In the Supreme Court for the State of Montana

Supreme Court No. DA 25-0266

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

BRENT JAMES OLSON,

Defendant and Appellant.

Appellant's Opening Brief

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, Hon. Leslie Halligan, Presiding

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Introduction

> Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence.

Montana v. Egelhoff, 518 U.S. 37, 63, 116 S. Ct. 2013, 2027 (1996). This case presents fundamental questions about the intersection of a citizen's constitutional right to present a defense with Montana's rape shield law.

Brent James Olson [Olson] was convicted of incest at trial. The testimony of his daughter, M.O., described age-inappropriate sexual knowledge. At trial, the State argued that M.O.'s detailed sexual knowledge could only have come from sexual abuse by Olson.

However, the district court prevented Olson from presenting evidence of two alternative sources for M.O.'s sexual knowledge: extensive adult pornographic material found on her brother's phone, which she admitted using, and documented inappropriate touching between the siblings that both the mother and stepfather knew of

before any allegations against Olson surfaced.

The exclusion of this evidence violated Olson's constitutional rights to present a defense and confront his accuser. Montana courts, like courts across the nation, have recognized that while rape shield laws serve important purposes, they cannot be applied to exclude evidence essential to a defendant's ability to rebut the State's case. This case should be remanded for a new trial.

Statement of the Case

Olson appeals from his conviction and sentencing in the Fourth Judicial District, Missoula County. A jury convicted Olson of one count of Incest, with sentencing enhancements. A second count of Incest, which had been severed in pretrial proceedings, was dismissed by the State at sentencing. (Appendix A).

On March 29, 2025, the district court sentenced Brent to a term of 100 years in the Montana State Prison with 85 of those years suspended. The court did not restrict Brent's parole eligibility. (Id.)

Brent filed a timely Notice of Appeal on April 10, 2025. He is currently housed in the Tallahatchie County Correctional Facility in

Tutwiler, Mississippi.

Statement of the Issues

The district court violated Olson's constitutional right to present a defense and confront witnesses by excluding evidence under Montana's rape shield statute of alternative sources for the alleged victim's age-inappropriate sexual knowledge.

The district court's rape-shield rulings unreasonably and unconstitutionally restricted Olson's right to cross examine his accuser.

Summary of the Arguments

Olson's conviction should be reversed because the court violated his constitutional right to present a defense by excluding evidence of alternative sources for his daughter's age-inappropriate sexual knowledge. Similarly, the court's rulings unreasonably restricted Olson's ability to cross-examine his accuser, a right guaranteed by both the *Sixth Amendment* to the United States Constitution and *Article II, § 24* of the Montana Constitution.

The State built its case on the argument that M.O.'s detailed knowledge of things like the consistency of semen and male anatomy

could only have come from sexual abuse by her father. The State repeatedly emphasized this "experiential, tactile" knowledge as proof of guilt and told the jury that her testimony alone was sufficient for conviction.

The district court prevented Olson from presenting evidence that M.O. had access to extensive pornographic material on her brother's phone (which she admitted using), and that she had engaged in documented inappropriate touching with her brother. The exclusion of this evidence also precluded effective cross-examination of M.O. While rape shield laws serve important purposes, courts here and elsewhere recognize these statutes cannot be applied to exclude evidence essential to a citizen's fundamental constitutional rights.

Exclusion was not harmless error given that the State's case rested entirely on M.O.'s credibility.

Either individually or in combination, the district court's error determining the evidence constituted inadmissible "rape shield" material violated Olson's constitutional right to defend himself.

Statement of the Facts

Olson is the father of daughter, M.O., and son, C.O. On February 27, 2021, Olson learned M.O. was accusing him of sexual abuse when he was contacted by Missoula County Sherriff's detectives. In interviews with law enforcement shortly after the allegations surfaced, Olson denied the allegations and consistently maintained that the conduct never occurred (Trial Tr. 832-833; 890-894). Before any charges were filed, Olson twice volunteered to speak with investigators and gave lengthy interviews in which he denied the allegations. (Trial Tr. 832-833, 890-894).

M.O.'s first disclosure of the alleged abuse did not occur to her mother. Instead, she made her disclosure to her stepfather during a private and coercive exercise he called "king's court" (Trial Tr. 746-756). The "king's court" exercise was described as a time when children could speak freely to their stepfather about anything at all, without fear of punishment. (Trial Tr. 551-552). The child would request a "king's court," and the adult would meet privately with the child to discuss what was bothering them.

During the "king's court" session where the abuse disclosure supposedly happened, the stepfather and M.O. met alone. The conversation was not recorded. (Trial Tr. 746-747).

The precise questions or statements put to M.O. by her stepfather are unknown. (Id). At trial, when questioned about the "king's court" at issue here, M.O. testified her and her stepfather did the "king's court" in her room, and "[stepfather] asked me questions over and over, and I didn't tell him the truth for quite a bit." (Id. at 514).

At trial, the stepfather acknowledged he disliked Olson prior to the allegations, in part because Olson had briefly dated stepfather's sister after Olson's divorce from M.O.'s mother. (Trial Tr. 772-774). He told investigators Olson was, even before the allegations arose, "not his type of people" and "not his biggest fan." (Trial Tr. 773). The State's own expert, Wendy Dutton, testified that improper questioning of children at any time can create unreliable or false allegations. (Tr. 444-447).

After the "king's court" disclosure to her stepfather, law enforcement was contacted and an investigation began, including a

forensic interview of M.O. (Trial Tr. 582; SEALED Appendix E).

