IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0468

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARRETT ALAN LEE,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Has Appellant waived his right to appeal to this Court through his express affirmations in both his signed acknowledgement and at the change of plea hearing? If not, has Appellant met his heavy burden to show that Mont. Code Ann. § 45-5-625(4)(a)(i)—the penalty statute for sexual abuse of a victim 12 years of age or younger—categorically violates the constitutional prohibition against cruel and unusual punishment?

2. Despite Appellant's guilty plea pursuant to a plea agreement, has Appellant preserved his right to appeal the district court's decision interpreting the penalty statute in Mont. Code Ann. § 45-5-625(4)(a)(i), or can Appellant show that the district court even relied upon that penalty statute in sentencing him? If so, when the Legislature enacted a corollary law to Florida's 2005 "Jessica's Law"[1] in 2007, did it intend the mandatory minimum penalties in subsection (4)(a)(i) to include Appellant's communications with an agent via an undercover sting operation?

3. Should this Court exercise plain error review and reverse Appellant's conviction based on Appellant's new claim that he was sentenced based upon misinformation?

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[1] Appellant mistakenly refers to this law as Meghan's law, which is a law related to registration of sexual offenders.

STATEMENT OF THE CASE

The State charged Appellant Garrett Alan Lee with one count of sexual abuse of children, alleging he enticed a person he "believed to be a child under 12 years of age or younger" to engage in sexual conduct. (Doc. 2.) The State noticed its intent to "seek a penalty enhancement" under Mont. Code Ann. § 45-5-625(4)(a)(i)—the penalty statute for sexual abuse of a victim 12 years of age or younger. (*Id*. at 1-2.) The State explained that the applicable punishment would be "a term of 100 years, of which the first 25 years may not be suspended or deferred, and during the first 25 years the Defendant will not be eligible for parole." (*Id*. at 2.)

The State and Lee entered into a Mont. Code Ann. § 46-12-211(1)(c) "open" plea agreement, under which neither party was bound to any recommended sentence. (Doc. 14.) Lee confirmed he understood the possible penalties—including the mandatory minimum penalty under Mont. Code Ann. § 45-5-625(4)(a)(i)—and further confirmed he "fully understood the consequences of signing this agreement." (Doc. 14 at 1-2; 4/28/22 Tr. at 2.)

Lee also acknowledged that "[b]y pleading guilty, I waive my right to appeal" and further acknowledged a waiver to "otherwise challenge my conviction by direct appeal." (Doc. 14 at 2.) At the change of plea hearing, after the court asked Lee whether he understood that he was waiving a variety of rights, as well as

"your right to appeal to the Montana Supreme Court," Lee agreed that he understood. (4/28/22 Tr. at 3.) The district court confirmed:

> [COURT]: And do you understand that if you plea[d] guilty, that you will be waiving those rights?
>
> [LEE]: Yes, I do.

(*Id*. at 4.) The court also confirmed that Lee understood the court was "not bound by this sentencing recommendation," Lee could not withdraw his guilty plea in any event, and "the Court can sentence you to anything up to and including the maximum possible penalty."[2] (*Id*. at 5.)

Lee pleaded guilty, explaining that "on or about the period from April 12th through April 14 of 2022," he "knowingly, through electronic communication, persuaded, enticed, counseled, encouraged, directed, or procured a person" he "believed to be 12 years of age or younger, to engage in sexual conduct, actual or simulated[.]" (4/28/22 Tr. at 6.)

After pleading guilty, Lee pursued two approaches in attempting to avoid the mandatory penalty in Mont. Code Ann. § 45-5-625(4)(a). First, Lee argued the penalty statute should not apply pursuant to the exception to the mandatory minimum statute, Mont. Code Ann. § 46-18-222(2)—particularly citing his recent

[2] Under the (1)(c) type of plea agreement, even if the court does not accept the agreement, the defendant has no right to withdraw his plea. *State v. Olson*, 2014 MT 8, ¶¶ 14-16, 373 Mont. 262, 317 P.3d 159; Mont. Code Ann. § 46-12-211(2).

assessment from Dr. Woolston concluding that Lee had an intellectual disability. (Doc. 17 at 2-3, citing Doc. 16, Woolston report.) Second, Lee argued that the enhanced penalties in Mont. Code Ann. § 45-5-625(4)(a) should not apply because "Lee had no actual correspondence or contact" with a victim 12 years old or younger, as he was actually communicating with an undercover agent in a sting operation. (Doc. 20 at 1.) Lee acknowledged that the term "victim" was not defined in subsection (4)(a) but argued that it was defined in the restitution statutes in Mont. Code Ann. § 46-18-243(2). Lee thus argued this other "victim" definition should apply to the sexual abuse of children statute, and the definition did not provide for his circumstances. (*Id*. at 2-4.)

While the district court rejected Lee's statutory interpretation argument, the court accepted Lee's other argument that Mont. Code Ann. § 45-5-625(4)(a) should not apply based on Lee's intellectual disability. (9/27/22 Tr. at 83-84, 86; Doc. 34 at 7.) The court ruled:

> Pursuant to § 46-18-222(2), the Defendant's mental capacity, at the time of the commission of the offense for which the Defendant was to be sentenced, was significantly impaired, although not so impaired to constitute a defense to the prosecution, therefore the mandatory minimum does not apply to this sentence.

(Doc. 34 at 7; *see also* Doc. 35 at 2; 9/27/22 Tr. at 86.)

At sentencing, pursuant to the court's "finding that it is not bound to impose the mandatory minimums," Lee recommended a 30-year sentence with 20 years

suspended. (9/27/22 Tr. at 109.) The State recommended a 100-year sentence with 65 years suspended, along with a 25-year parole restriction. (Doc. 26.)

The district court sentenced Lee to the Montana State Prison for 100 years with 65 years suspended. The court also imposed a 25-year parole restriction—not pursuant to the mandatory minimum penalties in Mont. Code Ann. § 45-5-625(4)(a), but rather pursuant to its general discretionary parole restriction authority under Mont. Code Ann. § 46-18-202(2)—finding Lee a danger to the community. (Doc. 35 at 2; 9/27/22 Tr. at 120-21.) In accordance with the psychosexual evaluator's recommendations, the court ordered that Lee complete Phase II of sexual offender treatment at the prison, and designated Lee as a Level II sexual offender. (Doc. 35 at 2; 9/27/22 Tr. at 90, 120-21.)

Lee filed an application for sentence review. (Doc. 32.) This Court granted Lee permission to file an out-of-time appeal. (8/29/23 Order.)

STATEMENT OF THE FACTS

I. The offense

On April 12, 2022, Lee, a man in his mid-twenties,[3] began communicating on a social media app with a person he believed to be a 12-year-old female ("Jane" for ease of reference, but actually an undercover officer). (Doc. 1 at 1.) Jane told

[3] Lee was 25 years old at the time of sentencing. (9/27/22 Tr. at 110.)

