IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0471

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CARESSA JILL HARDY, aka

GLENN LEE DIBLEY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable James B. Wheelis, Presiding

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ISSUES PRESENTED

1. Were Glenn's rights to counsel violated when the State used incriminating statements deliberately elicited by his cellmates after they offered their services to the State? Can the State show the admission of those statements and the forensic evidence derived therefrom was harmless beyond a reasonable doubt?

2. Did the district court fully and fairly instruct the jury on the special credibility concerns regarding the testimony of jailhouse informants where the court refused to give Glenn's proposed cautionary instruction? Did that error prejudice Glenn's substantial rights?

3. Did the district court violate Glenn's rights to counsel and to present a defense and dilute the State's burden of proof when it prevented defense counsel from commenting on a missing prosecution witness during closing argument, where the State told the jury the person would testify, paraphrased his out-of-court statements during opening statement, and then chose not to call him to testify? Is that error structural, or, alternatively, can the State show it is harmless beyond a reasonable doubt?

4. Did the prosecutors' repeated instances of misconduct, in conjunction with the errors above, collectively deprive Glenn of a fundamentally fair trial, thereby requiring reversal of his convictions under plain error review and the cumulative error doctrine?

STATEMENT OF THE CASE

On August 22, 2017, the State filed an Information charging Appellant Glenn Lee Dibley, a/k/a Caressa Jill Hardy (Glenn) with two counts of deliberate homicide in violation of Mont. Code Ann. § 45-5-102(1)(a) for purposely or knowingly causing the deaths of Dr. Thomas Korjack and Robert Orozco in rural Frenchtown, Montana, more than four years earlier on or about March 26, through April 1, 2013. (D.C. Doc. 3.) The State later filed an Amended Information charging Glenn with two counts of solicitation to deliberate homicide in violation of Mont. Code Ann. §§ 45-4-101 and 45-5-102(1) for encouraging two inmates, John Braunreiter and Bryan Palmer, to kill Karen Hardy (Karen), the State's alleged eyewitness to the homicides. (D.C. Doc. 41.) Glenn entered not guilty pleas. (Tr. at 15-16, 46-49.)

A jury found Glenn guilty on all counts after a nine-day trial. (Tr. at 2505; D.C. Doc. 369.) Glenn was sentenced to serve four concurrent life sentences in prison. (Tr. at 2527-28; D.C. Doc. 396, attached as Appendix A, at 4.) Glenn timely appealed.

STATEMENT OF FACTS

In early 2013, Korjack pulled out of a long-term, lucrative engineering project "without warning" and declared he was retiring and "going off the grid." (State's Ex. 34-2, 6/14/18 Jay D. Peterson Interview and emails, admitted at 1472; *see also* State's Ex. 1 at 1, admitted at 1472; Tr. at 1471-72.) Korjack withdrew almost $270,000 in cash and was investing in gold and silver. (Tr. at 1469-70, 1482-83, 1551-53, 1576-77.) By the end of March, he had disappeared, along with his business associate and friend/roommate, Robert Orozco, who had been actively trying to avoid tens of thousands of dollars in child support obligations. (Tr. at 1143, 1146-47, 1334-36, 1453, 1455-56, 1592-93.)

This was not the first time Korjack decided to liquidate his assets and disappear. (*See* Tr. at 1000, 1132; *see also* Videotaped Deposition of Teresa Gorka [hereinafter Gorka Dep.] at 31:00-37:45, played for the jury at 2318.) In the late 1990s, while under investigation by the

Internal Revenue Service for owing over a hundred grand in taxes, Korjack researched how to forge documents and assume new identities, as well as the possibility of living in a foreign country. (Tr. at 1153, 1168-69, 1174-75.) His ex-wife testified he was using numerous false names and had many driver's licenses from different states, and she found a false passport in his deceased brother's name stuffed between the bookcases in her home. (Gorka Dep. at 43:00-43:34, 49:00-50:20; 58:40-59:40.) He also owned firearms and, in her words, Korjack "without guns was like [a] fish without water." (Gorka Dep. at 58:25-58:35.) Korjack and his family were detained after trying to drive a U-Haul across the Canadian border with a false passport, multiple guns, and a large amount of cash. (Tr. at 1132, 1168-70; Gorka Dep. at 31:00-37:45.)

Korjack pled guilty to tax evasion and served time in federal prison. (Def.'s Ex. 1 at 2, admitted at 1171; Tr. at 1172; Gorka Dep. at 45:35-46:15.) According to his son, prison "fueled [Korjack] to try to get even worse as far as his outlook on life and living honestly," and he got out "bent on revenge." (Tr. at 1178-79.) He was later convicted of embezzlement and returned to federal prison. (*See* Tr. at 2306,

2316-17.) Korjack's family broke all ties with him by the early 2000s. (Gorka Dep. at 51:55-52:10; Tr. at 1163.)

I. Karen's Story

Glenn and Karen met in the late 1990s[1] when her then-husband kicked her out of their car on the side of the highway and Glenn offered her a ride. She moved in with him within a week. (Tr. at 832-34.) They had an on-again, off-again relationship for many years, which Karen claimed included a few instances of physical violence. (*See*, *e.g.*, Tr. at 841-45, 850-51, 979, 982-83.) Their romantic relationship ended around 2010 after Glenn transitioned to a transgender woman and legally adopted their daughter, Z.H.'s, surname, but they continued to live together off and on. (Tr. at 846-849, 851, 873, 1468.)

Glenn, Karen, and Z.H. met Korjack in Wyoming. (Tr. at 851-52.) They soon became close, moved in together, and began living as a "family." (Tr. at 852-53, 860-61, 881, 1124-25.) Later, Glenn introduced Karen to Orozco. They fell instantly in love, and she broke up with her

[1] Karen testified she was not good at dates and times, including being unable to state her daughter's birth date or year of birth. (Tr. at 836-37, 981.)

boyfriend and moved into the trailer home he was renting from Korjack a few days later. (Tr. at 861, 863-64, 872-73.)

Karen testified Korjack financially supported the "family," providing them with jobs, a place to live, and living expenses, and he would purchase larger items like vehicles and breast implants for them. The "family" members would "pay" Korjack back by working for him. (Tr. at 872-74, 877, 881-83, 885-86, 891-92, 987.) Karen was a stripper. (Tr. at 850-51.) Korjack was an engineer who worked on projects for an oil company and conducted home inspections for real estate transactions. (Tr. at 854-55, 886, 1449.) Glenn ran a construction crew and completed the repairs identified during Korjack's inspections. (Tr. at 854-55, 861, 885-87, 987, 991.) Orozco helped out with the inspections and repairs. (Tr. at 854, 861, 886-87.) At some point, it was discovered that an unqualified Pizza Hut employee showed up to conduct one of the home inspections, and it caused "stress" and problems for Korjack. (Tr. at 991-92, 2302-03.) There was no evidence indicating anyone paid income taxes.

Karen testified Korjack purchased a home for the "family" outside Frenchtown, Montana; however, the deed and purchase documents

were in Glenn's name.[2] (Tr. at 873-77, 984-85, 1021.) Korjack, Glenn, and Z.H moved to Frenchtown first, and Orozco and Karen joined them when Korjack sold their mobile home. (Tr. at 870-73, 887-88.) Their son, R.J., was born a few months later. (Tr. at 870.)

Karen testified Korjack began withdrawing funds from his accounts and stowing cash, coins, and jewelry in the basement safe after she moved to Montana so that she and Z.H. "would not have to worry if something happened." (Tr. at 881-82, 886-85, 928.)

According to Karen, Korjack's relationship with Glenn changed after he learned Glenn may be romantically involved with another man. (Tr. at 888-89, 891, 893.) Korjack began "pulling back the resources from" Glenn, changed the combination to the safe, and asked him to return the deed to the house. (Tr. at 891-93, 928.) At the same time, Korjack was becoming closer to Orozco. (Tr. at 894.) Glenn told Karen he was afraid Korjack would either leave or kick Glenn out and he and Z.H. would be homeless. (Tr. at 894.)

[2] Korjack used numerous aliases and assumed business names and sometimes listed Glenn or Orozco as officers. (*See*, *e.g.*, Tr. at 1111-12, 1551-53.)

Karen testified one morning during spring 2013, she, Orozco, R.J., and Korjack, were in the basement bedroom discussing their plan to obtain the Frenchtown deed and find a new residence. (Tr. at 896-98, 902-03, 910.) Glenn came in, and an argument ensued. Glenn said something to the effect, "Do you want war? Then I'll give you war," pulled a black gun out of the pocket of his bathrobe, and started firing towards "Korjack, Orozco, the bed, the windows, the wall . . . just all over." (Tr. at 903-04, 907.)

Glenn started kicking and punching Karen; he stopped when Karen begged him not to hurt the children. (Tr. at 908, 910.) There was blood on the ground near Korjack's body and on the walls and the television located nearby. (Tr. at 907, 910, 913.) Orozco was lying on the bed; he appeared to be unconscious. (Tr. at 902, 913-14.) One of the windows was shot out. (Tr. at 906-07.)

