IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0485

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CORY LEVI GOODMAN,

Defendant and Appellant.

REDACTED BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Jennifer B. Lint, Presiding

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2: Did the district court err in not disclosing confidential records to Cory following an in camera review?

3: Did the district court violate Cory's constitutional rights when it sentenced Cory based on the undisclosed records and his refusal to admit the charged offenses?

4. Did the district court impose an illegal sentence when it omitted 678 days of credit for time served?

STATEMENT OF THE CASE

The State charged Cory Goodman with incest and intimidation of his daughter, N.G. (Doc. 5.) The State alleged the two charges occurred between 2013 and 2018, when N.G. was 7 to 11 years old. (Doc. 5.)

A jury convicted Cory of both charges after a six-day trial. (Doc. 170; Trial at 1259.) The district court imposed a 100-year term of imprisonment with a 25-year parole restriction for incest, followed by a

consecutive 10-year prison sentence for intimidation. (7/8/21 Tr. at 12-13, attached as App. A; Doc. 202, attached as App. B.) Cory was designated a Level 3 sex offender. (7/8/21 Tr. at 12-13; Doc. 202 at 3.) Cory timely appeals. (Doc. 210).

STATEMENT OF THE FACTS

Background:

Cory became a father at age 18 when his daughter N.G. was born. (4/2/21-4/9/21 Tr. (hereinafter "Trial") at 354, 356-57.) N.G.'s mother left when N.G. was very young. (Trial at 628, 1072.) N.G. and Cory lived with Cory's mother, Lynn. (*See* Trial at 373, 378-79.) When N.G. was 8, Cory began a relationship with Viola, who was 16. (Trial at 499.) Viola moved into Lynn's house, and they got married. (Trial at 499-500.)

When N.G. was around 9, Cory, Viola, and N.G. moved in with Viola's brother, Cyle Morris, and his wife Savanna. (*See* Trial at 373-74, 494, 500-03; Ex. 23, offered and admitted, Trial at 204-05.) Cyle and Savanna lived near Lynn's house. (Trial at 429, 610.) Shortly thereafter, Cory and Viola broke up, and Viola moved out. (*See* Trial at 501-03; Ex. 23.) After Viola left, Cory, Savanna, and Cyle began a

three-way polyamorous relationship. (Trial at 577-78.)

N.G. and Cory continued to live at Cyle and Savanna's house until January 12, 2018, when 11-year-old N.G. was removed from Cory's custody due to allegations of physical abuse and neglect. (Trial at 364, 588-90; Ex. 23.) As pertinent here, three other children were removed: 11-year-old A.E. (Savanna's son), 2-year-old J.M. (Savanna's and Cyle's son), and 1-month-old V.M. (Savanna's and Cory's son). (Trial at 361, 364, 388-89, 541-42, 590, 1043.) The State filed proceedings to adjudicate the children as youths in need of care (DN cases). (*See* Docs. 74, 117.) Cory relinquished his parental rights to N.G. in December 2018, around nine months before this criminal case was filed. (Ex. 5, offered and admitted, Trial at 357-58.)

Throughout N.G.'s life, the Child and Family Services Division (CFSD) of the Montana Department of Public Health and Human Services (DPHHS) was "in and out" "all the time." (Trial at 474.) N.G. received treatment for auditory hallucinations and was eventually diagnosed with post-traumatic stress disorder. (Trial at 628, 668, 899.) N.G. became "savvy to the system," knew what "would get people in trouble," and "regurgitate[d] what she was told." (Trial at 664-65, 674.)

N.G.'s trial testimony:

At trial, N.G. (now 15) again altered her story. She testified to four occasions where Cory "put his penis in my butt." (Trial at 380-402.) N.G. testified the first time happened when she lived at Lynn's house. (Trial at 379-80.) N.G. testified that, after this first time, Cory threatened to kill N.G. if she told anyone. (Trial at 384-85.)

N.G. testified the last time happened at Cyle and Savanna's house in December 2017, the month before her removal. (Trial at 388-89.) N.G. testified it happened in a room she shared with J.M. (Trial at 389-90.) N.G. testified J.M. was asleep. (Trial at 389.) N.G. testified she was laying on the floor on her side, and Cory came in, pulled her pants down, and stuck his penis in her butt. (Trial at 389-92.) N.G. testified Cory's penis felt hard, and she had never seen Cory's penis. (*See* Trial at 478-80.) N.G. said that Cory told her nothing other than asking her to call him "Bob" or his video game username. (Trial at 392-95.)

N.G. also testified that at some unknown time, she overheard Cory tell Savanna and Cyle that Cory had "sodomized" N.G., which is where she learned the term. (Trial at 411-14.)

N.G. testified she bled after the assaults, and she was confident it was not from her period. (Trial at 385-86, 409-10, 478.) N.G. testified she had not started menstruating when the assaults began. (Trial at 410.) She could not remember when she started her period. (Trial at 477.) N.G. often wore "Depends" (an adult diaper) as a child, including when she menstruated. (*See* Trial at 478, 484, 529, 884, 1052-53.)

N.G.'s prior statements:

Despite meeting with several counselors and a psychiatric nurse practitioner from the ages of 9 to 11, N.G. never apparently alleged to them sexual abuse by Cory. (*See* Trial at 414, 465-66, 472-73, 661-72.)

N.G. was subjected to at least three forensic interviews prior to trial. She did not disclose her trial allegations in any of these forensic interviews. (*See* Trial at 724-25, 727-28, 739-40, 818, 821.) A forensic interview is a specialized "neutral fact-finding" conversation designed "[t]o figure out if something may have happened" to a child. (*See* Trial at 309-10, 324, 564, 760.)

Specifically, N.G.'s May 2013 forensic interview was conducted shortly after the sexual abuse alleged started, according to the Information. (*See* Doc. 5; Trial at 818.) A 7-year-old N.G. casually

denied any sexual abuse in an unconcerned manner. (*E.g.*, Ex. 10 at 14:06-14:30, offered and admitted, Trial at 822.) Neither did 11-year-old N.G. disclose sexual abuse in her second forensic interview, which was conducted by Val Widmer soon after N.G.'s removal. (Trial at 725.)

By the time of N.G.'s third forensic interview in April 2018 at age 12, N.G. was living with a foster family she chose to live with. (Ex. 6a at 00:44-1:02, 5:48-5:58, offered and admitted, Trial at 968; Trial at 709, 727-28.) N.G. was "really close" with her foster mom, Shannon Tiller. (Ex. 6a at 00:44-1:02; Trial at 708-09.) Shannon had discovered an internet search on a phone N.G. shared with A.E. about getting pregnant from anal sex with a father. (Trial at 415, 709-10.) N.G. told Shannon that Cory had been sexually abusing her since age 7 or 8; but N.G. blamed the phone search on A.E. (Trial at 711, 876-77.) N.G. saw a doctor for a pregnancy test, which was negative. (Trial at 643, 649.) N.G. told the doctor two different men had vaginal intercourse with her the previous summer, one of whom was Cory. (Trial at 646.)