Lee she was turning thirteen years old in May. (*Id*.) Lee told Jane he could meet her "anytime." (*Id*.) He asked if she was a virgin. He asked if she would have sex with him. (Doc. 1 at 2.) He suggested they meet up "to have sex" or to "go get ice cream." (*Id*.) Lee encouraged her to "sneak out of her house and he would pick her up." (*Id*.)

On April 14, 2022, Lee suggested they go for a drive, get some food, and talk. (*Id*.) Lee said they would have "hot sex," assuring Jane he was "very good at sex," while commenting on his genitals. (*Id*.) He discussed modes of contraception they would use. (*Id*.) He arranged to pick up Jane at a location in Billings. (*Id*.)

Lee arrived at the location and was apprehended by law enforcement. (Doc. 1 at 2.) He was given a *Miranda* advisory, whereupon he "admitted he intended on engaging in sexual conduct" with a "child he believed to be twelve years of age." (*Id*.)

II. Facts related to mandatory minimum sentence discussion.

Lee filed a motion seeking to avoid the penalty enhancement, arguing that there was no 12-year-old "victim" involved in the undercover sting operation, thus the mandatory penalty in Mont. Code Ann. § 45-5-625(4)(a) was inapplicable. Lee acknowledged that the term "victim" was not defined in subsection (4)(a), but

argued it was separately defined in Mont. Code Ann. § 46-18-243(2), which, in turn, did not account for such circumstances. (Doc. 20 at 2-4.)

The State responded that the "victim" definition in Mont. Code Ann. § 46-18-243(2) was not relevant to the sexual abuse of children statute because the statutory provisions in §§ 46-18-241 to -249 "are applicable to awards of restitution with cases involving a loss of property, bodily injury, or death as a result of a criminal offense." (Doc. 24 at 6.) The State also recounted the legislative history of the enaction of the enhanced penalties through SB 547 (2007), explaining the changes were modeled after Florida's "Jessica Law" and were intended to protect children from sexual exploitation. (*Id*. at 3.) The State particularly noted that the sponsor of SB 547 explained that the statute already "allowed for law enforcement officers to act as decoys." (*Id*. at 4.) The State explained that perpetrators "act knowingly and with the intent to sexually abuse children." (*Id*.)

The district court denied Lee's motion, referring to the sexual abuse of children offense statute and observing that the "question of whether the victim was in fact a twelve-year-old is irrelevant, what matters is did the Defendant believe the victim was in fact a twelve-year-old. It is the Defendant's intent that forms the *mens rea* for the crime." (Doc. 35 at 3.) The court detailed that Smith admitted at his change of plea hearing he acted knowingly and believed the other person to be 12 years old or younger. (*Id*.) The court further explained:

> The Defendant in this case interacted with the person that he was speaking to. Clarified that the individual was 12 years old and engaged in a very detailed sexual chat with that person. Showed up for the meet. Indicating that had a child been there, that child would have been perpetrated.
>
> And that is exactly the intent of the statute, exactly the intent of the drafters, and exactly the intent of the increased penalties.
>
> There is no free pass because it wasn't a real child. Instead, these penalties are designed to protect the next child, the next victim, the next individual that happened to be on a chat with someone like Mr. Lee.

(9/27/22 Tr. at 84.)

Referencing the legislative history, the district court also observed that, while the statutory penalties were briefly lowered in 2017, they were raised again in 2019 because "of what the Legislature has seen as a rising tide of sexual abuse of children." (*Id*.) Thus, the Legislature evinced an intent "to protect to the fullest with the strongest penalties that our statutes allow." (*Id*.) The court explained there was no indication from the legislature to exclude an undercover operation in its construction of the statute or through the legislative history. (*Id*. at 83-84.)

The court thus denied Lee's motion to exclude the application of the mandatory minimum penalties. However, the court granted Lee's motion on the alternative basis of his intellectual disability—and thus declined to apply the mandatory minimums in Mont. Code Ann. § 45-5-625(4)(a) due to Lee meeting an exception outlined in Mont. Code Ann. § 46-18-222(2).

III. The sentencing

A. PSI

Lee admitted he proposed and traveled to meet someone he believed to be "a 12-year-old girl" for sex. (Doc. 30 at 3.) He admitted he was "not thinking of the consequences." (*Id*. at 9.) He explained that he is a risk-taker and liked to "kind of see what happens." (*Id*.) Lee also admitted he has a "high sex drive" and did not "know how to control it and maybe just wanted to have sex." (*Id*.) He admitted he is impulsive and has "trouble doing what people tell me to do." (*Id*.)

The PSI author explained how, at the time of Lee's sexual offenses, Lee was already on felony probation for burglary, and his second revocation on that matter was pending. (Doc. 30 at 8.) The PSI author observed that Lee "continuously lied," both during his prior supervision and during his PSI interview. (*Id*. at 9.) As Lee explained, he lies when he is under pressure and he thinks lying is permissible. (*Id*.)

B. Psychosexual evaluation

Michael Sullivan, the psychosexual evaluator, noted that Lee self-reported he is "excessively sexual" and will "get really bad urges sometimes." (Doc. 30, Eval. at 9.) Sullivan explained that Lee had a "significant level" of a "characterological disturbance, with Schizotypal, Borderline, Avoidant, Dependent, Histrionic, Antisocial, Negativistic, and Masochistic features." (*Id*. at 10.) Sullivan further

described Lee as having "attachment deficits" and being "impulsive" and "wary[,]" while having a "tendency to engage in excessive fantasy." (*Id*.) Sullivan noted Lee's "history of poor decisions" and "overall poor problem solving including poor adjustment to probation" and that Lee was "manipulative and comfortable with dishonesty." (*Id*. at 14; *see also* 9/27/22 Tr. at 51.)

Sullivan concluded that Lee had a "36.8% at five years (Well Above Average)" chance of sexual recidivism, specifically observing that Lee's "risk for recidivism **is greater than the typical adult male sexual offender**[.]" (Doc. 30, Eval. at 12, 15; 9/27/22 Tr. at 72-74.) (Emphasis in original.)

C. Lee's pre-sentencing conduct

At sentencing, the State explained how Lee initially lied to law enforcement about discussing age during his online conversation prior to the meet-up. (9/27/22 Tr. at 94.) Lee had also initially pretended he was at the location where he arranged to meet a 12-year-old girl to help provide police with information. (*Id*.)

The State also presented jail phone logs of Lee's conversations (Doc. 33), explaining how "[s]ince the inception of this case, the Defendant has manipulated everyone around him." (9/27/22 Tr. at 93.) The State described how Lee manipulated people he knew, provided different accounts of his offense to different people, and even started bragging to his ex-girlfriend Elizabeth about his attempts to deceive Sullivan. (9/27/22 Tr. at 53-54.)

