d 960). For this Court to reverse a sentence, "[t]he district court must have based its decision 'in large part' on the defendant's lack of remorse or failure to take responsibility." *State v. Champagne*, 2013 MT 190, ¶ 47, 371 Mont. 35, 305 P.3d 61 (citing *Shreves*, ¶ 24).

In *Shreves*, this Court reversed Shreves's sentence because it was based "in large part" on his refusal to admit to his crime and show remorse at sentencing. *Shreves*, ¶ 24. Shreves declined to speak at his sentencing hearing, and his counsel informed the court that he was continuing to maintain his innocence. *Shreves*, ¶ 6. When imposing its sentence, the court stated, "As we sit here, you've given us

nothing as to why this happened." *Shreves*, ¶ 7. This Court observed that the sentencing court based its sentence on the defendant's "failure to 'give' the court something about why the crime happened." *Shreves*, ¶ 20. This Court held that "a sentencing court may not draw a negative inference of lack of remorse from the defendant's silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted—i.e. that he is actually innocent." *Shreves*, ¶ 22.

Similarly, this Court reversed a senence in *Cesnik* where a court said it was imposing incarceration "so that acceptance of responsibility occurs" after the defendant remained silent at the sentencing hearing and stated in the PSI that the "charges should be dropped." *Cesnik*, ¶¶ 9-10, 24-25. And, this Court reversed a sentence in *Rennaker* where a court told the defendant, "not only do you not have any remorse for what occurred, you don't even acknowledge that it is wrong. For that reason, and that reason, *in and of itself*, you should be subjected to prison." *Rennaker*, ¶ 42 (emphasis added). This Court reaffirmed that "[i]f a court chooses to sentence a defendant based upon lack of remorse, it cannot infer lack of remorse from a defendant's silence. Rather, it must point to affirmative evidence in the record demonstrating lack of remorse." *Rennaker*, ¶ 51.

In contrast, this Court affirmed a sentence in *State v. Otto*, 2017 MT 212, 388 Mont. 391, 401 P.3d 193, where the sentencing court noted Otto's lack of

cooperation with the PSI, but that did not appear to impact the court's sentence. This Court noted that the district court's criticism of Otto's unresponsive answer was made in passing and was part of a much larger assessment of Otto's attitudes and character. *Otto*, ¶ 12. In reaching that conclusion, this Court noted that sentencing courts "may consider any relevant evidence relating to the nature and circumstances of the crime, the character of the defendant, the defendant's background history, mental and physical condition, and any evidence the court considers to have probative force." *Otto*, ¶ 11. This Court concluded that "Otto's sentence was within statutory limits, and was supported by the totality of the District Court's appropriately stated reasons for the sentence." *Otto,* ¶ 12.

This Court will also affirm a sentence where the court ties its conclusion that the defendant lacked remorse to affirmative evidence in the record and the sentencing court relies on other relevant sentencing factors in imposing a sentence. In *Champagne*, the defendant denied sexually abusing a child and stated that the victim "made up the story." *Champagne*, ¶ 14. At sentencing, the psychosexual evaluator concluded that Champagne was "lacking in empathy and does not feel genuine remorse" for his criminal acts, had "little or no empathy for the victim" and "takes advantage of, or otherwise abuses other people." *Champagne*, ¶ 50. In announcing judgment, the sentencing court stated that "[Champagne] has no empathy for the victim and has has even projected blame on to the victim." The

sentencing court elaborated that Champagne "possesses several psychopathic qualities; he is callous and predatory, deceptive and manipulative, he lacks empathy and does not feel genuine remorse for his socially deviant and criminal acts. [Champagne's] prospects at rehabilitation are slim." *Champagne*, ¶ 49. This Court held that the district court did not improperly rely on lack of remorse because the court tied the lack of remorse to affirmative evidence in the record, specifically, the psychosexual evaluator's conclusion. *Champagne*, ¶ 50. This Court further noted that the sentencing court did not rely "in large part" on Champagne's denial of guilt where the court relied on other factors such as chemical dependency, psychopathic tendencies, rehabilitation prospects, and criminal history. *Champagne*, ¶ 49.

This Court also affirmed a sentence in *State v. J.C.*, 2004 MT 75, ¶¶ 39-41, 320 Mont. 411, 87 P.3d 501, even though the sentencing court noted at sentencing that it was troubled by the defendant's failure to accept responsibility. This Court explained that the sentencing court had considered "many relevant factors[,]" which "included the nature and evidence of J.C.'s crime, his character, background, history, and mental and physical functioning." *J.C.*, ¶ 39. This Court also noted that the sentencing court had relied on evidence that J.C. had been dishonest. *Id*. This Court concluded that the record did "not reflect that J.C.'s sentence was in large part based on the fact that he refused to take responsibility

and admit to his crime. This was only one of the myriad considerations of the court when it fashioned J.C.'s individualized sentence." *J.C.*, ¶ 40. This Court explained that the rule from Shreves was "narrow," and that a "trial court can consider lack of remorse, as evidenced by any admissible statement made by the defendant or gleaned from the manner of the commission of the offense as demonstrated by the evidence admitted at trial or at the sentencing hearing, when sentencing a defendant." *Id*. This Court concluded that the sentencing court had not based the sentence significantly on J.C.'s refusal to admit the crime. *J.C.*, ¶ 41.