Based on M.O.'s disclosures in the forensic interview, law enforcement obtained a warrant to search Olson's home and seized items including bedding and clothing. (Trial Tr. 829-831). Law enforcement believed "there was a good possibility there would be" physical evidence found on the bedding and clothing that would back up M.O.'s story and confirm abuse by Olson. (Tr. 828). Those items were submitted to the Montana State Crime Lab, but no DNA, serological, or physical evidence supporting the allegations was found. (Tr. 698-705; State's Ex. 5).

At the time of the allegations, Olson was 53 years old, lived in Frenchtown with his long-term partner, and worked in hotel management. (Trial Tr. 858-860). Other than an old DUI, Olson had no criminal history. Olson had been employed by the same company for decades, and several friends and colleagues testified as character witnesses that he was both honest and law-abiding. (Trial Tr. 838-857).

Olson and M.O.'s mother had divorced in 2014 after a seven-year marriage but continued to share parenting responsibilities of both

children under a 50/50 parenting plan. (Trial Tr. 641-644). In early 2021, M.O. expressed sadness about transitioning between homes, and shortly before the allegations surfaced, she told her mother she wanted to live with Olson full-time. (Trial Tr. 542-543).

After the initial February 2021 report, the State charged Olson months later on September 24, 2021 with a single count of sexual assault involving a minor alleged to have occurred at some point between March 1, 2015, and February 12, 2021. (Dkt. 3).

Olson appeared and plead not guilty to the single count on October 20, 2021, (Dkt. 11.10), and the case began its inevitable path toward trial. It remained on that path even after the State filed an amended information on November 9, 2022 – over a year after the first information. (Dkt. 31). The amended information maintained the same six-year temporal breadth for the allegation made by M.O., but added a count of Incest, which carried a significant mandatory minimum possible penalty. Undeterred, Olson maintained his innocence and entered a plea of "not guilty." (Dkt. 34).

Four months later, the State obtained a Second Amended

Information. (Dkt. 41). This Second Amended Information omitted the original allegation of Sexual Assault on M.O., kept the Incest allegation against M.O., and added as Count II, a second count of Incest. The alleged victim in Count II was C.O., Olson's son who had previously and repeatedly denied ever being sexually assaulted by Olson.

Again, Olson maintained his innocence and entered pleas of "not guilty" to the Second Amended Information. He would take his case to trial, (Dkt. 41.10), and Olson filed an Opposed Motion to Sever Count I from Count II for trial purposes. (Dkt. 49). The State opposed and filed a response brief, attaching several transcripts as exhibits. (Dkts. 52 - 56). Olson replied. (Dkt. 60). The court granted Olson's motion to sever based, in large part, on the court's "fears that resulting prejudice [from a joint trial] would prevent a fair trial." (Dkt. 61 at 8). The case involving M.O. was to be tried first.

The State filed a "Motion in Limine Regarding Trial One Involving [C.O.]." (Dkt. 70). The State's motion sought pretrial rulings on (1) the number and nature of Olson's proposed character witnesses; (2) whether character evidence opens the door to other act evidence, e.g.,

the allegations made by C.O.; (3) the preclusion of certain evidence by operation of the "rape shield" law; (4) admission of a family home movie, which had been referenced by C.O. in his interview with law enforcement but not by M.O. in her interview; and (5) to exclude hearsay statements and clarification of Olson's cross examination if he testifies.

Olson objected to various *in limine* requests. (Dkt. 109). The State filed a reply brief, (Dkt. 111). On March 19, 2024, without holding a hearing on the fact-intensive issues addressed in the briefing, the court issued an order denying some of the State's motions but granting the State's motions invoking the "rape shield" law. (Dkt. 113). The court excluded evidence about C.O. and M.O.'s alleged sexual contact, as well as pornography that C.O. had on his phone under the rape shield law. (Id. at 7-9). The written order did not analyze in depth the admissibility of the pornography on C.O.'s phone. (Id.)

The court conducted a status hearing on March 20, 2024. During that hearing, defense counsel urged the court to reconsider its *in limine* ruling excluding any reference at trial of pornography found on C.O.'s

phone. (3/20/24 Tr. at 23). The pornography was not photographs of M.O. Rather, it was graphic legal pornography C.O. had on his phone. Olson argued the pornography on C.O.'s phone should be introduced at trial because it was a "theme throughout the case" and a "theme throughout the investigation." (Id.) Olson pointed out the images on C.O's phone were a part of the investigation, and the lead detective spoke to both the children's mother and stepfather "about [whether they] were they aware what [C.O.] was looking at and would M.O. have had access to [C.O's] phone." (Id. 27). The court admitted its disadvantage as to knowledge of the evidence it suppressed but thought the court would benefit by having the opportunity to review [M.O.'s] First Step[1] interview. (Id. at 24). The court also indicated it did not know the timeframe C.O. may have downloaded pornography and whether it had any relevance to statements made by M.O. (Id.) The parties agreed to provide the court with Detective Wafsted's report on the images on C.O.'s phone so the Court could review it in camera and

[1]The name of the organization that conducts child forensic interviews in Missoula.

re-evaluate the admissibility of the evidence. (Id. at 28; SEALED Appendix F). The parties also provided the court with a transcript of M.O.'s First Step interview.

A second status hearing was held on March 22, 2024, at which defense counsel sought clarification and reconsideration of the court's *in limine* rulings. (3/22/24 Tr. 18-31). As to the pornography on C.O's phone, Olson argued the evidence was admissible because it was a "very important part of [his] defense" as it was something law enforcement investigated, and it was not remote in time. (Id. at 28). Olson again reiterated that a theme in the investigation was where M.O. could have learned the details she described in her First Step Interview. (Id.) Olson argued the pornography on C.O.'s phone went to a question at the heart of the case: where else could M.O. have learned the things she described at her First Step Interview? Olson predicted the "government's going to stand up and say, 'where else could she have learned it,' that's going to be their theme, I could probably give you their openings." (Id. at 29). Olson argued the extensive pornography on C.O's phone was where M.O. could have learned the matters she

described, that the evidence is "absolutely relevant and admissible and should not be excluded, and if it was, it "would be hurting a big part of Mr. Olson's defense." (Id). The court and the parties also took the opportunity to address proposed jury instructions. (Id. at 31-57).

