

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 24-0159

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

CHAD EVERETT BALL,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Thirteenth Judicial District Court
Yellowstone County, Honorable Donald Harris, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in denying Mr. Ball's Motion to Strike Sentencing Enhancement and by imposing a mandatory 100-year prison sentence under § 45-5-625(4)(a)(i), MCA, for an inchoate offense that involved a fictitious victim.
2. Alternatively, whether the mandatory 100-year sentence violates constitutional prohibitions against cruel and unusual punishment.

STATEMENT OF THE CASE

This case arises from a 2022 sex sting in Yellowstone County. Doc. 1, p. 2. The victims are "Mia" (age 12) and "Kelsey" (age 15). 2/21/23 TR 105:13-18. Mia and Kelsey are not real people. 2/21/23 TR 138:8-9; 2/22/23 TR 49:5-11. They were fictitious personas created by undercover agents that Mr. Ball met on the internet. *Id.*

Mr. Ball texted with Mia and Kelsey intermittently for about six weeks. 2/22/23 TR 67:3-5. He solicited sexually explicit images and sexual conduct. 2/21/23 TR 170:13-15; 2/22/23 TR 36-37. He was arrested on August 29, 2022, when he attempted to meet with Kelsey in person. 2/22/23 TR 72:10-24.

The State charged Mr. Ball with three counts of Sexual Abuse of Children. Doc. 2. Counts 1 and 2 were filed under § 45-5-625(1)(c), MCA, while Count 3 was charged under § 45-5-625(1)(h), MCA. *Id.* The State provided notice of its intent to

seek a sentence enhancement for Count 1 under § 45-5-625(4)(a)(i), MCA, and for Counts 2 and 3 under § 45-5-625(2)(b), MCA, both of which impose mandatory minimum sentences for offenses involving victims below a specified age. *Id.*

Mr. Ball moved to strike the sentencing enhancements before trial, arguing they do not apply to fictitious victims and that the undercover officers did not meet the statutory definition of "victim." Doc. 8. The District Court denied the motion, adopting the State's position that statutory language and legislative intent supported applying the enhancements. Docs. 11 & 14.

The State then filed an Amended Information adding alternative attempt charges for each count. Doc. 21. On July 23, 2023, a jury convicted Mr. Ball of the three original charges (Counts 1, 3, & 5). Docs. 41, 41.01, 41.02.

For Count 1 (Mia), the District Court imposed a 100-year prison sentence, with 75 years suspended, and a 25-year parole restriction under § 45-5-625(4)(a)(i), MCA. 5/24/23 TR 6-12; Docs. 54, 57. For Counts 3 and 5, the District Court sentenced Mr. Ball to 100 years with 75 years suspended, to run concurrent with Count 1. *Id.*

On March 26, 2024, this Court granted Mr. Ball leave to file an out-of-time appeal.

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STATEMENT OF THE FACTS

In July 2022, Mr. Ball responded to two online advertisements posted by the Montana Child Exploitation Human Trafficking Task Force on MeetMe.com. Detective Travis Wafstet of the Missoula County Sheriff's Office created one profile under the persona of "Mia," which listed Mia's age as 18. 2/21/23 TR 136:8-9, 139:22-24. Detective Bethany Richter of the Yellowstone County Sheriff's Office created a second profile under the name "Kelsey," which listed her age as 22. 2/22/23 TR 14:17-24.

Mia and Kelsey provided Mr. Ball with private phone numbers through the MeetMe app, inviting him to communicate via text. 2/21/23 TR 146:19-23; 2/22/23 TR 17:1-9. After Mr. Ball initiated contact by text, Mia disclosed that she was 12 and Kelsey stated she was 15. 2/21/23 TR 149:18-23; 2/22/23 TR 22:1-9. Mr. Ball continued texting Mia and Kelsey throughout August 2022, requesting sexually explicit images and soliciting sexual activity. 2/21/23 TR 170:13-15; 2/22/23 TR 36-37.

