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IN THE SUPREME COURT, STATE OF WYOMING

DANIEL IVAN VILLAFANA,	)	
	)	
Appellant	)	
(Defendant),	)	
	)	
vs.	)	
	)	**S-22-0049**
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee	)	
(Plaintiff).	)	

BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

This appeal arises from Mr. Villafana's conviction for two counts of 2nd Degree Sexual Abuse of a Minor, and subsequent *Judgment and Sentence* entered by the District Court for the First Judicial District, Laramie County, Wyoming. *Judgment and Sentence* (November 5, 2021), Court Record at 282-287. This order left no outstanding issues regarding Mr. Villafana's sentence, leaving nothing in the case for further consideration. Therefore, the District Court's order is final and appealable. *See Mitchell v. State,* 2018 WY 110, ¶¶ 20-21, 426 P.3d 830, 836 (Wyo. 2018). Mr. Villafana timely filed his *Notice of Appeal* within thirty (30) days of the order. *See Notice of Appeal* (December 3, 2021), Court Record at 290-297. Therefore, jurisdiction is vested in this Court under Article 5, Section 2 of the Wyoming Constitution and W.R.A.P. 1.04.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred when it refused to hear argument and testimony regarding the victim's sexual history, Mr. Villafana's relationship with the victim, and Mr. Villafana's relationship with the victim's family during sentencing?

II. Whether the District Court erred by sentencing Mr. Villafana to a sentence of 5 to 7 years on each count, to be served consecutively?

III. Whether the District Court violated the Art. 1 § 14 of the Wyoming Constitution when it sentenced Mr. Villafana to a lengthy term of incarceration?

III. STATEMENT OF THE CASE

I. Nature of the case, course of proceedings, and disposition.

In December of 2018, Mr. Villafana voluntarily reported to law enforcement that he had engaged in a sexual relationship with K.K., the underage daughter of his then business partner Mr. Kiledjian. Mr. Villafana, along with K.K. and her parents went down to the police station together to make this initial report. Almost two (2) years later, Mr. Villafana was charged by way of information on September 1, 2020, with seven counts of 2nd degree sexual abuse of a minor.

In June of 2021, a plea agreement was reached between the State and Mr. Villafana. The Change of Plea hearing was set for July 9, 2021. *Order on Scheduling Conference* (July 1, 2021), Court Record at 267-269. Per the plea agreement, Mr. Villafana would plead guilty to Counts I and VII of the information, the State would dismiss counts II-VI at sentencing, and the parties would argue for the sentence they deemed appropriate, with the State in particular arguing for 15-20 years on each count, to run concurrently. *Plea Agreement for Recommended Disposition* (July 2, 2021), Court Record at 270-272.

The sentencing hearing was to take place on October 14, 2021, but ended up requiring an additional day to complete the hearing due to lack of evidence regarding the State's request for over $100,000 in restitution, and was finished on October 25, 2021. *Order Setting Sentencing Hearing* (September 16, 2021), Court Record at 276, *Order Setting Continuation of Sentencing,* (October 18, 2021), Court Record at 280.

The Court sentenced Mr. Villafana to five to seven (5 to 7) years on each count, to run consecutively. The *Judgment and Sentence* was filed on November 5, 2021, from which this appeal is taken. The restitution request was denied, but Mr. Villafana was ordered to reimburse the state for travel costs.

II. Statement of Facts Relevant to Issues Presented for Review

Mr. Villafana joined the Army right after high school, and shortly after was transferred to North Dakota. *Psychosexual Evaluation,* (October 12, 2021) Court Record, Confidential Folder, at p. 5 of 15. While in North Dakota, Mr. Villafana became familiar with the oil field; upon leaving the military, he began working in the oil field industry full time. *Id.* Growing up with humble beginnings, he began making significantly more money in the oil field than he was ever accustomed to seeing. *Id. at pp. 4 and 5.*

Mr. Villafana quickly climbed the ranks in his field, and his career continued to explode. *Id at p. 5.* Through his newfound success, he was able to create his own company, and eventually partnered with two (2) other adult males, one (1) of which is Mr. Kiledjian, the father of the victim K.K. in this matter. *Id.* The partnership caused the men to spend a large amount of time together, and ultimately Mr. Villafana, Mr. Kiledjian, and their other partner became very close, and considered each other more like family than friends. *Id.* Largely due to their newfound financial success, the men constantly traveled for work, and with that travel came a lot of partying, drug use, and promiscuous behavior; this created an even closer bond between them. *Id.*

