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STATE OF MONTANA
Case Number: DA 18-0187

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0187

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WESLEY SMITH,

Defendant and Appellant.

BRIEF OF APPELLANT

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

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STATEMENT OF THE ISSUES

1. Did the District Court incorrectly interpret Mont. R. Evid. 801(d)(1)(B) and abuse its discretion by admitting a taped forensic interview of E.G. into evidence as a prior consistent statement?

2. Was Wesley Smith's right to a fair trial violated by prosecutorial misconduct?

3. Is Mont. Code Ann. § 45-5-625(4)(b), which requires supervision by the Department of Corrections and continuous satellite-based monitoring "for the remainder of the offender's life" after prison, facially unconstitutional under the 4th, 8th and 14th amendments to the United States Constitution and Article II, Sections 10, 11, 22, and 28 of the Montana Constitution?

STATEMENT OF THE CASE

Wesley John Smith was charged by Information with Sexual Abuse of Children, a felony, in violation of Mont. Code Ann. § 45-5-625. (D.C. Docs. 3 (Information), 35 (Amended Information), 48 (Second Amended Information).) The State alleged Mr. Smith knowingly made his stepdaughter E.G., age 9, dance on a pole in her underwear. At the final pretrial conference, the prosecutor advised the District Court and

defense counsel that the State would *not* introduce a video of E.G.'s forensic interview at trial. (Tr. at 59 (Final Pretrial Conference, 06/15/2017).)

A three-day jury trial occurred on June 19 – 20 and 22, 2017. (D.C. Docs. 59 (Minutes), 61 (Minutes), 68 (Minutes); Tr. at 83 – 379 (Day One), 380 – 520 (Day Two), 521 – 654 (Day Three).) E.G. testified at the end of the first day of trial. (Tr. at 343 – 75.) The remaining State witnesses testified on the second day of trial; over objection from the defense, the State was permitted to play a redacted version of E.G.'s forensic interview for the jury on the morning of the third day of trial. (Tr. at 480 – 520 (Day Two, argument and bench ruling), 524 – 27 (Day Three, bench conference prior to trial resuming and playing video for jury); D.C. Docs. 62 – 66 (parties' briefing) and 67 (Order Denying Defendant's Motion to Exclude Video Evidence), attached hereto as App. A.) Mr. Smith testified in his own defense immediately after the jury watched the video of E.G.'s forensic interview.

After more than five hours of deliberation, including several written questions to the District Court, the jury found Mr. Smith guilty of sexual abuse of a child. (D.C. Doc. 69 (Verdict); Tr. at 631 – 48.)

At sentencing[1], the District Court imposed a 100-year sentence to the Montana State Prison ("MSP") with all but 20 years suspended and designated Mr. Smith a Level I sexual offender with a low risk of re-offending. (Sent. Tr. at 678, 682 – 83, and 688, attached hereto as App. B.) The District Court sentenced Mr. Smith under Mont. Code Ann. § 45-5-625 (2015)[2], and found him eligible for the exception to the 25-year mandatory minimum term of imprisonment pursuant to Mont. Code Ann. § 46-18-222(6). (App. B at 678 – 83.) The District Court did not impose a parole restriction on Mr. Smith. (App. B at 683 – 84.) One of the conditions of Mr. Smith's sentence following his release from prison requires supervision by the Department of Corrections for the remainder of his life and continuous satellite-based monitoring as provided in Mont. Code Ann. § 46-23-1010, pursuant to Mont. Code Ann. § 45-5-625(4)(b). (App. B at 686 – 87; D.C. Doc. 58 at 9, ¶ 39

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[1] During this same hearing, the District Court also sentenced Mr. Smith in Cause No. DC-17-332, the docket containing four severed counts. (Tr. at 685 – 86.) Mr. Smith did not appeal the judgment in DC-17-332.

[2] All citations herein to the Montana Code Annotated are to the 2015 version, unless otherwise indicated. *State v. Tracy*, 2005 MT 128, ¶ 16, 327 Mont. 220, 113 P.3d 297; *State v. Tirey*, 2010 MT 283A, ¶ 26, 358 Mont. 510, 515, 247 P.3d 701, 704, *as amended on reh'g* (2011).

(Judgment), attached hereto as App. C.) The written judgment conforms with the oral pronouncement of sentence.

Mr. Smith timely appealed.

STATEMENT OF THE FACTS

On January 17, 2016, Wes Smith and his family were preparing to go to Westside Lanes in Missoula to watch the Denver Broncos play the Pittsburgh Steelers in a playoff game. Katie Graves, Wes's wife, was a pretty big Broncos fan. She decided to go ahead to the bowling alley to meet up with her brother who was already there so she would not miss the start of the game. Wes stayed behind to get their children – E.G. (age 9) and three boys (ages 7, 4, and 2) – dressed and ready to leave. It was a Sunday afternoon and the boys were still in their pajamas. (Tr. at 532 – 35.)

Twenty-five minutes after Katie left the house, Wes and the kids joined her and her brother at Westside Lanes. (Tr. at 548.) What happened during those 25 minutes is at the heart of this case.

Wes and Katie were in the middle of a contentious divorce. They had met in about June 2007, when Katie's daughter from another relationship, E.G., was one year old, and married the following year.

They decided as a couple to tell E.G. that Wes was her father. E.G.'s biological father was in prison. (Tr. at 415 – 17.) E.G. called Wes "Dad" because she thought he was her dad. (Tr. at 345.) The day prior to dancing on the pole Katie dropped a bombshell on E.G., telling her that Wes was not her father and who her actual biological father was. (Tr. at 366 – 67, 447.)

While the divorce case was pending, Katie and the kids found a house with Katie's friend Charity Diamond and her two kids. Charity and Katie were both exotic dancers at Fred's Lounge in Missoula. The house had a stripper pole in Charity's bedroom that Katie gave Charity as a birthday present. The six children and their friends played on the pole. Katie and Charity also gave pole-dancing lessons to adults in their home. (Tr. at 422 – 25.)