Mr. Ball and Mia discussed meeting in person at a park in Billings, but Mr. Ball did not appear. 2/21/23 TR 156-159:1-10. Mr. Ball did appear to meet Kelsey in Billings on August 29, 2022. 2/22/23 TR 68:9-19. He was arrested by task force agents upon his arrival at the meeting location. *Id.* at 72:10-24.

During a post-arrest interview, Mr. Ball admitted to sending inappropriate messages to Mia and Kelsey but claimed he did not believe they were real individuals and suspected a scam. Ex. 8. Mr. Ball reiterated this defense at trial and through his testimony. 2/22/23 TR 136:12-23.

STANDARDS OF REVIEW

Criminal sentences are reviewed for legality. *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26. This review is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. *State v. Rickman*, 2008 MT 142, ¶ 11, 343 Mont. 120, 183 P.3d 49 (citations omitted). This determination is a question of law and is reviewed is de novo. *Id.* (citation omitted).

SUMMARY OF ARGUMENT

Mr. Ball was convicted in Count 1 of violating § 45-5-625(1)(c), MCA, for communicating with an undercover officer posing as a minor. The District Court improperly applied the 100-year sentencing enhancement under § 45-5-625(4)(a)(i), MCA, which mandates this penalty when the "victim" is 12 years old or younger.

Montana's criminal code defines a "victim" as someone who suffers tangible harm, such as bodily injury, economic loss, or reasonable apprehension of injury. A fictitious persona cannot experience harm and, therefore, does not meet this

definition. The District Court incorrectly concluded that this definition applies only to restitution matters and not to sentencing enhancements, despite broader statutory language indicating otherwise.

Unlike federal law and other jurisdictions, Montana has not explicitly included fictitious victims in sentencing enhancements. Expanding the definition of "victim" violates due process, and under the rule of lenity, ambiguities must be resolved in favor of Mr. Ball.

Alternatively, even if the enhancement were valid, a 100-year mandatory sentence is unconstitutionally excessive. It is more severe than homicide penalties and disproportionately harsh compared to similar offenses in other states. Mr. Ball's offense was inchoate in nature and involved no actual victim or harm, yet the District Court had no discretion to impose a lesser sentence, making the punishment grossly disproportionate.

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING THE 100 YEAR SENTENCING ENHANCEMENT FOR COUNT 1 BASED ON A FICTITIOUS VICTIM.

Section 45-5-625(1)(c), MCA, states as follows:

(1) *A person* commits the offense of sexual abuse of children if *the person*:

(c) knowingly, by any means of communication, including electronic communication or in person, persuades, entices, counsels, coerces, encourages, directs, or procures *a child* under 16 years of age or *a person* the offender believes to be a child under 16 years of age to

engage in sexual conduct, actual or simulated, or to view sexually explicit material or acts for the purpose of inducing or persuading a child to participate in any sexual activity that is illegal.

(Emphasis added).

The District Court sentenced Mr. Ball for Count 1 under § 45-5-625(4)(a)(i),

MCA, which states:

(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.

(Emphasis added).

This enhancement is contingent upon the presence of a "victim" who is 12 years old or younger. Mr. Ball was convicted based on communications with an undercover officer posing as a minor. The question before this Court is whether the statutory definition of "victim" encompasses fictitious individuals. Montana statutes provides a clear answer: it does not.

A) The Statutory Definition Of “Victim” Does Not Include Fictitious Persons.

The legislature has provided clear and uniform definitions of "victim" in §§ 46-18-243(2)(a) and 46-24-106(5)(a), MCA. These definitions, which are identical

in language, do not distinguish between real persons and fictitious identities.

Specifically, they define "victim" as:

- a person who suffers loss of property, bodily injury, or reasonable apprehension of bodily injury as a result of:
 - the commission of an offense;
 - the good faith effort to prevent the commission of an offense; or
 - the good faith effort to apprehend a person reasonably suspected of committing an offense.

See §§ 46-18-243(2)(a)(i)(A-C) & 46-24-106(5)(a)(i-iii), MCA.

Nothing in these statutory definitions suggest that a fictitious person, such as an identity created by law enforcement, qualifies as a "victim." Instead, the definition explicitly requires that the individual suffers a tangible harm – such as loss of property, bodily injury, or reasonable apprehension of bodily injury. A fictitious persona, by definition, cannot experience such harm.