Through this partnership turned familial relationship, Mr. Villafana was introduced

to K.K. *Id.* Her father would bring her along to party with the adults, and would ask Mr. Villafana to "deal with her" behavior issues because they were closer in age. *Id.* Mr. Kiledjian often asked Mr. Villafana to spend time with K.K., and Mr. Villafana and K.K. grew close over a period of three and a half (3.5) years. *Id.* During this time, Mr. Villafana learned that K.K. had been engaging in sexual relationships with adult males, and that her parents were aware of the relationships. *Id.* During this same time, K.K.'s parents continued to push for her to spend time with Mr. Villafana, often referred to her as his "wife", and joked about her looking old enough to be his wife. *Id.* K.K.'s parents began supplying her with condoms for her sexual encounters, and made inappropriate sexual jokes to Mr. Villafana about K.K. *Id.*

In spite of their knowledge of K.K.'s sexual encounters with other adult men, K.K.'s parents continued to encourage a relationship between Mr. Villafana and K.K. *Id.* K.K.'s parents would drop her off at Mr. Villafana's home late at night after partying, and tell her to stay the night. *Id. at p. 6.*

Ultimately, sometime in 2017, after a night of drinking with Mr. Kiledjian and his wife, Mr. Villafana returned to his home. *Id.* K.K.'s parents then dropped her off at Mr. Villafana's home, and Mr. Villafana, for the first time, engaged in a sexual relationship with K.K. *Id at p. 7.* Mr. Villafana eventually confessed this to Mr. Kiledjian, but the sexual relationship between Mr. Villafana and K.K. continued without objection from her parents. After learning of the sexual relationship, Mr. Kiledjian began using it as leverage to get money from Mr. Villafana. *Id. at p. 6.*

In December of 2018, Mr. Villafana, Mr. and Mrs. Kiledjian, and K.K. all went to the police station together to report to law enforcement that Mr. Villafana and K.K. had engaged in a sexual relationship, and K.K. was pregnant. *See Affidavit of Probable Cause, attached to Unredacted Information* (October 8, 2020), Court Record, Confidential Folder. Mr. Villafana gave a voluntary statement, in which he admitted to his conduct. *Id.* Mr. and Mrs. Kiledjian told law enforcement that they had only recently learned of the sexual relationship between K.K. and Mr. Villafana, and had found out because they caught her sending him messages on her iPad. *Id.*

The day Mr. Villafana confessed in December of 2018, the Kiledjians told law enforcement that they did not wish to pursue any charges, and Mr. Villafana was not arrested or charged until September of 2020, almost two (2) years later. During that two year period, Mr. Kiledjian continued financially pressuring Mr. Villafana; He increasingly asked for more and more financial contributions from Mr. Villafana, and if Mr. Villafana did not comply he would threaten him with legal action for having had intercourse with K.K. *Id.* The trajectory of their relationship affected the business, and their partnership ultimately split up; Mr. Kiledjian attempted to sue Mr. Villafana but had to dismiss the suit because it was meritless. *Psychosexual Evaluation,* (October 12, 2021) Court Record, Confidential Folder, at p. 6 of 15.

Eventually, once Mr. Villafana had stopped payments and it was clear that there was no other method of financial recovery against him, Mr. Kiledjian again pursued the criminal action, resulting in Mr. Villafana's arrest approximately two (2) years after his

initial confession. After two (2) years of making payments to Mr. Kiledjian, Mr. Villafana finally had enough and decided, "I just needed it to end. I turned myself in." *Id.* He turned himself in once he was charged in September of 2020.

In June of 2021, a plea agreement was reached between the State and Mr. Villafana. The Change of Plea hearing was set for July 9, 2021. *Order on Scheduling Conference* (July 1, 2021), Court Record at 267-269. Per the plea agreement, Mr. Villafana would plead guilty to Counts I and VII of the information, the State would dismiss counts II-VI at sentencing, and the parties would argue for the sentence they deemed appropriate, with the State in particular arguing for 15-20 years on each count, to run consecutively. *Plea Agreement for Recommended Disposition* (July 2, 2021), Court Record at 270-272.