Even though Katie and Wes had a somewhat acrimonious relationship, Katie let Wes sleep overnight with her sometimes if he needed a place to stay. (Tr. at 419.) After he was evicted from his rental home in late December 2015, Wes started staying with Katie a couple nights a week. His other options were to stay in his truck or at his office at work. He did not have his own residence at the time and

his plan was to go to Oregon to be with his grandparents after he paid his taxes in January. (Tr. at 529 – 30.)

On the day of the playoff game, Charity and her two kids were not at home. (Tr. at 543, 545.) According to E.G.'s trial testimony, which differed from earlier accounts, Wes came into her bedroom about five or ten minutes after her mom left while she was lying on her bed watching YouTube videos on her computer wearing her headphones. E.G. claimed that Wes snapped her earphones on her head to get her attention and then directed her to go into Charity's room, undress down to her bra and underwear, and dance around the stripper pole for about five minutes while he watched. Wes supposedly said that he would pay E.G. $20 if she did it. When E.G. said she did not want to, Wes allegedly said "Just do it" in a "mean, harsh" voice and told her it was okay because her mom danced on the pole, too. E.G. stated she felt "uncomfortable" and "scared". (Tr. at 350 – 53.)

While E.G. spun around the pole, E.G. stated that Wes watched her, wearing only his underwear, with his hands in the air pressing his thumb and fingers together and biting his lip as his penis was getting bigger and he was telling her to go faster and faster. E.G. denied that

Wes ever touched her body. She said that after a while Wes told her she could stop and said “thank you”, he “appreciated it”, and “it helped a lot”. E.G. stated she then grabbed her clothes and ran back to her room across the hall. Wes came in and gave her $20. Then E.G. said they all went to the bowling alley. (Tr. at 354 – 58.)

Wes’s testimony refuted E.G.’s multiple versions about the pole dancing. Wes explained that after Katie left, he needed to get the three little boys dressed and to make sure E.G. got ready to go. The boys’ bedroom was downstairs and E.G.’s, Katie’s, and Charity’s bedrooms were upstairs. Wes began downstairs with the boys to pick out their clothes and start getting them dressed. When Wes went upstairs to check on E.G., he found her on her computer with her earbuds in and not paying attention. Wes pulled her earbuds and told her she needed to get ready to go. He went back downstairs to check on the boys’ progress. (Tr. at 533 – 36.)

After Wes got the boys dressed, he returned back upstairs to get dressed. Wes was wearing some sweatpants and a t-shirt. As Wes was heading to Katie’s room to get his clothes, he saw E.G. in Charity’s room dancing on the pole. Wes explained how E.G. was dancing, “You know,

little kids, they don't exotic dance. They just spin around, climb on it, do whatever moves that she had come up with. And she had her own moves that she liked to do, so she would practice her own moves." (Tr. at 538.) For a second time, Wes told E.G. that she needed to be getting ready. She was wearing the same dirty sweater that she had worn for three days and shorts instead of pants. (Tr. at 537 – 38.)

Wes grabbed his clothes from Katie's room and headed toward the bathroom. For a third time, he stopped at the door of Charity's room and told E.G. to get ready. While he was walking and talking, Wes was stepping out of his sweatpants and into his other pants. He finished changing his pants while he was in the doorway to Charity's room talking to E.G. (Tr. at 539 – 41.)

For the fourth and final time, Wes asked E.G. to change out of her dirty sweater. E.G. took off the sweater and threw it on the floor. She was defiant and upset about changing out of it because it was her favorite. Wes gave in and said she could wear it. (Tr. at 542.) E.G. put the sweater back on and Wes went downstairs to "finish putting the boys together, and we sit and wait." (Tr. at 545 – 46.) When Wes went back upstairs to check on E.G., he saw she had gotten her clothes on,

told her she did a good job, and said they all could go now. Wes and the kids piled in the car and went down to Westside Lanes to join Katie and her brother. (Tr. at 546.) As noted, this business took about 25 minutes. (Tr. at 548.)

On the next day, Martin Luther King Jr. Day, E.G. told her friend M.H., who was 13, about dancing on the pole. (Tr. at 333, 359.) But this version was different than the one E.G. related at trial. E.G. told M.H. that Wes was playing with himself while he watched her spin on the pole. (Tr. at 359 – 60, 373.) About two months prior to E.G.'s story, M.H. had been a victim of sexual abuse and had disclosed the abuse to E.G.[3] (Tr. at 472 – 73, 475 – 77.)

Then on Tuesday, the first day back at school after the long weekend, E.G. also told her school counselor about dancing on the pole. This version was different yet, because E.G. told the counselor that Wes and her brothers were in the room watching her dance on the pole. The counselor notified the authorities and called Katie to pick up E.G. from school. (Tr. at 399 – 404.)

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[3] Pretrial briefing indicates that M.H.'s disclosure to E.G. about her abuse was made prior to E.G.'s claims at issue herein. (Tr. at 46 – 54, 69 – 74; D.C. Docs. 54, 55, 58.)

E.G. Testimony and the Forensic Interview Video

E.G. admitted that she gave three different stories about dancing on the pole to, respectively, her friend M.H., the school counselor, and the forensic interviewer. (Tr. at 373 – 74.) The version of the story that E.G. told the interviewer was consistent with E.G.'s trial testimony. (Tr. at 481 – 85; St. Exh. 7 (unredacted interview video), 7A (redacted interview video.)

The forensic interviewer, Jane Hammett, testified that she interviewed E.G. on January 26, 2016, nine days after the pole dancing. (Tr. at 456 – 60.) The record does not indicate that E.G. stayed anywhere besides home with her mom after the school reported the alleged abuse. Ms. Hammett described E.G. as, "Very articulate. My impression of E.G. is that's [sic] she's very smart. She was very articulate, well spoken, and very detail-oriented." (Tr. at 458.) When asked her impression of E.G.'s maturity level, Ms. Hammett responded, "Very mature." (Tr. at 459.)

