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 APPELLEE

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 properly and within its discretion admit the child sexual abuse victim's forensic interview video as nonhearsay?

2. Did the prosecutor's closing argument deprive Smith of a fair and impartial trial, amounting to unpreserved plain error?

3. Should this Court dismiss Smith's claim that Mont. Code Ann. § 45-5-625(4)(b) is unconstitutional, whether it is a facial or an as-applied challenge?

STATEMENT OF THE CASE

Appellant Wesley Smith (Smith) appeals from his judgement of conviction for felony sexual abuse of children under Mont. Code Ann. §§ 45-5-625(1)(a) and -625(5)(b)(ii)—knowingly employing or using a child in an exhibition of sexual conduct for his sexual gratification by having his 9-year-old stepdaughter E.G. dance for him on a "stripper pole" in a state of undress. (D.C. Docs. 69, 71 (Instrs. 17-19), 86, 89; Tr. at 646-48.)

Four other felony charges against Smith were severed from this case and prosecuted separately in Cause No. DC-17-332. (D.C. Docs. 1, 35, 43, 48.) At the same time as sentencing in this case, the district court sentenced Smith for his two convictions in DC-17-332—one count of felony assault on a minor for putting chili

powder in his 2-year-old son's mouth and felony aggravated assault for strangling his wife and E.G.'s mother, K.G. (Tr. at 658-60, 685-86; *see* D.C. Doc. 77.1 at 1, 4 (PSI).) The judgment of conviction and sentence for these offenses is not at issue.

For committing sexual abuse of a children, the district court sentenced Smith, in accordance with Mont. Code Ann. § 45-5-625(4) (2015) (sentencing provisions for offenses against victims 12 years of age or younger), to 100 years in Montana State Prison (MSP), with 80 years suspended on enumerated conditions of probation; no condition or restriction on parole other than completion of phase I sexual offender treatment; surcharges, fees, and costs in the amount of $980; and credit for time served. (D.C. Doc. 86 at 2-10; Tr. at 682-88.) Among the conditions of probation recommended in the PSI, the district court imposed the following without objection:

> If the Defendant is released after the mandatory minimum period of imprisonment, the Defendant is subject to supervision by the Department of Corrections 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 MCA; per § 45-5-625(4)(b), MCA[.]

(D.C. Docs. 77.1 at 14 (recommended condition 40); 86 at 9 (imposed condition 39).)

STATEMENT OF THE FACTS

Nine-year-old E.G. lived in Missoula with her mom, K.G., her stepfather, Smith, and her three little half-brothers, W.S., A.S., and C.S. At the time of the events at issue in this case, K.G. and Smith were separated, they were in the process of divorcing, and E.G. had recently learned that Smith was not her biological father. (Tr. at 346, 365-67, 416-17, 447.) During this transition period, K.G. and the kids got a place together with K.G.'s roommate and best friend, Charity (who the kids called their "aunt"), but Smith would still come and stay with the family sometimes. (Tr. 346, 367, 419, 445-46.) E.G. used to call Smith "dad," but she stopped calling him that, she testified, "[a]fter what he did to me." (Tr. at 345.)

K.G. was employed as a "dancer," or as E.G. explained, an "entertainer." (Tr. at 348, 422.) Charity was also a dancer and there was an "exotic dancing pole" installed in her bedroom that she and K.G. used to practice for work and teach lessons. (Tr. at 422-23; State's Ex. 1 (photo of bedroom with the pole).) E.G. said that the kids used to play on the pole, trying to "climb it and spin around and stuff." (Tr. at 349, 424-25.) Charity let the kids do it, but they had to have permission. (*Id.*) E.G. described the pole as "like a fireman's pole, but it was stuck to the ceiling and the ground at the same time." (Tr. at 349.)

On a January day in 2016, K.G. went to a bowling alley to meet her brother, E.G.'s uncle, to watch the Denver Broncos in an NFL playoff game. (Tr. at 350, 446-47.) Smith and the children were to come a little while later. (Tr. at 351.) Before they did, Smith engaged in what the district court called "a life-altering event"—for Smith, E.G., and the entire family. (Tr. at 688.)

E.G. was in her room, watching videos with headphones on, when Smith came in, grabbed her attention by snapping her headphones, and asked her to go to Charity's room and "dance around [her] aunt's pole." (Tr. at 350-51, 536.) Smith told E.G. to "take all [her] clothes off but [her] bra and underwear" and told her to "spin around on the pole." (Tr. at 352-53.) E.G. said she did not want to and said "no"—but Smith said, "Take your clothes and do it anyways." (Tr. at 351.) E.G. did not want to, but Smith said, "Just do it." (Tr. at 352.) Smith said it in a mean, harsh voice and E.G. felt scared and upset. (*Id.*) Smith told E.G. that he would give her $20 extra dollars (on top of allowance) if she did it. (*Id.*) E.G. felt confused. (*Id.*)

E.G. did not want to do what Smith told her to do because she felt uncomfortable, but she did it anyway because she was scared. (Tr. at 353.) She was scared of Smith and of something worse happening. (*Id.*)

Smith told E.G. to "spin around the pole," told her "to dance." (Tr. at 353.) Smith said it was okay because her "mom did it." (*Id.*) Smith called E.G. the "P"

word—a "pussy"—which bothered E.G. (*Id.* at 354.) So E.G. just "spun around" with her bra and underwear on—it did not feel like a "kid thing" like she and her brothers did, it was more like an adult activity. (*Id.*) E.G. testified that her brothers were not in Charity's room at the time and did not watch her. (Tr. at 358.)

While E.G. danced and spun in her bra and panties, Smith "had nothing on but his underwear. And he was biting his lip and rubbing his hands." (Tr. at 354-55.) His pants were around his ankles. (Tr. at 355.) Smith was telling E.G. to "go faster and faster" and Smith's penis was getting bigger—"his wiener would, like, point up." (Tr. at 355-56.) Smith's hands were in the air and although he was not really "playing with [his penis] . . . he was, like adjusting his underwear." (Tr. at 359.) Smith did not touch E.G. during the display, but she was feeling sad and scared inside. (Tr. at 356.)

Finally, Smith told E.G. to stop; he thanked her and said he appreciated it and "that really helped." (Tr. at 356-57.) E.G. grabbed her clothes and ran to her room, still scared—she did not want Smith to come into her room, but there was no lock on the door to keep him out. (Tr. at 357.) Shortly after, Smith did come into E.G.'s room, handed her $20 without saying anything, and left. (*Id.*) Then E.G. went downstairs and they all went to watch the Broncos with their mom and play video games in the arcade. (Tr. at 358-59.) E.G. did not remember if Smith told her not to tell anybody about what happened. (Tr. at 358.)