The sentencing hearing was to take place on October 14, 2021, but ended up requiring an additional day to complete the hearing due to lack of evidence regarding the State's request for over $100,000 in restitution, and was finished on October 25, 2021. *Order Setting Sentencing Hearing* (September 16, 2021), Court Record at 276, *Order Setting Continuation of Sentencing,* (October 18, 2021), Court Record at 280. The restitution request was denied, but Mr. Villafana was ordered to reimburse the state for travel costs, which he stipulated to.

At both sentencing hearings (hereinafter referred to collectively as the "sentencing hearing"), argument and testimony was presented by both parties as to what an appropriate sentence for Mr. Villafana would be. Mr. Villafana introduced testimony from Dr. Amanda Turlington, a licensed clinical psychologist who performed a

psychosexual evaluation on Mr. Villafana prior to sentencing. *Tr. of Sentencing Hearing,* (October 14, 2021), pp. 14-52. The purpose of the psychosexual evaluation was to "determine current level of risk for sexual offense, treatment amenability, and to place Dan's potential sexual misconduct in the context of his social and psychological history." *Psychosexual Evaluation,* (October 12, 2021) Court Record, Confidential Folder, at p. 3 of 15. The psychosexual evaluation is a comprehensive assessment, making use of numerous tests to reach a conclusion about Mr. Villafana. One test evaluates sexual offending risk. Mr. Villafana was "assessed to be of Level II Risk, otherwise referred to as Below Average Risk with regards to sexual recidivism." *Id.* at 14. He also was assessed as low risk for future violent criminal behavior. *Id.*

Dr. Turlington testified at the sentencing hearing regarding her evaluation of Mr. Villafana. During direct examination by defense counsel, she explained that the purpose of a psychosexual evaluation was to assess "[the individual's] predicted likelihood of engaging in additional sexual misconduct that could produce another victim." *Tr. of Sentencing Hearing,* (October 14, 2021), at 15:16-18. An important part of the psychosexual evaluation is an assessment of whether Mr. Villafana was untruthful or manipulative during the evaluation, and here he was not. *Id,* at 17:22-25-18:1-7. Dr. Turlington testified that Mr. Villafana tested at below average risk for sexual recidivism, and subsequently those types of people "tend to do very well with community supervision. They tend to be very compliant." *Id.* at 19:21-23.

Further, Dr. Turlington testified that Mr. Villafana did not meet any of the criteria

for a diagnosis of pedophilia or a sexual attraction to children under the Diagnostic and Statistical Manual of Mental Disorders – V (from herein DSM-V). *Id.* at 20:6-19. Throughout her testimony, Dr. Turlington reiterated that Mr. Villafana presented at a below average risk for sexual recidivism. *Id.* at 21:15-25, *see generally Tr. Of Sentencing Hearing,* (October 14, 2021).

When addressing proper treatment for Mr. Villafana, Dr. Turlington testified that group therapy *would not* be beneficial to Mr. Villafana. *Id.* at 22:14-19. Group therapy with "like level risk" individuals could be beneficial, but group therapy in an incarcerated setting would not be beneficial, due in large part to exposure to higher risk individuals. *Id.* at 22:20-25-23:1-4.

Dr. Turlington did not have any concerns for Mr. Villafana reoffending if he were to be placed on community supervision. *Id.* at 23:5-10.

On cross-examination, the State attempted to discredit Dr. Turlington's assessment that Mr. Villafana was at below average risk of reoffending. The State raised the issue of Mr. Villafana's acceptance of responsibility, or their perceived lack thereof, as it pertains to his potential for reoffending. Dr. Turlington testified that minimization or deflection of one's own responsibility early on in a case is not indicative of an increased risk for recidivism. *Id.* at 41:24-25-42:1-6. Dr. Turlington further testified that as the case wore on, Mr. Villafana did come to accept responsibility for his actions. *Id.* at 41:20-24.

The State cross-examined Dr. Turlington on her labeling of Mr. Villafana not being "predatory in nature." *Id.* at 47:8-11. Dr. Turlington explained that someone who is

predatory in nature is "an individual who very much plans out situations, sexual victims who have a pattern of more the antisocial console [sic] psychopathology traits and engages those in a way that creates excessive harm." *Id.* at 47:13-16. Dr. Turlington further explained that to be predatory in nature is to go above and beyond what is necessary to complete the crime: "...was there rope burns? Was there punching? Was there something that needed medical attention?" *Id.* at 48:9-11.