Over hearsay objection from the defense, the prosecutor was permitted to ask Ms. Hammett what E.G. told her about the pole dancing. Ms. Hammett testified:

> A. She told me that he had come into her room and had asked her to go into Charity Diamond's room, and to remove her clothing and to dance with a pole.
>
> Q. (BY MS. PABST) In a sexual way?
>
> A. Correct.

(Tr. at 458.) Ms. Hammond testified further that E.G. stated she was scared and crying while dancing. (Tr. at 459.) E.G. did not tell Ms. Hammond that Wes was playing with himself or touching his penis while she danced, but did tell her that her brothers were downstairs watching the Powderpuff Girls, not in the room watching her dance around the pole. (Tr. at 461 – 62.) At the end of Ms. Hammett's testimony, the judge stated that she was not excusing Ms. Hammett as a witness "because there may be a need for further testimony." (Tr. at 463.)

When the trial recessed for lunch and the jury exited the courtroom, the prosecutor announced her intent to introduce the forensic interview video, contrary to her pretrial representations. She asserted various reasons to support its admissibility:

> MS. PABST: . . . We're offering the video for a couple of different reasons. The defense's main theme in their case is that [E.G.]

> made this up. . . I think it's really important for the jury to see her demeanor, particularly given the fact that this event happened so long ago and that she's had to retell it so many times. . . .
>
> I also think it's admissible as a prior consistent statement for a witness who they've pointed out the inconsistencies. That's been sort of a sub – secondary theme of theirs is these – the inconsistencies in her statement. So it would be a prior consistent statement to what she's testified to here in court. . . .

(Tr. at 481 – 82.) The judge indicated that she would review the rules and make a determination that afternoon as to the video's admissibility. (Tr. at 485.)

In the interim, the judge permitted the prosecutor to allow Ms. Hammett to provide a foundation for the redacted video outside the presence of the jury. (Tr. at 486.) Ms. Hammett testified that the video captures E.G.'s "demeanor", which would be helpful to the jury in determining E.G.'s credibility in addition to her words. (Tr. at 488 – 89.) Ms. Hammett conceded that she had not reviewed the redacted video the State proposed to show the jury and when asked by defense counsel if she knew what had been cut out, responded, "I have no idea." (Tr. at 490.)

During the lunch break, counsel submitted briefs in support of their respective positions concerning the admissibility of the redacted video. (D.C. Docs. 62, 63.) Upon reconvening after lunch, outside the presence of the jury, the District Court ruled orally:

> All right. So my review of the rule [801] and the case law, I am going to allow its admission under 801(d), sub 1, B. . . .
>
> . . .
>
> . . . I do find that there has been sufficient allegation [by the defense], so it will be offered to rebut an express or implied charge against the declarant, [E.G.], of subsequent fabrication, improper influence or motive.
>
> . . . I do believe that given the concerns, references to her learning about this report from [M.H.] and being influenced or having an improper motive, that there is sufficient evidence in the record to show that it's being offered to rebut the express or implied charge.
>
> . . .
>
> . . . I find that, I guess, it's consistent with [the prosecutor's] view that they [the jury] should have an opportunity to see her candor and to assess what she says; that you're not offering it for the proof of the matter asserted pursuant to 801, sub C.

(Tr. at 497 – 99.)

After the ruling, defense counsel objected that the prosecutor had failed to identify which prior consistent statements in the video the State wished to play to rebut the specific instances the State claimed the defense called into question during its cross-examination of E.G. (Tr. at 500.) The District Court responded, "I don't believe that the [Montana Supreme] Court has required the State to specifically say which are consistent or inconsistent. I'm happy to try to review that more carefully." (Tr. at 500.)

Relying on the best-evidence rule, defense counsel argued that the prosecutor was trying to bolster witness testimony with consistent evidence that did not meet the exception to the hearsay prohibition in Mont. R. Evid. 801(d)(1)(B):

> To put on the video evidence is, then, bolstering their story and just adding to it, giving them the opportunity to testify again to information that's already before the Court. . . . Those people were available to testify. They have, in fact, testified before the Court today.

(Tr. at 506 – 07.) Following this interchange, the District Court reaffirmed its ruling that the video was admissible. (Tr. at 507 – 08.) (Tr. at 510.)

No trial was scheduled for the next day. The defense took advantage of the hiatus to prepare and file a motion to reconsider the District Court's ruling to admit the redacted video. (D.C. Docs. 64, 65, 66.) Before trial reconvened, the District Court issued an Order Denying Defendant's Motion to Exclude Video Evidence. (App. A.)

In the order, the District Court rejected the State's argument that it was not offering the video for the truth of E.G.'s statements. (App. A at 4.) The District Court determined, however, the defense "waffled" on whether E.G.'s statements in the video were consistent or inconsistent with her trial testimony. (App. A at 5.) Thus, the District Court ruled:

> The State's written response to the objection asserts that it is offering the Video to rebut the defense theory that the alleged victim is not reliable and/or candid. **While this is not perfectly in line with the "improper influence or motive" language of the Rule, it is similar enough for the Court's satisfaction**. Therefore, pursuant to Rule 801(d)(1)(B), the Video is not hearsay and thus is not considered hearsay and is admissible. At trial, the Court further advised the parties of its review of several Montana Supreme Court decisions that supported this result. *See State v. Baker*, 2013 MT 113, 370 Mont. 43; *State v. Mederos*, 2013 MT 318, 372 Mont. 325.
>
> Defendant's motion to reconsider makes the new argument that the word "subsequent" in the

> Rule requires that the improper influence or motive arise after the Video was completed. Here, the Defense maintains that the Video [sic] after EG's initial disclosures and thus is not admissible under Rule 801(d)(1)(B). The Court disagrees on the plain language of the rule; "subsequent" does not modify "improper influence" or "motive," but only modifies "fabrication."

(App. A at 6 (emphasis added, citation format corrected.)

After the jury entered the courtroom on the morning of the third and final day of trial, the prosecutor played the redacted video to the jury and rested the State's case. (Tr. at 526 – 27.)