For several days, Glenn slept in the living room and made Karen sleep on the couch. (Tr. at 915-16.) When she woke up the next morning, there was a bullet on her pillow. (Tr. at 919.) Glenn screwed the windows shut. (Tr. at 918, 920.) Karen did not feel free to leave because Glenn had a gun on or near him at this time. (Tr. at 916.)

Karen noticed a fire burning for "a long time" in the burn pit behind the house and saw bedsprings nearby. (Tr. at 921-23.) She later returned to the basement and the bodies and her bed were gone. (Tr. at 924.) She heard power tools going in the basement and the broken window was replaced. (Tr. at 925, 929.) Karen testified Glenn asked her to drive with him to move the bodies; she refused. (Tr. at 920-21.) During this time, she thought she heard Orozco's voice downstairs and was uncertain he was dead. (Tr. at 989.) She would return months later to find the safe had a hole in it and was empty. (Tr. at 929.)

Glenn's friend, Lawrence McKinley, testified Karen and R.J. moved into his home in early to mid-April 2013 on the same day they met. (Tr. at 1238-42, 1252-53, 1256.) Karen agreed she was free to leave by the time McKinley showed up. (Tr. at 916.)

Karen would call and visit Glenn while living with McKinley, and they all went on vacation together. (Tr. at 930-31, 1245-46.) She moved back to Glenn's home after about six months. (Tr. at 934, 1242.) Glenn later helped her move to eastern Montana. (Tr. at 939-40.) Karen eventually moved in with a man in Sydney whom she had met online

while still living with Glenn. (Tr. at 938-39, 943.) Z.H. remained with Glenn. (Tr. at 935, 941.)

No one who interacted with Karen after March 2013 testified she appeared to be in duress or was being held against her will. (*See*, *e.g.*, Tr. at 1201, 1222, 1230, 1244, 1253-54, 1311, 1350-52, 1363, 2264.) McKinley believed she was sad because her ex-boyfriend had recently left her. (Tr. at 1243.) Before she moved to eastern Montana, Karen left a note for Glenn's sister indicating R.J.'s father was "missing," and Glenn had either done something to him or was responsible for him not being around. (Tr. at 1295-97.) Glenn's sister did not take the note seriously. Glenn got mad, asking Karen why she was always trying to get him into trouble. (Tr. at 1301-03.) Still, Karen stayed with Glenn.

Karen remained in contact with Glenn by phone throughout the years. (Tr. at 944-45.) During one of these calls, she told Glenn she wanted to come home. For the first time, Glenn said no. (Tr. at 946.)

More than three years after Korjack and Orozco disappeared, during the summer of 2016, Karen walked into the Law and Justice Center in Sydney and asked about the witness protection program.

She reported Glenn killed Korjack and may have killed Orozco, and she believed Glenn might have come to kill her. (Tr. at 1375-77.)

II. The Jailhouse Snitches

A. Anton Orth

Glenn became Orth's cellmate on September 14, 2017. Orth was facing a 20-year prison sentence for rolling his car at 100 miles per hour while on meth with his family in tow. (D.C. Doc. 338, Final Order on Defendant's Motion to Suppress, attached as Appendix B at 11; Tr. at 1965-67.) He had a lengthy felony history and had cooperated with the government before. (App. B at 11, 23; Tr. at 1965-67.)

A few days later, Orth asked his defense attorney to "arrange negotiations" with the county attorney's office. (Supp. Hr'g, Def.'s Ex. B, Orth's 9/25/17 letter, at 1, admitted at 261 and 264, attached as Appendix C.) When that was not fruitful, he sent a letter to the prosecutors, explaining he was Glenn's cell mate and revealing Glenn had told him he "'shouldna let [Karen] go.'" (App. C at 1.) Orth referenced his own criminal case number and reiterated his desire to "arrange negotiations." (App. C at 1.) He stated he was "at [the

prosecution's] disposal to the absolute best of my ability for as long as I am celled with [Glenn]." (App. C at 2.)

Detective Jared Cochran was the lead detective on the homicide investigation. (App. B at 7.) He first learned of Orth from this letter and set up a meeting. (App. B at 7-8; Supp. Hr'g, State's Ex. 1, admitted at 328, attached as Appendix D at 1.) Orth told Cochran that Glenn was "severely depressed" and suicidal when he first arrived. (App. B at 21; *see also* App. D at 2.) Glenn initially told Orth he could not talk about his case because his attorneys told him not to. (App. B at 11.) But, Orth revealed, he soon thereafter started asking Glenn direct questions about his charges; throwing "shockers" out, like trying to convince Glenn to reveal where the bodies were located before he committed suicide so that the families would get "closure"; "bait[ing] him" into providing information by challenging his statements; and talking to Glenn like he was "playing on his side" when he was not. (App. B at 23; App. C at 2-3, 7, 14.) Orth admitted he directly confronted Glenn, but Glenn maintained his innocence and had not acknowledged that Korjack and Orozco were dead. (App. C at 15-16.) However, Orth believed he "just [hadn't] peeled it out of [Glenn] yet."

(App. C at 5.) Orth explained Glenn was "getting to be more comfortable with" Orth, and Orth was working to "pull it out little" by little. (App. C at 16-17.) Orth admitted he had been "snooping through" Glenn's paperwork, including attorney-client privileged documents, and had ripped pages out of Glenn's notebook, which he gave to Cochran. (*See* App. B at 12-13, 32; App. C at 21-22; Tr. at 344-46, 421, 360-61, 1976-77.) Although Cochran denied knowing how Orth obtained information from Glenn, *see* App. B at 14, he agreed Orth told him he was "cultivating" Glenn to get more information about the homicides, App. B at 12, 22, and he knew Orth was "acting in an attempt to elicit . . . information" from Glenn and "was trying to obtain as much information as possible" from him, including by using his "CSI skills" against Glenn, Tr. at 252, 254, 274.

Cochran asked Orth to meet again to go over all of his notes of his conversations with Glenn, and Orth responded "give me about a couple weeks." (App. C at 19-20.) Orth understood Cochran was seeking "confirmation that [Glenn] states knowledge that the victims are in fact dead." (Supp. Hr'g, Def.'s Ex. E, Orth's 10/16/17 letter, admitted at 278,

attached as Appendix E.) Orth told Cochran he would pull additional pages from Glenn's notebook and send them to law enforcement. (App. C at 22.) Cochran responded, "I am not telling you to do that," and "if it'[s] his property I would tell you to leave his property alone." (App. C at 22; *see also* App. B at 8.) Although Cochran did not explicitly instruct Orth to try to obtain additional information from Glenn, he did not tell him not to do so. (App. B at 8, 12.) Because Cochran "did not influence" where Glenn resided or who resided with him, he knew when Orth left the interview, he was going back to the cell he shared with Glenn. (*See* App. B at 11, 13.)

After this meeting, Orth "called [Glenn] on" his claim that he did not know anything about Korjack's whereabouts, stating "I know they're dead and you know they're dead, don't you?" Glenn allegedly responded, "Yeah." (App. E, attached notes, 10/12 entry.) Shortly thereafter, Orth wrote the prosecutors to inform them Glenn had confirmed the victims were dead. (App. E.)

Cochran met with Orth a second time "because of some letters" Orth had recently written. (Supp. Hr'g, State's Ex. 2, admitted at 328, attached as Appendix F, at 1.) Orth revealed he had been engaging

Glenn in conversations about the homicides and was being "a little bit swindly because [I] was talking God and being his friend and then writing all this stuff down." (App. F at 60.) Orth told Cochran, "I feel like . . . I am on the front line for you right now." (App. F at 57.)

At trial, Orth testified regarding the following statements he elicited from Glenn after his first meeting with Cochran:

- Glenn stated things were getting "worse and worse" for a few months between him and Korjack. He overheard Korjack and Karen conspiring to move out and take Z.H. with them, "so I stopped it – I almost killed Karen to[o] but she had the baby." (Tr. at 1957.)

- Glenn let Karen leave even though she had betrayed him before because of R.J. (Tr. at 1946-47, 1957.)

- Glenn admitted he put the bodies in a truck and moved them to "the pit" two or three days after the murders. (Tr. at 1960.)

- Glenn laughed out loud when reading Karen's interview and stated "You can't [open a gun safe] with a chainsaw. I didn't use a chainsaw." (Tr. at 1947-48.)

- Glenn asked Orth if he knew anybody in a foreign country who could send a note ostensibly from Korjack. (Tr. at 1960-61.)

- Glenn stated one of the alleged victims had called his defense team from Costa Rica. (Tr. at 1944-45.)

- Glenn offered to pay Orth to "make sure that [Karen] doesn't testify," but later stated he was only kidding. (Tr. at 1953.)

Cochran testified he made sure Orth understood he had not been promised anything in exchange for this testimony and "he was not necessarily going to get anything out of this." (App. B at 20; Tr. at 206.) But Cochran told the persons with the ultimate power to make such offers—the prosecutors—that Orth and the other jailhouse snitches were providing useful information. (App. B at 20; *see also* Tr. at 1838, prosecutor stating, "the buck stops with the county attorney, right? Detective Cochran doesn't make the deals. . . .") Cochran later admitted a simple phone call to a prosecutor about an informant "sometimes goes a long way . . . in a person's mind." (Tr. at 2195-96.)

