IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0409

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HOLLY ANN MATHIS,

a.k.a. HOLLY ANN NORLING,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, the Honorable Robert G. Olson, Presiding

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I. Section 46-15-320's unconstitutionality and unfair application necessitates reversal.

A. Section 46-15-320 and the State deprived the defense of the opportunity to interview key witnesses.

Section 46-15-320 states, "A defendant may not interview a child under the age of 16 . . . or an immediate family member of the child who is also under the age of 16, except by an order of the court . . . ." Seeking to forestall judicial review of this flagrantly unconstitutional law, the State declares § 46-15-320 did not prevent Holly's defense from interviewing T.N. and J.M. (Appellee's Br. at 13.) In support, the State offers a legal argument and a factual assertion. Neither withstands inspection.

The State circularly argues § 46-15-320 does not unconstitutionally prohibit a defendant from interviewing a willing witness because . . . constitutionally, a witness must be free to speak with the defense. (Appellee's Br. at 22.) Indeed, due process means a witness must be free to speak with the defense, the defense with a witness, and the government may not obstruct equal opportunity for an interview. *State v. Smith*, 206 Mont. 99, 103, 765 P.2d 742, 744 (1988); *State v. Gangner*, 73 Mont. 187, 194–95, 235 P. 703, 706 (1925). But

that § 46-15-320's plain language conflicts with those constitutional requirements doesn't mean § 46-15-320 doesn't do what it says; it means § 46-15-320 is unconstitutional. *See* Unconstitutional, *Black's Law Dictionary* (11th ed. 2019) ("Contrary to or in conflict with a constitution.").

To be sure, under the canon of constitutional avoidance, when a statute is susceptible to more than one reasonable interpretation, a court may choose the reasonable interpretation that renders the statute constitutional. *See Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548. The State waves in the general direction of this canon. (*See* Appellee's Br. at 22 (citing *State v. Price*, 2002 MT 229, ¶ 22, 311 Mont. 439, 57 P.3d 42).) But notice, the State never explains how § 46-15-320's plain language can support a reasonable interpretation where it does not obstruct the defense from having an equal opportunity to interview witnesses. (*See* Appellee's Br. at 15–29.) In actuality, § 46-15-320 is a model of clarity when it says, "A defendant may not interview a child . . . except by order of the court." As the District Court understood, that plain language unambiguously places a disability regarding the opportunity to interview witnesses on the

defense only. (D.C. Doc. 125.) Since due process, among other guarantees, requires that the defense not face government obstruction in interviewing witnesses (Appellant's Br. at 19–22 (citing cases)), § 46-15-320 is blatantly unconstitutional.

As for the State's factual assertion, the State contends "T.N. and J.M. declined Mathis's request for pretrial interviews." (Appellee's Br. at 13.) The State has zero support for the assertion.

The State cites D.C. Doc. 104, which was Holly's brief in support of her motion regarding § 46-15-320. The State describes the citation as "defense counsel writing that Mathis sought access to the two children for pretrial interviews but 'all requests were denied.'" (Appellee's Br. at 16–17.) Coming immediately after the State asserts "T.N. and J.M. declined Mathis's request for pretrial interviews" (Appellee's Br. at 16), a reader would expect a statement in the cited record referring to all requests being denied by the children or their guardians. Not so, because the State provides only a portion of what defense counsel wrote. Defense counsel wrote, "Counsel has diligently sought access to both [T.N.] and [J.M.] for pre-trial interviews, as well as access to records in State of Montana v. Timothy Norling Sr., Fergus County Cause DC-

2018-22 both *through formal and informal discovery requests*, as well as motions and requests to the Court. To date, all requests have been denied." (Emphasis supplied.) Such discovery requests are axiomatically between the parties, not between parties and witnesses. *See, e.g.*, Mont. R. Civ. P. 26(f) ("[T]he court may direct *the attorneys for the parties* to appear before it for a conference on the subject of discovery" (emphasis supplied).); Mont. R. Prof. Conduct 3.4(d) ("A lawyer shall not . . . fail to make reasonably diligent effort to comply with a legally proper discovery requested by an opposing party."). What defense counsel wrote establishes it was the State that denied defense counsel's inquiries[1]—as one would expect because § 46-15-320 unambiguously prohibits such interviews.