Olson's trial began on March 25 and ended on March 29, 2024. March 25 began with an *in camera* meeting between the parties with Olson in attendance. The court again took an opportunity to revisit its rulings regarding the pornography found on C.O.'s phone, evidence obtained from the First Step video, and evidence from the children's mother that C.O. and M.O. had engaged in inappropriate touching of which the mother and stepfather were aware before either child made their allegations against Olson. (Trial Tr. at 8-11). The court, seeking greater detail to balance the victim's rights against Olson's right to a fair trial, announced it would revisit the issue again during the noon hour. (Id. at 10-11). Again, the court sought details via the arguments of the parties. (Trial Tr. 198-203;). Ultimately, the court concluded it would not allow evidence about the children's alleged touching, or about the pornography on C.O's phone unless M.O. "said something about her

seeing it on his phone." (Id. at 204-205).

Trial proceeded and lasted until March 29th. Both children testified at trial, as did their mother and stepfather. Olson also testified in his own defense and vehemently denied the allegations against him.

During trial, M.O. testified but did not say anything about seeing matters on C.O's phone. Both Olson and his counsel were careful to avoid violating the pre-trial order. For similar reasons, counsel did not cross-examine M.O. or any other state witness about the touching between the children or about the pornography that investigators found on C.O.'s phone.

As predicted by Olson's counsel, in closing argument, the State suggested to the jury that M.O. was credible because there was no other way in which a child could know the things she testified about unless Olson had abused her. Among other statements in its closing and rebuttal closing (discussed more fully below in the Argument section), the State argued:

So first I'd like to talk just a little about [M.O.'s] knowledge. Now,

> she's 13 at the time she came in here, she was nine years old at the time of disclosure. Again, I thought it was important, I highlighted it here, but she described the semen. You heard Defense counsel talking about glue mixed with slime, she also described a water and flour consistence. Experiential, a physical feeling. And again, in contrast with it not being visible, she said this happened under the clothes and she was unable to provide what the liquid looked like.
>
> Again, I posit that it was consistent with somebody abused, consistent with someone have to put her hands in their father's pants for this type of sexual abuse. He *[sic]* said - - says his penis didn't fit in her hand, but she described the grasping, the circular rubbing.

(Trial Tr. 972).

The jury returned a guilty verdict. (Trial. Tr. 1032).

On April 24, 2024, Olson filed a Motion for New Trial pursuant to *Mont. Code Ann. § 46-16-702*, arguing the court's pretrial evidentiary rulings violated his constitutional right to present a defense. (Doc. 152). The motion specifically challenged the court's exclusion of evidence regarding: (1) pornographic material found on C.O.'s cellular phone, and (2) alleged inappropriate touching between M.O. and C.O. (Id.)

Olson argued excluding this evidence prevented him from offering

alternative explanations for M.O.'s ability to describe things like semen consistency and physical characteristics of an erect penis, which formed a central part of the State's case. The State opposed, arguing the evidence was properly excluded under Montana's Rape Shield Law and that Defendant had not provided any factual basis warranting relief. (State's Resp. at 6).

After a hearing, the court denied Olson's motion in a written order on December 9, 2024. (Appendix C). The court noted a trial court may not "grant a new trial only on the basis that it chose to believe one line of testimony different from that which the jury believed." (Id. at 10).

The court acknowledged Olson's constitutional right to present a defense but emphasized this right "must be balanced against public policy exceptions," specifically Montana's Rape Shield Law. (Id. at 13). The court noted Montana law requires courts to balance ensuring a fair trial for the defendant while upholding the compelling interest of the Rape Shield Law from keeping a trial from becoming a trial of the victim. (Id. at 13-14).

In considering the harm of excluding evidence about the

pornography on C.O.'s phone, the court found the probative value was "diminished because this alone would not be able to provide [M.O.] with the ability to describe in detail a tactile experience pertaining to semen and an erect penis." (Id. at 17). The court further noted Olson's "inability to affirmatively demonstrate that [M.O.] had even viewed the pornography" further diminished its probative value. (Id. at 17).

Regarding the potential evidence about C.O. and M.O. interacting sexually, the court determined the probative value of such evidence was "diminished by the Defendant's inability to establish the timing and extent of any inappropriate sexual contact which occurred between the children." (Id. at 18). The court found any alleged touching occurred when [M.O.] was approximately two years old and [C.O.] was three, and that [C.O.] being prepubescent meant he "was unable to provide Jane Doe with experiential knowledge regarding an erect penis and semen." (Id.).

In its order the court also noted Olson had successfully moved to sever the cases, which undermined admission of the sought after evidence because testimony about the disputed evidence would have

required discussion of C.O.'s allegations against Olson. (Id. at 19, 25-26).

On February 24, 2025, after a contested sentencing, the court sentenced Olson to 100 years at MSP with 85 years suspended and designated him a Level 1 sexual offender. (Appendix A).

Standards of Review

This Court's "recent case law makes clear *de novo* review is required for appellate review of a district court's decision to exclude evidence pursuant to the rape shield statute, as such decisions necessarily implicate a defendant's constitutional right to confront witnesses and present a complete defense." *State v. Twardoski*, 2021 MT 179, ¶ 26 n.2, 405 Mont. 43, 491 P.3d 711.