E.G. testified that she was not making up "any of this" and she had no reason to want to get Smith in trouble for it if he had not done it. (Tr. at 362.) E.G. said that what Smith did to her had affected her by making her look at people differently, and that she had gone to counseling with a couple different people, but then she stopped going. (Tr. at 363.)

When K.G. confronted Smith about the reported incident, first he lied and skirted around the issue, but then, she testified, "he was so sorry. He didn't know why. He deserved to die. All sorts of things. Just admissions and what [K.G.] thought was actual remorse for a moment, until [she] got a fake suicide text later that evening." (Tr. at 425-26, 433-34, 444.) K.G. testified that E.G. not only told her what had happened, but that E.G. had to talk about it a lot and told her story to many other people. (Tr. at 431-32.)

E.G.'s prior statements—admitted without objection at trial

Statements testified to by E.G.

The day after the incident, E.G.'s friend Mackenzie came over and they were climbing and playing on the pole. (Tr. at 359.) Mackenzie asked why E.G. was not playing on the pole and E.G. told her what Smith did to her. (*Id.* at 359, 373.) She remembered telling Mackenzie that Smith "was playing with himself, playing with his pee-pee"—although she admitted at trial that was not completely true: "he

wasn't, like, playing with it, playing with it. But he was, like, adjusting his underwear." (*Id.*)

E.G. testified that Mackenzie promised not to tell, but, according to E.G., Mackenzie told her school counselor, who told E.G.'s school counselor. (Tr. at 360.) E.G. did not want Mackenzie to tell because she was scared and did not know what was going to happen. (Tr. at 361.)

E.G. was called in to see the counselor, Crystal Thompson, at her school, who asked E.G. to tell her what had happened with Smith. (Tr. at 361.) E.G. told the counselor that Smith "made [her] get naked and dance around on [her] aunt's pole." (*Id.*) E.G. denied that she had told the counselor that Smith made her "do this in front of [her] three little brothers." (Tr. at 373.) Ultimately, E.G. was glad she told the counselor what had happened. (*Id.*)

E.G. also testified that she went to a place called First Step and talked to a nice lady named Jane, a nurse. (Tr. at 362.) E.G. testified that she told Jane what she had told the counselor—that is, what she was telling in court. (*Id.*) On cross-examination, E.G. could not remember whether she told Jane that Smith was playing with himself or if Smith made her do it in front of the brothers. (Tr. at 374.)

On cross-examination, counsel established that E.G. had also talked to counsel and answered a bunch of questions. (Tr. at 364.) E.G. agreed that she had told three different stories. (Tr. at 374.)

On redirect, E.G. clarified that she met with the prosecutor before trial and was not told what to say, but rather what would happen at trial. (Tr. at 365, 374-75.) E.G. reiterated that she understood the most important thing about the trial: that she would "tell nothing but the truth." (Tr. at 344-45, 375.)

Having E.G. tell the truth was a common theme throughout trial: during voir dire (Tr. at 134-37, 157, 159, 190, 209, 222, 241, 277-78, 282); in the preliminary and post-trial instructions (D.C. Doc. 71 (Instrs. 3, 9 (referencing the child-witness's "understanding of the difference between truth and falsehood, and appreciation of his/her duty to tell the truth"), 13)); during the defense opening (Tr. at 341 (E.G. understood the "most important rule" was to tell the truth in the interview room)); during Smith's cross-examination of E.G. (Tr. at 374-75); during Thompson's testimony (Tr. at 404 (E.G.'s truthfulness was never in question)); during testimony about the First Step forensic interview (Tr. at 456, 460); and during closing argument of the parties (Tr. at 607, 616-17, 622, 627, 629-30). Smith, too, testified that he understood what it meant to tell the truth and that it was the jury's job to listen to the witnesses and determine who was telling the truth. (Tr. at 580-81.)

Statements testified to by the school counselor

The school counselor with whom E.G. spoke after the incident, Crystal Thompson-Towers (Thompson), testified without objection: that E.G. said that her mom had gone to watch a football game; that her stepdad was watching E.G. and her brothers; and that while he was watching them, "he made [E.G.] undress and dance on a stripper pole for at least five minutes . . . . And she was really upset and scared about that." (Tr. at 400.) Thompson testified that E.G. verbally "expressed that she was scared, and was visibly shaken while talking about it . . . . Quaky voice, shaky hands, teary . . . [and] seemed to feel guilty, scared . . . just confused." (Tr. at 401, 409.) She also testified that E.G. indicated that her brothers were "there" during the incident. (Tr. at 403.) However, Thompson thought E.G.'s statement could have meant the brothers were either "at home or in the room," but she did not ask and did not know. (Tr. at 403-04, 409-10.) Thompson did not recall getting a report about this incident from another school counselor. (Tr. at 407-08.)

Statements testified to by Detective Brueckner

City of Missoula Police Detective Connie Brueckner investigated the case and testified to certain prior statements by E.G. without objection. (Tr. at 464-79.) Detective Brueckner reviewed and watched E.G.'s statements in the First Step forensic interview, finding that there were normal variations in her statements

coming naturally from different tellings of her story "to different people who are asking different kinds of questions." (Tr. at 470-71.)

Detective Brueckner found E.G.'s statement to be "unique," in that E.G. described an act—"her dancing on the pole"—that Smith made her perform for his own gratification, but not that Smith touched her. (Tr. at 471.) The detective found it compelling how detailed E.G.'s statement was: "She described and re-enacted, if I recall correct in the interview, him rubbing his hands together and biting his lip. I thought that was . . . a detail that was important and kind of a visceral type thing, ready to demonstrate it. I thought that the statement made that he . . . was smiling but looked mad was an interesting and compelling comment on her observations of him." (*Id.*) Detective Bruecker also testified about Mackenzie's statement that E.G. told her that Smith was "playing with himself," playing with his "pee-pee." (Tr. at 476-78.)

Introduction of E.G.'s statements in the First Step forensic interview

Jane Hammett (Hammett) is a registered nurse and trained forensic interviewer who worked at the First Step Resource Center. (Tr. at 451.) First Step is a children's advocacy center: a child-friendly clinic for times when there are allegations or suspicions that children have been involved in a crime or witness to a crime. (Tr. at 452.)