In the jail phone calls, Lee repeatedly threatened Elizabeth he would "tell law enforcement that she physically abused her minor child" if she broke up with him. (9/27/22 Tr. at 95.) Lee said he would "keep his mouth shut" if Elizabeth got rid of her new boyfriend. (9/27/22 Tr. at 97; Doc. 33 at 6.) Lee continued these threats, despite being advised by his attorney to stop the jail phone conversations. (9/27/22 Tr. at 101.) He said:

> The fact is the detectives are looking into you now. They are watching you; they are studying you; they are building enough; they are building charges against you. That's what you don't understand. Once they have enough, they're going to charge you and that could put you away for life. This is very serious.

(9/27/22 Tr. at 98; Doc. 33 at 4.) Elizabeth questioned, if that was true, why she had not been charged. Lee responded:

> Because they don't want to talk to you. They are trying to build a case against you. They want to talk to me, because somebody told them that I was an eyewitness to everything. You got yourself in a very, very, very deep hole. You need to understand this, and I don't know how to get you to understand this, if they subpoena me to testify against you, I have to tell them everything, and that means you go bye-bye. Your kid could go to protective custody because of this. If I have to say something, I don't know what you expect me to do. I'm just trying to protect you.

(9/27/22 Tr. at 98; Doc. 33 at 4.)

Meanwhile, Lee was telling a mutual friend, Charlie Maxwell, to intercede with Elizabeth on his behalf:

> Tell her that you've decided you want the car back and we'll give it to someone else. Make her a little afraid, I guess. Or put a

> little scare into her. Make her realize what she's doing. Once she gets that message, maybe she'll straighten her ass up a little bit. Make sure you do it sooner than later. She needs to do it tonight. No waiting game. If she's not going to make efforts to fix our relationship, she doesn't deserve to have the car.

(9/27/22 Tr. at 99; Doc. 33 at 5.) Lee also instructed Charlie in a later conversation to intercede with Elizabeth's new romantic relationship, explaining that "if you don't put your foot down, I'm going to eventually." (9/27/22 Tr. at 100; Doc. 33 at 6.)

Discussing his case with Elizabeth, Lee explained "how he can take advantage of the Judge if she has kids[.]" (9/27/22 Tr. at 95; Doc. 33 at 2-3.) Lee explained to Elizabeth that "since you're a mother, you would be the perfect witness because you can testify that what I say is true. It will be a win, win situation." (Doc. 33 at 2-3; 9/27/22 Tr. at 98.)

Elizabeth later told Lee that her daughter "is saying [Lee] put his fingers in [her]." (9/27/22 Tr. at 100; Doc. 33 at 6.) Lee said the child "would not remember what happened to her." (9/27/22 Tr. at 100; Doc. 33 at 6.) Lee responded:

> If I would have put my fingers in your daughter, she would have said something to you or she would have been bleeding. There's no blood so they have no DNA on me.

(9/27/22 Tr. at 101; Doc. 33 at 6.)

Lee told Elizabeth that he was going to ask for the maximum sentence, explaining there was "no way I'll be able to control my sex drive." (9/27/22 Tr. at

101; Doc. 33 at 6-7.) He later falsely told Elizabeth that "the judge is going to let him live in Alaska" and proposed that they could start a new life there. (9/27/22 Tr. at 102.)

D. Sullivan's testimony

Sullivan testified that Lee appeared to have understood what he was doing at the time of the offense, as he talked about "ambivalence as he drove to the park." (9/27/22 Tr. at 75.) Sullivan interpreted this as concern about "what might happen" or whether he would be in trouble for propositioning a purported 12-year-old girl. (*Id*.) Thus, Sullivan concluded that Lee understood the decision he was making. (*Id*.)

Lee eventually told Sullivan that "his intent was to have sex and he was not terribly concerned about the age." (Doc. 30, Eval. at 2; 9/27/22 Tr. at 47.) This was concerning because it "creates a much broader target" of "potential victims out there from young to old and everything in between." (9/27/22 Tr. at 60.) Sullivan explained that there is "no doubt" that Lee was excessively sexual and got bad urges. (*Id*. at 61.) Specifically, Lee had "indications of sexual compulsivity" and "a rather indiscriminate pattern of sexual behavior or interest" while operating under a "high level of sexual impulses." (*Id*. at 77.)

Sullivan concluded that Lee was appropriately a "Level II or moderate risk adult male sexual offender." (9/27/22 Tr. at 69; Doc. 30, Eval. at 15.) Sullivan

particularly noted that Lee was "on the upper end of that moderate risk ground in terms of overall risk." (9/27/22 Tr. at 74.) Sullivan recommended the "intensive treatment phase" of sexual offender treatment at the prison. (*Id*. at 76.) Sullivan believed that Lee was a risk to the community and he needed to be incarcerated, explaining:

> [Lee is] inappropriate for community-based supervision. He was on supervision at the [time] that this offense occurred. Has history of doing poorly on supervision, and he needs to be in a place where he's confined, monitored, and is provided more structure to perhaps begin the process of treatment.

(*Id*.)

E. The sentence

The district court determined that Lee "is an individual who is very dangerous." (9/27/22 Tr. at 116.) The court detailed the nature of Lee's offense, Lee's criminal history, his history of dishonesty and impulsiveness, his poor judgment, his "varied sexual history," and the jail calls indicating that Lee "continues to manipulate[.]" (*Id*. at 118-19.) Particularly, the court was troubled by Lee's escalating behavior and consistent statements "that he cannot control himself" and his statements of "rape fantasies" and his "statements of really uncontrolled behavior." (*Id*. at 120.) After summarizing Lee's characteristics, the court explained:

> I do not see how this Court can sentence Mr. Lee to anything other than 100-years. Based on the statutes, based on the testimony

> today, and based on really a wild card of information presented in these reports.

(*Id*. at 119.) The court went on:

> I believe the sentence requested by the State is the most appropriate sentence, given the needs of the defendant. Given the specific and clearly identified danger to this community based on his behavior and the escalating nature of behavior.

(*Id*. at 120.) The court continued:

> I know this is not the sentence that you were hoping for, Mr. Lee. I will tell you; I think that your defense attorney did an admiral job at making the absolute best arguments he could make.
>
> But your conduct, your phone calls, your specific decisions have made a timeline that this Court cannot ignore, and I will not be responsible for any additional victims in this community.

(*Id*. at 121.)

The court also imposed a parole restriction, saying that "I made a specific finding under 46-18-222(2), that there was an exception to the mandatory minimum of 25 years, however the court will impose its own 25-year parole restriction. And that's based on the specific safety needs for this community that have been identified through testimony today as well as the documentation." (*Id*.) The court affirmed—both orally during sentencing and in its written judgment—that it was imposing the parole restriction pursuant to its discretionary authority in Mont. Code Ann. § 46-18-202(2), not under the mandatory minimum in Mont. Code Ann. § 45-5-625(4)(a). (9/27/22 Tr. at 122; Doc. 35 at 2.) The court

concluded, "I simply cannot allow Mr. Lee back into the community anytime before" 25 years. (9/27/22 Tr. at 120.)

