IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0468

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ORAL ARGUMENT REQUESTED

GARRETT ALAN LEE,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Honorable Jessica Fehr

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I. STATEMENT OF ISSUES PRESENTED.

A. Is the Mandatory 100-year sentence and 25-year parole restriction, of Sec. 45-5-625 (4) (i), M.C.A., Violative of the State and Federal Prohibition against Cruel and Unusual Punishment?

B. Did the lower court err, in ruling that Mr. Lee could be sentenced under the harsher Meghan's law, where the statutes did not explicitly include a fictitious identity?

C. Did the lower Violate Mr. Lee's right to Due Process in the Sentencing Hearing and in Rendering Inconsistent and Unfounded Findings?

II.CASE FACTS.

Mr. Garrett Lee is a severely handicapped individual, whose intellect is at the bottom of the spectrum for individuals of his age. Specifically, his IQ tested out between 62 to 69, which places him as being intellectually disabled. App. C; DC# 34-Findings of Fact and Conclusions of Law as to exception to mandatory minimum, par. No 9, p. 3. A prior neurological evaluation placed his IQ at 62, when he was 15 or 16. Sent Hrg, p. 8 (Dr. Woolston testimony). His IQ places him lower than 98% of the population and is classified as extremely low. Id,

p. 9. Dr. Woolston diagnosed Mr. Lee with the following mental disorders:

1.Attention Deficit disorder.

2. Unspecified learning disorder, considered intellectual disability, mild.

3. Autistic spectrum disorder, Mild.

4. persistent depressive disorder with low self-esteem, consider cyclothymic disorder.

5. Generalized anxiety disorder

6.Cannabis disorder, mild. App. D, DC# 34, Par. 10, p. 3

Mr. Lee also suffers from persistent anxiety, borderline autism disorder, and being very impulsive. Id, p. 13.

Between April 12 and 14, 2022, Mr. Lee was caught up in an undercover "sting" operation, conducted by various law enforcement entities in Yellowstone County. App. C, DC# 34, Finding of Fact and Conclusions of Law as to exception to mandatory minimum (FFCL), par. 2, p. 1-2 He was on a website known as "whisper," and an undercover agent represent that they were 12 years old and were

looking to hook up. Id. Mr. Lee engaged with them on line, utilizing sexual conversation, and eventually arranged to meet this person at a local park. DC# 3- Affidavit in support of Information. He was arrested. Id.

Mr. Lee was serving a previously imposed sentence for burglary, also out of the 13th Judicial District. DC# 22-Pre Sentence Investigation (PSI). He had been revoked off that deferred sentence and was sent to a prerelease. Id. While there, he exhibited some inappropriate sexual talk and behaviors, and received a psychosexual evaluation from one Christopher Quigley. App. C, p. 5. He never received a copy of that report, Sent Tr, p. 50. The Quigley report was not attached to his PSI; DC# 23; and wasn introduced into evidence at his sentencing hearing.

III. PROCEDURAL STATEMENT.

Mr. Lee was charged with sexual abuse of children, pursuant to Sec. 45-6-625 (2) (a), M.C.A. on April 5, 2022. App. A- docket sheet, DC# 1& 2, Motion and Affidavit; Information. The Information alleged the applicable penalty of a mandatory 100 years in prison, and a

mandatory 25-year parole restriction, pursuant to Sec. 45-6-625 (4) (i), M.C.A. (check) Id, DC#2.

He was arraigned on April 18, 2022, and an omnibus hearing was held on June 16, 2022. DC## 4& 10. On July 28, 2022, Mr. Lee pled guilty to one count of sexual abuse of children. Change of Plea Hearing Transcript, 7/28/22. At that hearing he allocated, as a factual basis for the crime that he knowingly enticed, persuaded, a person he believed to be under the age of 12 years, to engage in sexual conduct actual or simulated. 7/28/22 COP Tr. p. 6.

A psychological evaluation of Mr. Lee was conducted by Dr. Dee Woolston, a licensed psychologist, and was filed with the Court on August 4, 2022. DC# 16-Psychological Evaluation. On August 4, 2022, defense counsel filed his first sentencing memorandum, arguing that the mandatory sentencing provisions should not apply as the mental disorder exception of Sec. 46-18-222 (2), M.C.A., should be found, after a hearing, applicable to Mr. Lee's case. DC# 17-Def. Sent. Memo.

On September 7, 2022, Defense counsel filed a motion requesting an order that the sentencing enhancements should not apply, as no real victim was involved in the case, and thus no actual victim, under 12

years of age, existed, to be protected under the harsh sentencing law. DC# 20. He further argued that under the applicable tenets of statutory construction, the definition of "victim" in the criminal code, did not include a fictious victim. Id, p. 2-4. Instead, victim is defined as a person whom suffers loss of property bodily injury or death, as a result of the commission of an offense. Sec. 46-18-243 (2), M.C.A. Id.