Hammett explained her role as a forensic interviewer is as a neutral fact finder: "It's not up to me to determine whether or not a child's telling the truth. My job is to elicit information from the child by asking open-ended questions." (Tr. at 458, 460.) Hammett testified that she would not expect a child, in such a narrative, to provide her with "every single possible detail." (Tr. at 459.) Thus, she would not consider it unusual that, if the child told the account to someone else, different details might be included. (*Id.*)

Hammett conducted a forensic interview of E.G. at First Step nine days after the pole-dancing incident. (Tr. at 456-59.) Hammett testified that E.G. told her that the reason E.G. was there was to "talk to [her] about what happened last week." (Tr. at 457-58.) Hammett followed that with open-ended questions and E.G. "just opened up and started talking." (Tr. at 458.) Hammett's impression of E.G. was that she was very smart, articulate, well-spoken, detail-oriented, and mature. (Tr. at 458-59.)

Statements testified to by Hammett

Over Smith's hearsay objection[1], Hammett testified about what E.G. told her had happened with Smith: "She told me that he had come into her room and had asked her to go into Charity[']s] room, and to remove her clothing and to dance with a pole [in a sexual way]." (Tr. at 458.) Hammett testified that E.G. expressed

[1] Smith does not challenge this testimony as an issue on appeal.

several times how scared she had been and that she had cried while it was happening. (Tr. at 459.) On cross-examination, the defense elicited that E.G. did not tell Hammett that Smith was playing with himself or touching his penis, or that her little brothers were in the room—instead, they were downstairs watching the "Powerpuff Girls." (Tr. at 461-62.)

Statements contained in the video recording of the forensic interview

Hammett testified that she always recorded interviews with children at First Step and that she did so in this case with E.G.'s forensic interview. (Tr. at 487-89.) Hammett testified that the interview with E.G. was recorded to show that there had not been any suggestion or coercion; to capture things that would be important besides the child's words, specifically her demeanor; and to capture the child's statement while the incident was still fresh. (Tr. at 488-89.) Hammett further laid the foundation that the video was a fair and accurate representation of what happened that day in the interview room; that no changes had been made to it other than redactions of objectionable material; and that it contained information, other than E.G.'s words, that would be helpful to the jury in seeing E.G.'s demeanor and determining credibility. (Tr. at 489.) The State moved to admit the video as State's Ex. 7, which the district court reserved pending determination of Smith's objection. (Tr. at 489-92.)

Smith objected to admission of the video because it was hearsay not subject to an exception; the State argued for admission on grounds similar to how Hammett described the purposes of the forensic interview:

> The defense's main theme in their case is that [E.G.] made this up. And that because the First Step interview was different than the other interviews, that she must've not been truthful during the forensic interview. 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 think it's the . . . evidentiary value of what she said . . . [and] the freshness of it . . . [that] would be important for the jury to get that sense, particularly when her credibility's being attacked.
>
> 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 . . . secondary theme of theirs is these . . . inconsistencies in her statement. So it would be a prior consistent statement to what she's testified to here in court.

(Tr. at 480-82.) The parties filed an objection and response (D.C. Docs. 62-63), and argued in greater length on the record. (Tr. at 480-86, 493-508.)

The district court ruled that the video was admissible because it was not hearsay under Mont. R. Evid. 801(d)(1). (Tr. at 498-99, 504-05, 507-08.) The district court summarized: "So I'm [going to] find . . . as I indicated earlier, that it is not considered hearsay under Rule 801(d)(1). And to the extent that there may be some inconsistencies or consistencies that . . . would allow its admission either under sub (d)(1)(A) or sub (d)(1)(B)." (Tr. at 507-08 (citing *State v Mederos*, 2013 MT 318, 372 Mont. 325, 312 P.3d 438; *State v. Aker*, 2013 MT 253,

371 Mont. 491, 310 P.3d 506; *State v. Baker*, 2013 MT 113, 370 Mont. 43, 300 P.3d 696; *State v. Howard*, 2011 MT 246, 362 Mont. 196, 265 P.3d 606).)

To the extent any statements in the interview were considered prior "consistent" statements—as both parties appeared to agree to some extent—the record supported the court's findings of the foundational requirement under the Rule: that the statements were being "offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive," in accordance with Mont. R. Evid. 801(d)(1)(B). (Tr. at 498-99, 501-06.)

Following the ruling, the district court adjourned the trial for one day to allow time for the parties to review the video and sort out issues relative to redacting objectionable Rule 404(b) evidence from the recording. (Tr. at 508-12, 516-17; *see* State's Ex. 7A (redacted version of First Step interview video).) In the intervening day, Smith filed a motion to reconsider the district court's ruling to admit the redacted version of the video; the State filed a response; and Smith filed a reply. (D.C. Docs. 64-66.)

The district court issued a written order denying Smith's objection and motion to exclude the First Step video. (D.C. Doc. 67.) After accurately setting forth the factual and procedural background of the issue, and considering the filings and arguments of the parties, the court denied relief because it was "not convinced that it erred in admitting the [v]ideo." (*Id.* at 1-3.)

As determined by the district court, first, E.G.'s statements in the forensic video were relevant—an issue not disputed by the parties. (D.C. Doc. 67 at 3.) Next the court determined whether the video was admissible under the hearsay rule. (*Id.* at 3-4.) Because E.G. testified at trial and was subject to cross-examination, the question under Mont. R. Evid. 801(d)(1)(A) and (B) was whether her prior statements were inconsistent with her testimony, and/or consistent with her testimony and offered to rebut charges of subsequent fabrication, improper influence, or motive. (*Id*. at 4.)