Orth denied he obtained any benefit for testifying or that he interrogated Glenn for that purpose. (Tr. at 1934.) The court found Orth decided to become an informant because he did not like the way Glenn treated Z.H. (App. B at 22.) However, Orth had a reputation in the jail for dishonesty, Tr. at 2383, and pursuant to a plea agreement with the State, Orth received a sentence that resulted in immediate placement in the community, despite his lengthy criminal history and the serious charges in his case. (Tr. at 1935-36.)

Orth testified he overheard Glenn negotiating a deal with John Braunreiter, whereby Glenn would pay Braunreiter to "take out" Karen. (Tr. at 1954.) Orth previously testified he did not remember anything about this conversation, explaining to the jury here that he has a brain injury that causes memory loss and a long history of drug use. (Tr. at 1984-85.) Orth admitted he had no independent memory of anything not in his notes. (Tr. at 1984, 1997-98.) During deliberations, the jury asked to review Orth's notes; that request was denied because the notes were not admitted into evidence. (D.C. Docs. 365-66.)

B. Martin Hope

Martin Hope was Glenn's cellmate in December 2017 and January 2018. (Tr. at 372.) Cochran became aware of Hope after he sent notes of his conversations with Glenn to jail staff. (App. B. at 7, 24-25.) Hope was in jail on a federal hold and had many prior felony convictions. (App. B at 24.) He had a history of being dishonest, noting nobody in jail is honest. (App. B at 24, 31.)

When Cochran first met with Hope, he reported he had "stroked" or "fooled" Glenn into thinking he could trust Hope because he was a member of the Aryan Brotherhood who "knew everything there was to

know about the criminal element in life" and would never betray another inmate. (App. B at 25-26; Tr. at 382-87, 2083-84.) Hope put up this ruse to "becom[e] close to" Glenn, who did not talk to anyone else about his charges. (App. B at 14; Supp. Hr'g, State's Ex. 4, Hope's 12/21/17 interview transcript, admitted at 328, attached as Appendix G, at 8.) Cochran learned Hope was engaging Glenn in detailed conversations about the case and evidence, had access to Glenn's paperwork including communications with his defense team, and knew a lot of inside information about the case. (App. B at 28; Tr. at 2079-80.) He learned Hope was "calling [Glenn] out on all" of his questionable statements, working to "break him down," and pretending to try to help Glenn fabricate a defense to pry a confession out of him. (App. B at 14, 26; App. G at 5; *see also* Tr. at 293, 297, 382, 387-89, 402-03, 2084-85.) Cochran knew Hope was trying to get "the truth," *i.e.*, incriminating statements, out of Glenn, Tr. at 328, and he was trying to "get him to physically tell him himself that yeah, I did it," App. G at 15.

Hope reported that Glenn had made incriminating statements, including indicating he was "paranoid about some blood that could be

on a TV from the splatter or whatever." (App. G at 16; *see* App. B at 14.) However, Glenn had not confessed to the homicides. (Tr. at 2089.)

Although Cochran did not instruct Hope to discuss the homicides with Glenn, he did not tell him to stop plying Glenn for information either. (App. B at 14, 30; Tr. at 297, 391, 412.) Rather, Hope "was asked to contact" the detectives again if he learned anything new, and Hope let Cochran know that if he was successful, he "would certainly let [the homicide detectives] know." (*See* Supp. Hr'g, Def.'s Ex. J, admitted at 294, attached as Appendix H; Tr. at 412.) Cochran then allowed Hope to return to the cell he shared with Glenn.

As promised, Hope later sent a note indicating he had "a lot of new info." (*See* App. B at 26; App. H.) Cochran met with Hope on January 16, 2018. Hope admitted he had been trying to extract a confession from Glenn, "[a]nd he did," in fact, confess. (App. B at 26; Tr. at 387.) At trial, Hope testified regarding the following statements he elicited from Glenn after his first meeting with Cochran:

- Glenn and Korjack started to bicker after Glenn came out as a homosexual. (Tr. at 2061.)

- Glenn was upset because he was being asked about the deed to the property and he overheard a conversation between Karen and the victims about "having moving trucks come, take their stuff and leave." (Tr. at 2060.)

- On the day of the murders, Glenn "said the hell with it" and went to the basement bedroom where the others were talking. He then "hyped" up the issue, pulled the gun out, and said, "Do you want a war?" before shooting Korjack twice in the chest. Glenn then turned the gun to where Karen and Orozco were sitting on the bed and shot Orozco. (Tr. at 2062-63.)

- The gun was a .45 caliber gun that authorities had found when they searched Glenn's green trailer. (Tr. at 2068-69.)

- Glenn beat Karen up but didn't kill her because she was Z.H.'s mother. (Tr. at 2063.)

- Glenn mounted screws in the windows of the house to keep her inside, would leave bullet casings on her pillow, and threatened to kill her if she told anyone. (Tr. at 2064-65.)

- Glenn kept her in the house for 30 days and repeatedly threatened to kill her if she told anyone what happened. (Tr. at 2063-65.)

- Glenn said he later ground open a safe where Korjack kept his money, gold, and diamonds. (Tr. at 2063.)

- When Hope asked Glenn if he burned the bodies, Glenn made a "Poof" sound and smiled, as though they went up in smoke and had been burned. (Tr. at 2067.)

Hope denied he wanted any benefit for his testimony, although he admitted he disclosed his cooperation to his federal defender and provided his attorney's phone number to Cochran, allegedly because he was required to do so as part of his supervised release. (App. B at 27; *see also* Supp. Hr'g, Def.'s Ex. J, admitted at 294, attached as Appendix I, at 2.) The court found Hope informed on Glenn because he was annoyed with him and was tired of his perceived lies. (App. B at 26.)

On January 23, 2018, a week after Hope's second interview, Cochran filed an application for a warrant for a "cathode ray tube (CRT) large box style television." (Supp. Hr'g, Def.'s Ex. N, admitted at 310, attached as Appendix J, Application at 4.) Cochran averred he learned during Hope's *second* interview:

> [Glenn] told [Hope] that he had kept the television from where the homicides took place. [Hope] said that [Glenn] told [Hope] that he had cleaned the blood off of the television and had placed it in a storage room in the basement of the residence. [Glenn] described the television to [Hope] as a box style television.

(App. J, Application at 6.) Cochran testified he sought the warrant based on his "interviews" with Hope, and, specifically, Hope's statement that Glenn confirmed the "specific television was still on the property

and further described it in a manner that we believed that we could probably obtain that specific television." (Tr. at 225-26.)

The warrant was issued, and officers seized a television that would later test presumptively positive for blood. (Tr. at 1499, 2106, 2113, 2120.) A mixture of DNA from at least two, and possibly three individuals was recovered. It was highly likely that the major DNA profile in that mixture belonged to Korjack. (Tr. at 2136-39.) It could not be determined whether Korjack's DNA on the television was from blood or another source. (Tr. at 2147.)

C. Bryan Palmer

Palmer resided in the same pod as Glenn for a few days at the end of October 2017. (Tr. at 2014, 2021.) Palmer had a long felony history and had served as a confidential informant "a few" times. (Tr. at 2029-31.) He was diagnosed with multiple personality disorder and schizophrenia and suffered memory problems. (Tr. at 2026-27.)

Palmer testified Glenn told him his ex-girlfriend, Karen, was the reason he was in jail and offered Palmer $10,000 to shoot her in the head so that she was unrecognizable. (Tr. at 2016, 2019.)

After this discussion, Palmer sent letters to the county attorney asking for leniency in exchange for his testimony against Glenn and asking to have his probation transferred from Idaho to Montana. (Tr. at 2037, 2041.) Cochran promised to put in a good word with Palmer's probation officer so he would get less time in jail. (Tr. at 2039, 2041.) Cochran admitted he advised the prosecutor in Idaho that Palmer was cooperating. (Tr. at 2195-96.) Cochran testified it was common practice to do so, and he did not always document such conversations. (Tr. at 2195-97, 2204-05.) Palmer's pending drunk driving charge was later dismissed. (Tr. at 2037.)

D. John Braunreiter

Braunreiter resided in the same pod with Glenn and Orth in October 2017. (Tr. at 225.) The State learned about Braunreiter through Orth. (Tr. at 224.) Cochran interviewed Braunreiter with his attorney present. (Tr. at 224.) He was later listed as a witness on the Amended Information. (*See* Tr. at 224; D.C. Doc. 41.)

During his court-ordered deposition, Braunreiter refused to take the oath or answer many questions without an attorney. (D.C. Doc. 211 at 4-5.) Apparently, Braunreiter wrote a letter indicating if called to

testify at trial, he might refuse to do so or use the opportunity to inform the jury of perceived wrongs he suffered at the hands of the prosecutors in Glenn's case—who had also prosecuted him. (Tr. at 503-04.)