On re-direct by the defense, Dr. Turlington expanded on her analysis that group therapy would not benefit Mr. Villafana. Dr. Turlington explained that engaging in group therapy with people who are at higher risk for sexual recidivism was actually likely to make Mr. Villafana more susceptible to future recidivism, and thus increase his risk from where he presently was. *Id.* at 51:17-23.

Mr. Villafana also called Shamar Pigg, the business partner of himself and Mr. Kiledjian. *Id. at p. 52-53: 20-11.* Mr. Pigg attempted to testify regarding his knowledge of the relationship between Mr. Villafana and K.K., the family's knowledge and encouragement of that relationship, and his observations regarding that relationship. The Court refused to allow him to testify regarding these subjects. *Id.* at pp. 54-57: 24-7.

IV. STANDARD OF REVIEW

"Sentencing decisions are within the broad discretion of the sentencing court" and are subsequently reviewed under an abuse of discretion standard. *Mitchell v. State,* ¶ 21, 426 P.3d at 836 (citing *Jones v. State,* 2003 WY 154, ¶ 11, 79 P.3d 1021, 1025 (Wyo. 2003), further citations omitted). To determine whether there has been an abuse of

discretion, this Court must "determine whether the trial court could reasonably conclude as it did and whether any facet of its ruling was arbitrary and capricious." *Id.* (citing *Herrera v. State,* 2003 WY 25, ¶ 10, 64 P.3d 724, 727 (Wyo. 2003)). "A sentence will not be disturbed because of sentencing procedures unless the defendant can show an abuse of discretion, procedural conduct prejudicial to him, and circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Thomas v. State*, 2009 WY 92, ¶ 10, 211 P.3d 509, 512 (Wyo. 2009) (internal citations omitted). "The party who is appealing bears the burden to establish that an error was prejudicial." *Id.*

V. ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO HEAR TESTIMONY REGARDING THE VICTIM'S HISTORY IN THE CONTEXT OF MR. VILLAFANA'S RELATIONSHIP WITH THE VICTIM AND THE VICTIM'S FAMILY DURING SENTENCING.

During the October 14, 2021 sentencing hearing, defense counsel attempted to elicit testimony and make arguments about Mr. Villafana's relationship with the victim's family. These facts would have spoken directly to the sentencing considerations outlined by the Court, namely retribution, rehabilitation, and deterrence. *Tr. of Sentencing Hearing,* (October 14, 2021), at 57:1-2.

Sentencing hearings are not subject to the Wyoming Rules of Evidence in the same sense that trials are. W.R.E. Rule 1101(b). As such, what evidence is or is not heard is subject to the discretion of the sentencing court. The abuse of discretion standard evaluates

"the reasonableness of the trial court's choice." *Griswold v. State,* 2001 WY 14, ¶ 7, 17 P.3d 728, 731 (Wyo. 2001).

As explained in *Herrera v. State,* this Court must evaluate "whether any facet of its ruling was arbitrary or capricious." *Herrera v. State,* supra.

Arbitrary in the context of a judicial decision is defined as "founded on prejudice or preference rather *than on reason or fact.*" Black's Law Dictionary (11th ed. 2019)(emphasis added). The decision in question here is the decision to not allow testimony and argument pertaining to the victim's history in the context of Mr. Villafana's relationship with the victim and her family. The record in this case indicates that this decision was made based on preference than on reason or fact.

The Court opined that the sentencing hearing was about how Mr. Villafana was punished for his crime and how he was to be sentenced for that. *Tr. Of Sentencing Hearing,* (October 14, 2021), at 55:5-10. The Court contended that "blaming the victim, creating a situation in which the victim is looked at as some sort of seductress or an instigator, a child, that's wholly inappropriate and completely out of the context for a sentencing proceeding." *Id.* at 55:10-14. Defense counsel argued conversely that it was important for the Court to hear how this relationship came to be, how it reached the point that it did, and that those serve as mitigating factors. *Id.* at 55:23-25.

By the Court's own admission, the factors it considers are "[r]etribution, rehabilitation, [and] deterrents." *Id.* at 57:1-2. Defense counsel wished to elicit testimony

about Mr. Pigg's[1] "observations about comments the parents made about the relationship with the child....they are mitigating factors, indicate whether or not the family was accepting or condone the relationship prior to it happening." *Id.* at 58:8-15. To refuse to hear arguments that speak directly to those factors is an abuse of discretion, and in particular is arbitrary and capricious.