Overall, the court ordered the sentence "to protect the community from a Defendant whose documented manipulative tactics are so stark, the Court has no reference point other than the fictional character, Keyser Soze."[4] (Doc. 35 at 6.)

SUMMARY OF THE ARGUMENT

Issue 1: Pursuant to his plea agreement with the State, Lee expressly waived his right to appeal to this Court. Lee also affirmed with the district court that he intended to waive his right to appeal to this Court. Under these circumstances, this Court should decline to review Lee's constitutional challenge to his sentence on appeal.

Even if this Court considered Lee's challenge to the penalties in Mont. Code Ann. § 45-5-625(4)(a), Lee's claim would fail. Lee fails to meet his heavy burden to show that there is no set of circumstances by which the penalty statute could constitutionally apply. To the contrary, numerous states have enacted "Jessica's Laws," imposing 25-year penalties based on offenders who prey on young children. Thus, a broad consensus exists to support the application of such penalty

[4] Soze was the main antagonist portrayed by Kevin Spacey in the 1995 film The Usual Suspects. Keyser Söze - Wikipedia

statutes. Additionally, a legitimate penological purpose exists for the enaction of increased penalties in this circumstance because sexual offenders targeting young children are more likely to reoffend. The wisdom of the Legislature's enaction of enhanced penalties for child predators is readily apparent. The statute protects the public, particularly the youngest and most vulnerable in our society.

Issue 2: Through his guilty plea, Lee failed to exercise his right to preserve his challenge to the district court's decision on the applicability of Mont. Code Ann. § 45-5-625(4)(a), thus, this Court should decline to consider Lee's arguments on appeal. Lee also fails to present any evidence he was actually sentenced under that statute. The district court expressly declined to apply the mandatory minimum penalty for a victim under 12 in Mont. Code Ann. § 45-5-625(4)(a)(i) because Lee met an exception to the mandatory minimum sentence under Mont. Code Ann. § 46-18-222. The court imposed a *discretionary* parole restriction under Mont. Code Ann. § 46-18-202(2). The court did so for the protection of society from Lee's documented and admittedly compulsive behavior. Further, in explaining its reasons for its sentence, the court made abundantly clear it was imposing a discretionary and individualized sentence for Lee. Thus, Lee cannot show prejudice to his substantial rights through his challenge to the mandatory minimum

penalties in Mont. Code Ann. § 45-5-625(4)(a), which Lee cannot prove were even applied to him.

Even if this Court considered the merits of Lee's claim, Lee's statutory construction would fail. The penalty statute referencing a victim 12 years or younger should be read in tandem with the offense statute, which requires only that the offender "believe" the intended target to be a certain age. Moreover, the Legislature enacted the penalties in Mont. Code Ann. § 45-5-625(4)(a) while recognizing that it already allows for police sting operations. This Court should further reject Lee's undeveloped argument that the Legislature intended the restitution statute "victim" definition to apply to the sexual abuse of children penalties.

Issue 3: This Court should decline to exercise plain error review of Lee's claim he was sentenced based on misinformation from the inclusion of the Quigley report in the PSI. Lee fails to show any of the information in the Quigley report was inaccurate or incorrect, nor does Lee show that he lacked access to or knowledge of the report's contents.

///

STANDARD OF REVIEW

Montana "[s]entencing courts have exclusive authority to impose criminal sentences." *State v. Brotherton*, 2008 MT 119, ¶ 11, 342 Mont. 511, 182 P.3d 88. This Court reviews a district court's sentence for legality only, confining its review to whether the sentence falls within the parameters set by statute. *State v. English*, 2006 MT 177, ¶ 55, 333 Mont. 23, 140 P.3d 454.

ARGUMENT

I. This Court should either decline to consider Lee's facial challenge to Mont. Code Ann. § 45-5-625(4)(a) or hold that Lee failed to meet his heavy burden to show that the statute is unconstitutional.

A. Lee's challenge to the constitutionality of the statute is waived.

"[D]efendants waive fundamental state and federal constitutional rights when they are induced to plead guilty by reason of a plea agreement." *State v. Collins*, 2023 MT 78, ¶ 14, 412 Mont. 77, 528 P.3d 1106 (citing *Santobello v. New York*, 4040 U.S. 257, 264 (1971) (Douglas, J., concurring); *State v. Rardon*, 2002 MT 345, ¶ 16, 313 Mont. 321, 61 P.3d 132). "Montana's long standing jurisprudence holds that 'where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea.'" *State v. Watts*, 2016 MT 331, ¶ 9, 386 Mont. 8, 385 P.3d 960

(collecting cases). Thereafter, "[a] defendant may only attack the voluntary and intelligent character of the guilty plea and may not raise independent claims relating to prior deprivations of constitutional rights." *Id.* (collecting cases).

"A plea agreement is essentially a contract and is subject to contract law standards." *State v. Lewis*, 2012 MT 157, ¶ 13, 365 Mont. 431, 282 P.3d 679. Here, Lee expressly and unambiguously agreed in his bargain with the State that "[b]y pleading guilty, **I waive my right to appeal** or otherwise challenge my conviction by direct appeal." (Doc. 14 at 2, emphasis added.) At his change of plea, the district court reminded Lee that he was waiving his "right to appeal to the Montana Supreme Court," and Lee affirmed he understood. (4/28/22 Tr. at 3.) This waiver was given without any reservation.

"This Court and the United States Supreme Court have repeatedly upheld waiver of even constitutional rights under appropriate circumstances." *Campbell v. Mahoney*, 2001 MT 146, ¶ 28, 306 Mont. 45, 29 P.3d 1034 (collecting cases.) The Supreme Court has explained that even the "most basic rights of criminal defendants" are waivable, *Peretz v. United States*, 501 U.S. 923, 936 (1991), and courts cannot grant relief based on waived rights, *United States v. Olano*, 507 U.S. 725, 732-33 (1994). Baked into the notion of plea bargaining is that both parties forego potentially meritorious arguments to obtain a more certain, second-best result. *See Brady v. United States*, 397 U.S. 472, 751-52 (1970). Courts have

observed that "[a] criminal defendant 'may waive any right, even a constitutional right, by means of a plea agreement,' including 'the right to appeal a sentence.'" *United States v. Riccardi*, 989 F.3d 476, 489 (6th Cir. 2021) (quoting *United States v. Winans*, 748 F.3d 268, 270 (6th Cir. 2014)); *see also United States v. Rodriguez*, 49 F.4th 1205, 1211-12 (9th Cir. 2022) ("As a general rule, a defendant may waive his right to appeal and/or collaterally to attack his plea or sentence."). On appeal, Lee does not argue that his appellate waiver could be unenforceable for any reason, nor does he argue that his plea was not knowing, intelligent, or voluntary.