The State's Closing Argument

During closing argument, the prosecutor drew the jury's attention to bolstering statements within E.G.'s video:

> MS. PABST: . . . It was pretty clear that [E.G.]'s account of what happened was not rehearsed; that it wasn't exaggerated. I was noticing, and I would hope that you would take notice of all the times in that video –
>
> MS. BURBRIDGE: Objection, Your Honor. She is attempting to bolster her case by commenting upon the consistency of the statements, which was not the reason that it was admitted and should be disallowed.

MS. PABST: I'm talking about indicators that are important when determining whether or not a statement is valid that were – the very reason we asked that the video be played.

MS. BURBRIDGE: And if I could just clarify that that was not the reason that the Court admitted it, and actually held that the State's reason for admitting the video was not valid.

THE COURT: So, Ms. Pabst, I'll allow you to continue in light of the objection. Please be certain not to comment on, I guess, the evidence to the extent that you're re-bolstering those things, but to remind the jury what they can consider when they're deliberating.

MS. PABST: Thank you.

There were several times in there where [E.G.] would correct the – the questioner and make sure they weren't operating on the false questioning. I'm not gonna go through what [E.G.] said about what happened to her, what the defendant did to her, but there are pieces of that interview that are circumstantial indicators of corroboration.

(Tr. at 613 – 14.)

During rebuttal argument, the prosecutor contended that "this is not a family that walks around nude or partially nude", and that the one time that Wes said he was walking around in his underwear

happened to be the same time that E.G. claimed he made her "do this sexual thing".[4] (Tr. at 628.) The prosecutor also asserted that Wes told E.G., while he allegedly made her dance around the pole, "'Do it like your momma.' If she had been coached, would those be the words she would've used?"[5] (Tr. at 628.) The prosecutor further told the jury that Wes "lied about his own phone number."[6] (Tr. at 629.)

In closing, the prosecutor told the jury:

> The defendant preyed on [E.G.]'s innocence. Justice protects innocence. Just protects innocence. The defendant may have underestimated Miss [E.G.], but she did stand up for the truth. She did stand up against what is wrong. She continues to stand up and ask this Court and this jury for a little bit of justice. Please tell her with your verdict that the truth matters. Tell her with your verdict that what the defendant did to her was wrong. Tell her with your verdict that you believe her. Hold him responsible. The law requires it, the testimony warrants it, but justice demands it.

---

[4] Wes testified that he was "really quickly" changing out of his sweatpants into other pants when E.G. saw him in his underwear and that she had seen him change his pants before. (Tr. at 539 – 41, 561.)

[5] E.G. testified, "He said it was okay because my mom did it." (Tr. at 353.)

[6] Wes testified that he could not remember his phone number because he had changed it after leaving Missoula for Oregon. (Tr. at 564 – 65.)

(Tr. at 630.) The defense did not object to the prosecutor's rebuttal argument.

STANDARDS OF REVIEW

This Court generally reviews evidentiary rulings for abuse of discretion. *State v. McOmber*, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690 (citation omitted). "A district court abuses its discretion if it acts arbitrarily without employing conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *McOmber*, ¶ 10 (citation omitted). The Court undertakes plenary review of a discretionary ruling based on a conclusion of law to determine if the trial court correctly interpreted the law. *McOmber*, ¶ 10 (citation omitted).

In general, this Court does not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial, except on a discretionary basis under the plain error doctrine. *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968 (citations omitted). Plain error review is undertaken when "failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the

trial or proceedings, or may compromise the integrity of the judicial process." *Lawrence*, ¶ 9. The Court uses its inherent power of common law plain error review sparingly, on a case-by-case basis and only within this narrow class of cases. *Lawrence*, ¶ 6 (citation omitted). "Once the doctrine is invoked, this Court's review is grounded in our inherent duty to interpret the constitution and to protect individual rights set forth in the constitution." *Lawrence*, ¶ 6 (citations and internal quotation marks omitted).

The Court undertakes de novo review of a claim that a sentence violates the Constitution. *State v. Yang*, 2019 MT 266, ¶ 8, ___ Mont. ___, ___ P.3d ___.

SUMMARY OF ARGUMENT

The District Court incorrectly interpreted Mont. R. Evid. 801(d)(1)(B) and abused its discretion when it admitted E.G.'s forensic interview video. E.G.'s statements during the forensic interview were not admissible as prior consistent statements under Mont. R. Evid. 801(d)(1)(B) because her motive to fabricate the story about Wes making her undress and dance around the pole occurred *before*, not

after, she made the statements. The prosecutor inappropriately relied on E.G.'s video statements to corroborate E.G.'s in-court testimony.

Additionally, Mr. Smith's fundamental right to a fair trial was violated by prosecutorial misconduct. During her closing argument, the prosecutor vouched for E.G.'s credibility, repeatedly misstated witness testimony, told the jury Mr. Smith "lied", and concluded her rebuttal by telling the jury, "The law requires [a conviction], the testimony warrants it, but justice demands it." The Court should undertake plain error review of the prosecutor's improper comments. Failing to do so would leave unsettled the fundamental fairness of Mr. Smith's trial and would compromise the integrity of the judicial process.

Finally, Mont. Code Ann. § 45-5-625(4)(b) mandates DOC supervision and continuous satellite-based monitoring for the remainder of an offender's life even after their sentence is completed. DOC supervision and satellite monitoring of a person who has discharged their sentence and whose rights have been restored is facially unconstitutional as an unreasonable search without probable cause and as cruel and unusual punishment. Condition 39 of Mr. Smith's sentence, which implements this statute, must be struck.

ARGUMENT

I. The District Court incorrectly interpreted Mont. R. Evid. 801(d)(1)(B) and abused its discretion by admitting a taped forensic interview of E.G. into evidence as a prior consistent statement.