Prior to trial, the State informed the court it intended to call Braunreiter and asked the judge to admonish Braunreiter "about the appropriate procedure" prior to his testimony and outside the presence of the jury. (Tr. at 503-04.) The prosecutor assured the court he had "taken . . . into account" the possibility that Braunreiter would not heed the admonishment, indicating "[h]e should be seated, and he'll answer questions or he won't." (Tr. at 504-05.) The court agreed. (Tr. at 503-04.)

During voir dire, the State announced Braunreiter would testify. (Tr. at 546-47.) During opening statement, the prosecutor paraphrased various out-of-court statements made by prosecution witnesses, including Braunreiter and Orth. The prosecutor told the jury Orth had previously told Cochran he overheard Glenn offer to pay Braunreiter to "kill" Karen, and Braunreiter had "confirmed" Orth's account to investigators. (Tr. at 807-08.) The jury learned through the prosecutor that Braunreiter told law enforcement Glenn had approached him and

asked if he would "go after" Karen, and Braunreiter admitted he asked Glenn for $10,000 up front and another $10,000 after, noting he intended to take the money but denying he intended to kill Karen. (Tr. at 807-08.)

Mid-trial, the prosecutor argued Braunreiter should be prohibited from testifying that the State had offered to dismiss his charges in exchange for testimony against Glenn because no such offer had been made. (Tr. at 1825-26, 1828.) The court disagreed, suggesting defense counsel could ask Braunreiter about his understanding of any alleged offer, and the prosecutor could testify if he wanted to refute his account. (Tr. at 1828-29.)

The State decided not to call Braunreiter. The court prevented defense counsel from commenting on his absence during closing argument, and the jury was instructed not to consider his absence. (Tr. at 2477-78.)

III. Additional Evidence

The bodies of Korjack and Orozco were never found. Fragmentary human remains belonging to at least two individuals, at least one of whom was an adult, were found in the burn pit behind Glenn's home in

April 2018, but the State presented no evidence further identifying those persons. (Tr. at 1771, 1782.) When the remains were burned or deposited could not be determined. (Tr. at 1791.) Glenn's house had been in foreclosure when he purchased it and had previously been occupied by squatters and persons engaged in illegal activities. (Tr. at 2216.)

Two human remains detection dogs "showed interest" in a pickup on the premises but did not alert on it. (Tr. at 1685, 1730.) Although samples from the truck bed tested presumptively positive for blood, it could have been animal blood. (Tr. at 2119, 2133-34.)

A burned mattress and box springs were located near the burn pit. (Tr. at 1500.) Some neighbors noticed a "rank" smell and a fire burning in the fire pit behind Glenn's house that lasted about a week in the spring of 2013. (Tr. at 1032-33, 1078-80, 1090.) One neighbor saw a bed frame near the fire pit. (Tr. at 1033-34.)

Law enforcement recovered a .45 caliber pistol, Tr. at 1681; a bullet behind a section of repaired drywall in the basement bedroom underneath a window, Tr.at 1495-98; a fired .45 caliber cartridge from the patio area behind the basement bedroom, Tr. at 1680 and State's

Ex. 77-1, admitted at 1680; and a second spent cartridge in the burn pit, Tr. at 1682, State's Ex. 77-2, admitted at 1682. The bullet and the cartridge from the patio area were fired from the recovered weapon. (Tr. at 1745-46, 1760.) However, that cartridge did not appear to have been out in the elements for long.[3] (Tr. at 1757.) No blood or DNA evidence was recovered from the basement bedroom. (Tr. at 1601-02, 1677-78, 2106.)

Officers were unable to find any evidence confirming Korjack or Orozco were alive through their names, known aliases, or items associated with them before they disappeared. (*See*, *e.g.*, Tr. at 1407-13, 1447-52, 1462-63, 1488.) Although family and friends reported they had not heard from either man after early 2013, no one ever reported them missing. (Tr. at 1127, 1139-41, 1325-27, 1414, 1451-52, 1612-13.) When Korjack's family learned of Karen's allegations, they raised concerns about her credibility, and expressed the belief that Korjack might have staged the whole thing, given his "proclivity, in the past, to

[3] A police report mixed up the locations of the two cartridges, causing confusion at trial. (Tr. at 1751-52, 1759-60, 1762.) The cited discussion appears to be about the cartridge located in the patio area, State's Ex. 77-1, and not the heavily-burned cartridge found in the burn pit, State's Ex. 77-2.

create a different identity" for himself. (Tr. at 1174.) His ex-wife said he was very good at disappearing, Gorka Dep. at 58:40-58:55, and one of Korjack's friends and a former employer both agreed Korjack was capable of doing so, Tr. at 1132, 2311-13.

Korjack did not liquidate all of his asserts. (Tr. at 1548.) There was evidence Glenn had purchased a few items using Korjack's accounts right after Korjack left and again in 2016. (Tr. at 1430, 1438-44, 1505-11.) Glenn also called the purchaser of Korjack's Wyoming mobile home and told her to send the payments directly to him, as Korjack had retired and moved to Florida. (Tr. at 1113-14.)

The basement safe had been cut open. (Tr. at 1502, 1504.) Glenn deposited large sums of cash into his checking account and spent a lot of cash between 2013 and 2016. (*See*, *e.g.*, Tr. at 1045, 1048-49, 1073, 1211, 1230-31, 1518-22, 1530-33.) Glenn had been engaged in several businesses, including snow removal, running a used car lot and computer repair business, and construction work. (Tr. at 1045, 1204, 1230, 1283, 1352-53, 1520, 2262; State's Ex. 55, admitted at 1423, DSC_0002.jpg.)

Glenn also made some improvements to the Frenchtown property over the years. (*See, e.g.,* Tr. at 1197-98, 1234-35, 1347-52, 1355, 1372-73.) Now living alone in a rural area with Z.H., he upgraded security at the home. (*See* Tr. at 1199, 1235-36, 1359-60.) Z.H. would occasionally get violent and harm herself and had gotten out of the house and run away before. (Tr. at 964-66, 1308, 2217.) He installed locks on the outside of some interior doors and the windows were screwed shut or had bars on them. (Tr. at 1041-42 1304, 1654.) He also remodeled the basement bedroom. (*See* Tr. at 1190-95, 1213, 1676-77.)

SUMMARY OF ARGUMENT

Korjack and Orozco disappeared after Korjack quit his job, withdrew large sums of cash, and announced he was going off the grid. Glenn was convicted of murdering them primarily on the testimony of an alleged eyewitness of questionable reliability, Karen, who did not report the so-called murders until three years later, and the testimony of two jailhouse snitches, Orth and Hope, who reported Glenn had confessed and corroborated details in Karen's account after they admittedly reviewed Glenn's paperwork and discussed his case with him in detail. Those alleged confessions were elicited after Orth and

Hope offered their services as informants to the State, the State was aware of their interrogation techniques, and the State sent them back to the cells they shared with Glenn anyway, knowing they had the motive, opportunity, and capability to deliberately elicit incriminating statements from Glenn outside the presence of counsel, and knowing they fully intended to continue doing so and to report back to the State what they learned. The district court erred when it denied Glenn's motion to suppress the statements elicited in violation of his rights to counsel after Orth and Hope first met with Cochran. The court also should have suppressed the evidence indicating blood and Korjack's DNA were present on a television seized from Glenn's home as fruit of the poisonous tree. The State will not be able to show there is no reasonable possibility that such qualitatively important evidence—Glenn's alleged confessions and objective, scientific evidence corroborating a non-innocent part of Karen's story—contributed to his homicide convictions.

It is well-established that jailhouse informants' testimony is inherently unreliable and too often contributes to wrongful convictions. Recognizing this, the United States Supreme Court has stated that an

accused is entitled to careful instructions that address the special credibility concerns associated with such testimony, and courts around the country have required cautionary instructions regarding such testimony similar to those instructions addressing accomplice testimony. Yet, the district court refused to provide Glenn's proposed cautionary instruction that practically mirrored an instruction previously approved by the Supreme Court. Glenn's murder convictions were based in large part on jailhouse snitch testimony allegedly corroborating Karen's eyewitness account—an account they had access to through Glenn's paperwork. Moreover, his solicitation convictions were based *solely* on the testimony of two jailhouse snitches, Orth and Palmer, and the State's improper recitation of out-of-court statements made by another jailhouse informant, Braunreiter, whom the prosecutors promised to call as a witness, but didn't. Under these circumstances, this Court should conclude the jury was not fully and fairly instructed regarding the special credibility concerns associated with such testimony and that error affected Glenn's substantial rights and undermined confidence in the jury's verdicts here. His convictions should be reversed.

That error was compounded when the court prohibited the defense from commenting on the State's failure to call Braunreiter and ordered the jury to disregard his absence. By preventing Glenn from presenting a legitimate defense attacking the State's failure to satisfy its burden of proof and to corroborate the unreliable testimony of the snitch Orth and its failure to live up to its promise to deliver Braunreiter, the district court violated Glenn's rights to assistance of counsel and to present a defense and diluted the State's burden of proof. That type of error does not depend on the strength of the State's case and constitutes structural error requiring reversal. Even if it were not, the State could not meet its burden of showing the error was harmless beyond a reasonable doubt. Glenn's convictions should be reversed. At a minimum, Count III cannot stand.