Mr. Villafana's counsel was attempting to elicit testimony about the relationship between Mr. Villafana, K.K., and the victim's family. Specifically, information that K.K. had previously engaged in sexual relationships with adult males, at least one of which had been prosecuted for the relationship, and that K.K.'s parents had knowledge of that and continued to encourage an inappropriate relationship between her and Mr. Villafana when she was fourteen and he was an adult. Then, once the sexual relationship predictably occurred, her parents used that to extort hundreds of thousands of dollars from Mr. Villafana. Additionally, K.K. was committed to a mental health facility, and her parents, without his consent, listed Mr. Villafana as one of the three (3) people that K.K. could call. This type of manipulative and inappropriate conditioning created the perfect storm for Mr. Villafana to commit this crime.

Despite the Court's position on this as "victim blaming," the information regarding K.K.'s sexual history was never being offered to paint her as having any fault in the matter, or to blame her for what happened to her. The point was never her "promiscuity," rather

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1 Mr. Pigg was a business partner of Mr. Villafana and Mr. Kiledjian and was familiar with the relationship that Mr. Villafana had with the Kiledjian family.

her known vulnerability that was exploited by her parents for financial gain. As stated numerous times by defense counsel, K.K. was unquestionably a victim and carried no fault. The information was offered solely because Defense counsel believes it is relevant to the context of how this situation with Mr. Villafana occurred, which is directly relevant to determining what threat he may pose to society, and his propensity to reoffend.

The fact that K.K.'s parents knew of her vulnerability, yet continued to refer to her as Mr. Villafana's wife, make crude sexual jokes about them, and drop their young teenage daughter off at his home late at night, especially when he had been out drinking heavily with them beforehand, provides context as to how this particular offense occurred. K.K.'s family knew of her vulnerability, and continued to put her at risk by placing her in situations that were likely to result in this outcome. The point of the information is not that K.K. is to blame, but that she has been greatly victimized by all of the adults in her life, and as a result of their behavior this relationship with Mr. Villafana was normalized, encouraged, and sometimes even forced. Then, even worse, the relationship was exploited for financial gain. This is directly relevant to understanding how and why Mr. Villafana committed this crime, which is important to understand to properly determine what is appropriate retribution, rehabilitation, etc.

The information was not offered as a defense or an excuse for Mr. Villafana's conduct, but rather as an explanation as to how an adult male, with no sexual attraction to children and who was not deemed to have predatory behaviors by a psychologist, could find himself in a sexual relationship with a teenager. This information, when used in

context with Dr. Turlington's report, makes it clear how this unique situation resulted in this outcome, and how despite his actions in this matter that Mr. Villafana is not a threat to the greater society, and is below average risk for reoffending. The uniqueness of this situation speaks directly to the likelihood of whether Mr. Villafana would commit such a crime again, which is imperative to sentencing considerations.

The Court additionally refused to hear testimony regarding extortion payments that Mr. Villafana made to K.K.'s family, once it was discovered that KK was pregnant. The Court stated that such testimony was "not material to the considerations the Court must focus on. Retribution, rehabilitation, deterrents, those are the things the Court focuses on." See Tr. of Sentencing Hearing, (October 14, 2021) at 56:24-25-57:1-2. The extortion payments in question were a series of payments, amounting to hundreds of thousands of dollars in total, that Mr. Villafana made to K.K.'s family. See Tr. of Sentencing Hearing, (October 25, 2021), generally. This further provides context as to the motives behind why K.K.'s parents forced and encouraged this relationship between an adult and their child, and then used it for financial gain once it occurred. Again, this is not an excuse, but it is an explanation as to how Mr. Villafana found himself in this specific situation.

Understanding the victim's family's perspective on this matter is important to properly evaluating the level of retribution required, and in particular the level of rehabilitation required. As Dr. Turlington testified, Mr. Villafana is at below average risk for recidivism. When combined with the family's perspective during the relationship, it would become clear to the Court that rehabilitation is not something that is required here.

The same can be said for the factor of deterrents. Had the Court heard about the family's encouragement of the relationship, when combined with Dr. Turlington's testimony, it would have become clear to the Court that deterrents were not needed in this specific case.