The State's second citation is to a statement made in the hearing regarding § 46-15-320. The State describes the citation as "prosecution stating that the 'children's guardians . . . have a right to refuse those interviews.'" (Appellee's Br. at 17.) Again, coming right after the State asserts "T.N. and J.M. declined Mathis's request for pretrial interviews"

[1] Although not required, it is the common practice among many defense attorneys to reach out to the State when first seeking to interview many witnesses.

(Appellee's Br. at 16), a reader would expect this citation to mean (or at least suggest) the guardians in this case did refuse interviews by the defense. Again, the reader is misled.

The relevant portion of the transcript is as follows, with the District Court addressing the State:

> COURT: You don't disagree with me that if you chose to you could conduct an interview of either of these children basically anytime you want though correct? Or you could have someone do it on your behalf? The State. When I say that I'm talking in generic [about] the State.
>
> MS. ADAMS: Yes, Your Honor, based on the language of the statute at this point and time the State could do that. However, the children's guardians also I believe have a right to refuse those interviews and the discussions regarding those topics.

(12/2 Tr. at 33.) The passage depicts the court asking about and the prosecutor responding regarding witness interviews with the State, not the defense. Moreover, the passage represents the prosecutor discussing the general ability of witnesses to decline interviews—something Holly has always acknowledged (*see* Appellant's Br. at 20)—and not any actual declination in this case, the State's representations on appeal notwithstanding.

In this case and others, § 46-15-320 has done what it says and prohibited the defense from having the opportunity to interview key witnesses. This Court must review that deprivation.

B. Section 46-15-320 is unconstitutional, as was its effect in this case.

The State argues § 46-15-320 is constitutional because it passes strict scrutiny. Citing the House Judiciary Committee's hearing on the bill that eventually created § 46-15-320, the State argues the bill "was intended to protect these victims from further traumatization if they did not want to be interviewed." (Appellee's Br. at 26.)

At this point, a reader of the State's brief may well feel something is not adding up. If the bill was intended to protect alleged victims of sexual abuse from "further traumatization if they did not want to be interviewed," why does § 46-15-320, by its plain terms, prohibit all defense interviews of alleged victims and their minor relatives, absent court intervention, notwithstanding whether the witnesses agree to be interviewed? The disconnect is due to the State citing a hearing regarding a bill that was completely different than the bill that enacted § 46-15-320.

As initially proposed and heard by the House Judiciary Committee, HB 590 would have amended Mont. Code Ann. § 46-24-106 to state "child victim[s]" in sexual offense cases could "refuse to submit to," could set "reasonable conditions on," and could "terminate" pretrial interviews with the defense at any time. (HB 590, Version 1 (Appendix A).) These provisions would have been challengeable insofar as they targeted the defense alone and thus communicated "a message that cooperation with the defense is undesirable." *Alaska v. Murtagh*, 169 P.3d 602, 615 (Alaska 2007). But beyond that targeting of the defense, these provisions would have simply stated the law as it exists by constitutional necessity. (*See* Appellant's Br. at 20 ("A witness can, of course, decline a defense interview.").)

The bill was still essentially the same when it came up for a hearing before the Senate Judiciary Committee. (*See* HB 590, Version 2 (Appendix B).) But at the hearing, a lobbyist for the Montana County Attorneys' Association (MCAA) testified she was working on amendments. (Senate Judiciary Committee Hearing, March 28, 2019, at 11:00:00–00:15.) The reason as explained by the lobbyist? "There wouldn't actually be any change to law" with the bill as it was then

proposed. "While there would be some additional language, it wouldn't actually change current practice" under which a witness is free to speak with whomever he or she wishes. (Hearing at 11:02:35–02:47.) The MCAA, by contrast, wanted to change the law to create a presumption that the defense alone should not be permitted to interview child witnesses. Referring to such defense interviews, the lobbyist explained the amendments she was working on would take the law from "this is allowed, why shouldn't it be" to "this shouldn't be allowed, why should it be." (Hearing at 11:03:30–03:42.) Accordingly, several days after the hearing, an amended version of the bill was produced, striking all the proposed language in the former version of the bill and replacing it with entirely new language—a full tear down and rebuild. (HB 590, Version 3 (Appendix C).) Within the new language was a new statute, § 46-15-320, under which "[a] defendant may not interview" child witnesses in cases alleging child sexual abuse without obtaining a court order restricted to "exceptional circumstances." No hearing was held on the version of HB 590 that enacted § 46-15-320. (HB 590, Final Version (Appendix D).)