"Our standard of review of a trial court's ruling on a motion for a new trial depends on the basis of the motion." *State v. Dulaney*, 2025 MT 67, ¶ 20, 421 Mont. 251, 566 P.3d 534. "Where a district court exercises its discretion, its decisions will be reviewed for an abuse of discretion. Whether a district court has the authority to grant a new trial pursuant to *Mont. Code Ann. § 46-16-702,* is a matter of statutory

interpretation, and reviewed as a question of law." *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 249, 343 P.3d 1196 (internal citations and quotations omitted).

Argument

I. The District Court Violated Olson's Constitutional Right to Present a Defense.

A. Alternative Theories of M.O.'s Sexual Knowledge

The court thrice denied Olson's requests to present alternative theories on M.O.'s sexual knowledge. The first was its March 19, 2024, Order on the State' Motion *in Limine (*Doc. 113); the second was orally at a status conference on the first day of trial before voir dire and during lunch; and third in a written order denying Olson's Motion for new Trial (Doc. 152).

While rape shield statutes serve important purposes, they cannot be applied to exclude evidence essential for a defendant's right to present a defense. Montana case law and opinions from other jurisdictions demonstrate defendants have a constitutional right to present evidence of alternative sources for a victim's age-inappropriate

sexual knowledge when such evidence is relevant to their defense and not speculative or unsupported. Put another way, evidence necessary to rebut specific inferences relied upon by the State must be admitted over rape shield concerns. In Olson's case, the excluded evidence was essential to his defense to explain alternative ways that M.O. had gained age-inappropriate sexual knowledge.

"The principle of the rape shield law, designed as it is to exclude evidence that even if relevant has little probative value but great capacity to embarrass and distract, evidence that is considered to shift the balance of proof too far in favor of the rape defendant, has been held constitutional. But the constitutionality of such a law *as applied to preclude particular exculpatory evidence* remains subject to examination on a case-by-case basis." *Sandoval v. Acevedo*, 996 F.2d 145, 148-149 (7th Cir. 1993) (emphasis in original).

Mont. R. Evid. 403 balances the probative value of relevant evidence against the danger of *unfair* prejudice. (emphasis added). The fairness or unfairness of the prejudice is naturally gauged against the evidence that arises during trial and respective arguments each party

makes about that evidence.

This Court has recognized the "conflict" that can "arise between rape shield statutes and a defendant's right to confront his accuser and to present evidence at trial in defense of the charge against him" and the defendant's "similarly-based right to present evidence in his defense." *State v. Colburn*, 2016 MT 41, ¶ 24, 382 Mont. 223, 366 P.3d 258. A concurring opinion in *Colburn*, recognized Colburn's argument that excessive application of the rape shield statute limited his ability to explore "witness's bias, prejudices, and motives to fabricate. . ." and to rebut the "powerful inference" that the victim's sexual knowledge could only have been the result of Colburn's abuse. *Colburn*, ¶¶48-49 (McKinnon, J., concurring).

Along with *Colburn*, two other cases demonstrate the rape shield statute must bend if it would impinge a defendant's right to present a defense at trial. In *Twardoski,* the defendant was accused of sexually assaulting a minor, I.A., during a driving lesson. *Id.* ¶ 6. At trial, the court excluded evidence that shortly before the alleged assault by Twardoski, I.A. had been sexually abused by a family friend, Cody Hill,

in a manner almost identical to the acts alleged against Twardoski. *Id.* ¶ 35. This Court held that exclusion of the Hill assault violated Twardoski's constitutional rights under the *Sixth Amendment* and the Montana Constitution, as the evidence was relevant to the defense and not merely speculative or unsupported. *Id.* ¶ 36. This Court determined the district court misapplied the rape shield statute by failing to properly balance the competing interests of protecting the victim and ensuring the defendant's right to present a defense. *Id.* ¶¶ 35-36.

Similarly, in *State v. Lake*, 2019 MT 172, 396 Mont. 390, 445 P.3d 1211, this Court held the defendant had the right to present evidence of another man's sperm cells on the victim's underwear to counter the State's arguments that but-for the washing of the garment, the defendant's DNA would have been found. *Id.* ¶ 1, 38-42. In *Lake*, this Court held that introducing this evidence for the limited purpose of rebutting the State's theory did "not violate the spirit or letter of the Rape Shield Law." *Id.* ¶ 35. Key to the holding was the fact that in *Lake*, the "defense to the charges depended upon [the] ability to undermine the credibility of B.J.'s account of the alleged assault." *Id.* ¶

38.

Courts across the country have recognized various constitutions require a defendant be allowed to present evidence to offer an alternative explanation for a victim's sexual knowledge where such evidence is relevant to his defense. In *State v. Rolon*, 257 Conn. 156, 777 A.2d 604 (Conn. 2001), the Connecticut Supreme Court reversed the defendant's conviction for sexual assault of his granddaughter on the grounds he was denied his constitutional rights to confrontation, present a defense, and a fair trial by the lower court's application of the Connecticut rape shield law.

Reviewing many other state courts' decisions holding the same, the *Rolon* court held the defendant should have been allowed to present evidence of the victim's prior sexual abuse, where the evidence would have demonstrated an alternative source of the victim's sexual knowledge. *Id.* at 185.