Recognizing the weaknesses in its case, the prosecutors improperly bolstered Karen's questionable testimony by repeatedly referring to her inadmissible prior consistent statements and presenting an officer's testimony vouching for her believability. They repeated Braunreiter's inadmissible out-of-court-statements and then didn't call him to testify at all. They presented inadmissible and highly

prejudicial evidence that Glenn was a suspected rapist who owned an assault rifle and had an outstanding warrant for a felony weapon/assault offense. And they improperly argued to the jury that it could only acquit Glenn if it found all of the State's witnesses had committed perjury. That misconduct, when viewed in conjunction with the other errors discussed above, constitutes cumulative error that rendered Glenn's trial fundamentally unfair. This Court should exercise its discretion to review these claims under the plain error doctrine and reverse his convictions.

ARGUMENT

I. *Massiah* Violations

A. Standard of Review

This Court "exercise[s] plenary review of constitutional questions and review[s] a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution de novo." *State v. Martell*, 2021 MT 318, ¶ 9, 406 Mont. 488, 500 P.3d 1233. The factual findings underlying a lower court's decision on a motion to suppress are reviewed for clear error, but the application of the law to those underlying facts is reviewed de novo.

State v. Conley, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473. Whether an informant's conduct is fairly attributable to the government for purposes of a right to counsel claim is a question of constitutional law reviewed *de novo*. *See United States v. Surridge*, 687 F.2d 250, 252 (8th Cir. 1982). *See also State v. Ashby*, 247 A.3d 521, 532 n.19 (Conn. 2020) (collecting cases).

B. Background

Glenn moved to suppress incriminating statements regarding his homicide charges deliberately elicited by jailhouse informants outside the presence of counsel in violation of his rights to counsel under the Sixth Amendment and Article II, section 24 of the Montana Constitution. He further sought to suppress all evidence derived from those illegally-obtained statements, including a television seized pursuant to the January 23, 2018, warrant and all forensic evidence and testimony derived from it. (*See* D.C. Doc. 210 at 1-2, 4-6; Tr. at 445.)

The court held a two-day suppression hearing, during which Orth, Hope, Palmer, and Cochran testified. At the close of testimony, the State acknowledged Orth and Hope "perhaps . . . plied" Glenn for

incriminating information, arguing, "so what?" (Tr. at 449.) The State contended the real issue was whether, after Cochran became aware of the informants' efforts and met with them, their subsequent conduct could be considered "state action." (*See* Tr. at 197-99, 432-34.) The State argued it could not because the government had no "affirmative duty to remove inmates who the defendant confides in." (Tr. at 435.) The State further argued the fruits doctrine did not apply to the television because "the only information they used . . . was based on the information that they got from Mr. Hope prior to knowing about his conversations with the defendant." (Tr. at 436.)

The court denied the motion. The court found the witnesses testified truthfully and summarized their testimony without making findings of fact and without independently reviewing the exhibits admitted. (App. B at 4, 33.) The court concluded Orth and Hope "could communicate information to the police" and testify against Glenn because they were motivated to inform on Glenn based on their dislike of him. (App. B at 34.) The court further concluded there was "no credible evidence" the State exercised "full control" over their interactions with Glenn. (App. B at 35.)

C. Discussion

The right to the assistance of counsel guarantees an accused "assistance in meeting his adversary at all critical stages of criminal proceedings." *State v. Scheffer*, 2010 MT 73, ¶ 20, 355 Mont. 523, 230 P.3d 462 (quoting *United States v. Ash*, 413 U.S. 300, 310-11, 315 (1973)). The right to counsel is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). *See also Scheffer*, ¶ 20 (the right "protects the integrity and fairness of the adversary criminal process"). It attaches once "adversary judicial proceedings have been initiated," e.g., "by way of information" against an accused and is offense specific. *Scheffer*, ¶¶ 16, 18.

An accused's right to counsel is violated "when the government uses against him at his trial evidence of his own incriminating words . . . deliberately elicited from him . . . in the absence of counsel," either directly, or "indirect[ly] and surreptitious[ly]" through a cooperating third party. *Massiah v. United States*, 377 U.S. 201, 206 (1964). This may occur whenever the State "intentionally create[es] a situation likely to induce [the accused] to make incriminating

statements without the assistance of counsel," *United States v. Henry*, 447 U.S. 264, 274 (1980), or merely "knowing[ly] exploit[s] . . . an opportunity to confront the accused without counsel being present," *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

> The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. . . . [A]t the very least, the prosecutor and *police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel*.

Moulton, 474 U.S. at 171 (emphasis added).

Deliberate elicitation "falls far short of interrogation." *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004). Although it requires more than being a "passive listener" or a mere "listening post," it encompasses any "effort to stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 & n.9.

"[T]he [State] has long been on notice that the use of prison informants risks treading on the constitutional rights of the accused." *United States v. Stevens*, 83 F.3d 60, 65 (2d Cir. 1996). In *Henry*, the Supreme Court held a paid jailhouse informant's use of his position to engage the accused in conversations to secure incriminating information was deliberate elicitation fairly "attributable to the

government" because law enforcement "must have known" that their arrangement with the informant "likely would lead to that result." 447 U.S. at 270-71. In coming to this conclusion, the Court noted the "powerful psychological inducements to reach for aid" while in custody that may render an inmate "particularly susceptible" to the "ploys of informants who appear to share a common plight," and to whom the accused would be more likely to make incriminating statements than to a uniformed officer. *See Henry*, 447 U.S. at 269, 274.

Henry involved an explicit, *quid pro quo* agreement between the government and the informant. However, there is "no bright-line rule" or "litmus test" for determining whether a jailhouse informant's conduct is fairly attributable to the government for purposes of the Sixth Amendment right to counsel. *See*, *e.g.*, *Depree v. Thomas*, 946 F.2d 784, 793-94 (11th Cir. 1991). *Accord Ayers v. Hudson*, 623 F.3d 301, 311-12 (6th Cir. 2010); *Randolph*, 380 F.3d at 1144; *McBeath v. Kentucky*, 244 S.W.3d 22, 32 (Ky. 2007). The "central and determinative issue" is the nature of "the relationship between the informant and the State" as shown by the totality of the circumstances. *Randolph*, 380 F.3d at 1144.

Where the government makes "a conscious decision to obtain [an informant's] cooperation in the case," and the informant "consciously decides to cooperate with the government"—even if those decisions are implicit or tacit and informal—there is a sufficient relationship to hold the government responsible for the informant's conduct thereafter. *Randolph*, 380 F.3d at 1444; *see also Ayers*, 623 F.3d at 311-12; *Depree*, 946 F.2d at 793-94; *McBeath*, 244 S.W.2d at 32. In *Randolph*, an informant sent a letter to the prosecution indicating he was Randolph's cellmate and requesting leniency. The informant met with the prosecutors and was told not to expect leniency in exchange for his testimony. He thereafter met with the prosecutors again and revealed Randolph had confessed. *Randolph*, 380 F.3d at 1139. The Ninth Circuit concluded although Randolph's statements elicited prior to the initial meeting were not fairly attributable to the State, *Randolph*, 380 F.3d at 1144, once the prosecution was aware the informant was willing to cooperate, and they sent him back to the cell he shared with Randolph, an implicit agreement was reached: the State chose to obtain the snitch's cooperation, and he chose to cooperate. *Randolph*, 380 F.3d at 1144.

That is, "if the State places a cooperating informant [back] in a jail cell with a defendant whose right to counsel has attached" after the informant has "indicated his willingness to cooperate with the prosecution, the State intentionally create[s] a situation likely to induce [the accused] to make incriminating statements without counsel's assistance." *Randolph*, 380 F.3d at 1138, 1146. Under such circumstances, the State bears the risk that its informant might deliberately use their position to stimulate conversations about the pending charges with the accused. *Randolph*, 380 F.3d at 1138, 1146. Other courts have come to the same conclusion. *See, e.g., Ayers*, 623 F.3d at 310, 315-16 (after meeting with informant, government returned snitch to the accused's pod knowing he had already provided information and consented to testify; at this point, informant and State "working in conjunction with each other"); *Stevens*, 83 F.3d at 64(when "an informant obtains some initial evidence, approaches the government to make a deal on the basis of that information, and then—with the backing of the government—deliberately elicits further evidence from an accused, the materials gotten after such government contact are properly excluded"); *United States v. Pannell*,

510 F. Supp.2d 185, 190-92 (E.D.N.Y. 2007) (returning informant to accused's cell after he had used his position to elicit statements was "tantamount to sponsorship of further investigation;" informant "ceased acting as a private individual 'once the government became involved' and expressed interest" in using his statements at trial); *Smith v. Fischer*, 957 F. Supp.2d 418, 434 (S.D.N.Y. 2013), *rev'd on other grounds by* 780 F.3d 556 (2d Cir. 2015) ("once an inmate informs the government of a defendant's statements, he becomes a government agent with respect to later elicited statements"); *McBeath*, 244 S.W.3d at 33-34 (informant who indicated willingness to cooperate and was repeatedly returned to shared cell after admitting he directly questioned defendant was acting on behalf of government with respect to later conversations).