Lee never raised a constitutional Eighth Amendment challenge to his sentence. Further, Lee does not challenge the legality or constitutionality of his particular sentence.[5] This Court has "consistently held that a sentence within the maximum statutory guidelines does not violate the Eighth Amendment prohibition against cruel and unusual punishment." *Basto v. State*, 2004 MT 257, ¶ 15, 323 Mont. 80, 97 P.3d 1113 (citation omitted). While this Court generally allows pursuit of facial constitutional challenges to a sentence for the first time on appeal, *State v. Coleman*, 2018 MT 290, ¶¶ 7-11, 393 Mont. 375, 431 P.3d 26, it should consider the special circumstance of a valid appellate waiver. This Court should hold that such claims are not properly raised on appeal if the appellant has waived the right to appeal.

[5] Lee has filed an application for sentence review. (Doc. 32.)

Accordingly, this Court should decline to reach the merits of Lee's constitutional challenge, raised for the first time on appeal after a valid waiver of his right to appeal.

B. Alternatively, this Court should reject Lee's facial challenge to the constitutionality of Mont. Code Ann. § 45-5-625(4)(a)(i).

1. Background

In 1993, enhanced penalties for a victim under 16 years of age were added to Mont. Code Ann. 45-5-625, the sexual abuse of children statute. H.B. 562 (1993). In 2007, subsection (4)(a)(i) was enacted through Senate Bill 547, providing:

> 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.

Mont. Code Ann. § 45-5-625(4)(a)(i).

The act was entitled, in relevant part, "AN ACT STRENGTHENING THE REGISTRATION REQUIREMENTS AND OTHER PROVISIONS APPLCIABLE TO SEXUAL OFFENDERS." The Bill's sponsor, Senator Perry, testified about the importance of protecting children, and explained that the "real essence" of the bill was to strengthen the penalties. Mont. Sen. Jud. Comm., Sen.

Bill 547, 60th Legis. Reg. Sess. (Feb. 22, 2007) at 10:22:45, *available at* Montana Legislature (sliq.net). He also explained how the intent of the bill was to model the statute after Florida's May 2, 2005 Jessica's law.[6] Mont. Sen. Floor Sess., Sen. Bill 547, 60th Leg. Reg. Sess. (Feb. 26, 2007) at 13:39:20, *available at* Montana Legislature (sliq.net).

2. Applicable law

This Court exercises plenary review of constitutional issues. *State v. Jensen*, 2020 MT 309, ¶ 9, 402 Mont. 231, 477 P.3d 335 (citation omitted). "In reviewing constitutional challenges to legislative enactments, the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406 (citing *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517). Thus, the party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Sedler*, ¶ 5 (collecting cases). To prevail on a constitutional facial challenge, the party challenging the statute must show that "no set of

[6] Jessica's Law is the informal name given to a 2005 Florida law, as well as laws in several other states, designed to protect victims and reduce a sexual offender's ability to re-offend, which includes a mandatory minimum sentence of 25 years in prison and lifetime electronic monitoring when the victim is less than 12 years old. Jessica's Law - Wikipedia

circumstances exists under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications" or that the statute lacks any "plainly legitimate sweep." *Jensen*, ¶ 12 (citations omitted).

3. Discussion

The Eighth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, and article II, section 22, of the Montana Constitution, prohibits the infliction of "cruel and unusual punishments." "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Ewing v. California*, 538 U.S. 11, 21 (2003). Thus, a sentence that falls within the statutory guidelines generally does not violate the constitutional prohibitions against cruel and unusual punishment. *State v. Wardell*, 2005 MT 252, ¶ 28, 329 Mont. 9, 122 P.3d 443.

Here, Lee does not raise a typical Eighth Amendment claim challenging the length of his term-of-years sentence given the circumstances of his particular crime. Rather, he raises a facial challenge to the penalty statute in Mont. Code Ann. § 45-5-625(4)(a), arguing that it *categorically* violates the prohibition against cruel and unusual punishment. (Appellant's Br. at 22.) Thus, Lee's claim appears to concern an entire class of offenders who have committed a range of crimes.

While this Court does not appear to have addressed an Eighth Amendment categorical challenge to a term-of-years sentence, it looks to guidance from federal law when addressing the issue of cruel and unusual punishment. *Quigg v. Slaughter*, 2007 MT 76, ¶ 18, 336 Mont. 474, 154 P.3d 1217. The Supreme Court has entertained such categorical challenges by looking toward "objective indicia of national consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). The Supreme Court also considers "whether the challenged sentencing practice serves legitimate penological goals" and "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67-68.

The Supreme Court has observed that "[s]ex offenders are a serious threat in this nation." *McKune v. Lile*, 536 U.S. 24, 32-33 (2002) (summarizing statistics about how "the victims of sexual assault are most often juveniles" and "[n]early 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger") (emphasis added). And "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, 536 U.S. at 33 (citing U.S. Department of Justice statistics). Thus, "[r]ecidivism is a serious risk to public safety, and so incapacitation is an important goal." *Graham,* 560 U.S. at 72.

Courts have recognized the public safety aspect of Jessica laws, which are designed to reduce the chances of offenders preying on vulnerable young children. For example, the Kansas Supreme Court has explained that "[t]he legislative intent underlying Jessica's law is to protect children by removing perpetrators of sexual crimes against children from society." *State v. Woodward*, 294 Kan. 717, 722, 280 P.3d 203 (Kan. 2012). This Court, too, has explained that "Montana's sexual abuse of children statute serves a plainly legitimate purpose: to protect children from sexual predators and sexual exploitation." *State v. Hantz*, 2013 MT 311, ¶ 22, 372 Mont. 281, 311 P.3d 800.

In line with these important penological goals, Montana's Legislature enacted penalties in 2007 for sexual abuse of children for victims 12 years old or younger in Mont. Code Ann. § 45-5-625(4)(a), which includes a 25-year parole restriction. The amendments were proposed by Senator Perry "to protect the citizens of Montana and, in particular, to protect our children from sexual predators." *Senate Judiciary Hearing* at 10:48:20.[7] Senator Perry explained that "there are certain sex offenders who can be treated and can be treated successfully, but the ones we're talking about here and the reason we're stressing a long mandatory minimum sentence and

[7] These penological goals are well complimented with sting operations intending to catch predators *before* they can prey on vulnerable children, as the district court reasoned. (9/27/22 Tr. at 84.)

lifetime supervision is that the recidivism rate is very high on predators above 18 and children below the age of 12." *Senate Floor Statement on S.B. 547* at 13:48:40-13:49:20. He said, "We're trying to put an end to this, and be very serious about these heinous crimes particularly." *Id*. at 13:49:38-13:49:50. Here, the State of Montana has a particularly compelling interest in using incarceration as a means of protecting its youth from sexual offenders.