As outlined in *Rolon,* multiple jurisdictions have recognized that when the State relies on a victim's detailed sexual knowledge to support its case at trial, defendants must be permitted to present alternative

explanations over rape shield objection:

> *People v. Hill*, 289 Ill.App.3d 859, 864, 683 N.E.2d 188 (1997) (evidence of victim's prior sexual abuse relevant to rebut State's argument that victim's knowledge of fellatio, its biological effects, ability describe a penile erection, ejaculation, ejaculate, and the victim's "uncommon sexual knowledge lent credence to every aspect of her testimony.").
>
> *State v. Warren*, 1998 ME 136, 711 A.2d 851 (Me. 1998) (subject to traditional rules of relevancy and constitutional balancing test, evidence of past sexual abuse admissible to show alternative source of victim's extraordinary knowledge for purpose of rebutting jury's natural presumption of child victim's sexual naiveté).
>
> *People v. Morse*, 231 Mich.App. 424, 586 N.W.2d 555 (1998) (where prior sexual conduct is sufficiently similar to defendant's alleged conduct it may be admitted to rebut inferences that flow from victim's display of unique sexual knowledge).[2]
>
> *State v. Pulizzano*, 148 Wis.2d 190, 198-202, 434 N.W.2d 807 (App. 1988) ("The inference that [the victim] could not possess the sexual knowledge he does unless Ms. Pulizzano sexually assaulted the children greatly bolsters [the victim's] allegations. In order to rebut that inference, Ms. Pulizzano must establish an alternative source for [the victim's] sexual knowledge. Evidence of the prior sexual assault is therefore a necessary and critical element of Ms. Pulizzano's defense.)

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[2] *Morse's* admissibility test required evidence of a prior conviction. That limitation has since been overruled. *People v. Masi*, 2025 Mich. LEXIS 1278, *2 (July 14, 2025). Thus, the admissibility test is now even broader than it was in *Morse*.

State v. Budis, 125 N.J. 519, 593 A.2d 784 (1991) (following *Pulizzano* that prior sexual abuse evidence relevant to rebut inference that complainant could not describe details of sexual intercourse if defendant had not committed the acts in question).

State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (S.C.App. 2000) (evidence of child victim's prior sexual experience is relevant to demonstrate that defendant not necessarily source of victim's ability to testify about alleged sexual conduct).

LaJoie v. Thompson, 217 F.3d 663 (9th Cir. 2000) (evidence of prior rape admissible to show that victim could have learned about sexual acts and male genitalia from source other than defendant accused of rape).

Shaw v. United States, 24 F.3d 1040 (8th Cir. 1994) (defendant's claim that, his trial counsel failed to rely on exceptions to rape shield law allowing admission of evidence that would have provided jury with alternative explanation for victim's knowledge of sexual acts, required remand to determine admissibility of that evidence).

Grant v. Demskie, 75 F.Supp.2d 201 (S.D.N.Y. 1999) (recognizing that under appropriate circumstances defendant should be allowed to show that child complainant was previously raped to offer alternative explanation for child's sophisticated sexual knowledge, after exclusion of evidence because no proffer that prior rape was sufficiently similar).

Courts also recognize the interplay between the ability to

present alternative theories and the right to confront an accuser. The appellant in *Olden v. Kentucky*, 488 U.S. 227 (1988) made a similar constitutional challenge to evidence excluded under the a rape shield statute arguing the lower court's ruling prohibited him from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witnesses." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). (cleaned up).

Other courts have recognized the constitution requires a defendant be allowed to present evidence to offer an alternative explanation for a victim's sexual knowledge where such evidence is relevant to his defense. For example, in *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (Az. 1988), the Arizona Supreme Court articulated its belief "that if an accused raised the defense of fabrication, and if the minor victim is of such tender years that a jury might infer that the only way the victim could testify in detail about the

alleged molestation is because the defendant had in fact sexually abused the victim, then evidence of victim's prior sexual history is relevant to rebut such an inference."

The Supreme Court of New Hampshire came to a similar ruling in *State v. Howard*, 121 N.H. 53, 61, 426 A.2d 457, 462 (N.H. 1981). There the Court held "a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him," particularly where "the average juror would perceive the average twelve-year-old girl is sexually innocent."

An appellate court in Washington has also held that evidence of prior sexual abuse of child victims was "extremely relevant to defendant's case, and its exclusion unfairly curtailed defendant's ability to present a logical explanation for the victims' testimony" and rebut the inference they knew all about sex from the defendant." *State v. Carver*, 678 P.2d 842, 844 (Wash. App. Div.2 1984).

In light of these numerous advisory holdings, in combination with precedent evident in *Colburn*, *Twardoski*, and *Lake*, and in light of *de*

novo review, the court's error is obvious and so are the constitutional violations and prejudice to Olson. This is especially true given the testimony of M.O. and the State's arguments based on her testimony.

At trial, M.O. provided specific testimony about her alleged sexual knowledge that the State used as the centerpiece of its case. She described the consistency of semen as being "like flour mixed with water" and demonstrated physical touching through hand gestures. (Trial Tr. 503; 505-506). M.O. also testified she had access to C.O.'s phone because she "would play video games on [C.O.'s] phone." (Trial Tr. 563).

During closing, the State emphasized M.O.'s sexual knowledge as proof of Olson's guilt, arguing her "experiential, tactile" knowledge could only have come from the alleged abuse by Olson. (Trial Tr. 969-972). The State further argued: "[S]eeing things on the internet you'd be able to describe what semen looked like, you wouldn't be able to describe what the semen felt like. It's – this is a nine-year-old . . . it's just not the information type that you would have from going to second, third grade" (Trial Tr. 1010-1011). Reasonable jurors could disagree

about this aspect of the State's argument, but Olson was denied the ability not only to show the jury the content of the pornography—as some pornography may highlight semen or its consistency in graphic detail or description—but also that pornography was on the phone in the first place.