E.G. testified and was subject to cross-examination. Two days later, the District Court incorrectly allowed introduction of her forensic interview as a prior consistent statement. "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." Mont. R. Evid. 802. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). The District Court ruled E.G.'s forensic interview video was an out-of-court statement offered to prove the truth of the matter asserted. (App. A at 4.) Thus, the video was inadmissible hearsay unless an exception provided otherwise.

Montana Rule of Evidence 801(d) excludes certain out-of-court statements from the general definition of hearsay. Under Rule 801(d)(1)(B), an out-of-court statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement and the statement is . . . consistent with the declarant's

testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive[.]" *See also State v. McOmber*, ¶ 13, (breaking down the criteria for a prior consistent statement into four requirements).

E.G.'s prior consistent statement should have been admissible only if a specific motive to fabricate was alleged and if the statement was "made *before* the alleged motive to fabricate arose." *McOmber*, ¶ 15 (emphasis in original); *see also*, *State v. Veis*, 1998 MT 162, ¶ 24, 289 Mont. 450, 962 P.2d 1153; *State v. Lunstad*, 259 Mont. 512, 516-17, 857 P.2d 723, 726 (1993). The rule adopts the common law principle that a prior consistent statement "'has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.'" *Tome v. United States*, 513 U.S. 150, 156 (1995) (quoting E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972)). *See also* Mont. R. Evid. 801, Comments (explaining Montana adopted the common law and changed it only to the extent of allowing prior consistent statements as substantive evidence).

In *Lunstad*, the Court held prior consistent statements of an alleged child abuse victim were inadmissible on retrial because "they were made *subsequent* to the time C.H.'s alleged motive to fabricate arose." *Lunstad*, 259 Mont. at 516-17, 857 P.2d at 726 (emphasis in original). The defense suggested C.H.'s motive to fabricate was that she was angry the defendant refused to give her a piggyback ride. The child's statements, which occurred after the defendant refused the piggyback ride, were made after the motive to fabricate arose and therefore they "could not be prior consistent statements." *Lunstad*, 259 Mont. at 517, 857 P.2d at 726. The Court explained, "if a defendant does not assert that the victim is subsequently fabricating her story, but claims, as in this case, she was lying all along, prior consistent statements are not admissible." *Lunstad*, 259 Mont. at 517, 857 P.2d at 726, *citing State v. Scheffelman*, 250 Mont. 334, 339, 820 P.2d 1293, 1296 (1991).

Following *Lunstad*, the Court also found errors by trial courts in admitting prior statements in *McOmber* and *Veis*. In *McOmber*, the Court held a transcript and a written statement of a witness were not admissible as prior consistent statements because "the alleged motive to

fabricate arose *before* he made those statements." *McOmber*, ¶ 17 (emphasis in original). In *Veis*, ¶ 24, the Court held the alleged sexual abuse victim's statement made in therapy was not admissible as a prior consistent statement because her motive to fabricate "existed prior to the time" she made the statement in therapy. *See also Tome*, 513 U.S. at 167 (holding statements were not admissible as prior consistent statements since they were not made before the alleged fabrication).

Here, E.G.'s forensic interview was not a prior consistent statement admissible under Mont. R. Evid 801(d)(1)(B). Mr. Smith told the jury E.G. fabricated the story about him making her dance on the pole to get him out of the house after she learned about the real identity of her biological father. (Tr. at 624 – 25.) The video was not admissible as a prior consistent statement because "the alleged motive to fabricate arose *before*" E.G. gave the forensic interview. *McOmber*, ¶ 17. As in *Lunstad*, *McOmber*, and *Veis*, the District Court erred in admitting the video, because it was not a prior consistent statement admissible under Mont. R. Evid. 801(d)(1)(B).

The State used E.G.'s video to salvage E.G.'s credibility. She had told multiple versions of the pole dancing story that varied from her

trial testimony, including claims her brothers were present and Wes openly masturbated as she danced on the pole. (Tr. at 350 – 59, 481 – 82.) The prosecutor used the video to repeat E.G.'s trial testimony to show the jury she could give the same version of the story more than once.

E.G. and Mr. Smith agreed E.G. was dancing on the pole during the rush to get the three young boys ready to leave for the bowling alley. E.G. resisted the demands of the man she just found out the day before was not really her father. Mr. Smith admittedly pressed E.G. to take off her dirty sweater, get dressed in appropriate winter clothes, and go. The very next day, E.G. told her friend who verifiably had been sexually abused that she, too, was forced to act in a sexual manner on her mother's stripper pole, while Mr. Smith masturbated. E.G.'s story diverged again when she told her school counselor what happened, this time saying that her brothers were in the room also watching. It devolved to a point where only E.G.'s forensic interview matched her trial testimony. The prosecutor needed the video of the interview to redeem E.G.'s in-court testimony.

The prosecutor's emphasis of the video during closing argument demonstrates that she recognized the potency of its content. *Cf. McOmber*, ¶ 35 (reasoning the evidentiary error was harmless as "there is nothing about the content of [the] inadmissible prior consistent statements that was more compelling or deserving of greater evidentiary weight" than the witness's trial testimony). The prosecutor highlighted for the jury, "there are pieces of that interview that are circumstantial indicators of corroboration", even after the District Court admonished the prosecutor, following objection from the defense, not to attempt to bolster E.G.'s testimony with the video. (Tr. at 613 – 14.)

Mr. Smith's cross-examination of E.G. was eclipsed by the out-of-court video statements, which the jury viewed two days after E.G. testified and only a few hours before deliberations began. *Cf. Tome*, 513 U.S. at 165 (recognizing that if the rules allowed any prior statements as substantive evidence to rebut any charge of recent fabrication "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones").

This was a close case. The jury deliberated for more than five hours and sent multiple questions to the judge, strongly suggesting the

jury questioned the veracity of E.G.'s allegations. (Tr. at 631 – 45.) The video provided compelling corroboration of E.G.'s testimony and demeanor.

Due to the District Court's incorrect interpretation of Rule 801(d)(1)(B) and its abuse of discretion in admitting the video, Mr. Smith respectfully requests this Court to reverse his conviction and remand this matter for a new trial.