The State filed their response to the motion to deny the sentencing enhancement on September 20, 2022. DC# 24. It argued that the legislature's intent was to fortify the applicable laws and penalties for sexual crimes against minors, and thus, no "discount" on the penalties should be accorded to a defendant whom indicates an intent to engage in illicit sexual conduct with an underage person, fictious or real. Id, pp.3-5. It specifically argued:

> " The legislators did not intent to allow violators of Sexual abuse of Children a free pass under the sentencing scheme because the child was not real.....Convicted violators act with the intent to sexually abuse children....the enhanced sentencing scheme in §45-4-625 Mont.Code Ann, " *is the cost they pay for attempting to engage in sexual conduct with children below the age of sixteen- as was the legislature's intent*". Id, pp. 4-5.

The State concluded this argument by noting:

"The Defendant is seeking a loophole that does not exist simply because the child he wished to exploit do not (sic) exist." Id, p. 5.

The State, finally argued that as in another 13th Judicial District case, *State v. Schulz,* DC21-1380, the district court had ruled that the definition of "victim" propounded by defense counsel, only applied to restitution issues., that is Sec. 46-18-241 through 46-18-249, M.C.A.

Defense counsel filed its Reply Brief on September 22, 2022, arguing that where the legislative intent can be discerned from the plain meaning of the words of the law, then that controls and no excursion into the legislative material is warranted. DC# 25, p. 1. Counsel further argued that the ruling by another district court judge in the 13 Judicial District was inapplicable as it was partially premised on federal cases, with a differente statutory scheme that explicitly defined "victim" to include fictious persons. Id, p. 2.

The State filed its Sentencing Memorandum on September 23, 2022, arguing Mr. Lee was a manipulative, and dangerous offender, and the harsh minimum mandatory 100-year sentence, and the companion mandatory 25-year parole restriction should be imposed. DC# 26. It also filed excerpts of Mr. Lee's jail calls, which it contended showed he was

manipulative, dishonest, and thus, deserved the harsh sentences, DC# 33-State's Notice of sentencing exhibits.

A. The Sentencing Hearing and the Two Psychosexual Evaluations and Dr. Woolston's Psychological Evaluation.

On September 13 and 16, 2022 two presentence investigations were filed. DC## 22 &23. The PSI author, Ms. Laura Mc Kee, related that Mr. Lee had an "IEP" (individualized education program) in all subjects, but did graduate high school in 2016. She also stated that as his former probation officer, that he lied but when confronted about this, he explained that he lies under pressure and doesn't think before he speaks. Id, p. 9. Attached to the PSI report was the psychosexual evaluation done by Michal Sullivan, in which he rated Mr. Lee as a tier II sex offender, with a STATIC 2002 R score of 6, moderate, and a STABLE-2007 score of "high."

The PSI report also contained a paraphrased and partial version of a prior psychosexual, done by Christopher Quigley, which was not authorized by statute. DC# 23- pp. 6-9.

The lower court, on September 27, 2022, conducted both the sentencing hearing and the requisite hearing on any exception to the minimum mandatory sentence. First the defense called Dr. Woolston whom related his significant findings and diagnoses for Mr. Lee, finding that he was intellectually disabled, with a testing IQ between 62 and 69. Sent Tr, pp. 8-9. He also diagnosed him with various other companion disorders, including attention deficit disorder, possible autism spectrum disorder, depression and anxiety. Id, p. He related that his intellectual functioning was that of a 12- 13-year-old. Id, p. 16. He particularly stressed the impulsive nature of his decisions making, relative to his intellectual deficits. Id, p. 15 and noted all these disorders and syndromes made him vulnerable to abuse in a correctional setting. Id, p. 17

On cross examination, Dr. Woolston testified he was unaware of dishonesty issues that Mr. Lee had. Id, p. 25, and noted that young men with autistic spectrum disorder misbehave sexually and inappropriately. Id, p. 37.

Michael Sullivan, whom is not a licensed psychologist but is a LCSW (licensed social worker) testified for the State and related how

he decided to score Mr. Lee as a Tier II sex offender, although this was his first sex offense and his second felony offense. Sent Tr, p. 69.He related that he caught him in some lies, about his drinking and about using prostitutes, which he denied to Mr. Sullivan but admitted to Mr. Christopher Quigley in a previous psychosexual, that for his first sexual experience, he paid a woman to have sex in a porta potty. Id, p. 59.

Mr. Lee denied to Mr. Sullivan any interest in child pornography or any sexual attraction to prepubescent children or pedophilia. DC# 22-PSI, Psychosexual Evaluation, p. 9. Mr. Sullivan administrated the SSPI-2 (Screening Scale for Pedophilic Interests-2), and Mr. Lee scored 2 out of 5, meaning any interest in pedophilia were likely non exclusive. When Mr. Sullivan testified, he clarified this meant that Mr. Lee's sexual interests were age appropriate. Sent Tr. p. 66.