The court precluded Olson from presenting alternative reasons to the jury about the source of M.O.'s age-inappropriate sexual knowledge. Olson should have been allowed to present evidence about two viable alternative sources for M.O.'s sexual knowledge. The court's exclusion of these two categories of alternative source evidence was error. As it was in *Twardoski*. (see ¶¶ 27-28) (exclusion of evidence of prior sexual abuse violated the defendant's constitutional rights when the evidence was relevant to the defense and not merely speculative or unsupported.)

The first alternative source for M.O.'s sexual knowledge was pornography found on C.O.'s phone. C.O.'s phone contained extensive pornographic material, including images depicting semen. (SEALED Appendix F). M.O. admitted using C.O.'s phone to play games, creating a direct factual connection between M.O. and visual sexual material.

(Tr. Trans. 563). This evidence falls squarely within constitutional protection for presenting alternative sources of sexual knowledge. See *LaJoie v. Thompson*, 217 F.3d 663, 673 (9th Cir. 2000).

While both types of excluded evidence were confirmed by Detective Wafstet's investigation, his investigation into C.O.'s phone was extensive. The pornography he located was not "speculative" or "unsupported." Evident from Wafstet's investigation is that large amount of legal adult pornography was found on C.O.'s phone. The court was provided a copy of Detective Wafstet's report at the court's request. (3/20/24 Tr. at 27; SEALED Appendix F.). The file names alone are sufficient to elevate the evidence beyond "speculative" or "unsupported." Yet, Olson was prohibited from even questioning M.O. or Detective Wafstet about the file names or the content of the pornography.

M.O. used C.O.'s phone, yet Olson was precluded from cross-examining her on the extent of her use or what she had seen on the phone because of the court's pretrial rulings. The court's pretrial ruling concluded the evidence was "diminished because this alone would not be

able to provide M.O. with the ability to describe in detail a tactile experience pertaining to semen and an erect penis." (Appendix B at 17). However, this analysis failed to consider the combination of both categories of evidence. The pornographic images showing semen consistency as well as the acknowledged physical contact between siblings could fully explain M.O.'s knowledge.

The second viable alternative for explaining M.O.'s sexual knowledge was evidence about inappropriate contact between her and another "kid" in the Mother/Stepfather's house. During her First Step Interview, M.O. disclosed there had been "touching stuff with another kid" in her house and that her "parents"[3] already aware of that fact. (Sealed Appendix E at 70; see also Dkt. 141 at 2). Courts have repeatedly recognized that evidence of prior sexual contact is admissible when a defense requires demonstrating an alternative source of age-inappropriate sexual knowledge. *See Twardoski; State v. Warren*, 1998 ME 136, ¶¶ 10–13, 711 A.2d 851 (Me. 1998); *People v. Morse*, 231 Mich.

[3] The context of the interview makes clear that it was M.O.'s mother and stepfather who were aware.

App. 424, 430–31, 586 N.W.2d 555 (1998).

At a hearing on the State's Motion *in limine*, the court expressed ignorance as to the details of the touching but had no qualms about excluding the evidence without holding an evidentiary hearing. The State provided the court with a transcript of M.O.'s First Step interview. (3/20/24 Tr. at 31; 3/22/24 Tr. at 25). Despite having the benefit of the transcript, the court repeatedly granted the State's motion to exclude this evidence or allow Olson to cross-examine M.O. or C.O. The basis of that ruling was the rape shield law.

The court's rulings left Olson unable to rebut the State's central theory that M.O.'s sexual knowledge could only be explained by abuse by Olson. The State argued to the jury: "we're left in a position where the only evidence that you're going to have is what that child says" and "if you believe [M.O.], you can convict" (Trial Tr. 966, 970-971).

The law in Montana and virtually everywhere, is clear that when alternative evidence of sexual knowledge is relevant and supported, exclusion violates a defendant's constitutional right to present a defense. The court erred in concluding the proffered evidence lacked

sufficient probative value or was excludable under a rape shield policy.

The State's trial strategy transformed the excluded evidence from merely relevant to constitutionally essential to Olson's defense. The State did not simply present M.O.'s testimony and let it speak for itself. Instead, the prosecution built its entire case around the inference that M.O.'s sexual knowledge could only have come from Olson's abuse. Indeed, the State argued to the jury: "I'm sure the Defense is going to come in and say to you all that there wasn't evidence, that [M.O.'s] statement is the product of a misunderstanding at best, or a prodded fabrication [at] worst, but I think that the evidence surrounding that disclosure really erodes that being the case." (Trial Tr. 971-972). The State then used M.O.'s sexual knowledge to directly undercut any defense arguments: "[S]eeing things on the internet you'd be able to describe what semen looked like, you wouldn't be able to describe what the semen felt like. It's - - this is a nine-year-old . . . it's just not the information type that you would have from going to second, third grade." (Trial Tr. 1010-1011). Again, reasonable jurors could disagree with the State's argument especially if they learned that C.O., who was

also an elementary school student, had adult pornography on his phone. By arguing that M.O.'s knowledge was unique and could only come from Olson's abuse, the State made evidence of alternative sources not merely relevant but constitutionally required for a fair trial. *See e.g., Rolon*, 257 Conn. at 185 (Defendant should have been allowed to present evidence of the victim's prior sexual abuse, where the evidence would have demonstrate an alternative source of the victim's sexual knowledge.); *State v. Johnson*, 1998 MT 107, ¶¶ 21-23, 288 Mont. 513, 958 P.2d 1182 (Where application of the rape shield statute excludes evidence that violates a defendant's constitutional rights, a court must admit the evidence notwithstanding the statute).