II. The prosecutor violated Mr. Smith's fundamental right to a fair trial during her closing argument by misstating witness testimony, telling the jury Mr. Smith "lied", vouching for E.G.'s "truth", and telling the jury, "The law requires [a conviction], the testimony warrants it, but justice demands it."

This Court generally does not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. *State v. Walton*, 2014 MT 41, ¶ 10, 374 Mont. 38, 318 P.3d 1024 (citations and internal quotation marks omitted). The Court, however, may review such an issue under the plain error doctrine. *Walton,* ¶ 10 (citations omitted).

> Prosecutorial misconduct constitutes reversible error only when it prejudices a defendant's "substantial rights. . . . We measure prosecutorial misconduct by reference to

> established norms of professional conduct. . . . We do not infer prejudice from a prosecutor's improper comments; rather, the defendant must demonstrate, from the record, that the prosecutor's misstatements prejudiced him.

State v. Lehrkamp, 2017 MT 203, ¶ 15, 388 Mont. 295, 400 P.3d 697 (internal quotation marks and citations omitted). *See also State v. Stutzman*, 2017 MT 169, ¶¶ 16-17, 388 Mont. 133, 398 P.3d 265. The prosecutor's misconduct during Mr. Smith's trial meets the stringent standards for plain error review.

During closing argument, the prosecutor improperly relied on the forensic interview video to corroborate E.G.'s testimony, mispresented several pieces of critical testimony from other witnesses, and misstated the law. First, the prosecutor emphasized the corroborating aspect of E.G.'s interview video, even after the District Court cautioned the prosecutor not to do so following defense counsel's objection. (Tr. at 613 – 14.) She pointed out, "There were several times in there where [E.G.] would correct the – questioner and make sure they weren't operating on false questioning. I'm not gonna go through what [E.G.] said about what happened to her, what the defendant did to her, but there are pieces of that interview that are circumstantial indicators of

corroboration." (Tr. at 614.) Essentially, the prosecutor disregarded the District Court's direction.

Then, in her rebuttal argument the prosecutor told the jury "this is not a family that walks around nude or partially nude", and that the only time that Wes said he was walking around in his underwear happened to be the same time that E.G. claimed he made her dance on the pole. (Tr. at 628.) In fact, Wes testified that he was "really quickly" changing out of his sweatpants into other pants when E.G. saw him in his underwear and that she had seen him change his pants before. (Tr. at 539 – 41, 561.)

The prosecutor also asserted that Wes told E.G., while he allegedly made her dance around the pole, "'Do it like your momma.' If she had been coached, would those be the words she would've used?" (Tr. at 628.) Actually, E.G. testified far less provocatively, "He said it was okay because my mom did it." (Tr. at 353.) The prosecutor further told the jury that Wes "lied about his own phone number." (Tr. at 629.) In reality, Wes testified that he could not remember his phone number because he had changed it after leaving Missoula for Oregon. (Tr. at 564 – 65.)

Following these misrepresentations, the prosecutor claimed during her rebuttal argument that Mr. Smith "preyed on E.G.'s innocence" and told the jury, "Justice protects innocence." (Tr. at 630.) The prosecutor vouched for E.G.'s credibility by telling the jury E.G. "did stand up for the truth. She did stand up against what is wrong. . . . Please tell her with your verdict that the truth matters. Tell her with your verdict what the defendant did to her was wrong. Tell her with your verdict that you believe her. Hold him responsible." (Tr. at 630.) Finally, the prosecutor incorrectly asserted, "*The law requires it*, the testimony warrants it, *but justice demands it*." (Tr. at 630 (emphasis added).)

This Court has:

> consistently held that "the determination of the credibility of witnesses and the weight to be given their testimony is solely within the province of the jury." . . . A witness may not comment on the credibility of another witness's testimony. . . .
>
> . . .
>
> . . . As we have previously noted, statements by a prosecutor regarding his personal opinions are improper for the following reasons:
>
> (1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of

> its function to declare the guilt or innocence of an accused; (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence.

State v. Hayden, 2008 MT 274, ¶¶ 26-28, 345 Mont. 252, 190 P.3d 1091 (*en banc*) (internal quotation marks and citations omitted; formatting modified).

"It is for the jury, not an attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, ¶ 32. In *Hayden*, the prosecutor improperly testified during closing argument by vouching for the efficacy of the search of the defendant's residence and by stating his opinion that a scale found in the residence was used for drugs. *Hayden*, ¶ 32. Similarly here, the prosecutor vouched for the credibility of E.G. and called on other witnesses to testify that she was truthful. (Tr. at 404, 444, 458, 471, 616 – 17, 630.)

As in *Hayden*, the prosecutor's conduct invaded the role of the jury and created a clear danger that the jurors would adopt the prosecutor's views instead of exercising their own independent judgment. *Hayden*, ¶ 33. "The prosecutor's arguments and testimony also unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33 (citation omitted). Similarly to *Hayden*, "plain error is established as the record leaves unsettled the question of the fundamental fairness of the proceedings. *Hayden*, ¶ 33 (citation omitted).

This Court previously has found error where a prosecutor asked the jury to return a guilty verdict to protect the safety of a sympathetic young child. In *State v. Ritesman*, 2018 MT 55, 390 Mont. 399, 414 P.3d 261, during rebuttal argument the prosecutor told the jury that its "job" was to ensure the victim's safety, make sure that she was heard, and give control back to her. *Ritesman*, ¶ 9. The Court determined that the prosecutor's comments were improper and implicated the defendant's right to a fair trial. *Ritesman*, ¶ 27. "Indeed, the jury's purpose and duty is to decide if the State has proved the defendant's guilt beyond a reasonable doubt, based on the facts presented, . . . , not to decide the

case on the basis of sympathy or advocacy for the victim." *Ritesman*, ¶ 27 (citations and internal quotation marks omitted).