In looking to matters of "national consensus," the Supreme Court has determined the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislators.'" *Graham*, 560 U.S. at 62 (citing *Enmund v. Florida*, 458 U.S. 782, 794-95 (1982)). As Senator Perry explained here, "there has been a national movement towards adopting Jessica's Law or a form thereof in all the states across the country." *Senate Floor Statement on S.B. 547* at 13:40:10. Indeed, numerous states have adopted the basic 25-year mandatory minimum components and electronic monitoring aspects of Jessica's law. For example, at least 23 states have enacted both aspects of Jessica's law and 25 states have enacted mandatory 25-year minimum sentences for first time child

sex crime offenders.[8] Thus, Lee's attempt to draw attention to the few states that haven't enacted such penalties does not show a lack of national consensus. (*See* Appellant's Br. at 23-25.) And this Court should reasonably consider the consensus of Montana citizens. The Montana Legislature overwhelmingly adopted the enhanced penalties for sexual abuse of children in subsection 4(a), in a near-unanimous vote in both chambers. (State's Appendix, History and Final Status of SB 547.) This is an expression of the intent of the communities throughout Montana—through their elected representatives—to impose strict penalties for child predators.

Lee's remaining scattershot arguments—which appear to incorporate disparate comparisons for a proportionality analysis—fail. For example, Lee attempts to show that the penalties for sexual abuse of children in subsection (4) are disproportionate in all applications as allegedly harsher than deliberate homicide. (Appellant's Br. at 21.) This argument fails because both the general offense statute for sexual abuse of children as well as the deliberate homicide statute provide for potential life sentences. Mont. Code Ann. §§ 45-5-102,

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[8] National Conference of State Legislatures, "State Statutes Related to Jessica's Law," *available at page 9 of Colorado Commission on Criminal & Juvenile Justice, Review of Jessica's Law and Colorado's Sex Offender Laws*, Nov. 14, 2013, CCJJ - Review of Jessica's Law and Colorado's Sex Offender Laws (November 2013) (state.co.us), accessed July 18, 2024.

45-5-625(2)(a). And the penalty in subsection (4) is specifically a term-of-years sentence, which is less punitive than a life sentence in any event.

Lee next appears to argue that sexual abuse of children is not a "hands-on" offense, thus the sentence is disproportionate to the crime in all applications. (Appellant's Br. at 27.) This argument fails because the gradation of penalties in Mont. Code Ann. § 45-5-625 is based on an offender's belief about age, not based on conduct. As explained above, this was a clear and deliberate choice by the Legislature based on the possibility of recidivism by offenders who endeavor to target young children. And, whether or not the offenses are "hands on," the Legislature has evinced a clear intent to impose such enhanced penalties for *all* sexual crimes against children. *See* Mont. Code Ann. § 45-5-503 (SIWOC); Mont. Code Ann. § 45-5-507 (incest) (similar penalties based on gradations of age, including 12 years and younger, also included in S.B. 547 (2007)). As the bill's sponsor, Senator Perry, explained:

> Now what did we already have in law. We already provided for the possibility of lifetime sentences for sex offenders committed against a child who is less than 16. But what we have done is taken the age 12 and below, and required the 25 year minimum sentence. We've included GPS tracking, we already had child pornography as a felony offense, and that was already punishable by life in prison. And we already had worked with internet luring of minors, and we've already allowed law enforcement officers to act as decoys. So, what you have before you is an extremely powerful bill, and I'd like to see unanimous support from this body.

Senate Floor Statement on S.B. 547 at 13:45:50-13:46:55.

While Lee does not specifically argue that the mandatory nature of the sentence or the imposition of a 25-year parole restriction violates the constitution, such an argument would also fail if provided. The Supreme Court has explained that a sentence that is not otherwise cruel and unusual does not violate the Eighth Amendment simply because it is mandatory. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991); *see also United States v. Farley*, 607 F.3d 1294, 1343 (11th Cir. 2010) (holding that "the mandatory nature of a non-capital penalty is irrelevant for proportionality purposes"). And, as this case particularly shows, the enhanced penalty in Mont. Code Ann. § 45-5-625(4)(a) is not "mandatory" in every application because it is subject to the exception to the mandatory minimum sentence statute. Mont. Code Ann. § 46-18-222. In any event, the Legislature "has primary responsibility for making the difficult policy choices that underly any criminal sentencing scheme." *Ewing*, 538 U.S. at 28 (plurality opinion). Lee cannot show a parole restriction is unconstitutional in all applications, particularly towards an individual who is willing to attempt to lure a young child to meet for sex.

Finally, Lee argues that a "100-year sentence cannot be completed" and thus "no rehabilitation or reformation can logically occur" for a "male" sentenced under Mont. Code Ann. § 45-5-625(4)(a), purportedly because a male only typically lives to be 75 years old. (Appellant's Br. at 29.) Lee fails to acknowledge that a defendant may be released from custody on parole at a quarter time of their

sentence. Mont. Code Ann. § 46-23-201(3). Treatment and rehabilitation are principles baked into the penalty statutes—both during and after the custodial sentence. Child predators are required to complete two phases of sexual offender treatment in prison and are further required to participate in outpatient treatment, even upon release via parole. *See* Mont. Code Ann. §§ 45-5-625(4)(a)(iii), 46-18-207(2)(a)(iii). "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *McKune*, 536 U.S. at 33. This important penological goal has been accomplished.

Accordingly, Lee fails to meet his heavy burden to show the statute is unconstitutional beyond a reasonable doubt and there is "no set of circumstances" by which the statute can be valid.

II. This Court should decline to review Lee's challenge to the district court's statutory interpretation of Mont. Code Ann. § 45-5-625(4)(a)(i). Alternatively, Lee's challenge would fail on the merits.

A. Lee's claim is waived.

Lee pleaded guilty pursuant to a plea agreement with the State. Not only did Lee specifically waive his right to appeal to this Court generally through his plea agreement as explained above, but Lee failed to preserve his right to challenge the district court's decision on the applicability of subsection (4)(a). *See* Mont. Code

Ann. § 46-12-204(3) (statute allowing the defendant to reserve the right to appeal any "adverse determination of any specified pretrial motion" upon the approval of the court and the consent of the prosecutor after a guilty plea). "Consequently, after the plea, the defendant may attack only the voluntary and intelligent character of the plea, any jurisdictional defects, and *any specified adverse pretrial rulings he has reserved the right to appeal*." *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104 (emphasis added) (citing *State v. Violette*, 2009 MT 19, ¶ 16, 349 Mont. 81, 201 P.3d 804). Examining Mont. Code Ann. § 46-12-204(3), this Court has explained that "the language of the statute, however, clearly indicates that a claim must be specifically *reserved* in order to be appealable, not that a claim is automatically appealable unless it is expressly *waived*." *Pavey*, ¶ 12 (emphasis in original). After entering into a guilty plea pursuant to a valid plea agreement with the State, Lee did not preserve the right to challenge the district court's denial of his claim.