In refusing to allow testimony and arguments pertaining to Mr. Villafana's relationship with KK's family and how KK's family viewed the relationship, the Court was showing preference in its decision, rather than making a decision based on reason or fact. The Court's preference was to not hear arguments and testimony about so-called victim blaming, when in reality the arguments and testimony spoke to the sentencing considerations of rehabilitation and deterrents. This evidences that the decision was not based in reason or fact and subsequently was arbitrary.

This decision was also capricious. Black's Law defines capricious as "contrary to the evidence or *established rules of law.*" Black's Law Dictionary (11th ed. 2019)(emphasis added). It is a clearly established rule of law that "[a]t the sentencing hearing, the court shall afford the counsel for the defendant…an opportunity to comment…on other matters relating to the appropriate sentence." W.R.Cr.P. Rule 32(c)(1). To not allow defense counsel to comment on matters relating to the appropriate sentence is plainly contrary to the established rules of law and is subsequently capricious. Further, to so strictly limit defense counsel's ability to argue relevant mitigating factors offends the sense of public fair play as outlined in *Thomas v. State, supra* at p. 11.

The Court's decision to not allow arguments and testimony pertaining to Mr.

Villafana's relationship with the victim's family and the family's perspective on the relationship was both arbitrary and capricious, and was an abuse of discretion. *Herrera v. State,* supra at p. 17.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. VILLAFANA TO SERVE 5-7 YEARS ON EACH COUNT, TO BE SERVED CONSECUTIVELY.

The District Court sentenced Mr. Villafana to serve five to seven (5-7) years on each of the two (2) counts that he plead guilty to, to be served consecutively. *Judgment and Sentence* (November 5, 2021), Court Record at 282-287. While such a sentence is permissible under Wyo. Stat. Ann. § 6-2-315(b), this case deals with a particularly unique situation in which the imposition of a lengthy term of incarceration results in an abuse of discretion.

As iterated previously, this situation was particularly unique. While testimony on the matter is scant due to the Court's refusal to hear it, Mr. Villafana had a close relationship with Mr. Kiledjian, KK's father. It was from this relationship that Mr. Villafana's relationship with KK developed. Mr. Kiledjian knew about the relationship and encouraged it, at least until KK became pregnant. What we are not dealing with is some form of an online predator, who met a young girl through a chat room or a forum, and convinced her to meet him at a given location where he would eventually rape her. That situation is spotlighted by Hollywood and told about in schools throughout the country. That situation is not what we have here.

As Dr. Turlington testified, Mr. Villafana is not a man that is predatory in nature.

He did not go above and beyond what was necessary for the completion of the crime. What exists here is really an unfortunate situation, where a father encouraged an illicit and inappropriate relationship between his daughter and a business partner, that he then exploited for financial gain. Mr. Villafana is not innocent, and absolutely should never have allowed himself to get so deep into such an unfortunate situation. However, he has accepted responsibility for his crimes. He voluntarily confessed and plead guilty; He has no other criminal history, and remained without incident while on bond. In light of all the facts of this specific case, the imposed punishment does not fit the criminal behavior.

A non-violent, non-predatory defendant being sentenced to two consecutive terms of 5-7 years is a sentence that is unreasonable, arbitrary and capricious, and an abuse of discretion. At sentencing, defense counsel argued for a sentence of 10 years of probation for each count, to run concurrently. *Tr. Of Sentencing Hearing* (October 25, 2021), at 94:4-6. Counsel argued much the same of what has been stated here, that this situation in its entirety is unique. Mr. Villafana "did not put himself close to a child or tried to get close to a child to groom [them]." *Id.* at 88:21-24. Dr. Turlington did not diagnose Mr. Villafana because there was no appropriate diagnoses, he is not a pedophile. *Id.* at 89:8-11. Dr. Turlington testified that Mr. Villafana would do better in individual therapy, could actually end up in a worse mental state in group therapy, and was a good candidate for community supervision. *Id.* at 90:1-4.