So, the question is, to what compelling interest is the final version of HB 590—the version enacting § 46-15-320—narrowly tailored? Certainly not "protect[ing] these victims from further traumatization if they did not want to be interviewed" (Appellee's Br. at 26), for, by its terms, § 46-15-320 obstructs the defense's access to witnesses who agree to be interviewed, as well as siblings who are not the direct alleged victims of the offense.

Also certainly not an interest in not having child witnesses conduct any interviews that aren't forensic interviews, for § 46-15-320 obstructs the defense alone from asking these witnesses questions before trial, leaving prosecutors not trained in forensic interviews free reign to ask these witnesses the same sort of questions. Indeed, that happened in this case. (*See* Appellant's Br. at 10, 13.)

Also certainly not an interest in preventing intimidation of witnesses, for there are laws and ethical rules to prevent and punish this, *see* Mont. Code Ann. § 45-7-206 (tampering); Mont. R. Prof. Conduct 4.4 ("[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person."), and § 46-15-320 sweeps far more broadly, obstructing any defense interview.

No, what § 46-15-320 is tailored to is the interest identified by the MCAA: The interest of not letting the defense interview crucial witnesses in these cases. (Hearing at 11:03:30–03:42 ("This shouldn't be allowed, why should it be.").) But the defense's equal opportunity to interview witnesses without government obstruction has long been held a constitutional necessity. *E.g.*, *Gregory v. U.S.*, 369 F.2d 185, 188 (D.C. Cir. 1966); *Smith*, 206 Mont. at 103, 765 P.2d at 744; *Gangner*, 73 Mont. at 194–95, 235 P. at 706. The State has no legitimate interest in directly nullifying what has been recognized as necessary for effective assistance of counsel,[2] fundamental fairness, and due process. Section 46-15-320 is unconstitutional, and flagrantly so.

As for § 46-15-320's provision permitting a court to grant an interview in "exceptional circumstances," the State claims this means that § 46-15-320 "protects a defendant's right to a fair trial, rather than

[2] The State's brief never responds to § 46-15-320's prejudicial impact on effective assistance of counsel. (*See* Appellee's Br. at 15–29.) Perhaps that is because the prejudice is obvious. *See State v. Denny*, 262 Mont. 248, 253, 865 P.2d 226, 229 (1993) ("By not interviewing the potential witnesses and investigating the case, counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.") (cleaned up).

infringing upon it." (Appellee's Br. at 27.) The facts of this case and the State's arguments illustrate how ludicrous that claim is.

In this case, of course, the District Court did not grant the requested interviews even under the exceptional circumstances provision. The State argues that was not error because this case is—rather than exceptional—similar to "almost every child sexual abuse case. (Appellee's Br. at 17.) Holly stands by her arguments for why this case is exceptional. (*See* Appellant's Br. at 29–30.) But insofar as the State's argument is accepted, then that means § 46-15-320's nominal exception is illusory in every or almost every case in which § 46-16-320 applies. How the provision can then "protect a defendant's right to a fair trial," the State does not explain.

The State also argues that "additional pretrial interviews of the children were not necessary because they had already been forensically interviewed." (Appellee's Br. at 12.) The State's own actions belie the argument, as the State met with both witnesses before trial, and it is a matter of record that the State asked T.N. additional questions before trial. (Appellant's Br. at 10, 13.) So, additional pretrial interviews were necessary for the State. And that is not surprising. By their nature,

forensic interviews in which interviewers cannot lead children to discuss important points will almost always be incomplete in relation to what trials are about. Of course, that incompleteness will not be a problem for the State under § 46-15-320, because the State remains unhindered in its opportunity to conduct further interviews before trial. Section 46-15-320 instead makes that a problem—and a substantial one—for the defense alone.

Finally, the State shrugs off § 46-15-320's unequal deprivation because Holly has not raised an equal protection claim. (*See* Appellee's Br. at 24–25.) Due process, however, "speak[s] to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Placing an obligation or obstruction on the defense while granting the State immunity from the same tips that balance unconstitutionally. *See Wardius*, 412 U.S. at 474 n. 6, 475 n. 9 (recognizing courts must be "particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial"; "if there is to be any imbalance in discovery rights, it should work in the defendant's favor"). Thus, "elemental fairness and due process

require[]" that "both sides have an equal right, and should have an equal opportunity to access witnesses for pretrial interviews." *Gregory*, 369 F.2d at 188. And where constitutional rights "are involved, there can be no rule-making or legislation which would abrogate them." *Miranda v. Arizona*, 384 U.S. 436, 491 (1966). For these reasons and others, § 46-15-320 is facially unconstitutional and unconstitutional as it was applied in this case.