The District Court denied Mr. Ball's motion to strike the sentencing enhancement, reasoning that the statutory definition of "victim" applies only to restitution matters and is inapplicable to sentencing enhancements under § 45-5-625, MCA. Doc. 14, p. 4:23-27; 5:1-5.

The District Court held:

Defendant's argument that a "victim" as defined under the Montana Rules of Criminal Procedure would not include a fictitious person is taken out of the context of the statute. Section 46-18-243(2), Mont. Code Ann., provides a definition for "victim"; however, the statute clearly states that this definition

applies “for purposes of §§ 46-18-241 through 46-18-249.” Those sections deal with criminal sentences involving restitution awarded to victims who have sustained pecuniary or economic loss, bodily injury, or death as the result of a criminal offense, not the child-victims of sexual abuse. The sentencing guidelines found in § 45-5-625 control in this case.

Id.

The District Court’s reasoning was flawed. While § 46-18-243(2)(a), MCA, may apply only to restitution, the definition of "victim" in § 46-24-106(5), MCA, is not so limited. Section 46-24-101, MCA, establishes that the provisions of Chapter 24 apply to the treatment of crime victims and their role in the criminal justice process. Because § 46-24-106(5), MCA, provides a definition of "victim" within Chapter 24 and does not restrict its application solely to restitution, it logically applies to other contexts in which the term "victim" appears in Title 46, absent a more specific definition.

B) If The Legislature Intended A Mandatory 100 Year Prison Sentence For A Fictitious Victim, It Would Have Said So.

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” § 1-2-101, MCA. When statutory language is clear, courts must apply it as written. *State v. Wolf*, 2020 MT 24, ¶ 15, 398 Mont. 403, 457 P.3d 218. When the legislature includes specific language in some parts of a statute but omits it elsewhere, courts must assume the omission was

intentional. *See State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622.

Section 45-5-625, MCA, is a broad statute designed to comprehensively address child sexual abuse. It contains over thirty subsections and explicitly criminalizes both completed and inchoate offenses. Yet nowhere does the statute state that its sentencing enhancements apply to fictitious victims.

Judge Robert “Dusty” Deschamps of the Fourth Judicial District correctly recognized this omission in *State of Montana v. Andrew David Phillips*:

If the legislature had intended for the mandatory minimum . . . to apply not only to actual victims of less than 16 but also to “a *person the offender believes to be a child under 16 years of age*” the legislature would have added this language . . . as it did in subsections 1(c), (h) and (i) of the very same statute. The failure of the legislature to do so compels the conclusion that the legislature did not intend to create a mandatory minimum sentence except in those cases where there was an actual child victim . . .”

Missoula County District Court Cause No. DC-22-689, Opinion and Order filed April 10, 2023, p. 16:5-15 (emphasis in the original).

Had the legislature intended to extend enhancements to cases involving no actual victim, it could have adopted language similar to the federal sentencing guidelines. The U.S. Sentencing Guidelines explicitly allow enhancements in fictitious victim cases, such as those involving undercover officers posing as minors. *See* USSG § 2G2.2 (Trafficking in Material Involving Sexual Exploitation of a Minor). The federal guidelines define "Minor" to include: "an undercover law

enforcement officer who represented to a participant that the officer had not attained the age of 18 years." USSG § 2G2.2 (Application Notes, Definitions, "Minor" at (C))

Montana's statute contains no such provision, and this Court has never adopted such an interpretation. The absence of similar language signals a deliberate legislative choice. *In re T.N.-S.*, 2015 MT 117, ¶ 36, 379 Mont. 60, 347 P.3d 1263 ("When the legislature chooses not to adopt a provision that exists in other statutory schemes, courts must assume that choice was intentional.") (citations omitted).

By disregarding the statutes' plain language and legislature's intent by omission, the District Court improperly expanded the meaning of "victim" beyond its statutory definition. Because § 45-5-625, MCA, hinges its sentencing enhancement on the age of an actual victim – and no real child existed here – the application of the 100-year sentencing enhancement was improper.