When Mr. Lee was asked about the incident that led to the current charge, he said he doubted "her" age was 12, as she was "way too open" about sex. Id, p. 9 Mr. Sullivan's report indicates that on the MCMI-III, the scores might be artificially elevated due to Mr. Lee being under considerable stress. His personality patterns were indicated as schizotypal, borderline, avoidant, dependent, histrionic, etc. Id, p. 10. A

Combined cognitive distortion Scale was a 26 item scale Mr. Sullivan also utilized which rated whether or not, in part, Mr. Lee misused the Internet or other technology from a sexual standpoint. He found no such concerns were noted, p. 10- DC# 23, PSI with M. Sullivan Psychosexual Evaluation.

Mr. Sulivan testified that Mr. Lee was not an honest person and that when Detective Campbell contacted him about Mr. Lee's jail calls and how some of what he related might contradict what he told Mr. Sullivan, he returned to visit Mr. Lee again, he asked him about statements he made in those calls, criticizing Mr. Sullivan. Id, pp. 54-55. Mr. Lee told him that "I seemed nice" but he evaluated people harshly or bad. Id. Mr. Sullivan then testified that Mr. Lee was an "excessively sexual person." Id, p. 61. Ultimately, Mr. Sullivan testified that Mr. Lee was inappropriate for a community based supervision or placement, that he has high levels of unspecified "sexual deviance" and that he was a risk to the community. Id, pp. 76-77.

On cross examination, Mr. Sullivan stated that if the mandatory 25-year parole restriction was imposed, given the lengthy waiting list for sex offender treatment at the Montana State Prison, Mr. Lee would

not receive any treatment until he was 47 years old, and that delay didn't "lend" to treatment. Id, p. 80.

At that point in the sentencing hearing, the lower court issued its findings on the two issues before the court, first the fictious victim issue and secondly, the exception to the minimum mandatory sentence. On the fictious victim issue, it ruled that as the legislature had vastly increased the penalty for this crime, that evinced a legislative intent to impose the strongest penalties possible. Id. p. 83. It specifically adopted the State's argument that it would be giving a "free pass" to Mr. Lee to find that the lesser penalty applied as the definition of victim did not explicitly include a fictitious victim. Id, p. 83. Specifically, the lower court stated:

" and that is exactly the intent of the statute, exactly the intent of the drafters, and exactly the intent of the increased penalties ". Id, p. 84, ll. 10-12.

In conclusion the lower court pronounced that "this is not a loophole that at this District Court is willing to condone." Id.

Moving on to the second issue, the lower court did find that due to his lower IQ, and related mental health conditions, that Mr. Lee

suffered from significant impairment in his mental capacity at the time the crime was committed, and thus, no minimum mandatory sentence would apply. Id, p. 86; App. D.

When the Quigley report was discussed, defense counsel stated that Mr. Lee was aware a report was done, but never received a copy of that report, to act on its recommendations. Id, p. 87. The lower court then designated Mr. Lee a level II sex offender, according to the psychosexual evaluation done and attached to his PSI report. Id, p. 90.

The lower court the entertained the State's sentencing recommendation which was for a 100-year prison sentence with 65 years suspended, and completion of sex offender treatment I and II. Id. p. 91. State's counsel argued that there were many aggravating factors, and few mitigating factors. Id, p. 93. It contended Mr. Lee was very manipulative, dishonest, and that his recorded jail calls evinced those conclusions. Id, p. 94. State's counsel then expended considerable time summarizing the highlights, from her perspective, of those calls. Id. pp. 95-102. The State then lobbied the lower court to impose a 25-year parole restriction, stating that Mr. Lee was a significant risk to the community. Id, p. 105. In that regard she noted that Mr. Lee was being

punished for "one of the most egregious and horrific crimes that is codified in our Montana Code Annotated." Id.

Defense counsel then called Justin Lee, Mr. Lee's father, to testify. Justin Lee told the court he loved his son and:

" he's- he's just not this animal....." Id, p. 107.

Defense counsel then made the defense sentencing recommendation, which was that the court impose 30 years MSP, with 20 years suspended, and concurred in the State's recommendation that he complete SOP (Sex offender programming) {& II, before being paroled. Id, p. 109. He reasoned that although the jail calls were concerning, Mr. Lee's very significant mental disabilities, and his age were mitigating factors to be considered. Id. He pointed out that with a 25-year parole restriction, Mr. Lee would emerge from prison at age 50, with little to no treatment but with the lesser sentence, as Mr. Sullivan pointed out, he'd receive the necessary treatment much sooner Id, p. 111. He contended that the dishonesty was a product of Mr. Lee's significant mental impairment. Id, p. 112.