A week after N.G.'s doctor visit, she had her forensic interview, which was set up by CSFD and again conducted by Widmer. (Trial at 727-28.) N.G. did not make the allegations she made to Shannon or the

doctor. N.G. gave a different account that Cory had tried to molest her but never succeeded. (Ex. 8b at 9:06-9:36, offered and admitted, Trial at 747, 753, 975-77.)

After this point, N.G. steadfastly refused to do another forensic interview. She only wanted to be interviewed by a cop. (Trial at 962.)

A few months after N.G.'s last forensic interview, CFSD facilitated a psychological evaluation of N.G. with Dr. Melissa Neff. (Trial at 871.) N.G. told Neff that Cory had raped her approximately twice a month in her butt since she was 7 or 8. (Trial at 884.) According to this account, N.G. was assaulted about 96 times. (Trial at 915-17.) N.G. told Neff she wore Depends because she was bleeding constantly. (Trial at 884.) But N.G. expressed confusion about the source of the bleeding because N.G. said she previously believed it was due to her period. (*See* Trial at 884-85.) N.G. said she had a photographic memory, but Neff concluded N.G. was exaggerating in this regard and did not. (Trial at 930.)

N.G. was seen by another doctor and reported Cory had anal intercourse with her countless times. (Trial at 643-44.) STD testing was negative. (Trial at 649.)

N.G. spoke with Detective Jake Auch in October 2018. (Trial at

960-61.) Auch was untrained in forensic interviews. (Trial at 964.) Throughout the interview, Auch praised and reassured an emotional N.G., who did not want to give "the wrong answer." (*See* Ex. 6a at 26:20-26:25 ("You're doing great [N.G.]."), 32:42-32:47, 40:54-40:57 ("I'm proud of you.").)

N.G.'s story changed again. N.G. told Auch that Cory had anally assaulted her, not almost 100 times, but about a total of five times. (Ex. 6a at 27:44-28:48.) N.G. told Auch the abuse was "always at" Cory and Savanna's house and never occurred at Lynn's house as she would later testify. (Ex 6a at 28:18-28:26.) In contrast to her trial testimony, N.G. provided little detail about the first incident—now at Cory and Savanna's house—when she spoke with Auch. (*See* Ex. 6a at 6:34-7:14; *compare with* Trial at 379-87.)

As for the last incident, N.G. told Auch different facts than what she told the jury. Her accounts differed on whether J.M. was there (to jury, yes; to Auch, did not remember); whether she was asleep (to jury, no; to Auch, yes); where she was positioned (to jury, floor; to Auch, couch); Cory's positioning (to jury, Cory laid next to her; to Auch, Cory sat on her); whether she saw Cory naked from the waist down (to jury,

no; to Auch, yes); and whether Cory's penis was hard (to jury, yes; to Auch, did not remember). (*See* Ex. 6a at 10:45-12:56, 42:58-46:19; Trial at 388-92, 479-80.) Although N.G. testified Cory only spoke about her using certain names, N.G. told Auch that Cory threatened her during the last incident. (Ex. 6a at 17:47-18:00, 48:35-48:48; Trial at 392-95.)

With Auch, N.G. insisted she started her period at age 7, which she said a doctor had confirmed. (Ex. 6a at 3:30-3:38, 52:09-53:16.) Like with Neff, N.G. discussed bleeding but expressed previous confusion about whether it was due to menstruation or assault. (*See* Ex. 6a at 3:06-3:24.) Confusingly, the record reflects that N.G. told her psychiatric nurse practitioner two years before the Auch interview that N.G. had not started her period yet. (Trial at 638.)

Lynn testified when N.G. was around 6 or 7, N.G. told Lynn that Cory was doing something bad to her butt and she needed thicker Depends. (Trial at 530-31; *see* Ex. 23.) Lynn apparently did not do anything at the time except buy more Depends. (Trial at 531.) Lynn admitted at one point she doubted N.G.'s honesty. (Trial at 534.)

Cory presented two experts. Dr. Donna Zook opined the numerous interviews and influential adults in N.G.'s life "corrupted any interview

that took place." (Trial at 1013.) Dr. Zook pointed out flaws in N.G.'s interviews, like continual praise and noted N.G.'s "script[ed]" statements about fearing the wrong answer. (*See* Trial at 1016-22.) Dr. Gregory Gilbert opined N.G. should not live with Cory, but "I don't think that he actually raped or sodomized her." (Trial at 1120.)

Shannon, N.G.'s former foster mom, who was N.G.'s "rock" after removal, testified "[a] lot of [N.G.'s] stories changed over time." (Trial at 423, 1155.) Shannon witnessed N.G. plotting with A.E. against Cory, telling A.E. they "had to stick to the story." (Trial at 1156.) During N.G.'s testimony, N.G. downplayed her relationship with A.E. (Trial at 477 ("We've never been close[.]").) Shannon initially believed N.G.'s allegations against Cory but no longer does. (Trial at 1156.)

Other Evidence and Testimony:

No one testified that he or she personally witnessed Cory sexually abuse N.G., let alone sodomize her.

N.G. underwent three physical examinations, none of which showed findings of sexual abuse. (Trial at 791-95, 823-85.) In an exam of N.G.'s anal area in 2020, there were no findings of sexual abuse and only a non-specific finding of a skin tag, which was consistent with

N.G.'s history of hemorrhoids. (Trial at 824-26, 1135.) N.G. also had a history of urinary tract infections and yeast infections. (Trial at 523, 919; Ex. 6a at 53:52-54:02.)

Cory's ex-wife Viola testified she saw a large bloodstain in N.G.'s underwear when N.G. was 8. (Trial at 506-07.) Viola thought it was N.G.'s period and gave N.G. a pad. (Trial at 507.) But at trial, Viola testified she soon concluded N.G. was not having her period because Viola saw a dry pad in the trash later that day. (Trial at 507-08.) The record does not reflect Viola reported any suspected wrongdoing. Instead, Viola took N.G. to a doctor, who attributed bleeding to a possible yeast infection. (Trial at 522-23.) There is no evidence the doctor reported the bleeding to authorities either.

Although Lynn, together with Viola, did the laundry at Lynn's house, Lynn never saw bleeding. (Trial at 520, 536.)

Like Cory, Cyle came under investigation for sexual abuse of a child. (Trial at 583.) Cyle was suspected of abusing Savanna's son, A.E., who was the same age and "very close" with N.G. (Trial at 542, 583, 914-15.) Viola testified that, at one point, she made an allegation that Cyle—her brother—had raped her, too. (Trial at 513-14.)

Cyle testified that, one night, he was laying in bed with Cory and Savanna and overheard Cory tell Savanna that he had anally abused N.G. (Trial at 581-82.) Cyle did not remember that Cory used the word "sodomize." (Trial at 582-83.)

The State's prior bad acts evidence:

To aid its case, the State was allowed to present a variety and volume of other bad acts. Over Cory's pretrial or contemporaneous objection, the district court allowed evidence about private pornography usage, Cory's adult sexual relationships, and Cory's physical abuse and neglect of N.G. and other children in Cory's household. (*See* Docs. 38, 99; Docs. 152, 153, attached as Apps. C and D; Trial at 236-37, 457-58, 950-53.)