C) Due Process Prohibits Expanding The Statute Beyond Its Text.

A fundamental principle of due process is that criminal statutes must provide clear notice of the conduct they prohibit and the penalties they impose. *Monroe v. State*, 265 Mont. 1, 3, 873 P.2d 230, 231 (1994) (citation omitted). Expanding the definition of "victim" beyond its statutory limits would violate due process by subjecting defendants to enhanced penalties without clear legislative authorization, relying instead on an undefined and unenumerated standard.

Additionally, the rule of lenity requires that any ambiguity in a criminal statute be resolved in favor of the defendant. *State v. Liefert*, 2002 MT 48, ¶ 26, 309 Mont. 19, 43 P.3d 329 (citations omitted). Because § 45-5-625, MCA, does not clearly authorize sentencing enhancements based on fictitious victims, the rule of lenity requires that any doubt be resolved against the State and in favor of Mr. Ball.

II. A 100 YEAR MANDATORY SENTENCE FOR A FICTITIOUS VICTIM IS CRUEL AND UNUSUAL.

The sentencing enhancement in § 45-5-625(4)(a)(i), MCA, applies automatically upon conviction – even in the absence of an actual victim – and prohibits suspension or deferral of the first 25 years of the sentence except under the limited circumstances outlined in § 46-18-222(1) through (5), MCA.

One hundred years is an extraordinarily long sentence. While Mr. Ball's conduct was concerning, no actual harm was inflicted on any individual. Yet, once the enhancement was applied, the District Court had no discretion to impose anything other than the statutory sentence, even though no victim or injury was involved. This mandatory sentence and parole restriction are excessive and violate the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution.

Although Mr. Ball's trial counsel did not raise this issue, Montana law permits constitutional challenges to sentencing statutes for the first time on appeal. *See State v. Coleman*, 2018 MT 290, ¶ 8, 393 Mont. 375, 431 P.3d 26 (holding that facial

challenges to sentencing statutes may be raised on appeal, though as-applied challenges may not) (citations omitted); *see also State v. Brown*, 2022 MT 176, ¶ 31, 410 Mont. 38, 517 P.3d 177.

Here, Mr. Ball argues that the mandatory sentence and parole restriction under § 45-5-625(4)(a)(i), MCA, are so disproportionate to the offense – particularly given the absence of an actual victim – that they constitute cruel and unusual punishment. This is a facial challenge, as the enhancement for a fictitious victim could apply to any similarly charged defendant.

A) The Test For Cruel And Unusual Punishment.

Neither the Eighth Amendment nor Article II, Section 22 explicitly prohibit disproportionate sentences. However, the U.S. Supreme Court has long held that the Eighth Amendment bars sentences that are grossly disproportionate to the offense. *State v. Rickman*, 2008 MT 142, ¶ 15, 343 Mont. 120, 183 P.3d 49 (citing *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)).

Montana generally adheres to the principle that a sentence within statutory limits does not violate the prohibition against cruel and unusual punishment. *Id.* (citing *State v. Shults*, 2006 MT 100, ¶ 30, 332 Mont. 130, 136 P.3d 507). However, an exception exists where a sentence is so disproportionate that it "shocks the conscience and outrages the moral sense of the community." *Id.* (citing *State v. Wardell*, 2005 MT 252, ¶ 28, 329 Mont. 9, 122 P.3d 443). The burden is on the

defendant to demonstrate that his sentence meets this standard. *Id.* (citing *State v. Tadewaldt*, 227 Mont. 261, 271, 922 P.2d 463, 469 (1996)).

B) A Sentence Greater Than Homicide Penalties Shocks The Conscience.

Montana’s mandatory 100-year sentence for sexual abuse of a child with a fictitious victim under 12 is more severe than, or at least equal to, the penalties for the state’s most serious homicide offenses. Deliberate homicide carries a sentence of 10 to 100 years, mitigated homicide is punishable by 2 to 40 years, and negligent homicide has a maximum penalty of 30 years. See §§ 45-5-102(2), 45-5-103(4), 45-5-104(3), MCA.