C. A new trial is necessary.

By obstructing the defense's opportunity to interview the alleged victim in child sexual abuse cases, § 46-15-320 obstructs the defense's opportunity to interview the single person most likely to have the information necessary to defend against the charge.[3] No wonder, then, the error that § 46-15-320 effectuates meets all the criteria for structural error. (Appellant's Br. at 31–32.) Indeed, the State does not argue any of the criteria are unsatisfied. (*See* Appellee's Br. at 30.)

[3] The State's brief (Appellee's Br. at 30) cites *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982), a case in which the "witnesses" at issue were not witnesses at all: They did not testify, an investigation concluded they possessed "no evidence material to the prosecution or defense," and the defense "made no attempt to explain" how the "witnesses" would aid the defense given they were not aiding the prosecution. *Valenzuela-Bernal*, 458 U.S. at 861. This is all a far cry from § 46-15-320 and this case, which necessarily concern actual and material witnesses.

But the result is no different if harmless error review is applied in the context of this specific case. Under harmless error review, the State, as the beneficiary of the error, must "demonstrate" or "prove" there is no reasonable probability the violation contributed to the trial's outcome. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735.

Instead of demonstrating or proving anything, the State declares that, had the defense's access to T.N. and J.M. not been obstructed, the opportunity to interview them would not have led to evidence beyond what the witnesses disclosed at trial. The State's speculation is not sufficient to carry its burden to prove and demonstrate harmlessness. (*See* Appellant's Br. at 34 (citing, *e.g.*, *Massachusetts v. Balliro*, 209 N.E.2d at 316 (1965))). Harmless error review would have to be a different and less fair standard for the State's argument to prevail. Justice requires reversal in this case.

II. The State violated a court order to lodge relevant forensic interviews.

In addition to the foregoing violation, the State failed to lodge Confidential Criminal Justice Information (CCJI) that included forensic interviews of T.N. and J.M. stemming from the investigation into

Timothy Norling. On appeal, the State does not dispute that it did not lodge these forensic interviews. (*See* Appellee's Br. at 31–34.) Instead, the State suggests the prosecutor below did not understand she was required to lodge these interviews. (Appellant's Br. at 32.) If that was the prosecutor's understanding, it was clearly unreasonable.

As an initial matter, Mont. Code. Ann. § 46-15-322(1)(a) requires the State, upon request, to make available to the defendant the "names, addresses, *and statements* of all persons whom the prosecutor may call as witnesses in the case in chief." (Emphasis supplied.) Holly served a discovery request on the State (D.C. Doc. 12), and the District Court's omnibus order required the State, "[p]ursuant to MCA § 46-15-322," to "[d]isclose . . . the State's witnesses . . . and *any statements* or reports they have made." (Emphasis supplied.) A "statement" includes "a video or audio recording of a person's communications or a transcript of the communications." Mont. Code. Ann. § 46-1-202(26)(b). T.N. and J.M. were witnesses in the State's case in chief, and their forensic interviews stemming from the Timothy Norling case were communications constituting statements. Thus, by not making these statements available to the defense, the State violated both the law and the

omnibus order. *See State v. Pope*, 2017 MT 12, ¶¶ 18–27, 386 Mont. 194, 387 P.3d 879 (concluding State erred by withholding a witness statement under a claim that it was work product). If the State believed other concerns should override § 46-15-322(1)(a) and the omnibus order's facial application to the forensic interviews, the State's remedy was a protective order under Mont. Code Ann. § 46-15-328(1). But the State didn't seek a protective order. Instead, the State violated § 46-15-322(1)(a) and the omnibus order.

Next, in a motion to the court, the defense specifically moved for the State to disclose records including T.N.'s and J.M.'s forensic interviews stemming from the State's investigation of Timothy Norling. (D.C. Doc. 39 at 1 ("Specifically, the defense requests the file and information in the possession of the Fergus County Attorney's Office associated with State of Montana v. Timothy E. Norling, Fergus County Cause DC-2018-22, including . . . forensic interviews . . . .").) The State responded that it did not possess many of the requested records. (D.C. Doc 43 at 13, 14.) But as to the requested forensic interviews and some of the requested counseling records, the State acknowledged—both explicitly and implicitly—that it possessed those; indeed, the State