Specifically, the State admitted evidence of pornography usage from an Android smartphone that was seized during the drug raid that accompanied N.G.'s removal. (Trial at 598-600, 938, Ex. 21a and Ex. 21b, offered and admitted, Trial at 950-53.) Cory identified the phone as his, but Cyle had used it, too. (Trial at 600, 1049.) The phone was forensically analyzed and Cellebrite reports of the contents were created. (Trial at 938-40.) The phone only possessed data for two and a

half months, from November and December 2017 to the start of January 2018. (Trial at 957.)

No illegal child pornography was found on the phone. (Trial at 978.) Auch searched the Cellebrite report for entries that included at least one of three different terms—"teen," "young," or "anal," and, as to Exhibit 21b, "family-related" terms. (Trial at 949-50.) Auch's results were generated into two documents, Exhibit 21a and Exhibit 21b, which were admitted at trial. (Trial at 949-53.) These exhibits reflected around 3% of what was on the phone. (Trial at 979-80.)

The information reflected in Exhibits 21a and 21b "may have been legal and adult" pornography. (Doc. 153 at 3-4.) Exhibit 21a consisted of 14 entries of search terms typed into the internet browser on the phone on four separate dates. (Trial at 954-56; Ex. 21a.) There were search terms such as "teen pussy," "teen ass porn," and "young teen porn," and many terms were duplicative.

Exhibit 21b consisted of titles and URL addresses in the web history on the phone. (Trial at 956.) The exhibit was 14 pages long and reflected about 154 entries from the Cellebrite report from 29 separate dates. (*See* Ex. 21b.) Auch testified the information reflected actual

websites that someone had visited using the phone. (Trial at 956.) Auch pointed out for the jury several graphic and offensive titles related to "teen" pornography, incest pornography, or anal pornography, like "Young Dude Stretching Tight Buttholes With His Dick." (*See* Trial at 956-59.)

Viola testified she and Cory watched pornography together during their relationship, which included "family taboo" pornography like "daddy does daughter." (Trial at 503-04, 516.)

Cyle testified about Cory's sex life with Cyle and Savanna, Cyle's wife. (Trial at 577-78.) According to Cyle, he walked in on Cory and Savanna having sex, and they convinced him to open his relationship up. (Trial at 577-78.) Savanna, however, testified the three-way relationship was Cyle's idea. (Trial at 1043.)

Over objection, Cyle testified he witnessed Cory and Savanna engage in anal sex after Cory allegedly admitted he had sodomized N.G. (Trial at 457-58, 582.)

As detailed below, N.G. testified to physical abuse and neglect against her and other children she witnessed in Cyle, Savanna, and Cory's household. Although she testified this abuse happened, N.G. did

not explicitly tie her alleged fear of disclosing sexual abuse to what she witnessed within the household; rather, N.G. attributed it to Cory's alleged "threat" to her following the first alleged sexual abuse incident. (*See*, *e.g.*, Trial at 419-20.)

N.G. testified she fed, bathed, and changed J.M., and woke up with J.M. at night. (Trial at 375-76.) N.G. testified she was "homeschooled" for a year to care for J.M. (Trial at 374-75.) N.G. testified she witnessed Cory "messing around" with A.E. until he was in a chokehold. (Trial at 404-06.) N.G. testified Cory made her and A.E. watch a video of Cory and Savanna having sex. (Trial at 440-41.) N.G. testified Cory made her remove her shirt around guests so he could pop her chest and back pimples. (Trial at 438-39.) N.G. testified Cory physically hit her with a shoe, belt, or hairbrush when she got in trouble. (Trial at 402-03.) N.G. testified she hurt herself and ran away to Lynn's. (Trial at 428-29.)

The State spent a large portion of its case repeating a volume of this sort of evidence. As explained later, the State presented evidence of abuse and neglect from around twelve of its eighteen witnesses, including N.G.'s CFSD case worker.

In closing argument, the State explicitly invited the jury to draw character inferences about Cory from these bad acts. The State began by focusing the jury on "the life that [N.G.] had to live." (Trial at 1210.) The State relied on "everything we know" about Cory to argue he was capable of committing the allegations: "Can we doubt that this man wouldn't carry out that assault just because -- even though there's a two-year-old in the room, sleeping two-year-old? Not with everything we know about him. That's going to happen." (Trial at 1217.) The State relied on the inference that Cory was a sexual maniac. When arguing in rebuttal why no DNA testing was done at the house, the State argued, "Would we be surprised, with what you know, that his semen is all over that house?" (Trial at 1252.)

Additional facts will be discussed as relevant below.

STANDARD OF REVIEW

The Court generally reviews a trial court's evidentiary rulings and denial of discovery for an abuse of discretion. *State v. Lake*, 2022 MT 28, ¶ 23, 407 Mont. 350, 503 P.3d 274; *State v. Stutzman*, 2017 MT 169, ¶ 13, 388 Mont. 133, 398 P.3d 265. To the extent the ruling is based on "an interpretation of an evidentiary rule or statute," review is de novo.

State v. Stewart, 2012 MT 317, ¶ 23, 367 Mont. 503, 291 P.3d 1187. The Court exercises plenary review of constitutional questions. *State v. Hoff*, 2016 MT 244, ¶ 11, 385 Mont. 85, 385 P.3d 945.

The Court exercises de novo review for legality as to sentences of at least one year of actual incarceration. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889. The Court reviews a sex offender level designation for an abuse of discretion. *State v. Hill*, 2009 MT 134, ¶ 22, 350 Mont. 296, 207 P.3d 307.

SUMMARY OF THE ARGUMENT

The State was erroneously allowed to portray Cory to the jury as a person capable of committing these offenses based on "everything we know about him." The district court erred under Montana Rules of Evidence 404(b) or 403 in admitting a broad array of evidence about the private use of pornography, Cory's adult relationships, and his acts as a poor parent. This evidence was either exclusively or primarily relevant to show Cory was a bad man with a deviant mind who acted in conformity with that character in abusing N.G. as she alleged. Specifically as to pornography usage on Cory's cell phone or from Viola and evidence of Cory's adult sexual relationships, this evidence was

inadmissible under Rule 404(b) because any non-propensity purpose for it required an inference about Cory's predisposition to commit the crime. Even if any of the evidence was tangentially relevant to a non-propensity purpose, the prejudicial effect of showing the jury entries for "teen" pornography evidence that "may have been legal and adult," Cory's variant adult sexual relationships, and voluminous bad acts of Cory's as a father substantially outweighed any legitimate probative value. The State greatly overstepped the fine line it chose to walk in presenting a substantial portion of its case through bad acts evidence. Considered either alone or cumulatively, the errors in admitting this evidence compounded with the State's improper use of it in closing require reversal of Cory's convictions.

In addition, Cory asks this Court to conduct its own review of around 2,500 pages of sealed CFSD records the district court reviewed in camera prior to trial. The Court must order a new trial if any records contain information favorable to Cory's defense.