An individual convicted of an offense involving no actual victim faces the same or greater punishment than someone convicted of taking a human life. The mandatory nature of the sentence and its parole ineligibility, combined with the restriction on suspending a portion of the sentence, results in a penalty so disproportionate that it shocks the conscience and violates the prohibition against cruel and unusual punishment.

C) Sentencing In Comparable Jurisdictions.

The 100-year mandatory sentence stands in stark contrast to penalties imposed for similar offenses in neighboring states, further highlighting its excessive nature.

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(1) Colorado

Colorado's laws distinguish between different levels of online sexual offenses and impose significantly lower sentences than Montana's. Under Colorado's Internet Luring of a Child statute (§ 18-3-306, CRS), it is a class 5 felony to knowingly communicate with a person believed to be under 15 about explicit sexual conduct and invite them to meet. See also § 18-1.3-401, CRS. The penalty for a first offense is 1-3 years in prison. *Id.* If the intent is to engage in sexual exploitation or contact, the offense is elevated to a class 4 felony, punishable by 2-6 years. *Id.*

Enticement of a Child (§ 18-3-305, CRS), which criminalizes inviting a child under 15 to a secluded place with intent to commit sexual assault or unlawful sexual contact, is a class 4 felony (2-6 years), with an enhancement to a class 3 felony (4-12 years) if the child suffers bodily injury or the defendant has prior convictions. *Id.*

(2) Wyoming

Wyoming's Soliciting to Engage in Illicit Sexual Relations statute (§ 6-2-318, WS) criminalizes soliciting or encouraging a person under 14 (or someone believed to be under 14) to engage in sexual activity. A conviction carries a maximum sentence of 5 years. § 6-2-318, WS.

(3) North Dakota

North Dakota's Luring Minors by Computer or Other Electronic Means statute (§ 12.1-20-05.1, N.D. Cent. Code) makes it a felony to use electronic means

to solicit a minor for sexual activity. See also § 12.1-32-01, N.D. Cent. Code. Depending on the circumstances, the offense is classified as a Class B felony (punishable by up to 10 years in prison) or a Class C felony (1-5 years) if no substantial step toward meeting the minor was taken, demonstrating a more measured approach to sentencing based on actual harm and intent. §§ 12.1-20-05.1 & § 12.1-32-01, N.D. Cent. Code.

Plainly put, Montana's uniquely harsh sentencing scheme is wildly out of step with its neighboring states, all of which impose significantly lower penalties for comparable offenses.

D) The Harsh Penalty For Inchoate Conduct Further Demonstrates Its Unconstitutionality.

Count 1 is in fact an inchoate offense, where Mr. Ball solicited a fictitious minor to send sexually explicit messages and to engage in sexual conduct. Inchoate crimes differ fundamentally from completed offenses involving actual harm, and no actual harm was committed in this case. Yet, Montana imposes the same punishment – or worse – on offenders who engage in no physical contact as it does on those who actually harm children.

The overwhelming disparity between Montana's sentencing scheme and those of neighboring states, coupled with its failure to differentiate between inchoate and completed offenses, renders § 45-5-625(4)(a)(i), MCA, unconstitutionally excessive.

CONCLUSION

Because § 45-5-625, MCA, conditions the 100-year sentencing enhancement on the age of an actual victim – and no real child existed here – the District Court erred in imposing the enhancement. This Court should reverse the District Court’s denial of Mr. Ball’s motion to strike and remand for resentencing on Count 1.

In the alternative, this Court should hold the mandatory 100-year sentence and 25-year parole restriction under § 45-5-625(4)(a)(i), MCA, when the victim is fictitious, constitutes cruel and unusual punishment under both the United States and Montana Constitutions. Accordingly, this matter should be remanded to the District Court for resentencing on Count 1.

Respectfully submitted this 5th day of March, 2025.



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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word software and excluding tables and certificates is 3,488.

Respectfully submitted this 5th day of March, 2025.



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I, Lance P. Jasper, hereby certify that I have served true and accurate copies of the foregoing Appellant's Opening Brief to the following on March 5, 2025:

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