Mr. Lee then spoke to the court stating he knew he "screwed up," and he wanted to take responsibility, put his best foot forward, and apply himself to get sex offender treatment, p. 113-14. He evinced self insight, stating he knew he's made a lot of bad decisions, and apologized to anyone he hurt. Id, p. 114. He related that due to his disabilities when in custody, people took advantage of him, and he was impulsive. Id, p. 115.

The lower court began its sentencing pronouncement by stating there were a lot of victims in Mr. Lee's case. Id. p. 116. It found he was a very dangerous individual, and reviewed the details of what Mr. Lee did, when interacting with the undercover agent. Id. The court then proceeded to adopt the opinion of Mr. Sullivan that Mr. Lee was comfortable being dishonest, and that his sexual predilection for both men and woman, made him "incredibly dangerous." Id, p. 119. It found that all the reports received by the court were "a wild card of information," and nothing was consistent. Id. The lower court stated it did not see how the court could impose any sentence, other than the 100 year mandatory sentence. Id.

The lower court then imposed a 100-year sentence, with 65 years suspended, stating there was no other option for the Court than to follow the State's recommendation. Id., p. 120. In addition, it imposed its own 25-year parole restriction, finding that due to community safety Mr. Lee could not be allowed back into the community. Id. On prompting by State's counsel, the lower court clarified that it was imposing the parole restriction pursuant to Sec. 46-18- 202, M.C.A., and not Sec. 45-5-256, M.C.A. Id, p. 122.

The sentencing order and judgment was filed on November 29, 2022. App. B, DC# 35, as were the lower court's findings of fact and conclusions of law, finding the exception to the minimum mandatory sentence. App. D, DC# 34.

On September 8, 2023, a notice of appeal was filed, pursuant to Mr. Lee's petition for an out of time appeal, filed on September 5, 2003.

IV. SUMMARY OF THE ARGUMENT

The lower court erred in ruling that the sentencing enhancement of Sec. 45-5-256 (4) (i), M.C.A., applies to a fictitious minor victim, of allegedly 12 years old. Nothing in either statutory definition of victim,

in the Montana criminal code, can be logically construed to include a fictious victim.

By contrast, in the federal sentencing scheme a federal sentencing guidelines specifically allows for a fictious victim to be considered , as a real victim. While some of Montana's criminal code provisions are proactive, there is a critical distinction that must be drawn between a sex offender whom commits a hands on offense, and an offender caught in sting operation, where no real child is assaulted. Nor does the lower court's finding that such a construction of the statute be considered a "loophole" or "free pass," thus, make logical sense, and comport with the tenets of statutory construction, given that without applying Meghan's Law, serious prison time can still be imposed.

The exceptionally draconian sentencing provisions of Sec. 45-5-625 (4)(i), M.C.A., so-called "Meghan's Law", violates the State and Federal prohibitions against cruel and unusual punishment. Although defense counsel did not argue such issue, relevant precedent of the Montana Supreme Court allows such a challenge on appeal. When the sexual abuse statute penalty, "Jessica's law" is compared to other

serious felonies, as deliberate homicide or mitigated deliberate homicide, where a victim is killed and a life terminated by an offender, it is evident the sexual abuse penalty is grossly disproportionate. Comparison to comparable laws in three sister states, reveals Meghan's law to be grossly disproportionate. Moreover, given that a Montana's male's 2020 statistical life expectancy is 75.4 to 76.8 years, such a sentence is a legal impossibility.

The lower court violated due process in sentencing when it imposed a 25-year parole restriction, finding Mr. Lee "incredibly" dangerous, yet, by contrast found that the 25 years mandatory Meghan's law parole restriction did not apply, as the mental health exception was proven. It further violated due process by significantly relying on a paraphrase of the Quigley psychosexual, a key document, the totality of which was never entered into evidence, and was never received by the defense.

V. ARGUMENT.

A. Standard of Review- Unconstitutional Criminal statute and Illegal Sentence.

Criminal sentences are reviewed for legality. *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26. Any claim that a sentence violates a constitutional provision is reviewed de novo. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 224, 392 P.3d 607. See, also. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 491, 452 P.3d 897, 900

B. Sec. 45-5-625 (4) (I), M.C.A.'s Mandatory Penalties Are Draconian and Constitute Cruel and Unusual Punishment.

Mr. Lee was 25 and some years when he was sentenced to a 100-year term with 65 years suspended.

The operative section of Sec. 45-5-625, M.C.A., entitled "Sexual Abuse of Children," provides for a previously unprecedented mandatory 100-year prison term, and a companion mandatory 25 years parole restriction, when a victim is 12 years or under at the time of the crime:

> "4)(a) If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:
> (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-

> 18-222(1) through (5), and during the first 25 years of imprisonment, the offender is not eligible for parole. The exception provided in 46-18-222(6) does not apply."

Although Mr. Lee's trial counsel did not challenge the constitutionality of this penalty provision, the Montana Supreme Court allows a facial challenge to a penalty provision in a criminal case on appeal.