Alternatively, the district court committed several sentencing errors. The district court violated Cory's constitutional rights when it sentenced him based on the undisclosed CFSD records and Cory's

failure to admit the offenses. The Court should remand for resentencing in front of a different judge. In the alternative, the district court violated Cory's constitutional rights and abused its discretion when it designated Cory a Level 3 offender based on Cory's failure to admit the charges during the psychosexual evaluation. At a minimum, the Court must remand for amendment of the judgment to designate Cory a Level 2 sexual offender.

Finally, the district court imposed an illegal sentence when it failed to credit Cory's sentence with 678 days of time served.

ARGUMENT

I. The district court erred when it allowed the State to present the private usage of pornography, Cory's adult sexual relationships, and voluminous evidence of Cory's acts as a bad dad at his incest trial.

Only relevant evidence is admissible. Mont. R. Evid. 401, 402. Nor is "[e]vidence of other crimes, wrongs, or acts" admissible to prove "the character of a person in order to show action in conformity therewith." Mont. R. Evid. 404(b). The bar on character evidence "comes into play" whenever the jury may be tempted "to decide the case against the defendant on an improper propensity basis." *Stewart*, ¶ 62.

The rule's purpose is to prevent convictions based on "someone ha[ving] a propensity to do certain things." *State v. Aakre*, 2002 MT 101, ¶ 12, 309 Mont. 403, 46 P.3d 648. Bad character is inadmissible due to fears a jury will "'prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Stewart*, ¶ 63 (quoting *State v. Sage*, 2010 MT 156, ¶ 37, 357 Mont. 99, 235 P.3d 1284). A right to a fair trial is an essential component of due process. *State v. Daniels*, 2019 MT 214, ¶ 32, 397 Mont. 204, 448 P.3d 511.

A defendant's other acts "may" be admissible for "other purposes" such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Mont. R. Evid. 404(b). But even if so, the evidence may still be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mont. R. Evid. 403.

To admit evidence for an "other purpose" exception under Rule 404(b), the proffered evidence must further the proposed non-propensity purpose and relate to an issue in dispute. *See Lake*, ¶ 27; *Aakre*, ¶ 11. The State must "'clearly articulate'" how the proposed evidence "'fits

into a chain of logical inferences, no link of which may be [an] inference that the defendant [thus] ha[d] the propensity' or was predisposed to commit the charged offense." *Lake*, ¶ 27 (citations omitted). The exception cannot swallow the rule: "trial courts '*must ensure* that the use' of prior bad acts evidence under Rule 404(b) is 'clearly justified and *carefully limited*.'" *Lake*, ¶ 44 (emphases in *Lake*).

Even if such evidence is not barred by Rule 404(b), it is critical that courts make "careful consideration and application of Rule 403." *Lake*, ¶ 32. Prior bad acts evidence is "inherently prejudicial." *Lake*, ¶ 32. In particular, court must exercise "great caution" when allowing "potentially inflammatory propensity or character evidence" of a sexual nature. *See Sage*, ¶¶ 36-37; *see also*, *Lake*, ¶ 32. As to pornography evidence or evidence of "variant sexual practices," "[c]aution is especially warranted in trials for sex crimes because a jury may infer from a defendant's use of pornography that the defendant had the propensity to engage in other morally questionable sexual behaviors." *State v. Clark*, 452 S.W.3d 268, 289 (Tenn. 2014); *see, e.g.*, *State v. Nichols*, 2014 MT 343, ¶ 19, 377 Mont. 384, 339 P.3d 1274.

A. Evidence of the private use of pornography and of Cory's adult sexual relationships

Over Cory's pretrial or contemporaneous objection, the district court admitted evidence of pornography from Cory's cell phone and through testimony from Viola. (*See* Docs. 152-153; Trial at 504-05, 950-53.[1]) Over Cory's objection, the district court also allowed evidence of his adult sexual relationships, including how his three-way relationship developed and that Cory allegedly participated in anal sex with Savanna. (*See* Doc. 152 at 10-11; Trial at 446, 457-58, 577-78, 582.) Considered either separately or together, the district court abused its discretion in admitting this evidence under Rule 404(b) or 403.

As the district court noted, pornography evidence on the cell phone "may have been legal and adult." (Doc. 153 at 3.) Adult pornography, even where it involves young-looking adults, is a

[1] Although the district court initially granted Cory's pretrial motion to exclude evidence of his sex life with Viola, the court ruled such evidence would be admissible if its relevance was demonstrated. (Doc. 152 at 2, 16.) The district court's orders collectively demonstrate it deemed Cory's viewing of incest pornography with Viola relevant and admissible. (*See* Doc. 153 at 3-4; Trial at 952; *see also*, Trial at 427 (district court noting "I wouldn't have let [the State] finish [its] sentence" if the State sought to admit evidence that violated the orders in limine).)

constitutionally protected form of speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239-41, 249-51 (2002). No saved or deleted images of child pornography were found on the phone. (Trial at 946, 978; Doc. 110 at 2.) The State only offered words from the Cellebrite report and presented no direct evidence about what was actually visible on any listed websites. Likewise, as to Viola's testimony about watching "daddy does daughter" pornography with Cory years before, Viola did not testify they watched *child* pornography. Thus, the State presented no evidence Cory accessed or viewed anything illegal.

In addition, the State presented no evidence that linked the two-month cell phone evidence to any of the four incidents of anal abuse that N.G. testified about. For example, N.G. did not testify Cory made her view pornographic websites before, during, or immediately after any of the alleged incidents. As for Viola's testimony, Viola did not testify N.G. viewed any of the pornography Viola and Cory watched together, accidentally or otherwise.

Evidence of the private use of pornography on the cell phone or with Viola was not relevant under Mont. R. Evid. 401. *See State v. Boleyn*, 303 P.3d 680, 692 (Kan. 2013) (citing literature about

pornography reflecting sexual fantasy or arousal rather than real life situations). Even if relevant, the evidence was prohibited by Rule 404(b) because it was only admissible to show Cory "had the propensity to engage in other morally questionable sexual behaviors." *Clark*, 452 S.W.3d at 289; *see Nichols*, ¶ 19; *see also*, *State v. Hotchkiss*, 2020 MT 269, ¶ 35, 402 Mont. 1, 474 P.3d 1273 (Sandefur, J., dissenting) (disagreeing with probation conditions restricting pornography due to the absence of evidence of "tangential or coincidental involvement" of pornography in the criminal behavior). Nor was the nature of Cory's adult sexual relationships remotely relevant to N.G.'s allegations.

The State's main argument to admit the cell phone evidence was to show "Defendant was motivated by an apparent interest in or desire for sexual contact (particularly anal in nature) with young girls." (Doc. 110 at 6.) Similarly, to the jury, the State argued pornography evidence on the cell phone and evidence of Cory's anal sex with Savanna went to his "motivation." (Trial at 1230-31, 1250-51.)