Here, the prosecutor's similar argument to avenge E.G.'s innocence deviated from professional norms and prejudiced Mr. Smith. Immediately before the jury retired to deliberate, the prosecutor misstated the law and appealed to the jury's sympathy on behalf of a young girl who testified her stepfather made her dance around a pole in her underwear while he watched. The undue pressure placed on the jury by the prosecutor's improper argument after repeatedly misrepresenting witness testimony substantially prejudiced Mr. Smith before the jury began deliberations.

Mr. Smith's right to a fair trial was violated due to the prosecutor's misconduct. Failing to review these errors would result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of Mr. Smith's trial, and would compromise the integrity of the judicial process. *Lawrence*, ¶ 9. Applying plain error review, the Court should reverse Mr. Smith's conviction and remand this matter for a new trial.

III. Mont. Code Ann. § 45-5-625(4)(b), which requires supervision by the Department of Corrections and continuous satellite-based monitoring for the remainder of an offender's life after prison, even when the sentence is discharged, facially violates the 4th, 8th, and 14th amendments of the United States Constitution and Article II, Sections 10, 11, 22, and 28 of the Montana Constitution.

The District Court ordered Mr. Smith to remain on continuous satellite-based, also known as global positioning system ("GPS"), monitoring for the rest of his life after he is released from prison. Article II, Section 11 of the Montana Constitution and the Fourth and Fourteenth Amendments to the United States Constitution prohibit unreasonable searches and seizures and require probable cause for issuance of a warrant prior to a search. In Montana, these rights are augmented by Article II, Section 10 of the Montana Constitution, which recognizes a right to individual privacy that cannot be infringed without a compelling State interest. This Court long has "held that Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment[.]" *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 75 (1995) (*en banc*). Montana "recognizes broader protections for an individual's right of privacy pursuant to Article II, Section 10, of

Montana's Constitution, than the United States Supreme Court does pursuant to the Fourth Amendment of the United States Constitution, and other states typically do pursuant to their state constitutions." *State v. Scheetz*, 286 Mont. 41, 47, 950 P.2d 722, 725 (1997) (citation omitted).

"A threshold question in the determination of whether an unlawful search has occurred is whether there has been government intrusion into an area where privacy is reasonably expected." *Scheetz*, 286 Mont. at 46, 950 P.2d at 724. To determine "whether there has been an unlawful government intrusion into one's privacy, this Court looks to the following factors: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion." *State v. Bassett*, 1999 MT 109, ¶ 24, 294 Mont. 327, 982 P.2d 410 (citations omitted). For example, the Court has recognized:

> [T]he use of thermal imaging in the context of a criminal investigation constitutes a search under Article II, Section 11 of the Montana Constitution. Moreover, we conclude that the privacy interests uniquely protected by Article II, Section 10 of the Montana Constitution are also implicated by the use of thermal imaging in the context of a criminal investigation and that the

> use of this technology by the government, in the absence of a search warrant, requires the demonstration of a compelling state interest other than enforcement of the criminal laws.

State v. Siegal, 281 Mont. 250, 257, 934 P.2d 176, 180 (1997), *overruled in part on other grounds by State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556. The Court reached this conclusion "even though most other states have held otherwise[,]" when interpreting the Fourth Amendment or their own state constitutions. *Scheetz*, 286 Mont. at 48, 950 P.2d at 726, *citing Siegal*, 281 Mont. at 265 – 78, 934 P.2d at 185 – 92.

The United States Supreme Court has held that a state "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, ___ U.S. ___, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 459 (2015) (*per curiam*). In *Grady*, the Supreme Court found that a North Carolina statute requiring satellite-based monitoring of a "recidivist" sex offender for the rest of his life, after having been convicted of two sex offenses and serving the entirety of those two sentences, *Grady*, 135 S.Ct. at 1369, "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth

Amendment search." *Grady*, 135 S.Ct. at 1371. On remand from the Supreme Court to consider whether the state's monitoring program was a reasonable search under the Fourth Amendment, the North Carolina Supreme Court ruled that the relevant statutory provisions violated the Fourth Amendment for all individuals who are subject to lifetime satellite-based monitoring based solely on their status as a "recidivist". *North Carolina v. Grady*, 831 S.E.2d 542, 546 – 47, 568 – 69 (2019).

At least two other state supreme courts have ruled similarly. The Georgia Supreme Court held that a statute requiring offenders designated as "sexually dangerous predators" to wear a GPS monitoring device even after the completion of their criminal sentences facially violated the Fourth Amendment. *Park v. Georgia*, 305 Ga. 348, 352 – 53, 825 S.E.2d 147, 152 – 53 (2019). Likewise, the South Carolina Supreme Court held that a state statute imposing electronic monitoring on convicted sex offenders who fail to register "demands an individualized inquiry into the reasonableness of the search in every case", rather than imposing "an automatic, mandatory consequence" for life of failing to register. *South Carolina v. Ross*, 423 S.C. 504, 507, 513, 815 S.E.2d 754, 755, 758 (2018) (rejecting the state's argument that the

statute itself reflects an individualized analysis by the state legislature). *Cf. Massachusetts v. Feliz*, 481 Mass. 689, 708 nn. 12 and 13, 119 N.E.2d 700, 708 nn. 12 and 13 (2019) (holding that GPS monitoring of the defendant during his probationary period was unconstitutional on as as-applied basis under the state constitution, and collecting cases examining statutes that mandate GPS monitoring of probationers and offenders who have completed their sentences).[7]

Article II, Section 22 of the Montana Constitution and the Eighth and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment. "The general rule in Montana is that a sentence that is within the statutory maximum guidelines does not violate the prohibition against cruel and unusual punishment." *State v. Rickman*, 2008 MT 142, ¶ 15, 343 Mont. 120, 183 P.3d 49 (citation omitted). The Court "recognizes an exception to the general rule when a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice, it constitutes cruel and unusual punishment." *State v. Wardell*, 2005

[7] Mr. Smith does not make an as-applied challenge to Mont. Code Ann. § 45-5-625(4)(b). *Yang*, ¶ 12, *citing State v. Coleman*, 2018 MT 290, ¶ 11, 393 Mont. 375, 431 P.3d 26.