> "A claim that a statute authorizing a sentence is unconstitutional on its face may be raised for the first time on appeal, but the exception does not apply to as-applied constitutional challenges." *State v. Coleman*, 2018 MT 290, ¶ 8, 393 Mont. 375, 431 P.3d 26 (cleaned up) (quoting *State v. Parkhill*, 2018 MT 69, ¶ 16, 391 Mont. 114, 414 P.3d 1244).
> *State v. Brown*, 2022 MT 176, ¶ 31, 410 Mont. 38, 52, 517 P.3d 177.

Legislation is presumed constitutional, and the litigant mounting such a challenge has the burden to prove the statute violates constitutional norms. *Coleman*, supra.

C. The Test for Assessing Cruel and Unusual Punishment Claim Includes Proportionality and Shock of the Community Conscience.

The Montana Supreme Court has thus defined the test for determining if a penal law violates the cruel and unusual clause of Art. II, Section 22, of the Montana Constitution:

> "While neither the Eighth Amendment to the United States Constitution, nor Article II, Section 22 of the Montana Constitution, contains explicit prohibitions against disproportionate sentences, the United States Supreme Court has held that the cruel and unusual punishment clause of the Eighth Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. *See Harmelin v. Michigan,* 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L.Ed.2d 836 (1991). The general rule in Montana is that a sentence that is within the statutory maximum guidelines does not violate the prohibition against cruel and unusual punishment. *State v. Shults,* 2006 MT 100, ¶ 30, 332 Mont. 130, ¶ 30, 136 P.3d 507, ¶ 30. ..... **This Court has recognized an exception to the general rule "when a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice.**" *Shults,* ¶ 30 (*citing State v. Wardell,* 2005 MT 252, ¶ 28, 329 Mont. 9, ¶¶ 28, 122 P.3d 443, ¶ 28).; *State v. Rickman*, 2008 MT 142, ¶ 15, 343 Mont. 120, 122–23, 183 P.3d 49, 52 (emphasis supplied).

Here, the penalty for this crime, a ***mandatory*** 100-year prison term, paired with the 25-year parole restriction, is, short of the death penalty, one of the most serious penalties to be levied in any felony criminal case in Montana, with the prison term being equivalent to the most serious homicide offense.

It is important to note, that in determining this most aggravated penalty, which functionally is a life prison term, the Montana Legislature did not define "victim" or "minor" to specifically exclude a fictious person, as has occurred in numerous " sting " operations being conducted in and outside Montana, utilizing on line platforms, and the Internet.

Thus, if serious harm which has actually occurred to a real person, is not distinguished by this harsh law.

D. Comparative Montana Criminal Statutes and Penalties.

The penalty for deliberate homicide, the highest grade of homicide, in Montana is a minimum mandatory prison term of 10 years and up to 100 years:

> "(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in 46-18-301 through 46-18-310, unless the person is less than 18 years of age at the time of the commission of the offense, by life imprisonment, or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years, except as provided in 46-18-219 and 46-18-222."
> Mont. Code Ann. § 45-5-102 (2)

For the next most serious grade of homicide, mitigated deliberate homicide, the maximum penalty is 40 years imprisonment, with a two-year minimum mandatory prison term. Sec. 45-5-103, M.C.A.

For negligent homicide, the maximum penalty is 20 years. Sec. 45-5-104, M.C.A. For negligent vehicular homicide, the maximum penalty is 30 years, and none of that may be deferred. Sec. 45-5-106, M.C.A.

Mr. Lee submits, this disproportionate gradation between all Montana's homicide offenses' penalties and the 100 year mandatory sentence of sexual abuse of a child under 12 years, paired with the limit on suspending a certain portion of the 100 years, shocks the conscience, and renders that law violative of the cruel and unusual punishment clause of Art. II, Sec. 22, Mont.Constitution.

E. Sister State's Comparative Sexual Abuse of Children Laws and a Federal Comparison.

A survey of three of Montana's "sister" Western states, North Dakota, Wyoming and Colorado reveals penalties far less onerous than that of the Treasure State.

1.Colorado- comparable statutes.

Two crimes from the Colorado Sexual Criminal code are comparable to Sec. 45-5-625 (2), M.C.A, which Mr. Lee plead guilty to. The potential penalties are decades less than Montana's 100-year mandatory prison term.

§ 18-3-306. Internet luring of a child

> (1) An actor commits internet luring of a child if the actor knowingly communicates over a computer or computer network, telephone network, or data network or by a text message or instant message to a person who the actor knows or believes to be under fifteen years of age and, in that communication or in any subsequent communication by
>
> message, or instant message, describes explicit sexual conduct as defined in section 18-6-403(2)(e), and, in connection with that description, makes a statement persuading or inviting the person to .... meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be.
>
> (3) **Internet luring of a child is a class 5 felony; except that luring of a child is a class 4 felony** if committed with the intent to meet for the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401.(emphasis supplied);Colo. Rev. Stat. Ann. § 18-3-306.