"It can be easy to confuse evidence of propensity with evidence of motive," which is precisely what the State did. *Harrison v. United States*, 30 A.3d 169, 178 (D.C. 2011). The State's "motive" purpose was

propensity-based: the evidence showed Cory was predisposed to anal sex or anal sex with teens, which made it more likely that 7 to 11-year-old N.G.'s allegations of anal abuse were true. *See State v. Rodriguez*, 254 S.W.3d 361, 374-78 (Tenn. 2008) (reversing based on the erroneous admission of evidence suggesting the defendant possessed child pornography to show he "has a thing for children" because it was propensity evidence); *see also*, *Lake*, ¶ 27 (explaining an argument the defendant was predisposed to commit the offense is an improper propensity argument). The State improperly cast "a wide net" to define motive as a predisposition to anal sex or anal sex with teens. *See State v. Blaz*, 2017 MT 164, ¶ 15, 388 Mont. 105, 398 P.3d 247. Likewise, Viola's single reference to incest pornography was only possibly relevant to show a predisposition in Cory to engage in that behavior.

The district court also determined the cell phone evidence was admissible for identity, relying on *State v. Colburn*, 2018 MT 141, ¶¶ 10-19, 391 Mont. 449, 419 P.3d 1196 (*Colburn II*). (Doc. 153 at 4-5.) In *Colburn II*, ¶¶ 3-4, 11-14, 18, the Court upheld the admission of over a hundred Internet search terms on Colburn's computer that included "preteen pussy" and "preteen tube" to show Colburn's identity as the

perpetrator of victim R.W.'s allegations of sexual abuse. Importantly, Colburn's appeal followed a retrial in which he was permitted to admit evidence that R.W. was abused by another person. *State v. Colburn*, 2016 MT 41, ¶¶ 19-30, 382 Mont. 223, 366 P.3d 258 (*Colburn I*). Colburn's retrial defense "specifically and intentionally put into trial" "the identity of the perpetrator of these crimes." *Colburn II*, ¶ 13. Colburn's internet search history was admissible to show Colburn's identity as the abuser of the 11-year-old victim. *Colburn II*, ¶ 13; *see Colburn I*, ¶ 9.

Cory's case is unlike *Colburn II*. Cory's case did not involve *Colburn II*'s dispute as to identity. Nor did the State's pornography evidence here pertain to individuals of the alleged victim's age. N.G. was between 7 and 11 during the 5-year charging period. The limited segment of cell phone evidence, at its youngest, pertained to teens; Viola's evidence pertained to un-aged daughters; and Cory's anal sex with Savanna pertained to an adult. This evidence did not pertain to a category of individuals of N.G.'s age, unlike *Colburn II*. *See State v. Ayers*, 2003 MT 114, ¶ 93, 315 Mont. 395, 68 P.3d 768 (stating the identity exception proves "'like crimes by the accused so nearly identical

in method as to earmark them as the handiwork of the accused'" (citation omitted)).

Moreover, the State separately filed criminal charges against Colburn for possession of child pornography. *See Colburn II*, Brief of Appellant, DA 17-0175, at 4 n.1 (Nov. 6, 2017) (noting Colburn was convicted of two counts of attempted possession of child pornography). Here, the State just relied on raw data from the Cellebrite report that "may have been legal and adult."

The only link between this evidence for identity, or for any of the other purposes the jury was instructed upon (opportunity, plan, knowledge, or absence of mistake or accident, *see* Doc. 168, Instr. 23), was propensity-based. Furthermore, Cory's defense did not put opportunity or absence of mistake in dispute. *See Aakre*, ¶ 11. Cory did not dispute he resided with N.G. He did not assert he engaged in some sort of accidental or unknowing sexual conduct.

Even if the pornography evidence or evidence about Cory's adult sexual relationships was possibly relevant for a non-propensity purpose, the district court abused its discretion in admitting the evidence as it did under Mont. R. Evid. 403. The danger of unfair prejudice and

confusion of the issues far outweighed any legitimate probative value. In light of the prejudicial nature of this evidence, the district court had to tread carefully. *See Sage*, ¶¶ 36-37; *see also*, *Lake*, ¶ 32. Neither the court nor the State did so.

The potential for the evidence to improperly inflame the jury against Cory was high. The State's bare labels of data on the Cellebrite report created an overpowering but unsupported inference that Cory had possessed or attempted to possess illegal child pornography. To mitigate that inference, it was not enough to inform the jury no illegal images were found. *See State v. Van Kirk*, 2001 MT 184, ¶ 46, 306 Mont. 215, 32 P.3d 735 (noting "the highly inflammatory nature" of evidence regarding possible child molestation).

The district court took no steps to minimize the cell phone evidence's prejudicial effect, such as by limiting the quantity or allowing generalized testimony. The State introduced the cell phone evidence through its last witness and enlarged the portions read by Auch. (*See* Trial at 953-58.) Auch recognized the evidence was offensive and apologized for it. (Trial at 954 ("Some of the things here, I apologize. I don't mean for them to be offensive, but I'm going to read them off for

you.").) Auch read aloud graphic titles of websites: "Lovely three teens getting nailed one lucky fat cock," "FamilyStrokes - Scared Stepdaughter Gets Fucked while Wife Sleeps," from "Pornhub.com" and a website visited "the day after Christmas" called "Young Dude Stretching Tight Buttholes With His Dick" from "Young Porn Videos." (Trial at 957-59; Ex. 21b at 1, 7, 14.) The jury could read over 150 other titles of a similar nature, although at least 10 entries had a confusing time stamp of being accessed at the exact same time. (*See* Ex. 21b at 3, 12-13.) Some titles did not pertain to teens but only to rough or anal sex or just simply "young porn." (*See* Ex. 21b.)

Likewise, the inflammatory impact of Viola's testimony about "daddy does daughter" pornography, viewed separately or together with the highly prejudicial evidence of Cory's three-way relationship and his anal sex with Savanna, was overwhelming. *See Nichols*, ¶ 19 (holding the State's questioning on details of variant legal sexual practices was inflammatory and unfairly prejudicial); *City of Kalispell v. Miller*, 2010 MT 62, ¶ 14, 355 Mont. 379, 230 P.3d 792 ("Because there remains strong potential that a juror will be prejudiced against a homosexual or bisexual individual, courts must safeguard against such potential

prejudice."). Despite any tangential relevance, this evidence unfairly presented Cory as a deviant man with variant sexual proclivities that made him more likely to have committed N.G.'s allegations.

On the other side of the Rule 403 balancing, the relevance of the evidence was low. In addition to the mismatched ages between this evidence and N.G., the State lacked evidence of N.G. viewing the cell phone pornography or Viola's pornography. Finally, given testimony that Cyle had used the phone, an issue was presented whether Cory was even responsible for the cell phone evidence.

Under *Van Kirk*, a trial error requires reversal unless the State can demonstrate "the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶¶ 41-44 (emphasis in original). The State cannot meet that burden here considering, either alone or cumulatively, the cell phone evidence, the pornography evidence from Viola, or evidence about Cory's adult sexual relationships.

The State's case was based on N.G.'s inconsistent allegations, lacked physical evidence, and relied on the testimony of Cyle, who himself was under investigation for sexual abuse. The State chose to

use pornography evidence from Cory's cell phone and from Viola and Cory's variant adult sexual relationships to distract the jury, inflame their sentiments against Cory, and paint Cory as a deviant, sexual maniac, capable of N.G.'s allegations. The State exploited these precise character arguments in closing.