The excluded evidence was not peripheral to Olson's defense. It was essential to his ability to rebut the State's trial arguments. It is axiomatic a jury would wonder how a young child like M.O. could testify about such age-inappropriate topics. Olson's defense necessarily relied on providing alternative explanations for M.O.'s sexual knowledge, but the court's evidentiary rulings eliminated his ability to present this defense to the jury. That ruling was error and unconstitutionally

prejudicial to Olson.

II. Unconstitutional Restriction on Cross-Examination

The court's ruling also prevented Olson from conducting constitutionally required cross-examination. Despite M.O.'s testimony that she used C.O.'s phone to play games, Olson was prohibited from exploring whether she had seen pornographic material on the phone. This violated his confrontation rights by preventing him from exposing potential bias or alternative explanations for her testimony.

The constitutional violation became most apparent during the State's closing arguments, which repeatedly used M.O.'s sexual knowledge as proof of guilt while Olson was unable to present evidence that would rebut these inferences. The State's argument that her knowledge was "experiential" and could only come from abuse was devastating to Olson's case precisely because he was prevented from offering alternative explanations or probing M.O. for possible motive or bias, e.g., whether she was accusing Olson as an alternative to the inappropriate touching by C.O.

The evidence excluded by the court would have rebutted the

State's argument that M.O.'s allegations against Olson were credible because she had sexual knowledge that a girl her age would only have obtained from sexual abuse by Olson. This evidence would have provided viable alternatives for the source of sexual and anatomical knowledge and thereby rebutted the State's exhaustive argument that M.O.'s sexual knowledge proved Olson sexually abused her.

The State used this to bolster its case on M.O.'s credibility. In its closing argument, the State argued "we're left in a position where the only evidence that you're going to have is what that child says." (Trial Tr. 966). "I'm sure the Defendant is going to come up here and say this was a he-said-she-said, that you can't convict because there's insufficient evidence. I say if you believe [M.O.], that she came in her and she testified and if you believe her, that's sufficient proof of any fact. You can believe her beyond a reasonable doubt and find guilt." (Trial Tr. 970-971).

The State argued to the jury that it could convict Olson based on what M.O. said. "A 13-year-old-girl came in, sat in that chair right here, and she told you what happened. She told you about the touches,

she demonstrated for a group of strangers how her dad touched her chest, how he rubbed her vaginal area, described his penis, described the consistency of semen – like water with flour. And you heard about a prior one. That's when she was nine." (Trial Tr. 967). The State implored the jury "to rely on the evidence, the statements of [M.O.] and the corroborating facts to find [Brent] guilty." (Id.)

Perhaps most to the point and consistent with the rulings from other jurisdictions referenced above, the State's closing specifically asked the jury to use M.O.'s descriptions to corroborate her story and infer Brent's guilt.

> "Again, [M.O.] described the consistency of semen, that it was like flour mixed with water, like a little bit of a thicker texture or consistence than water. An experiential, tactile, position. And I posit that lends credence to what she was saying. She didn't have the visual impact, she had the experiential impact. And this was under his clothes, right?
>
> Now, some of her answers were short, sure, and she did physical demonstrations as well, motioning her right hand and in a circular motion to discuss those touches. The short answers, she was uncomfortable. She's talking about her dad's semen, about her touching and feeling good, about a horribly traumatic event.

(Trial Tr. 969-970).

Apparently believing the point had not been sufficiently made, the State continued and used M.O.'s sexual knowledge to undercut Brent's trial arguments and his own closing argument.

> I'm sure the Defense is going to come in and say to you all that there wasn't evidence, that [M.O.'s] statement is the product of a misunderstanding at best, or a prodded fabrication [at] worst, but I think that the evidence surrounding that disclosure really erodes that being the case. I think when you look closely and actually analyze what you heard in this trial, that doesn't add up, doesn't make sense.

(Trial Tr. 971-972). Given how the court hampered Brent's ability to rebut or offer the entire contents of M.O.'s disclosure, the State's closing argument was certainly compelling. M.O.'s statement certainly made sense to the jury because the jury did not hear that M.O. and her brother, C.O., had engaged in inappropriate touching and that C.O. had vast amounts of graphic pornography on his phone that M.O. both had access to and used.

Unconstrained by these details, the State's argument continued to rest the entire basis for conviction on the details of M.O.'s story.

> So first I'd like to talk just a little about [M.O.'s] knowledge.

> Now, she's 13 at the time she came in here, she was nine years old at the time of disclosure. Again, I thought it was important, I highlighted it here, but she described the semen. You heard Defense counsel talking about glue mixed with slime, she also described a water and flour consistence. Experiential, a physical feeling. And again, in contrast with it not being visible, she said this happened under the clothes and she was unable to provide what the liquid looked.
>
> Again, I posit that it was consistent with somebody abused, consistent with someone have to put her hands in their father's pants for this type of sexual abuse. He *[sic]* said - - says his penis didn't fit in her hand, but she described the grasping, the circular rubbing.

(Trial Tr. 972).

The State did not change its tune during its rebuttal argument either.

> [S]eeing things on the internet you'd be able to describe what semen looked like, you wouldn't be able to describe what the semen felt like. It's - - this is a nine-year-old . . . it's just not the information type that you would have from going to second, third grade.

(Trial Tr. 1010 - 1011).

> Again, ladies and gentlemen, the testimony of one person whom you believe is sufficient for the proof of any fact. So if you believe Maci, you can convict. And the fact that there was separate testimony to discredit what she said by the Defendant doesn't have to equate to reasonable doubt. If that alone was reasonable doubt there would never be a

> conviction, ever, somebody would just say it didn't happen and that would be that.

(Trial Tr. 1014).