Arbitrary, meaning based on preference or prejudice rather than on reason or fact, and capricious, meaning contrary to the evidence. The lengthy term of incarceration

imposed on Mr. Villafana is both arbitrary and capricious. Applying reason to this case shows that community supervision and individual therapy would have been appropriate for Mr. Villafana, and actually proportionate to his crime. The evidence itself shows that a sentence of probation would have been appropriate, as testified to by Dr. Turlington, and in the interest of societal good because it would have allowed Mr. Villafana to remain low risk. Mr. Villafana's sentence ignored the science and opinion of a licensed clinical psychologist, and as such, the sentence that was imposed was an abuse of discretion.

III. THE DISTRICT COURT VIOLATED ARTICLE 1 § 14 OF THE WYOMING CONSTITUTION WHEN IT SENTENCED MR. VILLAFANA TO PRISON IN CONTRAVENTION TO THE RECOMMENDATIONS OF DR. TURLINGTON.

a. Standard of Review

"A sentence is illegal when it exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law." *Mitchell v. State,* ¶ 21, 426 P.3d at 836 (citing *Palmer v. State,* 2016 WY 46, ¶ 9, 371 P.3d 156, 158 (Wyo. 2016)). "Whether a sentence is illegal is a question of law, which [this Court] reviews *de novo.*" *Id.* (citing *Manes v. State,* 2007 WY 6, ¶ 7, 150 P.3d 179, 181 (Wyo. 2007)).

b. This call for independent state constitutional analysis is properly before this Court.

The Wyoming Supreme Court has previously laid out an approach for raising an independent state constitutional analysis claim, commonly referred to as the "*Saldana* factors." *See Saldana v. State,* 846 P.2d 604 (Wyo. 1993); *see also Sheesley v. State,* 2019

WY 32, 437 P.3d 830 (Wyo. 2019) (referring to the factors as *Saldana* factors).

In *Sheesley,* the Court listed six "non-exclusive" factors that serve as relevant criteria in determining whether the Wyoming Constitution provides broader rights than the Federal Constitution. *Sheesley,* ¶ 15 (citing *Saldana,* 846 P.2d at 622 (Golden, J., concurring)). The factors are: "(1) the textual language; (2) the differences in the texts; (3) constitutional history; (4) pre-existing state law; (5) structural difference; and (6) matters of particular state or local concern." *Id.*

"[I]t" is *usually* essential to raise state constitutional claims in the lower court to warrant our review on appeal." *Sheesley,* ¶ 6, 437 P.3d at 838, n.6 (emphasis added). It is not essential to raise state constitutional claims in the lower court when "issues are of such a fundamental nature as to allow us to consider them for the first time on appeal…" *Crofts v. State ex rel. Dept. of Game and Fish,* 2016 WY 4, ¶ 23, 367 P.3d 619, 624 (Wyo. 2016). As to what actually is a question of fundamental nature, "our case law does not define with precision what issues are of 'such a fundamental nature that they must be considered.'" *Id.* (citing *Byrd. v. Mahaffey,* 2003 WY 137, ¶¶ 10-11, 78 P.3d 671, 674 (Wyo. 2003)). Here, we are dealing with a criminal punishment that subjects Mr. Villafana to a group setting that will actually increase his likelihood of sexual offense recidivism. Such a punishment borders on psychological torture and creates a risk of severe mental injury. As such, this creates a question of such fundamental nature that this Court should consider Wyoming constitutional issues on appeal.

c. The District Court's Sentence Violates the "Cruel or Unusual Punishment"

Clause of Art. I, § 14 of the Wyoming Constitution.

Wyoming Constitution Article I § 14 reads "...nor shall cruel or unusual punishment be inflicted." Wyo. Const. Art. I. § 14. This plain language is more expansive than that of the Eighth Amendment to the United States Constitution, which requires that punishment be cruel *and* unusual in order for said punishment to be unconstitutional. U.S. Const. Amend. 8. The Wyoming constitution only requires that it be cruel *or* unusual.

Cruel and unusual punishment is a somewhat vague term, but Wyoming has taken it to mean punishment that is "so out of proportion to the offense as to shock the moral sense of the people." *Fisher v. McDaniel,* 9 Wyo. 457, 64 P. 1056, 1061 (Wyo. 1901). Another interpretation, adopted from the South Dakota Supreme Court by the *Fisher* Court, states that the punishment must be "so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally." *Id.* (citing *State v. Becker,* 3 S.D. 29, 51 N.W. 1018, 1022). The *Fisher* Court further opined in dicta that "[i]t may be said to be fairly well settled that constitutional provisions as to cruel and unusual punishments are *aimed more at the form or character of the punishment*, rather than its severity in respect to duration or amount." *Id.* at 1061 (emphasis added).