In closing, the State argued Cory was capable of these crimes based on "everything we know about him." (Trial at 1217.) The State directly argued the cell phone evidence showed "[h]e was searching for young teen porn. That would be teens -- Seems like common sense would say to us 13, 14, 15 is young teens." (Trial at 1250.) The State exploited its absence of proof that Cory had accessed child pornography to argue that very point, although that crime was uncharged and N.G. was not "13, 14, [or] 15." Although the pornography evidence and evidence of Cory's adult relationships involved no individuals of N.G.'s age, occurred at different times, and was presumptively all legal, the State argued it collectively showed Cory's "motivation," or his predisposition, for anal sex. (Trial at 1231.) The State then closed by painting the picture for the jury of Cory's "semen [] all over that house." (Trial at 1252.) Although the district court gave a cautionary

instruction (Doc. 168, Instr. 23), it was not sufficient to mitigate unfair prejudice from evidence that, by Auch's own admission, was highly offensive. *See Sage*, ¶ 42 (holding cautionary instruction was not sufficient to mitigate photographs the State characterized as sufficient to "make a sailor blush"). The State cannot meet its burden to demonstrate harmless error. Cory's convictions must be reversed.

B. Cory's character as a bad father

The district court, over Cory's objection, allowed voluminous highly prejudicial evidence about Cory's character as a father, ruling abuse and neglect that occurred in the household was relevant if N.G. "personally experienced" it. (*See* Doc. 152 at 12-13, 16; Trial at 236-37.)

Evidence showing Cory was more likely to have committed these offenses because he was a bad dad was character evidence. *See Stewart*, ¶ 62. This evidence may have had permissible non-propensity purposes under Rule 404(b) such as showing N.G.'s motive to fabricate, grooming, or for the intimidation charge. But this evidence was, at best, tangentially relevant to the offenses' elements. Importantly, N.G. did not explicitly link what she experienced or witnessed within the household to her fear of disclosing her allegations against Cory. Rather,

N.G. tied her fear of disclosure to Cory's direct threats to her during the abuse. (*See*, *e.g.*, Trial at 419-20.) Given the nature of the evidence, the State and district court had to proceed with "careful consideration and application of" Rule 403. *Lake*, ¶ 32. Instead, the State "drove the proverbial truck through the crack in the door." *Lake*, ¶ 34.

The State held a mini-trial on Cory's acts as a poor parent. The State went so far as to subpoena and elicit testimony from N.G.'s CFSD caseworker who effectuated her removal. (*See* Docs. 122, 135; Trial at 587-93.) The jury heard a volume of this evidence, not only through N.G., but repeated through around twelve of its eighteen witnesses, including through N.G.'s prior statements. The jury heard from five other individuals about Cory putting A.E. in chokeholds. (Trial at 543, 579, 568, 592, 880 (A.E., Cyle, Widmer, CFSD worker, and Neff).) The jury heard from four other individuals about N.G.'s physical abuse. (Trial at 592, 635, 882-83, Ex. 6a at 19:41-19:48 (CFSD worker, psychiatric nurse practitioner, Neff, and Auch's interview with N.G.).) The jury heard from six other witnesses about N.G.'s neglect. (Trial at 489-90, 505-06, 591, 611, 654, 892-93 (school superintendent, Viola, CFSD worker, psychiatric nurse practitioner, police officer, and Neff).)

The jury heard from six other witnesses about Cory forcing N.G. to watch homemade pornography of Cory and Savanna. (Trial at 568-69, 647, 880-81, Ex. 12a at 00:45-01:23, offered and admitted Trial at 570, Ex. 8b at 17:44-18:36, Ex. 6a at 32:15-32:27 (Widmer, doctor, Neff, Widmer's interview with A.E., Widmer's interview with N.G., Auch's interview with N.G.).) The jury heard from two other individuals about Cory popping N.G.'s pimples. (Trial at 580, 647 (Cyle and a doctor).)

Cory was forced to defend with a long-time friend who testified he never witnessed anything inappropriate, and Cory was a "regular father." (Trial at 1106.) Cory presented evidence that N.G. stayed home from school because she was strip-searched. (Trial at 1073.)

In closing, the State did exactly what Rule 404(b) prohibited. The State began by focusing the jury, not on the allegations, but "the life that [N.G.] had to live." (Trial at 1210.) The State made the propensity-based argument that "everything we know" about Cory left no doubt that he had the moral character to carry out an assault of N.G. with two-year-old J.M. nearby. (Trial at 1217.)

There was a very narrow range of relevant evidence in this case and the evidence supporting N.G.'s allegations was not strong. By

using voluminous bad acts of Cory as a parent that bore tangential relevance to the crimes' elements, the State chose to walk a fine line. The State greatly overstepped that line by the quantity of evidence, the inflammatory nature of it, and the State's use of it in closing. The feeling in the courtroom on "the majority of the [S]tate's case" was palpable, as it forced Cory to respond the case was not about whether "you like Cory" or whether he "was a neglectful parent." (Trial at 1246.) The State cannot show there is no reasonable possibility that, given the breadth of evidence presented and the improper use of it, the jury would not have reached a different conclusion. The district court's failure to rein in the State is reversible error.

II. The district court erred in not disclosing information from the CFSD files following an in camera review.

CFSD's extensive involvement in N.G.'s life culminated in the DN cases. Cory filed a pretrial motion pursuant to Mont. Code Ann. § 41-3-205(2), requesting the district court review a broad array of CFSD documents in camera: "all notes (handwritten or otherwise), memoranda, correspondence, evaluations, reports, and any other

documentation (electronic or otherwise) compiled and/or produced as a result of the civil proceedings" related to the four DN cases. (Doc. 74.)

The district court granted the motion and reviewed the provided records months before trial. (Doc. 81; Doc. 117, attached as App. E.) The records approximated 2,500 pages, some double-sided, but the district court disclosed very little information to Cory. (Doc. 113; Doc. 117 at 5.) Yet, the State directly injected the DN cases into this criminal trial by eliciting testimony from N.G.'s CFSD case worker. To make matters worse, the district court relied on the numerous CFSD records reviewed in camera when imposing sentence on Cory, as explained further below. Yet, Cory was not authorized to review those records, let alone use them in his defense.

An accused is entitled to a meaningful opportunity to present a complete defense to a criminal charge as well as to discover potentially exculpatory evidence. *Stutzman*, ¶¶ 28-29; *see Colburn I*, ¶ 24. "Exculpatory evidence includes that which is favorable to the accused and material either to guilt or to punishment." *Stutzman*, ¶ 28.