The district court found that Smith "waffled on whether the [v]ideo showed" that E.G.'s statements were inconsistent or consistent with trial testimony. (D.C. Doc. 67 at 5.) While the defense asserted that E.G.'s testimony was generally consistent, its cross-examination of the State's witnesses focused on identifying inconsistencies in the various statements made by E.G. (*Id.*)

The court also found that the defense equivocated on whether they implied that E.G. had an improper influence or motive, or subsequently fabricated any or all of her statement. (D.C. Doc. 67 at 5.) Specifically, the defense implied during cross-examination that E.G.'s friend (Mackenzie) improperly influenced her, and that E.G. might have had a motivation to get Smith out of her and her family's lives. (*Id.* at 5-6.) The State's position that the video was offered to rebut Smith's theory that E.G. was not reliable and/or not candid was also consistent with the

"improper influence or motive" language of the Mont. R. Evid. 801(d)(1)(B). (*Id.* at 6.) Therefore, the district court concluded that the video was not hearsay and was admissible, citing the cases about which the court had already advised the parties. (*Id.*)

In regard to the motion to reconsider, the district court noted Smith's new argument that the word "subsequent" in the Rule required that the improper influence or motive arise after the statements in the video were made. (D.C. Doc. 67 at 6-7.) While Smith maintained that the recorded statements made after E.G.'s initial disclosures were not admissible, the court disagreed: based "on the plain language of the Rule: 'subsequent' does not modify 'improper influence' or 'motive,' but only modifies 'fabrication.'" (*Id.*)

The State played the redacted video of E.G.'s forensic interview for the jury, subject to Smith's reserved "right to make objections as they come up during the video." (Tr at 524-27[2].) Smith appeared to make one objection during the video, but it was withdrawn. (Tr. at 527.) Thus, Smith made no objections to any specific statement by E.G. as they came up during the video. After the video was played, the State rested its case. (*Id.*)

[2] Although the trial transcript references State's Ex. 7 (the unredacted video), the State, on appeal, understands that the redacted video was the version that was played for the jury, State's Ex. 7A. (*See* Clerk's Exhibit Record.)

At trial Smith alleged that the First Step video was a prior statement that was "consistent" with E.G.'s trial testimony because neither statement referenced Smith playing with himself or touching his penis, or that E.G. was forced by Smith to dance on the pole in front of her brothers. (*See* Tr. at 341, 461-62, 623.) E.G., however, created some inconsistency between those erstwhile consistent statements when she testified that she did not remember that she did not tell Hammett those things in the interview. (Tr. at 374.)

Furthermore, there are facts stated in E.G.'s trial testimony that she did not tell Hammett in the forensic interview, making the statements inconsistent: that Smith offered and gave E.G. $20 for dancing on the pole; that he told her it was okay because her "mom did it;" that he called her the "P" word; and that he told her to go faster and faster. (*See* Tr. at 352-55, 357.) There are other facts stated in the forensic interview that E.G. did not state, or did not remember, during her trial testimony, further making the two statements inconsistent, including: repeatedly explaining that she was scared because she did not know if Smith had done something to her brothers, or would do something to her or her brothers—something bigger or scarier, like hurting her, her brothers, or her family really badly; that she was afraid that Smith might take her and her brothers away from their mom, because she had seen him act crazy, get mad, and freak out; that Smith was making "moaning sounds" while she danced; that E.G. was crying while she

danced; that after it was over Smith grabbed her arm when he came into her room; and that Smith told E.G. not to tell anybody—a fact she did not remember at trial. (*See*, *e.g.*, State's Ex. 7A at 7:00-9:00, 12:09-45,17:45,18:40-19:00, 20:30-22:00, 22:40-50, 24:28-26:20, 33:15, 33:40-34:10; Tr. at 358.)

Charges of fabrication, motive or influence

The defense first made reference to the influences and motives affecting E.G.'s statements and testimony during their opening statement. Counsel pointed out there was "so much stress going on in [E.G.'s] life at home at that point"—from her parents' difficulties, separation, and divorce; from E.G.'s apparent bias that Smith treated her and her brothers harshly; and that E.G. had just learned that Smith was not her biological father and her brothers were only half-brothers. (Tr. at 338-39.) Smith also emphasized the different stories E.G. told to Mackenzie, to her counselor, and to the forensic interviewer—and asked the jury to carefully evaluate the credibility of witnesses based on their consistent or inconsistent stories. (Tr. at 340-41.) "If you hear a witness who's given numerous versions of the same event, think about whether any of those stories are reliable." (Tr. at 341.)

The defense then elicited testimony that E.G. grew up thinking that Smith was her biological father, that she had recently learned that he was not her real father, and that that information was confusing. (Tr. at 366.) The defense also

emphasized that Smith and K.G. were separated and that E.G. "liked it better when [Smith] was gone." (Tr. at 367-68.) The defense elicited that E.G. did not always like how Smith treated her or her little brothers. (Tr. at 369.) The defense brought up additional inferences of influences or motives about E.G.'s statements and testimony, including the prosecutor talking about what E.G. would say at trial and E.G.'s varying statements to Mackenzie, Thompson, and Hammett. (Tr. at 365, 373-74.)

Smith testified, in regard to E.G.'s statements, that: "I would say that she was lying. . . . The kid lies. . . . [It was] a lie, not a misunderstanding." (Tr. at 559-61.) Smith persisted in that position during closing argument: "She made up the story. She wanted [Smith] gone. And that's all this is, it's a story." (Tr. at 626.) Smith urged the jury to be critical of "all the different statements and stories," the fact that "things weren't perfect at home," and the stresses and influences E.G. was under. (Tr. at 617-18, 622-25.) Then counsel flat out told the jury that it could not "rely upon the word of" E.G. and K.G.—they were "not credible. [E.G.] had many reasons to make this story up. She had lots to gain." (Tr. at 625.) Smith was very clear about his theory of the defense at trial and his story to the jury: it was all about E.G.'s lack of credibility, her lies, and the reasons she would fabricate her story—the motives and the improper influence. (Tr. at 617, 622-25.)

Prosecutor's closing argument

From the beginning of its closing, the State argued, without objection, that the jury's job was to look at all of the facts, in addition to E.G.'s testimony that would to help answer the question of whether the incident was a "sexual thing or was it just a case of a mistake or a lie on [E.G.'s] part?" (Tr. at 606-07.) The prosecutor argued there were "a lot of facts out there that corroborate what she said, and we'll go through some of those. But really what this case boils down to is: Is she telling the truth?" (Tr. at 607.) The prosecutor pointed out Instruction 3 to the jury, regarding the credibility of witnesses and what they might consider when deciding whether to believe a witness, specifically E.G.—including her manner and demeanor on the stand and any interest, motive or bias she might have. (Tr. at 607-08; D.C. Doc. 71 (Instr. 3).)