As the State essentially conceded below, *see* Tr. at 449, Orth and Hope deliberately elicited incriminating statements from Glenn regarding his pending homicide charges outside the presence of counsel after his right to counsel on those charges had attached. Throughout the time they shared cells with Glenn, the snitches intentionally and constantly abused their positions of trust as his cellmates to stimulate conversations with Glenn regarding the homicide charges. They asked

him direct questions and intentionally provoking "shockers" about the charges, called him out when they did not believe him, talked about God and redemption and bringing closure to the alleged victims' families to prod him to confess, lied about their gang affiliations to earn his trust, and pretended to assist him in formulating defenses to the charges. There is no "perhaps" about it; the record shows they deliberately elicited incriminating statements from Glenn both before and after they met with Cochran. They were not merely "passive listeners" or "listening posts." *See Henry*, 447 U.S. at 271 & n.9.

As the State acknowledged, the primary issue in this case is whether that conduct is fairly attributable to the State under the totality of the circumstances. As in *Randall*, the State was not aware of Orth or Hope until they reached out and offered their services to the State. But when Cochran acted on that information and met with the snitches, he learned they each had the motive, opportunity, and capability to deliberately elicit incriminating statements from Glenn regarding his pending charges, as they already successfully done so by providing incriminating information. He also knew they fully intended to continue those efforts, as they both noted they had been working to

earn his trust and confidence, reported they were making progress, and believed they could extract a confession in time. Armed with that information, Cochran prearranged to meet with them again, at least if they obtained new information. Cochran then sent both men back to the jail cells they shared with Glenn, knowing they would attempt to extract a confession from Glenn without his attorney's assistance. In doing so, Cochran consciously chose to obtain the informants' future cooperation and both Orth and Hope consciously chose to continue cooperating with the State. Albeit mostly tacit and informal, this agreement to work together to investigate and prosecute Glenn was an agreement nonetheless. And, pursuant to that agreement, when the snitches reported success, Cochran promptly met with each of them again to extract that information.

After they met with Cochran, Orth and Hope "ceased acting as private individuals," *see Pannell*, 510 F.Supp.2d at 191, and began "working in conjunction with the State" in its investigation and prosecution of Glenn. *See Ayers*, 623 F.3d at 315-16. No longer could the State claim to have no role in obtaining the statements—it became a knowing and complicit participant in, and sponsor of, surreptitious

conduct designed to get Glenn to confess without the assistance of counsel. The State took "some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks" *see Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986), and "knowing[ly] circumvented [Glenn's] right to have counsel present in a confrontation between" Glenn and someone acting on behalf of the State, *see Moulton*, 474 U.S. at 176.

Contrary to the State's suggestion below, the State has an "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *See Moulton*, 474 U.S. at 171. By sending the snitches back to the cells they shared with Glenn, knowing what they had done and what they intended to do for the State, Cochran violated that obligation and unconstitutionally interfered with Glenn's right to counsel. All statements the snitches elicited after their initial meetings with Cochran were obtained in violation of Glenn's rights to counsel and should have been suppressed.

The district court's conclusion to the contrary seems to be based on a misreading of *Hoffa v. United States*, 385 U.S 293 (1966).

(*See* App. B at 34.) While the Supreme Court recognized that "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," *Hoffa*, 385 U.S. at 302, Glenn's claim is not a Fourth Amendment claim. Nor is his claim based on the right to privacy examined in *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489, also cited by the district court. (App. B at 34.) Rather, his right to counsel was violated. Pertinent to that claim, the *Hoffa* Court held "the use of secret informers is not per se unconstitutional," but "[t]his is not to say that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent." *Hoffa*, 385 U.S. at 311 (citing *Massiah*). That is, *Hoffa* confirms that once Hope and Orth were acting as secret government informers, they were subject to the limitations of the Sixth Amendment set forth in *Massiah* and *Henry*. They could not do anything the detectives themselves could not do, including eliciting incriminating statements from Glenn outside the presence of counsel.

A *Massiah* violation does not require proof of a *quid pro quo* arrangement or actual consideration. *Randolph*, 380 F.3d at 1144; *see also McBeath*, 244 S.W.3d at 33 ("The government is not absolved of its use of [the jailhouse informant] by the fact that it does not appear to have rewarded him for his actions or testimony."); *State v. Arrington*, 960 N.W.2d 459, 470 (Wis. 2021) ("There is no need to have consideration at all, let alone consideration spelled out in advance."). Nor are an informant's self-serving statements regarding his motivation for informing determinative. It is the totality of the circumstances defining the relationship between the State and the informant that matters.

Those statements aside, Orth involved his public defender and explicitly referenced his criminal case and indicated he wanted to "arrange negotiations" with the prosecutor in his introductory letter to the State. (App. C at 1.) Hope, too, informed Cochran he let his federal defender know he was cooperating in this case and passed along his contact information to Cochran, just in case he needed it. (Def.'s Ex. E.) As Cochran testified, he let the prosecutors in this case know the snitches were cooperating and just making that call can go a long way

in a snitch's mind. (App. B. at 20; Tr. at 1838, 2195-96.) "[T]he expectation of a '[r]eward for testifying is a systemic reality'" of the penal system, one that can be hidden from the courts and juries by simply having the informant testify first and request and receive favors later. *State v. Arroyo*, 973 A.2d 1254, 1260 (Conn. 2009) (quoting R. Bloom, *Jailhouse Informants*, 18 Crim. Just. 20, 24 (Spring 2003)). Indeed, "[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence," no matter how remote that possibility may be. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). Regardless of what they said, Cochran knew or must have known the snitches, who were out "on the front line" for the prosecution, were doing so, at least in part, in hopes of receiving a benefit. Although not necessary, there is evidence in the record—evidence the district court arbitrarily failed to even consider when issuing its Order—indicating the snitches' self-serving testimony about their motivations for informing against Glenn were not the entire story.

The district court also noted Cochran did not have "'full control' of the interactions between [Glenn] and the inmates." (App. B at 35.) While true, such control is neither possible nor necessary for a violation

of the right to counsel to occur. Whether a jailhouse informant's conduct is fairly attributable to the State depends on the totality of the circumstances presented, not some formalistic test under agency law. *See, e.g., Randolph*, 380 F.3d 1144; *McBeath*, 244 S.W.2d at 32. Notably, Cochran exercised some control over the informants. He told Orth to leave Glenn's personal belongings alone and he apparently did. He asked Orth to provide his notes and to meet a second time for confirmation that Glenn knew the victims were dead, and he did. He asked Hope to let him know if he learned anything new, and he did. And he chose not to make any effort to have them moved from the cells they shared with Glenn, although he could have done so.

The Sixth Amendment does not permit the State to circumvent an accused's right to counsel and "accomplish 'with a wink and a nod' what it cannot do overtly." *Ayers,* 623 F.3d at 312. *See also State v. Marshall*, 882 N.W.2d 68, 100 (Iowa 2016). The court here failed to carefully scrutinize the State's dealings with Orth and Hope and allowed Cochran to knowingly exploit the situation to accomplish that which he could not do himself through the snitches' surreptitious actions. As Hope testified, Cochran was "not stupid enough" to

explicitly instruct Orth and Hope to go back to Glenn's cell and prod him for information on the homicides, *see* Tr. at 391—and Orth and Hope, repeat offenders who knew how the game was played, were "not stupid enough" to testify that he did. Cochran didn't need to. He did it with a wink and a nod.

The district court erred when it denied Glenn's motion to suppress the incriminating statements Orth and Hope elicited from Glenn after their initial meetings with Cochran, as set forth above.

D. Fruits of the Poisonous Tree

The fruit of the poisonous tree doctrine applies to violations of the Sixth Amendment right to counsel. *Scheffer*, ¶ 20. Thus, derivative evidence, both tangible and testimonial, that is the product of incriminating statements resulting from an unlawful interrogation outside the presence of counsel, or that is otherwise acquired as an indirect result of that violation of the right to counsel, must be suppressed as well as the statements themselves. *See Murray v. United States*, 487 U.S. 533, 536-37 (1988). Seizure of evidence pursuant to a warrant will clear the taint of prior illegal conduct only if the officer's decision to seek the warrant was not prompted by the

incriminating statements he learned through unconstitutional means, and the magistrate's decision to issue the warrant was not affected by those unlawfully-obtained statements. *See Murray*, 487 U.S. at 542.

Cochran testified he sought a warrant for a CRT television a week after Hope's second interview based on statements from *both* of Hope's "*interviews*," including the detailed description of the television and its specific location within the home and Glenn's confirmation that the TV was still on the premises. (Tr. at 225-26.) That information was provided in Hope's second interview. It was elicited from Glenn after Hope started working in conjunction with the State. Thus, Cochran's decision to seek the warrant was prompted by information he learned through unconstitutional means.