And another highly similar Colorado statute is:

§ 18-3-305. Enticement of a child

"(1) A person commits the crime of enticement of a child if he or she invites or persuades, or attempts to invite or persuade, a child under the age of fifteen years to enter any vehicle, building, room, or secluded place with the intent to commit sexual assault or unlawful sexual contact upon said child. It is not necessary to a prosecution for attempt under this subsection (1) that the child have perceived the defendant's act of enticement.
(2) **Enticement of a child is a class 4 felony. It is a class 3 felony if the defendant** has a previous conviction for enticement of a child or sexual assault on a child or for conspiracy to commit or the attempted commission of either offense, or if the enticement of a child results in bodily injury to that child....." (emphasis supplied). Colo. Rev. Stat. Ann. § 18-3-305

A class 3 felony carries a penalty of 4- 12 years in prison, a class 4 felony carries a penalty of 2-6 years, and a class 5 felony carries a prison term of 1- 3 years. Colo. Rev. Stat. Ann. § 18-1.3-401.

2.Wyoming's Comparable Statute.

§ 6-2-318. Soliciting to engage in illicit sexual relations; penalty

"Except under circumstances constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304, or sexual abuse of a minor in the first, second, third or fourth degree as defined by W.S. 6-2-314 through 6-2-317, anyone who has reached the age of majority and who solicits, procures or knowingly encourages anyone less than the age of fourteen (14) years, or a person purported to be less than the age of fourteen (14) years, to engage in sexual intrusion as defined in W.S. 6-2-

301 is **guilty of a felony, and upon conviction shall be imprisoned for a term of not more than five (5) years. "**

3. North Dakota's Comparable Statute.

§ 12.1-20-05.1. Luring minors by computer or other electronic means

1. An adult is guilty of luring minors by computer or other electronic means when:
a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs from one computer or electronic device to another to initiate or engage in such communication with a person the adult believes to be a minor; and
b. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.
2. A violation of this section is a class A misdemeanor if the adult is less than twenty-two years of age and reasonably believes the minor is age fifteen to seventeen. If the adult is less than twenty-two years of age and reasonably believes the minor is under age fifteen, or the adult is twenty-two years of age or older and the adult reasonably believes the minor is age fifteen to seventeen, **violation of this section is a class C felony. If the adult is twenty-two years of age or older and the adult reasonably believes the minor is under the age of fifteen, violation of this section is a class B felony.** The court shall sentence an adult convicted of a class B or class C felony under this section to

> serve a term of imprisonment of at least one year**, except the court may sentence an individual to less than one year if the individual did not take a substantial step toward meeting with the minor.**N.D. Cent. Code Ann. § 12.1-20-05.1 (emphasis supplied).

A class B felony in North Dakota is punishable by a maximum of 10 years, and or a $ 20,000 fine. N.D. Cent Code Sec. 12.1c32. And this law provides for an even lesser sentence, if no substantial step was taken toward meeting with the minor victim, a legislative judgment that culpability must be calibrated in these situations.

To contrast and compare, then, these three states have comparable penalties that range from 5 to only 20 years, for virtually the same conduct Mr. Lee was convicted of.

4. A Federal Example.

Attached as Exhibit E in the Appendix is an official press release of the U.S Attorney's office, relating the facts and sentence imposed in an international internet sexual crime against minor females. This Defendant ran an extensive internet luring sex operation which included hands- on filing of minors having sex in the Philippines, and connecting them with other perpetrators in the United States. Exh. E-DOJ Press Release -Dec. 14, 2023, He received a 25-year prison

sentence, a meager punishment when that defendant's conduct is compared to that encompassed by the relevant subsection of Sec. 45-5-625 (2) (a), M.C.A.

F. The Extreme Penalty compared to the Inchoate Criminal Conduct Supports a Finding that the 100 years Penalty Shocks the Conscience.

It is vital to note that certain of the acts outlawed by Sec. 45-5-625 (2), (a), M.C.A., consist of inchoate crimes. These must be distinguished from "hands on" sexual offenses such as those outlawed in Sec. 45- 5-503, M.C.A., for sexual intercourse without consent, or by Sec. 45-5-502, M.C.A. for sexual assault, involving the touching, over or under clothing of the intimate body parts.

American criminal jurisprudence, historically, draws a major distinction between crimes with actual conduct resulting in bodily injury, or death to a person, and those where a completed crime is averted. See, e.g., *State v. Boyd,* 2021 MT 323, ¶ 19, 407 Mont. 1, 7, 501 P.3d 409, 413.

G. Meghan's Law Violates the Constitutional and Statutory Provisions for Reformation and Rehabilitation. The Mandatory 100-year Sentence is a Legal Impossibility.

Montana's constitution has a fundamental right to restoration of one's rights, once a criminal sentence has been fully served. Art II, Section 28, provides, in part:

> (1) Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims.