A defendant's right to exculpatory evidence "extends to confidential files compiled by DPHHS." *Hoff*, ¶ 31. Since DPHHS

records must generally remain confidential, *see* Mont. Code Ann. § 41-3-205(1), this Court has held the trial court must conduct an in camera review of such records for exculpatory evidence when a defendant seeks their access. *See State v. Johnston*, 2014 MT 329, ¶¶ 6-9, 377 Mont. 291, 339 P.3d 829; *see also*, *Hoff*, ¶¶ 30-31. The inquiry focuses not on admissibility but on whether the records contain "favorable" evidence in the sense of having the "'potential to lead directly to admissible exculpatory evidence.'" *Stutzman*, ¶ 28 (quoting *State v. Weisbarth*, 2016 MT 214, ¶ 24, 384 Mont. 424, 378 P.3d 1195). A trial court's refusal to grant access to records is reversible error where there exists "'a reasonable probability that had the information been provided, the result would have been different'" or that the verdict is not "'worthy of confidence.'" *Stutzman*, ¶ 29 (citation omitted).

Here, out of around 2,500 pages, the district court concluded [redacted]. (Doc. 117 at 3.[2]) The district court [redacted]

[2] The district court's order following the in camera review was filed under seal. Thus, information from this confidential order, as well as other references in this brief to the confidential psychosexual evaluation, have been redacted from the publicly filed version pursuant to Mont. R. App. P. 10(7).

[redacted]. (Doc. 117 at 3.) The district court asserted [redacted] Doc. 117 at 3-5.) Upon motion, the district court preserved the reviewed records for appeal, which this Court received in a large box on December 19, 2022. (Docs. 145, 157; *see* DA 21-0485.)

Due to undersigned counsel's lack of access to these records, counsel cannot detail the favorable evidence they contain. Cory asks the Court to review the records for potential information including, but not limited to, the following:

- any statements by N.G. inconsistent with her trial testimony or her previous forensic interviews, *cf. Stutzman*, ¶ 34, which could include statements to Dr. Borino, Amy Rau, or any of N.G.'s many counselors (*see* Trial at 473-74, 983, 988-92 (Auch noting N.G.'s statement she had told CFSD and "Melinda" "everything");
- any prior allegations by N.G., *see Weisbarth*, ¶ 22;
- any statements by N.G. suggesting animosity towards Cory, fear of or coaching by a third party, or a motive to fabricate, *Stutzman*, ¶ 35;

- any medical records as to N.G.'s mental health that could impugn N.G.'s credibility, *see Weisbarth*, ¶ 21;
- any medical records or statements as to alternative sources for N.G.'s bleeding (*see* Trial at 212-14 (district court commenting that evidence about N.G.'s health issues was "all over" the CFSD records));
- any potentially exculpatory forensic examinations of N.G., *Stutzman*, ¶ 30;
- any statements of Cyle, Lynn, or Viola inconsistent with their trial testimony, suggesting a motive to testify falsely, or relevant to impeachment (*see*, *e.g.*, Doc. 46, attached affidavit at 5 (referring to possible report to CFSD of Cyle "rap[ing] N.G.")); or
- any records and information revealing any defect or defects of the capacity of N.G., Cyle, Viola, or Lynn to perceive, observe, recall, or recount events.

In this case, any of the above information could have altered the outcome. N.G.'s allegations were always changing. By trial, her foster mother that first reported N.G.'s allegations no longer believed them. There were no eyewitnesses and no medical evidence directly supporting N.G.'s claims. Should this Court determine the confidential records contain any information favorable to the defense, the Court will be unable to conclude the verdicts against Cory remain "worthy of confidence" and the Court must reverse Cory's convictions. *Stutzman*, ¶ 29. Alternatively, this Court may disclose any pertinent records and order supplemental briefing to address reversible error, including any

cumulative prejudice resulting from errors under Part I above. *See* Mont. R. App. P. 12(10).

III. The district court violated Cory's constitutional rights when it sentenced Cory based on undisclosed records and Cory's refusal to admit the charged offenses.

Even if this Court does not reverse Cory's convictions, the Court must address the district court's violation of Cory's rights by sentencing him based on the undisclosed CFSD records and his failure to admit the charges after trial.

A. Cory was improperly sentenced upon undisclosed CFSD records and his failure to admit the offenses, which requires resentencing before a new judge.

When sentencing Cory, the district court referred both to the DN court files and the broader CFSD records the court had reviewed in camera. (7/8/21 Tr. at 10.) In choosing the sentence, the district court explicitly relied on "the facts of the extensive abuse and neglect cases involving the victim and her half siblings and other children at the house," which were "all documents of which were reviewed by the Court per Defendant's request." (Doc. 202 at 9-10.)

A defendant's due process right requires "an opportunity to explain, argue, and rebut any information which may lead to the

deprivation of life, liberty or property." *State v. Redding*, 208 Mont. 24, 28, 675 P.2d 974, 976 (1984), *overruled on other grounds*, *State v. Waters*, 1999 MT 229, ¶ 20, 296 Mont. 101, 987 P.2d 1142. It violates a defendant's due process right to sentence the defendant based on "private, out-of-court information, communications or investigation." *Redding*, 208 Mont. at 27, 675 P.2d at 976 (reversing and remanding for resentencing where the defendant was given no opportunity to argue, rebut, or explain undisclosed information the district court obtained in a private meeting with the presentence investigating officer); *see also*, *Gardner v. Florida*, 430 U.S. 349, 358-62 (1977) (plurality) (holding due process was violated when the death penalty was imposed based on confidential information that was not disclosed to the defense).

In addition to due process protections, this Court has consistently held a sentencing court cannot impose a harsher sentence based upon a defendant's refusal to admit guilt. *E.g.*, *State v. Rennaker*, 2007 MT 10, ¶ 52, 335 Mont. 274, 150 P.3d 960; *State v. Cesnik*, 2005 MT 257, ¶ 25, 329 Mont. 63, 122 P.3d 456; *State v. Shreves*, 2002 MT 333, ¶ 22, 313 Mont. 252, 60 P.3d 991. These decisions "prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes

his privilege against self-incrimination." *State v. Imlay*, 249 Mont. 82, 91, 813 P.2d 979, 985 (1991).

The district court violated Cory's due process rights at sentencing because it relied on CFSD records the district court explicitly denied Cory access to. The district court explicitly relied on "the extensive abuse and neglect cases," which were "all documents of which were reviewed by the Court per Defendant's request," thus suggesting the court could rely on these undisclosed records precisely because Cory requested their disclosure after an in camera review. (Doc. 202 at 9-10.) Cory's exercise of his due process right to exculpatory information in the CFSD records through his only option of an in camera review did not forfeit his due process right to be sentenced on information he had access to. As in *Redding* and *Gardner*, Cory was sentenced on "private, out-of-court information, communications or investigation" he was denied access to. *Redding*, 208 Mont. at 27, 675 P.2d at 976.

In addition, the district court punished Cory for not admitting the offenses and maintaining his innocence. In determining Cory was "not fit for society," the district court explicitly relied on Cory's failure to admit the offenses after trial. (7/8/21 Tr. at 11-12; Doc. 202 at 10

(sentencing Cory based on his "utter lack of remorse and continued denial of his criminal acts").) As explained further below, the district court explicitly relied on Cory's failure to admit the offense to reject the entire psychosexual report. The district court violated Cory's constitutional rights by sentencing Cory based on undisclosed information and his failure to admit the offense. These constitutional violations require remand for resentencing. *See Redding*, 208 Mont. at 30, 675 P.2d at 977.