This Court should decline to review this claim under the plain error doctrine because the similarities between this case and *Otto*, *Champagne*, and *J.C.* demonstrate that failing to review this claim would not result in a manifest miscarriage of justice. And even if this Court reviews this claim under the plain error doctrine, the claim should be denied because the district court did not base the sentence in large part on Bauer's failure to accept responsibility. The district court referenced Bauer's "inability to accept any responsibility" when it recounted Judge Mizner's reasons for imposing the original sentence, and the court agreed that the same factors still applied. (Tr. at 53.) But the court did not refer to Bauer's failure to take responsibility when listing the court's own reasons for the sentence. Instead, the court emphasized Bauer's high risk to reoffend and the need to protect the community. (Tr. at 54-58.) The court specified that it was imposing

the sentence because of "the heinous nature of the offense, the danger to the community," and Bauer's poor amenability to treatment. (Tr. at 58, *see also* Tr. at 56.)

The court's conclusion that Bauer was not amenable to treatment was based on the psychosexual evaluation, which concluded that there was "little indication that Mr. Bauer would be amenable for either out patient or in patient sexual offender therapy[.]" (Doc. 94, Silvers Eval.) When viewed as a whole, the court's sentence is based on evidence in the record, not Bauer's refusal to admit his guilt. Therefore, the sentence does not violate his right to remain silent.

IV. Bauer's claim that his sentence is cruel and unusual should not be reviewed under the plain error doctrine and, if it is reviewed, it should be denied on the merits.

For the first time on appeal, Bauer raises an as applied challenge to his sentence arguing that it is cruel and unusual in violation of the Eighth Amendment to the United States Constitution and article II, section 22 of the Montana Constitution. This Court will not address as applied constitutional challenges if they were not raised in the trial court. *State v. Yang*, 2019 MT 266, 397 Mont. 486, 452 P.3d 897. Because Bauer did not raise this as applied challenge in the trial court, this Court may review the claim only if it exercises its discretion to do so under the plain error doctrine. This Court should not review this claim under the

plain error doctrine because Bauer has failed to demonstrate that failing to review the claim would result in a manifest miscarriage of justice. And even if this court reviews this claim under the plain error doctrine, the claim should be rejected because Bauer's sentence, which gives him the possibility of parole, does not shock the conscience in light of the heinous nature of the offense, Bauer's criminal history, and his risk of reoffending.

Sentences generally do not violate the prohibition on cruel and unusual sentences if they are within the statutory guidelines. *State v. Rickman*, 2008 MT 142, ¶ 15, 343 Mont. 120, 183 P.3d 49. An exception applies "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." *Rickman*, ¶ 15. A defendant bears the burden to demonstrate that his sentence shocks the conscience. *Id.* . The nature of the offense and the likelihood the defendant will reoffend are weighty factors in determining whether a sentence shocks the conscience. *Rickman*, ¶¶ 17, 19.

Bauer's sentence does not shock the conscience. The nature of the offense demonstrates that he is a sexual predator. About one month after he was released from prison for other felony offenses, including a conviction for sexual intercourse without consent, Bauer lied to his probation officer so that he could go to Anaconda and rape his mentally and physically disabled daughter. *Bauer II*,

¶¶ 9-10. He returned again to her apartment the next month. When he was located there, he lied about whether he had consumed alcohol. *Bauer II*, ¶¶ 11-12. Days later, he sent his daughter threatening letters. *Bauer II*, ¶ 13. A psychosexual evaluation concluded that he was a high risk to reoffend and was not likely to benefit from therapy. (Doc. 94, Silvers Eval.) These facts support the court's sentence of 100 years with no parole for 30 years. Indeed, Judge Dayton's sentence, which gives Bauer the possibility of parole, is more lenient than the sentence imposed by Judge Mizner.

Bauer asserts that his sentence is cruel and unusual because he will not live long enough to complete the sentence. There is no law to support the claim that a sentence to a serious felony offense is cruel and unusual simply because the offender will remain incarcerated for life. Indeed, life sentences without the possibility of parole are statutorily permissible and are unconstitutional only if mandatorily imposed on juvenile offenders. *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2020). Life sentences are routinely imposed and are necessary for dangerous offenders who cannot be safely released into the community. Further, Bauer is eligible for parole in about ten years, and he may live long enough to be released on parole.

Bauer has failed to demonstrate that his claim should be reviewed under the plain error doctrine or that he can prevail on the merits because, given the

circumstances of the case, Bauer's character, and his criminal history, the sentence does not shock the conscience.

CONCLUSION

This Court should decline to review all of Bauer's claims under the plain error doctrine. If this Court reviews any of the claims, they should be denied on the merits. Bauer's sentence for incest of 100 years with no parole for 30 years should be affirmed.

Respectfully submitted this 28th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 9,080 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-28-2022:

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