Mont. Const. art. II, § 28

Montana's sentencing policy also requires a sentencing court to factor into any sentence, the rehabilitation of an offender. Sec. 46-18-101, (2)(d) M.C.A.

The National Center for Disease Control and Prevention, provides statistics on life expectancy for Americans, in Mr. Lee's appendix, he has attached an official U.S. government document, "U.S. Life Expectancy by State and Sex for 2020." Exhibit D. He requests the Corut take judicial notice of this document and its content pursuant to MRE 201(b). See, also, *Stephens v. Elliott*, 1907, 36 Mont. 92, 92 P. 45. (Judicial notice may be taken of the standard mortality tables.)

This data compilation shows that the average life expectancy for 2020 (the latest year available) for males in Montana is 75-4 to 76.8 years.

The significant of this statistic, is that the mandatory 100 expectancy, meaning the 100-year sentence cannot be completed. Thus, no rehabilitation or reformation can logically occur for a male sentenced under Meghan's law.

Furthermore, Montana has a basic maxim of jurisprudence that states:

> "The law never requires impossibilities."

Mont. Code Ann. § 1-3-222

The 100-year sentence, given a Montana male's statistical life expectancy, is a nearly forgone legal and factual impossibility, and must be found unconstitutional, for this reason, also.

H. The Lower Court Erred in ruling that Victim Includes a Fictious Person, as That Utilized in the Undercover Sting Operation Here.

1. The Statutory Definition of Victim in Montana Does not Explicitly Include a Fictitious Person.

Victim is defined in two sections of Montana's criminal code.=, Sec. 46-18-243 (2), M.C.A. and 46-24- 106, M.C.A.

Both definitions are identical and do not distinguish between a real person and a fictious identity. That definition reads:

> "(5) As used in this section, "victim" means:
>
> (a) a person who suffers loss of property, bodily injury, or reasonable apprehension of bodily injury as a result of:
>
> (i) the commission of an offense;
>
> (ii) the good faith effort to prevent the commission of an offense; or
>
> (iii) the good faith effort to apprehend a person reasonably suspected of committing an offense; or
>
> (b) a member of the immediate family of a homicide victim."

By comparison, a commentary note to the U.S. Sentencing Guidelines, explicitly provides that the term "minor," when sentencing for a federal sex crimes, includes a fictitious "person:"

> "Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, **whether fictitious or not**, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a

participant that the officer had not attained the age of 18 years.>

U.S.S.G. 2G2.2-Trafficking in Material Involving Sexual Exploitation of a Minor, et. al. (emphasis supplied).

2. The Lower Court Ignored the Applicable laws of Statutory Construction and Erred as a Matter of Law in finding "victim" includes a fictitious Identity.

1.Standard of Review.

The interpretation of a statute in Montana is a question of law that is reviewed for correctness." *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 18, 384 Mont. 503, 380 P.3d 771 (citation omitted); *City of Missoula v. Fox,* 2019 MT 250, ¶ 8, 397 Mont. 388, 392, 450 P.3d 898, 901.

2.The Statutory Definition of Victim Does not Explicitly Include a fictious Identity and the lower court erred in its ruling.

The lower court included this finding, on Mr. Lee's written motion to deny the Meghan's Law sentencing enhancement:

"the questions of whether the victim was in fact a 12-year-old is irrelevant, what matters is did the Defendant believe the victim was in fact a 12-year-old." App. B, Sent Order and Judgment, p. 3.

It continued to find that:

"the loophole sought by the Defendant is unsupported by the law- in reality, *another attempt by the Defendant to manipulate the system.*" Id, p. 3.

This attribution of Mr. Lee's counsel's legitimate advocacy[1] for his client, especially in the face of such an onerous penalty, is an abuse of judicial discretion and the applicable law. It further demonstrated the lower court's error in making its ruling to allow the enhancement for a fictious victim.

When a court interprets a statute, it is to implement the legislature's objectives and must look to the statutory language. *Bullock v. Fox,* 2019 MT 50, ¶ 52. A court should not insert what has been

[1] Indeed, at the close of the sentencing hearing the lower court complimented defense counsel on his "admiral (sic) advocacy." Sent Tr. p. 121

omitted, or omit what has been inserted. *State v. Christensen,* 2020 MT 237, ¶ 95.

Here, the plain meaning of victim is clear, and does not include a fictious identity, as is the opposite case in the Federal sentencing scheme.

A statute in Montana's criminal code, pertains to construing the term "victim."

> (1) The general purposes of the provisions governing the definition of offenses are:
>
> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;
>
> (b) to safeguard conduct that is without fault from condemnation as criminal;
>
> **(c) to give fair warning of the nature of the conduct declared to constitute an offense;**
>
> Mont. Code Ann. § 45-1-102 (1) (emphasis supplied)

Again, where the meaning of a statutory term is clear and plain, the court cannot go further, to discern another meaning.