Along those lines, the State argued that E.G. had nothing to gain from saying that Smith did this—a "really embarrassing subject" for a child, that she did not want her friend to tell, and that could "[destroy] what was left of their family." (Tr. at 608-09.) The State asked the jury to look at E.G.'s testimony and other statements from the perspective of a "child's consistency," including the natural, "subtle variations" where a child had to "tell a given series of events multiple times over the course of 18 months." (Tr. at 609.) In contrast, "absolute consistency" over time would make the child's statements appear rehearsed. (*Id.*)

The State emphasized the unique nature of E.G.'s statements about things "described by a child who doesn't obviously understand what they mean," but only knew they were "wrong and that it was scary;" it was "very clear that she was talking about things that she had not had a lot of personal experience in." (Tr. at 609-10.) The statements' uniqueness also tended to show they were not exaggerated—if a child were "making up a story to get somebody in trouble," like Smith maintained, one would think that it would be rehearsed, it would be exaggerated, and it would "probably include something with actual touching." (Tr. at 610, 613.)

Smith did not object to the State's argument until well into closing, when the State started to say: "I was noticing, and I would hope that you would take notice of . . . all the times in that video . . . ." (Tr. at 613.) The basis of the objection was that the State was "attempting to bolster [its] case by commenting upon the consistency of the statements, which was not the reason that [the video] was admitted and should be disallowed." (*Id.*) The State clarified it was "talking about indicators that are important when determining whether or not a statement is valid"—indicators like E.G.'s demeanor, candor, credibility, and lack of coercion which had all been presented as legitimate purposes of the video. (Tr. at 614; *see* Tr. at 481-82, 488-89.) The court overruled the objection and allowed the State to "continue in light of the objection," with the following caveat: "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." (*Id.*) The State continued with and completed its argument without objection, or "re-bolstering" anything, but only pointing out what the jury could appropriately consider. (Tr. at 614-17, 626-30.)

References to additional facts in the record, particularly unpreserved error from the State's rebuttal argument, will be made in the Argument section of this brief.

SUMMARY OF THE ARGUMENT

The district court properly and within its discretion admitted E.G.'s prior statements in the forensic interview video as nonhearsay because they were mixed consistent and inconsistent statements.

This Court should refrain from exercising plain error review of Smith's prosecutorial misconduct claims. The prosecutor's various challenged statements, in the context of the entire closing argument, did not deprive Smith of a fair and impartial trial and Smith has not shown any prejudice.

This Court should reject Smith's claim that Mont. Code Ann. § 45-5-625(4)(b) is unconstitutional. Either he has not carried his burden to prove that the statute is facially unconstitutional based on evidence that no set of circumstances

exists under which the statute would be valid or that the statute lacks a plainly legitimate sweep. Or Smith is actually claiming the statute is unconstitutional as applied to his case—based on his recitation of mitigating facts—and he may not raise such a claim for the first time on appeal under *Lenihan*.

ARGUMENT

I. The district court properly and within its discretion admitted nonhearsay prior statements of the child victim contained in her recorded forensic interview.

A. Standard of review and applicable law

"Whether evidence is relevant and admissible is left to the sound discretion of the district court and will not be overturned on appeal absent an abuse of discretion." *State v. Porter*, 2018 MT 16, ¶ 14, 390 Mont. 174, 410 P.3d 955 (quoting *State v. Whipple*, 2001 MT 16, ¶ 17, 304 Mont. 118, 19 P.3d 228).

"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). Hearsay is not admissible as evidence in court unless it falls under an exception provided in statute or another rule. *Porter*, ¶ 30 (citing Mont. R. Evid. 802).

A prior statement of a declarant is not hearsay if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement,"

and the statement is either: "inconsistent with the declarant's testimony;" or "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." Mont. R. Evid. 801(d)(1)(A) and (B).

B. All of E.G.'s prior statements contained in her taped forensic interview were admissible under Mont. R. Evid. 801(d)(1) as "mixed" inconsistent and consistent statements.

"Not all out-of-court statements constitute hearsay." *Mederos*, ¶ 15. Where the declarant testifies at trial and is subject to cross-examination, the Rule designates two types of prior statements as nonhearsay: inconsistent statements and consistent statements offered to rebut a charge of improper influence. *Mederos*, ¶ 15; *Howard*, ¶ 30; Mont. R. Evid. 801(d)(1)(A)-(B).

This Court has held that it is not an abuse of discretion under Mont. R. Evid. 801(d)(1) to "admit consistent statements in conjunction with inconsistent statements where the nature of a witness's testimony makes it difficult for the court to separate the consistent from the inconsistent portions of the prior statement." *Mederos*, ¶ 18; *Howard*, ¶ 31; *State v. Lawrence*, 285 Mont. 140, 160, 948 P.2d 186, 198 (1997). A claimed lapse of memory may constitute an "inconsistent statement," but it is not "the only ground for application of Rule 801(d)(1)(A)." *Howard*, ¶ 31; *Lawrence*, 285 Mont. at 159, 948 P.2d at 198. It could also simply mean testifying "inconsistently" with what declarant said in the prior statement, or

admitting on the stand that things previously said (i.e., in an interview) were different, or "in fact not true." *Howard*, ¶ 32.

Furthermore, to the extent prior statements are properly "inconsistent" under Mont. R. Evid. 801(d)(1)(A), then the foundational requirements (fabrication, influence, motive) need not be established before admitting the "mixed" consistent statements. *Lawrence*, 285 Mont. at 160, 948 P.2d at 198. Admitting some consistent statements along with the inconsistent ones serves the purposes "of judicial efficiency and assisting the jury." *Id.*

E.G. testified at trial, was subject to cross-examination, and made prior statements in the forensic interview video that were both consistent and inconsistent with her trial testimony. *See supra* at 17-18. Thus, E.G.'s statements in the video were admissible non-hearsay under Mont. R. Evid. 801(d)(1), *Mederos*, *Howard*, and other cases, as the district court found and concluded. (Tr. at 498-99, 504-05, 507-08; D.C. Doc. 67 at 6.) Regarding consistent portions of the statements—although the foundation was not required pursuant to *Lawrence*, 285 Mont. at 160, 948 P.2d at 198—the court found and concluded that the prior video statements were being offered to charges of fabrication, improper influence, or motive under Mont. R. Evid. 801(d)(1)(B). (Tr. at 498-99, 501-06; D.C. Doc. 67 at 4-6.)

On appeal, Smith fails to address *Mederos* and the related cases regarding admission of mixed consistent and inconsistent prior statements, despite the fact that the district court relied on such cases in its verbal and written orders and cited them multiple times in the record. Thus, in substance, the district court's orders remain effectively unchallenged on appeal and this Court need not address Smith's inapposite arguments. Furthermore, Smith's argument that any improper motive or influence under the Rule must be subsequent to the prior statement, is also irrelevant because this Court has held that foundational conditions of admission of consistent statements need not be met in the "mixed" statement context under *Lawrence*—even though the district court made that finding here.