Moreover, Lee cannot show he was even sentenced under the mandatory minimum penalties in Mont. Code Ann. § 45-5-625(4)(a)(i). The district court specifically ruled that—pursuant to an exception to the mandatory minimum statute, Mont. Code Ann. § 46-18-222—"the mandatory minimum does not apply to this sentence." (Doc. 34 at 7.) The court repeatedly clarified it was imposing a parole restriction pursuant to its discretionary authority in Mont. Code Ann.

§ 46-18-202(2) based on Lee's dangerousness, not based on the mandatory minimum parole restriction in § 45-5-625(4)(a)(i). Notably, the general sexual abuse of children penalty statute in subsection (2)(a) provides for a 100-year term-of-years sentence. *See* Mont. Code Ann. § 45-5-625(2)(a) (proving that "[E]xcept as provided in subsection . . . (4), a person convicted of the offense of sexual abuse of children shall be punished" either by life or by "imprisonment in the state prison for a term not to exceed 100 years[.]"). The district court made abundantly clear it was imposing a discretionary sentence upon Lee based on the nature of his offense and his characteristics and troubling history, not based on any mandatory penalties. (*See* 9/27/22 Tr. at 115-21.)

Consequently, Lee's challenge to the district court's ruling on the application of Mont. Code Ann. § 45-5-625(4)(a)(i) fails to show any prejudice to his substantial rights, and thus cannot be a basis for granting him relief on appeal. *See* Mont. Code Ann. § 46-20-701(1)-(2) ("Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded[,]" and "[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial."). This is only further evidenced by Lee's proposed choice of remedy on appeal, a remand for resentencing (Appellant's Br. at 38) for the district court to apply the general sexual abuse of children statute (*Id*. at 34), which clearly allows

for the same sentence that the district court ultimately imposed. *See* Mont. Code Ann. §§ 45-5-625(2)(a), 46-18-202(2). Lee fails to show any error in the discretionary sentence the district court imposed.

B. Lee fails to show that the district court incorrectly interpreted the penalty section in Mont. Code Ann. § 45-5-625(4).

Lee challenges the district court's ruling on its statutory interpretation of Mont. Code Ann. § 45-5-625(4)(a)(i). As in the district court, Lee argues that the Legislature has already defined the term "victim" in Mont. Code Ann. § 46-18-243(2) in the restitution statutes. (Appellant's Br. at 30.) Lee further argues that the plain language of Mont. Code Ann. § 45-5-625(4)(a)(i) "is clear" and "does not include a fictitious identity[.]" (*Id*. at 33.)

"Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426. The duty of this Court is to "read and construe each statue as a whole" so that it may "give effect to the purpose of the statute." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (citation omitted). This Court's "objective in interpreting a statute is to implement the objectives the Legislature sought to achieve." *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771.

Here, the penalty statute for sexual abuse of children in Mont. Code Ann. § 45-5-625(4)(a)(i) must be read in the context of the offense statute immediately

above it. For example, Mont. Code Ann. 45-5-625(1)(c) criminalizes acts of a defendant "knowingly" communicating with either a person "under 16 years of age" or "a person the offender believes to be a child under 16 years of age" and persuading or enticing that person "to engage in sexual conduct, actual or simulated[.]" Thus, as the district court correctly concluded, it is the "Defendant's intent that forms the *mens rea* for the crime." (Doc. 35 at 3.) Under the offense statute, then, no actual child victim is required to sustain a conviction. And Lee expressly conceded at his change of plea that he met the requirements to violate the offense statute.

The inclusion of the mental state based wholly on the defendant's belief about age was a legislative choice to cover attempts at inducement of persons believed to be young victims along with actual inducement of a young victim. And liability under subsection (4)(a) does not distinguish between real and fictitious child victims. Lee concedes this point. (Appellant's Br. at 21 ("[T]he Montana Legislature did not define 'victim' or 'minor' to specifically exclude a fictitious person, as has occurred in numerous "sting" operations being conducted in . . . Montana[.]").)

The offense statute, along with the legislative choice to not distinguish certain conduct for penalty purposes, can only rationally support the concept that the Legislature intended to impose criminal liability in the circumstance of

undercover sting operations. *See, e.g., State v. Heelan*, 263 N.C. App. 275, 283-84, 823 S.E.2d 106, 111-12 (N.C. Ct. App., Dec. 18, 2018) (review denied in *State v. Heelan*, 373 N.C. 170 (N.C., Oct. 30, 2019) (holding that "an actual child victim" is not required to sustain a violation of the offense of taking indecent liberties with children which "underscores legislative intent to impose criminal liability regardless of whether a defendant succeeds in committing the crime")). As Senator Perry explained in advocating for the enhanced penalties "we already had worked with internet luring of minors, and we've already allowed law enforcement officers to act as decoys." *Senate Floor Statement on S.B. 547* at 13:45:50-13:46:55. There is zero indication the Legislature paradoxically intended to narrow the aperture of a penalty statute to cover less conduct than the offense statute.

"Sting operations are a common and effective method of identifying such offenders before they victimize an actual child." *People v. Moses*, 10 Cal. 5th 893, 910 (Cal. Dec. 28, 2020) (citations omitted). And "[a]pplying criminal culpability" in such circumstances "is an obvious safeguard to society because it makes it unnecessary for police to wait before intervening until the actor has done the substantive evil sought to be prevented. It allows such criminal conduct to be stopped or intercepted when it becomes clear what the actor's intention is and

when the acts done show that the perpetrator is actually putting his plan into action." *Id*. at 911.

Lee's unreasonable interpretation of the statute would require law enforcement to use an actual child as a decoy in sting operations to subject a child predator to enhanced penalties. It is unlikely that the Legislature intended to prohibit the employment of sting operations or that the Legislature would have intended the unlikely result of utilizing an actual child in sting operations. *See, e.g., United States v. Tykarsky*, 446 F.3d 458, 468 (3d Cir. 2006) (holding that "the lack of an actual minor is not a defense to a charge of attempted persuasion, inducement, or enticement of a minor," and further explaining that "[i]t is common knowledge that law enforcement officials rely heavily on decoys and sting operations in enforcing solicitation and child predation crimes such as § 2422(b). We consider it unlikely that Congress intended to prohibit this method of enforcement.").

Finally, the sexual abuse of children statute contains several associated definitions, but "victim" is not a defined term. Mont. Code Ann. 45-5-625(5). Nonetheless, this Court should reasonably reject Lee's assertion that the Legislature defined the term victim in the restitution statutes because no evidence supports the assertion that the restitution statutes were intended to be made applicable to the sexual abuse of children statute. Instead, the offense statute

supplies the requisite context to the penalty statute. This Court should uphold the district court's statutory interpretation of Mont. Code Ann. § 45-5-625(4).