In light of these arguments in closing which, again, were telegraphed to the court by defense counsel before trial even began, this Court's holding in *Johnson* bears repeating: Where application of the rape shield statute excludes evidence that violates a defendant's constitutional rights, a court must admit the evidence notwithstanding the statute. *Johnson*, ¶¶ 21-23. This Court's decision in *Johnson* is not an outlier. As early as 1974, in *Davis v. Alaska*, 415 U.S. 308 (1974), the United States Supreme Court determined a state's procedural rule and statute protecting the privacy of a juvenile's delinquency record had to give way to the superior claim of the Confrontation Clause. Despite recognizing the policy interest in protecting the juvenile's privacy, the *Davis* Court concluded the policy interest "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

In *State v. Budis*, 593 A.2d 784 (N.J. 1991), the trial court applied

New Jersey's rape shield statute to restrict the defendant's ability to cross-examine the nine-year-old victim and police witnesses regarding prior sexual assault on the victim by a person other than the defendant. The defendant sought to cross-examine the victim to explain how a young girl could describe in detail the sexual acts she attributed to the defendant. The New Jersey Supreme Court's decision overruling the lower court's ruling rested almost solely on the need to protect the defendant's right to cross-examination. "[T]he restrictions on defense counsel's cross-examination diluted the connection between the [the victim's] sexual awareness and that [past] abuse." *Id.* at 796. The *Budis* Court also took note of the restriction's effect on jury. The jurors as the "sole judges of credibility, were entitled to know that the defendant may not have been the sole source of [the victim's] sexual knowledge." *Id.* at 796 (internal quotation and citation omitted). The lower court's rape shield ruling "prevented the jury from learning that [the victim's] stepfather, not the defendant, may have been the source of her knowledge of vaginal and oral sex. The jury's determination of defendant's guilt depended on whether it believed his story or [the

victim's]. In that context, we cannot say that the omission of evidence crucial to the credibility of defendant's version was harmless error." *Id.*

The evidence excluded by the court would have rebutted the State's argument that M.O.'s allegations against Olson were credible because she had sexual knowledge that a girl her age would have only from sexual abuse. The evidence would have provided an alternative to Brent for the source of sexual and anatomical knowledge and thereby rebut the State's exhaustive argument that M.O.'s sexual knowledge proved Brent sexually abused her.

It is precisely the type of evidence that must be excepted from application of the rape shield law because it truly does go to the "witness's bias, prejudices, and motives to fabricate. . ." and to rebut the "powerful inference" that the victim's sexual knowledge could only have been the result of" the defendant's abuse. *Colburn*, ¶¶ 48-49 (McKinnon, J., concurring). The constitutional error is at its greatest when the witness is also the accuser. Reversal is necessary.

III. Harmless Error

In Montana, harmless error analysis begins by determining

whether an error is structural or trial error. *State v. Van Kirk*, 2001 MT 184, ¶¶ 37–47, 306 Mont. 215, 32 P.3d 735. Structural error, which affects the framework of the trial itself, is automatically reversible. *Id.*

Trial error, by contrast, occurs during the presentation of the case and may be deemed harmless if the State proves lack of prejudice. To meet this burden, the State must show there is no reasonable possibility that the error—such as admission or exclusion of evidence—contributed to the conviction. *Id.* ¶ 40; *State v. Slavin*, 2004 MT 76, ¶ 22, 320 Mont. 425, 87 P.3d 495. When "claimed error [is] a court ruling which excluded testimony, the State must demonstrate there was no reasonable possibility that the exclusion contributed to the conviction." *Id.*

The State cannot meet this burden here. A major focus of the State's case focused on M.O.'s credibility and sexual knowledge. In its closing argument, the State argued "we're left in a position where the only evidence that you're going to have is what that child says." Trial Tr. 966. The State told the jury: "if you believe [M.O.], that she came in her and she testified and if you believe her, that's sufficient proof of any

fact. You can believe her beyond a reasonable doubt and find guilt." Trial Tr. 970-971.

The State's rebuttal argument made the constitutional error even more apparent: "Again, ladies and gentlemen, the testimony of one person whom you believe is sufficient for the proof of any fact. So if you believe [M.O.], you can convict." Trial Tr. 1014.

Given that the State's case rested entirely on M.O.'s credibility, and the State hammered away at her sexual knowledge as the primary means of establishing that credibility, the exclusion of evidence that could have provided alternative explanations for that knowledge cannot be harmless. The jury was denied the opportunity to consider whether M.O.'s knowledge could have come from sources other than Olson's alleged abuse, making a fair trial impossible. This case should be sent back for a new trial.

In the event the Court considers the court's rulings to be harmless, it should also be noted that the cumulative effect of the errors prejudiced Olson's right to a fair trial. *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289.

Conclusion

The district court's exclusion of evidence regarding alternative sources of M.O.'s sexual knowledge violated Mr. Olson's constitutional rights. The rape shield law cannot be applied to exclude evidence essential to a defendant's defense.

The State's arguments that M.O.'s detailed sexual knowledge could only have come from abuse by her father made evidence of alternative sources constitutionally required. Mr. Olson should have been permitted to present evidence that M.O. had access to pornographic material, what the content of that pornography might indicate, and that she had potentially engaged in inappropriate touching with her brother.

The exclusion was not harmless. The State told the jury that M.O.'s testimony alone was sufficient for conviction, making the jury's inability to consider alternative sources of her knowledge fundamentally unfair.

For these reasons, Mr. Olson respectfully requests that this Court reverse his conviction and remand for a new trial.

DATED THIS 19th day of September, 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 Century 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 WordPerfect software and excluding tables and certificates, is 8,506.

Dated this 19th day of September 2025.

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