Moreover, the face of the warrant application indicates the information included therein was obtained during Hope's second interview—not his first. (*See* App. H, Application at 2.) As such, the information Cochran obtained illegally—the detailed description of the TV and its specific location in the home—was presented to the magistrate and affected the decision to issue the warrant by providing the necessary particularity and probable cause to believe the evidence

would be found in the home despite the passage of nearly five years since the alleged homicides occurred. Under *Murray*, the warrant was not independent of the constitutional violation but rather was derived from it. The television and the forensic analysis of samples obtained from it should have been suppressed as fruits of the poisonous tree.

E. Harmless Error Review

Massiah violations are subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 307, 311 (1991) (citing *Milton v. Wainwright*, 407 U.S. 371 (1972)). As the beneficiary of the error below, the State bears the burden to demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State must "demonstrate that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735 (emphasis in original). The State cannot meet that "very high bar," *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423, because "[a] confession is like no other evidence," and "the defendant's own confession is probably the most

probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 296.

Hope and Orth testified Glenn confessed he killed Korjack and Orozco and corroborated significant details in Karen's story and law enforcement's investigation of the murders, *e.g.,* the alleged motive, the specific words spoken before the shooting, and the type of gun used. That testimony is qualitatively different than any other evidence presented in this no-body homicide case, where Glenn's defense was, in part, that the State could not even prove the alleged victims were dead. The prosecutor understandably emphasized this evidence during his closing argument, arguing the jury did not have to rely on Karen's testimony alone because Glenn had confessed and confirmed many of the details she provided. (Tr. at 2448-50.) The jury apparently found it important, too, as they asked to see Orth's notes of his alleged conversations with Glenn. (Tr. at 2501.)

In addition, the presence of blood and Korjack's DNA on the television constituted powerful objective, scientific evidence corroborating a non-innocent portion of Karen's story. *See State v. Snell*, 2004 MT 334, ¶ 42, 324 Mont. 173, 103 P.3d 503 (describing the

"natural propensity among jurors to accord greater weight to objective scientific evidence"). Indeed, it was some of the only evidence—aside from the snitches' testimony itself—to do so. The prosecutor understood the potential power of this evidence, falsely emphasizing in closing argument that the State proved Korjack's blood was on the TV, Tr. at 2445-46, and incorrectly arguing the jury would have to conclude "[s]omeone put Korjack's blood on the TV" to acquit Glenn of the homicides. (Tr. at 2461; *see also* Tr. at 2494.)

Given the quality of the tainted evidence and the way the prosecution asked the jury to use it, there is far more than a reasonable possibility that the admission of Glenn's incriminating statements and the forensic evidence regarding the TV affected the outcome of this case. Reversal of Glenn's homicide convictions is required.

II. Informant Jury Instruction

A. Standard of Review

Jury instructions are reviewed to determine whether, as a whole, they fully and fairly instructed the jury on the applicable law, and

whether any error prejudiced the defendant's substantial rights. *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 9, 400 Mont. 46, 462 P.3d 1219.

B. Background

Glenn requested the court provide a specific instruction regarding the informants' testimony in this case, which provided:

> You heard testimony from inmates [Orth, Hope, Braunreiter and/or Palmer]. Their testimony was received in evidence and may be considered by you, but you should carefully scrutinize their testimony given and the circumstances under which they testified, and every matter in evidence which tends to indicate whether they are worthy of belief. Consider each witness' intelligence, his motives, his access to secondary sources including the Defendant's paperwork, his state of mind, his demeanor and manner while on the witness stand. All evidence of a witness whose self-interest is shown from either benefits received, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.

(D.C. Doc. 315, Def.'s Prop. Jury Instr. 39, attached as Appendix K.)

The State objected, arguing the instruction was "direct commentar[y] on the witnesses' testimony . . . geared to telling the jury to distrust a certain witness" that was "not appropriate." (Tr. at 2412, discussion attached as Appendix L.) Defense counsel countered that

jailhouse "informants are not typical witness[es]," and, because of this, a similar instruction is routinely given in federal courts. (App. L.) Counsel further contended the inmates' admitted review of Glenn's correspondence, pleadings, and discovery in the case justified additional cautionary language regarding that fact. (App. L.) Although acknowledging the informants' "credibility is an issue," the court refused the instruction. (App. L.)

C. Discussion

"The purpose of jury instructions is to guarantee decisions consistent with the evidence and the law. . . ." *State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379, 239 P.3d 949. Montana law "recognize[s] the principle that if a person can avoid or lessen her punishment by testifying against another, that person will have strong motivation to not speak truthfully," and a jury is entitled to "view such testimony with disfavor." *State v. Charlo-Whitworth*, 2016 MT 157, ¶ 11, 384 Mont. 50, 373 P.3d 845 (discussing accomplice instruction).

A jailhouse informant, like an accomplice, is not just any other witness, and such testimony should not be viewed like that of any other witness. A jailhouse snitch is already in the power and custody of the

State and has little to lose, is looking to better his situation in an environment where bargaining power is hard to come by, and usually has a history of criminality. *Arroyo*, 973 A.2d at 1260-61 n.9 & 10. The incentive of freedom for a jailhouse snitch is a strong motivator to deceive, perhaps even more so than with accomplices not yet charged with any crimes. *Cervantes-Pacheco*, 826 F.2d at 315. And false confessions are easy to fabricate but difficult to subject to effective cross-examination, and there is virtually no risk of a perjury conviction upon such testimony. *See State v. Jones*, 254 A.3d 239, 251 (Conn. 2020).

Not surprisingly, "[a]ccording to one study of persons exonerated by DNA evidence, false informant testimony supported the wrongful conviction in twenty-one percent of the cases." *Marshall*, 882 N.W.2d at 82 (citing Jim Dwyer, et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 246 (2000)). Currently, seven percent of all exonerees on the National Registry of Exonerations were convicted, in part, by testimony from a witness who was in custody with the defendant and who reported the defendant confessed to him. University of Michigan Law School, The National

Registry of Exonerations, Detailed View, available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

Recognizing the "serious questions of credibility" that arise when the government uses "informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business'" to prosecute a defendant, the Supreme Court long ago endorsed the use of cautionary instructions to address these special credibility concerns. *On Lee v. United States*, 343 U.S. 747, 757 (1952). Although the Supreme Court refused to hold that such testimony is incompetent across the board due to its inherent unreliability, it noted in such cases, "*a defendant is entitled* to broad latitude to probe credibility by cross-examination and *to have the issues submitted to the jury with careful instructions*." *On Lee*, 343 U.S. at 757 (emphasis added). *See also State v. Gommenginger*, 242 Mont. 265, 273, 790 P.2d 455, 460 (1990) (discussing the scope of cross-examination and stating "testimony of informants should be scrutinized closely to determine whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interests.").

Although the *On Lee* Court did not address the substance of the requisite "careful instructions," the Supreme Court later in *Hoffa*, 385 U.S. at 312 n.14, cited approvingly a cautionary "interested witness" instruction identical to the instruction Glenn proposed here, with the exception of Glenn's addition of a specific reference to the informants' access to his paperwork in this case. As defense counsel noted, similar instructions are now part of the "customary, truth-promoting precautions that generally accompany the testimony of informants." *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004). *See also* Kevin F. O'Malley, et al., 1A Fed. Jury Prac. & Instr. § 15.02 (6th ed. 2008) ("The testimony of an informant, someone who provides evidence against someone else for . . . personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated").

That is, the highest court in the land has recognized an accused is *entitled* to a cautionary instruction regarding informant testimony, and it is proper to require the jury to carefully scrutinize and view with caution and care the testimony of persons who testify on behalf of the government for personal benefit or based on prejudice against the

defendant. Glenn's requested instruction was not an improper comment on the evidence, as argued by the State below, but a necessary safeguard against the effects of inherently unreliable testimony. This Court agreed in *State v. Grimes*, 1999 MT 145, ¶¶ 45-46, 295 Mont. 22, 982 P.2d 1037, holding that a cautionary instruction should be given when an informant testifies, and the refusal to give such an instruction is reversible error if the testimony was crucial to the State's case.

However, in *State v. DuBray*, 2003 MT 255, ¶¶ 92-93, 317 Mont. 377, 77 P.3d 247, this Court, citing *State v. Long*, 274 Mont. 228, 907 P.2d 945 (1995), concluded a specific informant instruction was not required because the jury was instructed it "may consider" whether *any* witness "has an interest in the outcome of the case or any motive, bias, or prejudice." *See also* Mont. Crim. J. Instr. 1-103. What is lacking from that pattern instruction is exactly what the *On Lee* Court concluded an accused is entitled to: "careful instructions" designed to address the "special credibility concerns" that arise when the government relies on informant testimony. *See* 343 U.S. at 757. The pattern instruction does not address any "special" credibility concerns—it treats jailhouse informants like ordinary witnesses. They are not.

In contrast, Glenn's proposed *Hoffa* instruction specifically addressed the special credibility concerns in this case by instructing the jury to carefully scrutinize and consider the snitches' testimony with caution and care in light of the strong pressures—and low risks—that come to bear on persons behind bars and the specific circumstances that led to their testimony here, including their access to non-public information regarding Glenn's case. The State relied heavily on the informants' testimony to corroborate Karen's story regarding the homicides—a story they knew well because they had access to Glenn's paperwork in this case. Again, a confession is a uniquely convincing piece of evidence, even if it is a confession to a snitch, and it is almost impossible to refute, without sacrificing the defendant's privilege against self-incrimination in the process.