III. Lee's unpreserved due process claim does not show that he was sentenced based on misinformation.

A. Background

Sullivan reviewed several aspects of Lee's history, including a prior psychosexual evaluation done in 2020 by Chris Quigley. (9/27/22 Tr. at 50.) He was provided this evaluation from Probation and Parole. (*Id*.) This was "well after" Sullivan completed and submitted his own evaluation; thus, the Quigley evaluation did not affect Sullivan's conclusions. (*Id*. at 59, 69.) But, as Sullivan explained, even assuming he could incorporate the Quigley evaluation, it might have raised Lee's score a couple points on the sex-specific scales, but it "wouldn't have changed my ultimate recommendation in terms of risk level for registration." (*Id*. at 70-71.) Nonetheless, Sullivan did note that the Quigley evaluation confirmed his understanding that Lee had been deceptive in his answers in Sullivan's evaluation. (9/27/22 Tr. 54.) For example, in Sullivan's evaluation, Lee denied using prostitutes, but Lee admitted in the Quigley evaluation to paying $100 for sex with a woman in a port-a-potty. (*Id*. at 59.) Lee also admitted in the same evaluation to "rape fantasies[.]" (*Id*.)

The Quigley evaluation was summarized in the PSI. (Doc. 30 at 6-8.) At sentencing, when asked about any changes to the PSI, defense counsel noted that "although [Lee] underwent the Quigley psychosexual evaluation, he doesn't believe he ever actually received the report." (9/27/22 Tr. at 87.) Defense counsel did not challenge the evaluation's contents.

However, in the court's written judgment, the court pushed back on Lee's assertion, noting that Lee himself "failed to disclose to anyone the Quigley evaluation" while he was in prerelease on a prior offense in 2020, particularly when the evaluation contained a "specific recommendation in 2020 that he engage in intensive outpatient sex offender treatment[,]" which Lee had decided to ignore. (Doc. 35 at 5.) The PSI details that Lee "admitted" to not sharing the Quigley evaluation with his supervising officer. (Doc. 30 at 8.) Thus, the district court relied upon the Quigley evaluation to highlight Lee's danger to the community based on his successful obfuscation of the evaluation during his previous supervision. (Doc. 35 at 4-5.)

B. Discussion

Lee concedes he did not "timely object" based on the "ground of due process," but urges this Court to exercise plain error review. (Appellant's Br. at 36.) This Court uses its inherent power of common law plain error review sparingly, on a case-by-case basis, and only in a narrow class of cases.

State v. Lackman, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. In analyzing a claim under plain error, this Court "first determine[s] whether the defendant's fundamental constitutional rights have been implicated.'" *State v. Ritesman*, 2018 MT 55, ¶ 21, 390 Mont. 399, 414 P.3d 261. "Even then, [this Court] will not invoke the plain error doctrine to reverse a conviction when 'the alleged error did not result in a manifest miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Ritesman*, ¶ 21.

A district court "is given a wide scope of inquiry in sentencing." *State v. Kippenstein*, 239 Mont. 42, 45, 778 P.2d 892, 895 (1989). "A trial court may consider the broad spectrum of incidents making up the background of an offender in determining the proper sentence," *State v. Baldwin*, 192 Mont. 521, 524, 629 P.2d 222, 224 (1981), and "may consider any relevant evidence relating to the defendant's character, history and mental condition, and any evidence the court deems has 'probative force,'" *State v. Simmons*, 2011 MT 264, ¶ 11, 362 Mont. 306, 264 P.3d 706.

"Montana recognizes that due process applies to sentencing, but the defendant's liberty interest during sentencing is less than that interest during trial." *State v. Krantz*, 241 Mont. 501, 512, 788 P.2d 298, 305 (1990). Nonetheless, due process guards against "a sentence predicated on misinformation" and requires that

the defendant have an opportunity to "explain, argue and rebut any information" that may lead to a deprivation of life or liberty. *Simmons*, ¶ 11 (citations omitted).

Lee argues that the district court erred because the Quigley evaluation was "not admitted into evidence at his sentencing hearing." (Appellant's Br. at 35.) This claim fails because the rules of evidence do not apply to sentencing hearings. *State v. Hill*, 2009 MT 134, ¶ 20, 350 Mont. 296, 207 P.3d 307. Lee additionally appears to argue that a more complete version of the evaluation was not included in the PSI. (Appellant's Br. at 35.) But, considering that Lee admitted he had previously secreted the results of the Quigley evaluation, along with the fact that Lee himself was subject to the evaluation, Lee had apparent access to and knowledge of the report's contents. This also undercuts Lee's counsel's assertion at the sentencing hearing that Lee didn't "believe he ever actually received the report." (9/27/22 Tr. at 87.) And nothing prevented Lee from completing the record at sentencing if portions of the evaluation were missing as Lee claims.

Lee finally argues that the information from the Quigley evaluation was damaging to him because the district court partially relied upon it in fashioning his sentence. (Appellant's Br. at 35-36.) But the district court considered the Quigley report more with an eye toward Lee's deception in hiding the evaluation while on supervision to avoid sexual offender treatment, rather than the actual conduct in the evaluation. (*See* Doc. 35 at 4-5.) In any event, Lee's prior sexual conduct was

also highly probative of his chances of recidivism and his danger to the community. (*See id*.) This is precisely the information a district court would be entitled to rely upon to have a full picture of a defendant for individualized sentencing. *See Simmons*, ¶ 11. As to Sullivan, he did not rely on the Quigley evaluation, and it would not have changed the outcome of his psychosexual testing if he had.

Lee had the opportunity to review the PSI. He also had the opportunity to dispute the Quigley evaluation's findings at sentencing. He did not do so. And, as Lee's sentencing counsel explained, there was no dispute that Lee "underwent the Quigley psychosexual evaluation[.]" (9/27/22 Tr. at 87.) "A criminal defendant cannot be heard to complain where the information in a presentence report is true; however, where a petitioner can show that the sentence was predicated on something materially erroneous in the presentence report, that petitioner is entitled to resentencing." *Bauer v. State*, 1999 MT 185, ¶ 27, 295 Mont. 306, 983 P.2d 955.

Lee fails to show he was sentenced based on misinformation and thus fails to show an error resulting in a manifest miscarriage of justice, raising a question as to the fundamental fairness of the proceedings, or compromising the integrity of the judicial process. This Court should decline to exercise plain error review.

CONCLUSION

The State respectfully requests that this Court affirm Lee's sentence for sexual abuse of children.

Respectfully submitted this 26th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,978 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0468

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARRETT ALAN LEE,

Defendant and Appellant.

APPENDIX

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-26-2024:

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