proposed that, if the court were to grant the defendant's motion, the State would lodge those records for in camera review. (D.C. Doc. 43 at 7, 15–16 ("The State requests that this forensic interview be reviewed *in camera*"; "The State can lodge those counseling records with the Court for *in camera* review . . . .").) The defense replied it had "no objection to the Court conducting *in camera* review." (D.C. Doc. 52 at 4.) The District Court's order accepted the State's offer, ordering that, as to those records in the State's possession, the court would "conduct an in camera review of the CCJI" relating to "all three Children," including T.N. and J.M. (D.C. Doc. 59 at 6.) But the State responded by lodging only J.M.'s counseling records and not the requested forensic interviews. (D.C. Doc. 60.)

Simply put, it would make no sense for the State to have understood the District Court's order to require it to lodge J.M.'s counseling records but not the forensic interviews. The District Court's order was not specific to J.M.'s records, but rather the CCJI in the State's possession, which the State acknowledged included the forensic interviews. Accordingly, the State on appeal offers no explanation for how the prosecutor could have reasonably understood the order not to

have required lodging the forensic interviews at issue. (*See* Appellee's Br. at 31–34.)

The State on appeal instead employs the defense's subsequent subpoena for DPHHS material to obfuscate the prosecutor's violation. (*See* Appellee's Br. at 33.) But the record makes clear the defense's subpoena to the local Fergus County DPHHS office was in accordance with the District Court's prior order, which granted defense's motion relating to material in the State's possession and denied the motion as to the material outside the State's possession, directing that Holly should get a subpoena for that unpossessed material. (D.C. Doc. 59 at 6–7 ("Defendant broadly requested . . . records not in the possession of the State . . . . Defendant should ascribe to the Subpoena procedure . . . .").) The State understood this, responding to the motion for the subpoena by noting it related to records that the court had "denied the defendant's request for." (D.C. Doc. 72 at 4.) That hardly lets the State off the hook for not lodging, per the court's prior order, the records that were in the State's possession.

Further, the State's suggestion that DPHHS possessed the forensic interviews stemming from the Timothy Norling investigation is

unfounded and likely untrue. The State asserted below that the forensic interviews at issue were confidential criminal justice information. (D.C. Doc 43.) Indeed, the interviews were conducted pursuant to the criminal investigation of Timothy Norling. *See* Mont. Code Ann. § 44-5-103(3) (defining CCJI to mean "criminal investigation information"). Possession of such CCJI is generally restricted to criminal justice agencies. *See* Mont. Code Ann. §§ 44-5-302, -303 (restricting dissemination of CCJI). DPHHS is not a criminal justice agency and accordingly seeks not to hold CCJI. Section 44-5-103(7)(b) (defining a criminal justice agency as a federal, state, or local agency performing "as its principle function the administration of criminal justice"). A local prosecutor's office, however, is a criminal justice agency. *See* § 44-5-103(7)(b). So, the local DPHHS office likely did not have the forensic interviews and thus could not include them when responding to the subpoena, but the local prosecutor definitively had the forensic interviews and simply refused to disclose them despite the law and a court order.

In any event, it was the local prosecutor who fulfilled the DPHHS subpoena, requesting an extension to respond and lodging the

purportedly responsive records. (*See* D.C. Docs. 74 ("The State has been unable to compile the documents within four (4) business days and respectfully requests [an extension] to lodge the documents with the Court."), 78 ("[T]he State of Montana, and gives notice of lodging the DPHHS file . . . .").) If anything untoward happened in the response to the subpoena, the local prosecutor is responsible.

Finally, the State seeks to undermine the known significance of its discovery violations by baldly asserting it was "ambiguous" whether T.N. testified at trial that he disclosed Holly's alleged conduct in his initial forensic interview stemming from the Timothy Norling case. (Appellee's Br. at 32.) But there is no ambiguity. In the relevant testimony, defense counsel asked T.N. if he knew how the investigator knew to show up at T.N.'s grandmother's house to ask about conduct involving Holly's breasts. (1/28 Tr. at 104.) T.N. responded that it was because he had disclosed that conduct when he was previously interviewed, "so I think they probably knew because I told them." (1/28 Tr. at 105.) T.N. confirmed the referenced interview was when his dad "first got arrested" and he was picked up by Child Protective Services. (1/28 Tr. at 105.)