Furthermore, as the Court has ordered following due process violations at sentencing, *Bauer v. State*, 1999 MT 185, ¶ 32, 295 Mont. 306, 983 P.2d 955, it is appropriate that resentencing be conducted before a new judge. *See also*, *State v. Webber*, 2019 MT 216, ¶ 21, 397 Mont. 239, 448 P.3d 1091. It is reasonable to expect the judge would find it difficult to put the information contained in the undisclosed CFSD records out of the judge's mind. *See State v. Rambold*, 2014 MT 116, ¶ 21, 375 Mont. 30, 325 P.3d 686; *State v. Smith*, 261 Mont. 419, 445-46, 863 P.2d 1000, 1016-17 (1993). "'[F]or the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of

partiality.'" *U.S. v. Nicholson*, 611 F.3d 191, 217 (4th Cir. 2010) (citation omitted). Thus, the Court should instruct a different judge to preside at resentencing.

B. The Level 3 designation was imposed in violation of Cory's constitutional rights.

Alternately, even if this Court does not remand for resentencing, the Court must remand for Cory to be designated a Level 2, rather than a Level 3, sexual offender.

During the sentencing process, Cory expressly maintained his innocence and stated his intent to appeal. (Docs. 194 at 14, 195 at 3, 199.) A psychosexual evaluation was performed, and the evaluator recommended a Level 2 designation for Cory. (Doc. 199 at 5.) The evaluator [redacted]. (Doc. 194 at 16, 26, 28-29.) Cory and the State concurred with a Level 2 designation. (7/8/21 Tr. at 9.)

The district court deviated from that recommendation and designated Cory a Level 3 offender based on Cory's failure to admit the offense during the psychosexual evaluation. The district court

illogically deemed the entire evaluation invalid because it "did not take into account that he was convicted of raping his daughter" based on the sole fact the evaluation's tests and results were "computer generated based upon Mr. Goodman's answers" and Cory's answers did not include an admission to the offense. (7/8/21 Tr. at 10.) The district court reasoned "the test results and subsequent recommendations and conclusions [of the psychosexual evaluation] are of little value, if not completely irrelevant" because, as a result of "the Defendant's answers," "[t]here is no factoring in for the fact that the Defendant was convicted of incest and intimidation." (Doc. 202 at 10.) While the court also critiqued information given to the evaluator, the record demonstrates the Level 3 designation was based, in large part, on Cory's failure to verbally admit the offense during the evaluation.

As noted above, a sentencing court may not augment a sentence for failure to accept responsibility for the crime "when that defendant has expressly maintained his innocence and has a right to appeal his conviction." *Cesnik*, ¶ 25; *see also*, *Rennaker*, ¶ 52; *Imlay*, 249 Mont. at 91, 813 P.2d at 985. To do so would violate the defendant's constitutional rights against self-incrimination as well as render

meaningless a defendant's rights to direct appeal and collateral review. *Imlay*, 249 Mont. at 90-91, 813 P.2d at 985.

Here, like *Cesnik*, ¶ 24, "the court was dismayed at [Cory's] refusal to acknowledge the jury's verdict" and "placed considerable weight on the fact that [Cory], despite having been convicted of the offense," "would not admit to having committed the crime." *See also*, *Rennaker*, ¶ 52 (holding district court violated Rennaker's constitutional rights when it imposed a sentence based, in large part, on Rennaker's silence and failure to acknowledge the wrongfulness of his conduct). As in *Cesnik*, Cory "expressly maintained his innocence and has a right to appeal his conviction," and the district court violated Cory's constitutional rights when it augmented his sentence due to his failure to admit the offense. *Cesnik*, ¶ 25; *Imlay*, 249 Mont. at 91, 813 P.2d at 985. Furthermore, the district court abused its discretion when it tossed out the psychosexual evaluation for failing to account for Cory's denial of the offense when the evaluation plainly did so. Even if the Court does not remand for resentencing, the Court should reverse the Level 3 designation and remand for redesignation as a Level 2 offender.

C. These claims are proper for the Court's review.

The district court's errors at sentencing are proper for the Court's review. Cory filed a sentencing memorandum that maintained his innocence and invoked his Fifth Amendment constitutional rights. (Doc. 199 at 1-2.) Any issue relating to the improper use of these rights at sentencing was raised in district court. Although Cory did not raise a due process objection at sentencing, this Court can review the due process aspects of Cory's claim because an allegation "a sentence violates constitutional guarantees of due process is a reviewable allegation of illegality" under *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979). *State v. Winter*, 2014 MT 235, ¶ 27, 376 Mont. 284, 333 P.3d 222.

Additionally, as an alternate basis for review, plain error is appropriate. Failure to review the claim implicates Cory's fundamental constitutional rights and may result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the trial, or may compromise the integrity of the judicial process. *Daniels*, ¶ 30. The privilege against self-incrimination and the right to due process "are both undeniably fundamental constitutional rights." *State v. Sullivan*,

280 Mont. 25, 32-33, 927 P.2d 1033, 1038 (1996). The record supports both that Cory was sentenced based on confidential information he was expressly denied access to and the exercise of his right to remain silent and to appeal. Leaving the errors uncorrected would result in a manifest miscarriage of justice that leaves unsettled the fundamental fairness of the proceedings or may compromise the judicial process's integrity because it leaves Cory to spend the rest of his life serving a sentence fashioned in reliance on blatant violations of his constitutional rights.

IV. The district court illegally omitted 678 days of credit for time served.

Under Mont. Code Ann. §§ 46-18-403(1)(a) and 46-18-201(9), a court must credit a criminal sentence with time spent incarcerated prior to sentencing. *See also*, *State v. Spagnolo*, 2022 MT 228, ¶ 7, 410 Mont. 457, 520 P.3d 330; *Parks*, ¶ 9. Giving less credit than the law requires can be raised for the first time on appeal. *State v. Erickson*, 2005 MT 276, ¶ 27, 329 Mont. 192, 124 P.3d 119.

Here, Cory requested 678 days of credit for jail time served prior to sentencing, but the district court granted no credit. (7/8/21 Tr. at 7;

see also, Doc. 195 at 1.) The district court issued an illegal sentence when it omitted 678 days of credit for time served. Mont. Code Ann. §§ 46-18-201(9), -403(1)(a); *see also*, *Parks*, ¶ 9; *Spagnolo*, ¶ 15. Even if this Court orders no other remedy, the Court must remand for inclusion of 678 days of credit for time served. *Parks*, ¶ 14.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgement and reverse Cory's convictions due to the erroneous admission of various bad acts evidence and undisclosed exculpatory evidence.

In the alternative, the Court should vacate the judgment and remand for resentencing in front of a different judge. At a minimum, the Court should remand with instructions to issue an amended judgment that designates Cory a Level 2 offender and grants 678 days of time served credit.

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Respectfully submitted this 5th day of April 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,992, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristen L. Peterson
KRISTEN L. PETERSON

APPENDIX