MT 252, ¶ 28, 329 Mont. 9, 122 P.3d 443 (internal quotations and citation omitted).

Mont. Code Ann. § 45-5-625 provides the following punishment for people convicted of sexual abuse of a child when a victim is 12 years old or younger and the offender is 18 years old or older at the time of the offense:

> If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to DOC supervision for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

Mont. Code Ann. § 45-5-625(4)(b). There is no individualized determination before imposing the lifetime monitoring.

Dr. Michael J. Scolatti, Ph.D., P.C., determined during the presentence investigation that Mr. Smith was at a low risk to sexually reoffend. (App. B at 678.) Consequently, the District Court designated Mr. Smith a Level 1 sex offender. (App. B at 678, 688.) In support of its designation, the District Court noted, *inter alia*, this was Mr. Smith's first sexual offense; there was not a chronic, compulsive pattern of sexual abuse involving many victims over many years; Mr. Smith did not demonstrate sexual interest patterns in young children; and the

pole dance did not involve sexual touching and appeared to be an offense involving a regression from normal sexual patterns. (App. B at 679 – 80.) Yet, notwithstanding these and other mitigating circumstances, the District Court required Mr. Smith to "participate in a program for continuous satellite monitoring. I don't believe there's any way to exempt you from that[.]" (App. B at 687.)

Thus, Condition 39 of Mr. Smith's Judgment requires supervision by the DOC and continuous, satellite-based monitoring for the remainder of Mr. Smith's life, even after completing his sentence. (App. C at 9, ¶ 39.) The District Court ordered this condition because it was mandated to do so, despite the fact it determined that Mr. Smith has a low risk of reoffending and qualifies for the exception in Mont. Code Ann. § 46-18-222(6), to the mandatory minimum period of imprisonment and corresponding parole restriction of 25 years under former Mont. Code Ann. § 45-5-625(4)(a). (App. B at 682 – 83, 686 – 87.)

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At sentencing, Mr. Smith was 35 and in good health. (D.C. Doc. 77.1 at 1 (Pre-sentence Investigation Report ("PSI").[8]) Once Mr. Smith is discharged to probation, he is eligible for termination of the remaining portion of his 80-year suspended sentence after he has served three years of probation, pursuant to Mont. Code Ann. § 46-18-208(b)(i) (2019).[9] He may be discharged even earlier from supervision upon the recommendation of his probation and parole officer for a conditional discharge, pursuant to Mont. Code Ann. §§ 46-18-208(b)(ii), 46-23-1011(6) (2019).

There are several problems with a statute that imposes a blanket requirement of lifetime supervision and continuous satellite-based monitoring on people whose sentences are complete and whose rights

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[8] Mr. Smith's PSI contains confidential personal information that is exempt from public disclosure. Mont. Code Ann. § 46-18-113(1); M. R. App. P. 10(7)(a), (b). All references herein to the PSI pertain to information that is also located elsewhere in the record on appeal or that Mr. Smith has consented to disclose. Mr. Smith reserves the right to object to any disclosure of confidential information by the State in its response brief that is not included herein or in the public record.

[9] The 2019 amendments to Mont. Code Ann. §§ 46-18-208 and 46-23-1011, which revised procedures governing termination of deferred and suspended sentences and grants of conditional discharge, were effective on May 8, 2019. 2019 Mont. Laws 380, §§ 1 – 3. These are the provisions that will govern Mr. Smith's probationary sentence.

have been restored. Most importantly, the "lifetime" aspect of the punishment extends beyond a term-of-years sentence. This problem is not a remote, hypothetical concern, but rather a real-life impediment to liberty. For example, a defendant who is convicted and sentenced at a relatively young age, like Mr. Smith, well may succeed in discharging his sentence in the years to come, yet remain subject to DOC supervision and satellite monitoring for the remainder of his life under § 45-5-625(4)(b).

Article II, Section 28 of the Montana Constitution provides, "Full rights are restored by termination of state supervision for any offense against the state." Likewise, Mont. Code Ann. § 46-18-801(2) mandates that once a person's sentence has expired or the person has been pardoned, the restoration of "all civil rights and full citizenship, the same as if the conviction had not occurred." Yet Mont. Code Ann. § 45-5-625(4)(b) continues to punish people who have paid their debt to society by subjecting them for the rest of their lives to relentless government surveillance. Without question, direct supervision by the State and continuous monitoring by satellite are substantial and onerous restrictions on individual liberty.

This Court should determine that mandating such measures on people who already have completed their sentences violates the Montana Constitution's guarantee of restoration of "all civil rights and full citizenship, the same as if the conviction had not occurred" and constitutes cruel and unusual punishment, in violation of Sections 22 and 28 of the Montana Constitution, as well as the 8th and 14th Amendments to the United States Constitution. Further, as several courts already have ruled under the Fourth Amendment – whose protections are less expansive than those required by Article II, Sections 10 and 11 of the Montana Constitution – the Court should rule that these extreme measures also constitute an unwarranted intrusion into individual privacy and an invasive search of a person who has fully discharged his or her sentence without probable cause to suspect the person is committing any crime.

Because Mont. Code Ann. § 45-5-625(4)(b) is facially unconstitutional, Condition 39 must be struck from Mr. Smith's judgment.

CONCLUSION

Mr. Smith respectfully requests this Court to reverse his conviction and to remand this matter for a new trial. Mr. Smith also asks the Court to strike Condition 39 from his sentence because the statute upon which it is based, Mont. Code Ann. § 45-5-625(4)(b), is facially unconstitutional.

Respectfully submitted this 4th day of December, 2019.

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By: /s/ Deborah S. Smith
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,130, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Order Denying Defendant's Motion to Exclude Video Evidence.....App. A

Oral Pronouncement and Reason for Sentence..............................App. B

Judgment..App. C

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-04-2019:

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