In sum, the State violated its obligations and the court's order, and that led to the defense not being able to directly refute T.N.'s false testimony with the undisclosed records. This fundamental unfairness warrants reversal in combination with the other errors and violations.[4]

III. *Weaver* controls, and the District Court plainly erred by not fully and fairly instructing the jury with the applicable uniform instruction.

A trial court must fully and fairly instruct the jury on the applicable law. *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 9, 400 Mont. 46, 462 P.3d 1219. Where jurors might be confused about the necessity to unanimously agree on a specific criminal act, the trial court's instructional duty requires giving a specific-act unanimity instruction, *State v. Weaver*, 1998 MT 167, ¶¶ 34, 39, 290 Mont. 58, 964 P.2d 713, which is now standardized as Model Criminal Jury Instruction 1-106(a). *Weaver* establishes the District Court's failure to give a specific-act unanimity instruction in this case was plain error.

The State nonetheless attempts to shunt this case into the course of conduct exception that the *Weaver* Court recognized but held

[4] If the Court does not reverse, then the Court should remand for the State to finally lodge the pertinent records for a full assessment of the previous non-disclosure's prejudice.

inapplicable in that case. (*See* Appellee's Br. at 36–39.) The problem with the State's strategy is that there is no basis to hold this case fits into that exception when *Weaver* does not. This case concerns alleged sexual assaults; so did *Weaver*. *Weaver*, ¶ 1. This case concerns an alleged victim around 10 or 12 years old; so did *Weaver*. *Weaver*, ¶ 7. This case concerns charges with timeframes of several months to a year; so did *Weaver*. *Weaver*, ¶ 36. This case concerns a handful of alleged incidents within the alleged timeframes; so did *Weaver*. *Weaver*, ¶ 17. This case concerns charges the State did not charge as continuous courses of conduct; so did *Weaver*. *Weaver*, ¶ 36.

In an equal, predictable, and fair system of law, "[w]here the reason is the same, the rule should be the same." Mont. Code Ann. § 1-3-202. *Weaver* did not fit into the course of conduct exception because the alleged acts were not so many as to be pervasive, the alleged victims were old enough to discern, separate, and testify about different occasions of alleged acts, and the State never charged the case as a course of conduct. *See Weaver*, ¶ 36. Those same reasons apply equally to this case, and they demand the same outcome: The *Weaver* rule applies, and the course of conduct exception does not.

Without any basis to distinguish *Weaver* on facts bearing on the course of conduct exception, the State pulls at other threads, suggesting the *Weaver* holding was based on there being "multiple victims and unrelated allegations of abuse." *Weaver*, ¶ 40. But that was not the basis for *Weaver*'s holding. As *Weaver* explains, its rule is based on several alleged acts being situated under a charge, and how that necessitates the jury being informed of the constitutional requirement of reaching substantial agreement on a specific act. *Weaver*, ¶ 38. There may be an argument that when the State situates multiple alleged acts *and* multiple alleged victims under a charge, there is even greater impetus for a specific-act unanimity instruction. But *Weaver* makes clear—because each charge there corresponded to a single alleged victim, *Weaver*, ¶¶ 9, 10, 11, 13—that the trial court's duty to instruct on specific unanimity when there are multiple alleged acts situated under a charge does not also require multiple alleged victims. The same applies here.

With *Weaver* being on-point and applicable, it was plain error, as in *Weaver*, for the District Court not to fully and fairly instruct the jury using Model Criminal Jury Instruction 1-106(a).

It was also ineffective of counsel not to request the required instruction. The State's only counterargument—beyond continuing to insist without reason that the continuing course of conduct exception would apply here when it did not in *Weaver*— is that the "record does not explain why counsel did not request the instruction." (Appellee's Br. at 41.) The State ignores Holly's argument that there is no plausible explanation for counsel failing to request an applicable instruction that would have demanded more of the State to achieve a conviction than what the State did here, smushing together and arguing multiple allegations cumulatively. (*See* Appellant's Br. at 48; Appellee's Br. at 41.) That the State cannot offer a plausible explanation for counsel's conduct shows no plausible explanation exists. Trial counsel's ineffectiveness is accordingly reviewable and reversible on direct appeal.

Like the government's obstruction of Holly's equal opportunity to interview key witnesses and the State's failure to lodge relevant records, the lack of a specific-act unanimity instruction subverted the fundamental fairness of this case. Whether assessed alone or in combination with those other errors and violations, the specific-act

unanimity instruction error warrants reversal. This Court should reverse.

Respectfully submitted this 25th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4,970, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-25-2022:

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