To the extent this Court determines that the admission of E.G.'s prior statements contained in the video constitute inadmissible hearsay, erroneously admitted into evidence, any such error was harmless. "Presentation to a jury of admissible evidence that proves the same facts as tainted evidence usually amounts to harmless error when the tainted evidence qualifies as cumulative of the admissible evidence." *Mederos*, ¶ 24 (citing *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735). A witness's testimony regarding prior out-of-court statements is cumulative and, thus, harmless error, when those statements mirror other statements admitted by the trial court without objection. *Mederos*, ¶ 24 (citing *State v. Mizenko*, 2006 MT 11, ¶ 26, 330 Mont. 299, 127 P.3d 458).

Here, the fact-finder was presented with cumulative, unobjected to, and admissible evidence that proved the same facts as the allegedly "tainted" evidence, and the quality of E.G.'s statements in the video was not such that it would have contributed to the conviction. *Van Kirk*, ¶¶ 43-44, 47. The cumulative, unobjected to, and admissible other evidence included E.G.'s own trial testimony about what happened; her trial testimony about what she told Mackenzie, Thompson, Hammett, defense counsel, and the prosecutor; the testimony of Thompson about what E.G. told her; the testimony of Detective Brueckner about E.G.'s and Mackenzie's statements; and the testimony of Hammett about what E.G. told her about what happened (objected to but not raised as error on appeal). *See supra* at 4-10, 12.

"[A] defendant is not prejudiced by hearsay testimony when the statements that form the subject of the inadmissible hearsay are admitted elsewhere through the direct testimony of the 'out-of-court' declarant or by some other direct evidence." *Notti v. State*, 2008 MT 20, ¶ 38, 341 Mont. 183, 176 P.3d 1040 (quoting *State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153), *overruled on other grounds* by *Whitlow v. State*, 2008 MT 140, ¶ 18 n.4, 343 Mont. 90, 183 P.3d 861. Exclusion of the challenged evidence would not have changed the outcome of the proceeding, given the quality of other properly admitted evidence proving the same facts.

II. The prosecutor's closing argument did not amount to plain error.

A. Standard of review and applicable law

Prosecutorial misconduct may be grounds for reversing a conviction and granting a new trial only if the conduct deprived the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091; *State v. McDonald*, 2013 MT 97, ¶ 10, 369 Mont. 483, 299 P.3d 799. The Court evaluates a prosecutor's statements during closing argument in the context of the argument as a whole. *State v. Walton*, 2014 MT 41, ¶ 13, 374 Mont. 38, 318 P.3d 1024. However, this Court will not presume prejudice from the alleged misconduct; the defendant must show that the argument violated his substantial rights. *McDonald*, ¶ 10 (citing *State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213).

This Court generally will not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. *Walton*, ¶ 10 (citing *Aker*, ¶ 21; *State v. Longfellow*, 2008 MT 343, ¶ 24, 346 Mont. 286, 194 P.3d 694). The defendant must make a timely objection to statements in closing argument or the objection is deemed to be waived. *State v. Cooksey*, 2012 MT 226, ¶ 40, 366 Mont. 346, 286 P.3d 1174.

Discretionary review, applied sparingly, may be available on a case-by-case basis under the plain error doctrine. *Aker*, ¶ 21; *McDonald*, ¶ 8. But a prosecutor's

argument is not plain error if made in the context of discussing the evidence presented and how it should be used to evaluate testimony under the principles set forth in the jury instructions. *Aker*, ¶ 27 (citing *McDonald*, ¶ 15).

B. The prosecutor's unobjected-to statements in closing argument did not deprive Smith of a fair and impartial trial and did not amount to plain error.

Despite Smith's admitted failure to object to the State's closing at trial, on appeal he relies upon three primary areas of the argument to support his claim for plain error: reliance on the "forensic interview video to corroborate E.G.'s testimony;" mispresenting or misstating witness testimony; and misstating the law and/or vouching for E.G.'s credibility during the final summation on rebuttal. (*See* Br. of Appellant at 21, 29.)

First, in the initial portion of closing, according to Smith, "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." (Br. of Appellant at 29.) Smith's objection was to the State's attempt "to **bolster [its] case** by commenting upon the consistency of the statements." (Tr. at 613 (emphasis added).) The district court admonished the State to "be certain not to comment on . . . 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."

(Tr. at 614 (emphasis added).) The argument on appeal says that the prosecutor "disregarded" the district court's ruling when she argued:

> There were several times in [the video] 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.

(Br. of Appellant at 29-30 (citing Tr. at 614).)

Second, during rebuttal argument, according to Smith, the State misrepresented the evidence by saying three things: first, that "this is not a family that walks around nude or partially nude," but Smith happened to be walking around in his underwear the day of the incident; second, that Smith told E.G. to "[d]o it like your momma;" and third, that Smith "lied about his own phone number." (Br. of Appellant at 30 (citing Tr. at 628-29).) Smith, with the benefit of hindsight and a verbatim transcript, goes on to clarify on appeal his current interpretation of the testimony on these points—even though the statements apparently were not significant enough to object to or correct during argument. (*Id*. (citing Tr. at 353, 539-40, 561, 564-65).)

Third, in the final summation of the State's rebuttal, according to Smith, the State improperly appealed to the jury's sympathy, vouched for E.G.'s credibility and misstated the law when it concluded:

> The defendant preyed on [E.G.'s] innocence. Justice protects innocence. . . . The defendant may have underestimated [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.

(Br. of Appellant at 18, 31 (citing Tr. at 630).)

Smith has failed to show how these few statements—in the context of the entirety of the State's closing argument and under the principles set forth in the jury instructions—amounted to prosecutorial "misconduct," deprived Smith of a fair and impartial trial, or prejudiced his substantial rights.

It is proper for the prosecutor to comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences that may be drawn therefrom. *State v. Daniels*, 2003 MT 247, ¶ 26, 317 Mont. 331, 77 P.3d 224 (citation and quotation omitted). Similarly, although a prosecutor must avoid offering personal opinion, comment is appropriate on the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved in the instructions to the jury. *Aker*, ¶ 27 (citing *McDonald*, ¶ 14).