> "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S.Ct. 2051, 2056, 64 L.Ed.2d

766 (1980). "If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and this Court need go no further nor apply any other means of interpretation." *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499.

Moreover, the lower court's finding that to rule in Mr. Lee's favor would give him a "free pass:" App. B, p. 3; and create a "loophole," Id, is clearly erroneous. Sec. 45-5-625 (2) (a), M.C.A, would still allow a substantial prison sentence, which obviously, does not equate to a "free pass."

I. The Lower Court Violated Mr. Lee's Right to Due Process in Making Findings Not Based on Facts.

"[T]he rights of the defendant must be protected and due process must be observed in sentencing hearings." *State v. Webb*, 2005 MT 5, ¶ 18, 325 Mont. 317, 106 P.3d 521 (citations omitted). Under the due process guarantee, a defendant must be given an opportunity to explain, argue, and rebut **"any information that may lead to a deprivation of life, liberty, or property."** *Webb*, ¶ 19 (citing *State v. McLeod*, 2002 MT 348, ¶ 18, 313 Mont. 358, 61 P.3d 126).

State v. Webber, 2019 MT 216, ¶ 10, 397 Mont. 239, 242, 448 P.3d 1091, 1093

Here, the lower court drastically violated the right to due process, by first ruling that the minimum mandatory sentences of Meghan's' law did not apply to Mr. Lee, due to a mental health exception. App. C-FFCL. This includes the 25-year parole restriction, which is a mandatory sentencing term and subject to the exceptions of Sec. 46-18-222 (2), M.C.A.

However, the lower court then contradicted this finding, by imposing a 25-year parole restriction, ostensibly under Sec. 46-18-202, M.C.A. Sent Tr. p. 122. In imposing this sentence, it found that Mr. Lee was "incredibly" dangerous. Id, p. 119. In doing so, it relied, in part, on the missing Christopher Quigley evaluation, which was only partially included in the PSI report; DC# 23, pp. 6-8, and which was not admitted into evidence at his sentencing hearing.

This report had stated that he utilized a prostitute, had "threesome" sexual encounters, and had a rape fantasies, which he denied to Mr. Sullivan. Id, p. 119; see also M. Sullivan testimony. Id p. 59. Nor does Mr. Sullivan relate that he legally obtained this evaluation, and that Mr. Lee provide a valid release of his rights of confidentiality that he would have in such a confidential document.

The lower court "weaponized" the negative findings of the paraphrased Quigley report, and further found as to the professional evaluations used in Mr. Lee's case, that there is nothing consistent in these reports – whether it's the Quigley report, the Woolston or the Shepard report. Id, p. 120. It then found the only thing that is consistent, is that Mr. Lee told individuals what they wanted to hear, and it was all for his benefit and his manipulation. Id.

Additionally, the judicial finding that Mr. Lee was incredibly dangerous is inconsistent with the lower court's adoption of the Tier II designation for Mr. Lee, from the Sullivan Psychosexual. App. B- p. 4.

Thus the lower court used all these skewed findings to support the 25 year parole restriction and the 100 years, partially suspended sentence it imposed.

Although defense counsel did not timely object to the sentence imposed on ground of due process, in this appeal, Mr. Lee contends the errors are so egregious that plain error review, pursuant to Mont. Code Ann. § 46-20-701, must apply in this case.

Pursuant to such statute and judicially recognized doctrine, it is within the Court's discretion to review errors that, while not properly preserved for appeal, implicate a criminal defendant's fundamental constitutional rights. *State v. Dasen,* 2007 MT 87, ¶ 38, 337 Mont. 74, ¶ 38, 155 P.3d 1282, ¶ 38.

When the Supreme Court determines the applicability of the common law plain error doctrine, it will consider the totality of the circumstances in each case. *State v. Brown,* 1999 MT 31, ¶ 12, 293 Mont. 268, ¶ 12, 975 P.2d 321, ¶ 12.

Here the judicial error encompasses serious misjudgments, factual and legal contradictions in the lower court's deliberative process and in its sentencing order, and affects the rest of this person's natural life. Plain error review is warranted.

VI . CONCLUSION.

Appropriate relief must be decisively awarded in Mr. Lee's case, and Meghan's law declared, on its face, unconstitutional, and a ruling

that the statutory definition of "victim" does not include a fictious identity should issue, and Mr. Lee's case must be remanded for a new sentencing hearing.

DATED this 26th day of January, 2024.

By: /s/ Penelope S. Strong

Penelope S. Strong
Attorney for Petitioner and Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced font of Century Schoolbook, 14 point; is double spaced; Microsoft Word 2010, and consists of 7356 words, excluding the table of contents, table of authorities, certificates of service and of compliance.

DATED this 26th day of January, 2024.

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

I, Penelope S. Strong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-26-2024:

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