As for Mr. Villafana's sentence itself, two five to seven (5-7) year sentences to be served consecutively, it likely passes constitutional muster. It is the consequences of the sentence, the character of the punishment, for an individual with a below average risk of reoffending that "shock the moral sense of the people." Per Dr. Turlington's testimony, group therapy with higher risk individuals would make Mr. Villafana more susceptible to

future recidivism than if he were to participate in individual therapy and supervised probation. *Tr. of Sentencing Hearing* (October 14, 2021), 51:17-23. In a prison environment, Mr. Villafana will be surrounded by individuals that are at a higher than average risk of future recidivism. As a function of this, Mr. Villafana himself will go from a below average risk individual to an increased risk individual.

To subject an individual to an environment that doctors can attest will fundamentally make the individual more likely to commit crimes is akin to torture. Sentences of torture have long been illegal in the United States. *See generally Wilkerson v. State of Utah,* 99 U.S. 130, 136 (1878). Torture is defined as "the infliction of intense pain to the body or *mind* to punish..." Black's Law Dictionary (11th ed. 2019). While the psychological pain inflicted on Mr. Villafana would occur over years, the intensity of it results in a fundamentally changed person at the subconscious level. As a result of being sentenced to a term of imprisonment, Mr. Villafana will be subject to an environment that, according to Dr. Turlington, will fundamentally change who he is and increase his risk for sexual offense recidivism. It will take someone who is presently not a pedophile or predator, and put them at risk of becoming one simply by forcing them into harmful and detrimental treatment. Not only is that unconstitutional, it also against the interests of society at large. Society wants to reduce the likelihood of a given sexual offense occurring, not make individuals more likely to commit another offense.

As it stands, Mr. Villafana will go from a <u>below average</u> risk individual, to someone with an <u>increased risk</u> for sexual violence, who will then be released back into the public

in ten to fourteen (10-14) years. We have done society a great disservice if we are willing to take a below average risk person, put them in prison only to increase their risk of sexual violence, and then release them back into society. Surely that cannot be in the interest of justice.

This Court should find that under Wyoming Constitution Article I, Section 14, that the term of imprisonment imposed on Mr. Villafana constitutes cruel and unusual punishment, and is subsequently unconstitutional.

VI. CONCLUSION

For the foregoing reasons, Mr. Villafana respectfully requests that this Court remand this case back to the District Court for a new sentence that falls in line with the recommendation made by Dr. Turlington and the arguments made by defense counsel. Alternatively, counsel respectfully requests that this Court modify Mr. Villafana's imposed incarceration from five to seven (5 to 7) years consecutive, to five to seven (5 to 7) years concurrent.

RESPECTFULLY SUBMITTED, this 18th day of April, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 18th day of April, 2022, a true and correct copy of the foregoing was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System (CTEF), addressed as follows:

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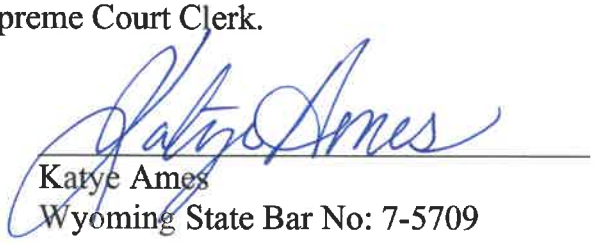
The original paper copy plus six copies of *Brief of Appellee* were sent to the Wyoming Supreme Court by hand delivery this 18th day of April, 2022.

I have accepted the terms for e-filing and hereby certify the foregoing document, as submitted in electronic form, is an exact copy of the written document filed with the Wyoming Supreme Court Clerk and has been scanned for viruses and is free of viruses. Additionally, I certify all required privacy redactions have been made and, with the exception of any required redactions, this document is an exact copy of the written document filed with the Wyoming Supreme Court Clerk.



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Appendix A

Judgment and Sentence

Appendix B

Statement of Costs

Pursuant to Rules 7.01 and 10.01 Appellant hereby notifies the Court that it has incurred costs for the original transcript of the evidence in the amount of $223.75. Appellant has incurred no docket fees. Undersigned Counsel hereby certifies that payment has been issued for the cost of the original transcript.

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