It is a well-recognized principle of law that juries are presumed to follow the law as given them. *State v. Turner*, 262 Mont. 39, 55, 864 P.2d 235, 245 (1993) (citing *Opper v. United States*, 348 U.S. 84, 95 (1954); *McKenzie v. Risley*,

842 F.2d 1525, 1533 (9th Cir. 1988), cert. denied, 488 U.S. 901 (1988)). Among other things, the jury was instructed—and is presumed to have obeyed—that they should take the law from the court's instructions alone and not anyone else's version—although counsel may comment and argue upon the law as given (Instrs. 2, 5); that they may not be governed by mere sentiment, conjecture, sympathy, or passion (Instr. 2); that they are the sole judges of the credibility of witnesses and the weight to be given their testimony (Instrs. 3, 13); that they may consider a list of five things: witness appearance, manner, candor, etc.; witness interest, motive, bias, or prejudice; whether witnesses are supported or contradicted by other evidence; a witness's ability to perceive and communicate; and evidence of bad character for truthfulness (Instr. 3); and that the statements and arguments of the attorneys "are not evidence, and you must not consider them as evidence in deciding the facts of this case." (D.C. Doc. 71 (Instr. 14); Tr. at 320-23, 326, 603.)

As to the first challenged statement, then, the State simply pointed out a matter that the jury was entitled to consider: that E.G. said certain things on the video and that parts of the video corroborated other evidence—that is to say, that some testimony by E.G. was "supported or contradicted by other evidence [i.e. the video]." (D.C. Doc. 71 (Instr. 3).) And that is exactly what the district court told the State that it could do: "remind the jury what they can consider." (Tr. at 614.) It is also exactly what Smith asked the jury to do: carefully evaluate witnesses'

credibility based on their consistent or inconsistent statements. (Tr. at 340-41.) In addition, as the State argued throughout trial, the jury was entitled to consider more than just E.G.'s words in the video, but also her candor, demeanor, and credibility, as well as how it corroborated her testimony.

As to the claimed "misstatements," each could constitute proper comment on, or interpretation of, the evidence presented, credibility of witnesses or conflicts and contradictions in testimony, and/or suggested inferences to be drawn therefrom—all as permitted by case law. Each of the arguments was consistent with and based on the trial testimony and suggested inferences that the jury could draw from the testimony—Smith's wearing his underwear around the house was a rare occurrence and suspicious on that day; Smith encouraged E.G. to "dance" on the pole because her mom did, like her mom did; and forgetting a fairly common thing like one's phone number just may be a convenient lie, whatever Smith's after-the-fact explanation. Defense counsel certainly had the opportunity to object or correct these statements if she recalled them differently. More likely, counsel consciously refrained from objecting for strategic reasons anyway. In any event, the jury was prohibited from considering such statements and arguments as evidence (D.C. Doc. 71 (Instr. 4).)

Finally, regarding the final summation, the State did not offer any improper "personal opinions on a witness's credibility." *State v. Racz*, 2007 MT 244, ¶ 36,

339 Mont. 218, 168 P.3d 685 (citation omitted). The prosecutor stated what E.G. had done, which was in fact stand up in court and tell what she believed to be true—something emphasized throughout these proceedings: the overarching importance of telling the truth, acknowledged by the parties and witnesses. *See supra* at 8. Furthermore, there was nothing inherently pandering to the sympathy of the jury in the prosecutor's statements—and the jury was instructed to ignore such appeals anyway. Ironically, it was the defense that brought up sympathy for E.G. repeatedly in closing: "It's natural to want to sympathize with [E.G.]. We all do;" and "It is natural to feel sympathy for [E.G.]. She was in a rough place." (Tr. at 617, 623.) Finally, there is no "misstatement of the law" in this summation. It is simply the culmination of a closing argument that commented on the evidence and concluded that the law, the testimony, and "justice" required a verdict of guilty—that was the whole point of the trial. Again, the jury instructions provide that only the judge instructs on the law and the statements and arguments of counsel are not evidence.

Moreover—as to each category of statement—this Court has said that the potential prejudicial effect of improper arguments may be cured when the jury has been admonished not to regard those statements as evidence. *State v. Gladue*, 1999 MT 1, ¶ 31, 293 Mont. 1, 972 P.2d 827 (citation omitted). In *Gladue*, as in this case, the district court instructed the jury that it was to decide the case based

only on the evidence presented, and that the statements of the prosecutor and defense counsel were not evidence. *Id.*

Ultimately, Smith has not shown that the State's argument otherwise prejudiced his case or violated his substantial rights. Smith himself acknowledges on appeal that this was a "close" case, that the jury deliberated for over five hours, and had questions about the evidence. (Br. of Appellant at 27-28; Tr. at 631-45; D.C. Doc. 71 (Instr. 22).) That length of deliberation, along with searching for answers to evidentiary questions, indicates serious and thoughtful consideration of the facts and law as presented and instructed—and perhaps rational debate among the panel. The prosecutor told a compelling story within the bounds of the law, but did not sway the jury or prejudice the trial through misconduct.

On these allegations, the prosecutor's argument does not rise to the extraordinary and firmly convincing level necessary to justify the exercise of discretionary plain error review by this Court; it does not reach the level of a serious mistake evincing manifest miscarriage of justice, unresolved questions of fundamental fairness, or compromised integrity of the judicial process. *See Aker*, ¶ 21.

/ / /

III. This Court should dismiss Smith's claim that Mont. Code Ann. § 45-5-625(4)(b) is unconstitutional, whether it is deemed to be a facial or an as-applied challenge.

A. Standard of review

This Court reviews criminal sentences for legality. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897.

The constitutionality of a sentencing statute presents a question of law that the Court reviews de novo. *State v. Strong*, 2009 MT 65, ¶ 7, 349 Mont. 417, 203 P.3d 848.

B. Smith failed to bear his burden to prove that the statute is unconstitutional—if it is reviewable at all under *Lenihan*.

Legislative enactments are presumed to be constitutional. *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324. The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional. *Yang*, ¶ 14. To prevail on a facial challenge, the party challenging the statute must show either that "no set of circumstances exists" under which the statute would be valid or that the statute lacks a "plainly legitimate sweep." *In re S.M.*, ¶ 10 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

Smith was convicted of the crime of "sexual abuse of children" under Mont. Code Ann. §§ 45-5-625(1)(a) and -625(5)(b)(ii), and was sentenced under § 45-5-625(4) for adult offenders whose victims are 12 years old or younger. The

sentencing statute has two parts—first, "punishment" by imprisonment for 100 years with certain parole restrictions, along with a fine and required sexual offender treatment. *Id*. § 45-5-625(4)(a)(i)-(iii). Smith was sentenced under this provision to 100 years at MSP, with 80 years suspended without a parole restriction (the district court made an exception to the mandatory minimums)—resulting in a 20-year prison sentence (with the possibility of parole) followed by 80 years of supervision on probation subject to enumerated conditions. Smith does not challenge this "sentence" on appeal and that part of the statute is not at issue.

The second part of the sentencing statute does not impose additional "punishment," but places conditions on the offender upon release from the mandatory prison sentence: "If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections 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). This provision was imposed as a condition of probation in the judgment of conviction. As a practical matter, this condition will apply for the entirety of Smith's 80-year period of supervision on probation. For the first time on appeal, Smith challenges the constitutionality of that part of the sentencing statute—at least nominally as a "facial" challenge.

Smith argues that the article II, sections 10-11, of the Montana Constitution afford greater privacy and search and seizure protection than United States Constitution, amend. IV, but does not explain how that proves that Mont. Code Ann. § 45-5-625(4)(b) is facially unconstitutional. *In re S.M.*, ¶ 10 (the standard is "no set of circumstances exists" under which the statute would be valid or that the statute lacks a "plainly legitimate sweep"). Smith also cites to *Grady v. North Carolina*, 575 U.S. 306 (2015) (per curiam) and *State v. Grady*, 831 S.E.2d 542, 553 & n.6 (N.C. 2019) (on remand). But the Supreme Court did not decide the constitutionality—facial or otherwise—of North Carolina's statute. Although the Supreme Court held that the statute affected a Fourth Amendment search designed to obtain information, it did not decide whether such a search would be unreasonable, and therefore remanded. *Grady*, 575 U.S. at 309-10. The North Carolina statute is starkly different from the sexual abuse of children sentencing statute here: requiring satellite-based monitoring (SBM) for "recidivist" sex offenders who have completed their prison sentences and are no longer supervised by the State. *Grady*, 831 S.E.2d at 553 & n.6.

Those cases, and the other state-court cases cited by Smith, clearly deal with statutes very different from Mont. Code Ann. § 45-5-625(4)(b), and they do not control here to establish the facial unconstitutionality of Montana's statute. Smith neither alleges nor argues that the statutes are similar, nor does he provide any

supporting authority. Smith, again, has failed to describe, allege, or meet his burden to establish that "no set of circumstances exists" under which the statute would be valid or that the statute lacks a "plainly legitimate sweep."

The sexual abuse of children statute enumerates many types of proscribed conduct, not just the kind of "exhibition" that Smith engaged in. Mont. Code Ann. § 45-5-625(1)(a)-(i). Within those varieties of criminal conduct, there would also be levels of severity of offenses and culpability of offenders. Smith has not shown that the condition of supervision and monitoring under Mont. Code Ann. § 45-5-625(4)(b) would be an unreasonable and constitutionally impermissible search in every case, for every type of offense, and for every offender—even if he thinks it would be as-applied to him.

In fact, instead of going on to demonstrate how Mont. Code Ann. § 45-5-625(4)(b) is always an unreasonable search and unconstitutional on its face in every case, Smith describes the facts of his own case and explains why the statute is an unreasonable infringement on his rights to privacy. (*See* Br. of Appellant at 40-43.) Smith does not describe how or why the supervision and monitoring condition would be unreasonable to every potential offender, but only describes his own circumstances: a first sexual offense; no chronic or compulsive pattern of sexual abuse over time; no demonstrated sexual interest patterns in young children; crime that did not involve sexual touching; crime that appeared to be an offense

involving a regression from normal sexual patterns; low risk of reoffending; qualification for exception to mandatory minimums; and "other mitigating circumstances." (*Id.*) Smith also argues how unreasonable the condition of supervision would be if he were able discharge his sentence and be free from his 80-year probationary period—an entirely speculative proposition while he is still in prison and just beginning to serve his 100-year sentence.

Smith, in effect, is arguing that the condition and the statute is "objectionable" as to him. Suddenly, Smith's facial challenge has become a thinly veiled "as-applied" challenge. To the extent that it is an as-applied challenge, then it is not reviewable for the first time on appeal under *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

The *Lenihan* rule may apply to constitutional challenges of criminal sentences. *Strong*, ¶ 7. The Court differentiates between the types of constitutional challenges that it will address for the first time on appeal under *Lenihan*: challenges to the facial constitutionality of a sentencing statute may be raised for the first time on appeal, but the exception does not apply to as-applied constitutional challenges. *Yang*, ¶ 10. A facial constitutional challenge is based on a "defendant's allegation that the **statute** upon which the district court based her sentence is unconstitutional. A defendant's sentence is illegal if she is sentenced pursuant to an unconstitutional statute." *Yang*, ¶ 11 (emphasis in original). On the

other hand, an as-applied challenge is based on a "defendant's allegation that her **sentence** is unconstitutional, although imposed pursuant to a constitutional sentencing statute. As long as it is within statutory parameters of a constitutional sentencing statute, the as-applied challenge is considered objectionable and therefore waived if not first presented to the sentencing court." *Id.* (emphasis in original); *see Yang*, ¶ 12 (citing *State v. Coleman*, 2018 MT 290, ¶ 11, 393 Mont. 375, 431 P.3d 26).

Not only is Smith's "as-applied" challenge waived and not reviewable by this Court, but Smith conceded and acquiesced in the validity of the condition on the record. Smith admitted that: he had had an opportunity to review the PSI; did not find any mistakes or areas that needed to be corrected; had no concerns about any of the recommended conditions; did not want the court to review any of the conditions imposed; and believed that "all of the conditions set forth [were] consistent with the statutory requirements." (Tr. at 667-68, 687; *see* D.C. Docs. 77 (motion to strike and refile corrected PSI; no objection to recommended conditions), 84 (no objection to conditions or Mont. Code Ann. § 45-5-625(4)(b) in sentencing memorandum).) The time to have raised his as-applied constitutional challenge was at sentencing.

This Court should reject Smith's argument that § 45-5-625(4)(b) is unconstitutional, whether it is deemed a facial or an as-applied challenge.

CONCLUSION

This Court should affirm Smith's judgment of conviction and sentence for felony sexual abuse of children.

Respectfully submitted this 5th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,993 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

./s/ Jonathan M. Krauss
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CERTIFICATE OF SERVICE

I, Jonathan Mark Krauss, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-05-2020:

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