Moreover, unlike in *DuBray* and *Long*, *the only evidence* showing that Glenn solicited anyone to kill Karen was the testimony of two jailhouse snitches, Palmer and Orth.[4] There was no corroboration. And there was no real risk to either of these men in testifying about what

[4] Long did not involve a jailhouse informant, but rather a full-time paid informant who conducted a drug buy for the State. *See Long*, 274 Mont. at 231, 907 P.2d at 947.

they allegedly heard in private conversations with Glenn. Palmer admittedly received a benefit for his testimony: Cochran called Idaho authorities and put in a good word for him. And Orth sought a benefit for his cooperation and eventually received a community placement despite his serious felony convictions and lengthy record. Regardless, neither of these men testified for a law enforcement purpose; they testified for their own personal advantage or prejudice against Glenn. And their inherently unreliable testimony was not only "the primary evidence of [Glenn's] guilt," it was the *only* evidence on Counts III and IV. *See People of Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1260 (9th Cir. 1980) (discussed in *Grimes*).

DuBray and *Long* notwithstanding, this Court should conclude the jury in this case under these facts was not fairly and fully instructed on the applicable law regarding the "special credibility concerns" raised by the jailhouse informants' testimony, and the court's refusal to give Glenn's proposed *Hoffa* instruction prejudiced his substantial rights. The jury should have been instructed to carefully consider whether their testimony was influenced by their personal biases against Glenn or for an actual or desired benefit, and whether their testimony was the

product of their admitted access to Glenn's paperwork and non-public information contained therein. Alternatively, this Court should reconsider those decisions in light of *On Lee* and *Hoffa* and the ever-increasing volume of evidence showing jailhouse snitch testimony is unreliable and too often results in wrongful convictions. The use of minimal procedural safeguards like the cautionary instruction requested here is necessary to counteract that phenomenon. Because the informants' testimony was crucial to the State's case and there is far more than a reasonable possibility that the lack of a cautionary instruction regarding their testimony contributed to Glenn's convictions, he is entitled to a new trial on all counts with an appropriately instructed jury. At a minimum, the solicitation convictions should be reversed, given the lack of any evidence corroborating the inherently unreliable testimony of Orth and Palmer.

III. Improper Limitation on Closing Argument

A. Standard of Review

Again, this Court "exercise[s] plenary review of constitutional questions." *Martell*, ¶ 9.

B. Background

Outside the presence of the jury, defense counsel indicated his belief he could "make a very good argument, in closing, that the State has not met its burden of proof on count three, in part because John Braunreiter did not testify." (Tr. at 2343, discussion attached as Appendix M.) The court expressed its concern that Braunreiter "didn't qualify as a witness" because he might have refused to testify under oath. (App. M at 2344.) The court stated it "guess[ed]" that was why the State chose not to call him, to which the prosecutor responded equivocally, "*I think that was part of it*." (App. M at 2345 (emphasis added).)

The court stated the defense "can't use . . . the absence of Braunreiter to show that the state is not calling him because his testimony would conflict with—with their charge" because if Braunreiter "won't cooperate, he's not a witness." (App. M at 2345.) The court explained that had Braunreiter come in and been belligerent, he would not have allowed him to testify. (App. K. at 2348-49.) The court continued: "[Y]ou don't get to say, 'Where's Braunreiter? He's the one who would have supplied it,' unless you can show the state

could have called him, and that he would have testified." (App. M at 2345-46.) The court ultimately stated, "[a]t this stage, I don't think you can comment on—on the state's failing to call him, but we can argue about it more later." (App. M at 2351.)

Much of defense counsel's closing argument focused on the credibility of the jailhouse snitches, particularly Orth. (*See* Tr. at 2471-80.) During this argument, defense counsel raised the State's evidence supporting Count III—which consisted solely of Orth's testimony—and rhetorically asked, "Where is Mr. Braunreiter in this trial?" The State objected, and the court sustained the objection, stating, "The jury will disregard this." (App. K at 2477-78.)

C. Discussion

The Sixth and Fourteenth Amendments to the United States Constitution "guarantee[] criminal defendants a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *State v. Twardowski*, 2021 MT 179, 405 Mont. 43, 491 P.3d. 711. Due process further protects an accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In re Winship, 397 U.S. 358, 364 (1970); *see* U.S. Const. amend. XIV; Mont. Const. art. II, § 17. And, as discussed above, criminal defendants are constitutionally guaranteed the assistance of counsel at all critical stages of a criminal prosecution.

A "'closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial.'" *State v. Chaplin*, 2018 MT 266, ¶ 9, 393 Mont. 233, 429 P.3d 917, *quoting Herring v. New York*, 422 U.S. 853, 858 (1975). Closing argument is the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt," *Herring*, 422 U.S. at 862, and "the primary purpose of a defendant's closing is to hold the State to its burden of proof." *Frost v. Van Boening*, 757 F.3d 910, 916 (9th Cir. 2014) (en banc), *rev'd sub nom. on other grounds by Glebe v. Frost*, 574 U.S. 21 (2014). Thus, "'it has been universally held that counsel for the defense has a right to make a closing summation to the jury, *no matter how strong the case for the prosecution may appear*. . . .'" *Chaplin*, ¶ 9 (quoting *Herring*, 422 U.S. at 858 (emphasis added)).

The right to present a closing argument does not mean the right to present *any* closing argument. The trial court maintains broad

discretion over the duration and scope of closing argument. *Herring*, 422 U.S. at 862. But the accused has the constitutional "right to have his counsel make a proper argument on the evidence and the applicable law . . . and the trial court has no discretion to deny the accused such right." *Herring*, 422 U.S. at 860. So long as the defense theory is "not precluded as a matter of law," and is a "legitimate defense theory," the court may not deny the accused an opportunity to make it. *United States v. Brown*, 859 F.3d 730, 737 (9th Cir. 2017).

Here, the district court violated Glenn's rights to present a defense and to the assistance of counsel when it prohibited defense counsel from commenting on Braunreiter's absence. "A time-honored defense argument in a criminal case is the lack of evidence, with one source of the deficiency being missing witnesses." *McDowell v. State*, 162 So.3d 124, 126 (Fla. Dist. Ct. App. 2014). "Counsel for the defendant may comment in his argument to the jury upon the failure of the state to put a witness upon the stand. . . ." *State v. Parr*, 129 Mont. 175, 182-83, 283 P.2d 1086, 1090 (1955). *See also State v. Markarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213 (prosecutor to may comment on defense's failure to present a witness so

long as comments do not shift the burden of proof or violate the privilege against self-incrimination). In addition, it is appropriate to ask the jury to consider "witness credibility" by arguing the other side failed to present corroborating testimony from other witnesses. *See Markarchuk*, ¶ 26. Moreover, counsel is generally permitted to point out that opposing counsel made false promises during opening statement about the testimony and evidence he would present at trial and to suggest the State's case lacks evidentiary support. *See State v. Soraich*, 1999 MT 87, ¶¶ 22-23, 294 Mont. 175, 979 P.2d 206.

The court should have permitted defense counsel to ask the jury to assess the credibility of the State's only witness to the alleged solicitation in Count III, Orth, and to assess the sufficiency of the State's proof in support of that charge by commenting upon the State's failure to present corroborating testimony from another witness—the alleged solicitee, Braunreiter. Such argument is both proper and essential where the State's *only* witness to the alleged offense is a jailhouse snitch who allegedly overheard a portion of a conversation between the defendant and third party whom the State chose not to call. In addition, defense counsel should have been permitted to

comment on the State's unfulfilled promise to let the jury hear directly from Braunreiter and to ask the jury to consider what other things the State had overpromised regarding its case.

The district court apparently concluded this line of questioning would not be fair because the State wanted Braunreiter to testify, but could not due to circumstances beyond its control. First, the record shows although the prosecution *initially* wanted Braunreiter to testify, the prosecutors changed their minds. The record does not reveal exactly why the State made that decision. However, the State did not endorse the court's belief that it chose not to call Braunreiter solely because of his threats to disrupt the process. Indeed, it could not, as the State was aware of those threats before trial and assured the court it had taken them into account before it decided to call Braunreiter and before it told the jury the substance of his prior statements. The State decided not to call Braunreiter *after* learning of his threats and *after* having promised to do so. It was not unfair to point that out to the jury.

Contrary to the court's suggestion, Glenn bore no burden to call the State's witness to determine whether he would have testified against Glenn. If the State truly desired to have Braunreiter testify but

wished to preclude an absent-witness argument if he would not do so, *the State* necessarily bore the burden to show the witness was unavailable or not competent to testify. Indeed, the State acknowledged as much, saying "[h]e should be seated, and he'll answer questions or he won't." (Tr. at 504-05.) The court's conclusion to the contrary turned on their heads the State's burden of proof and the presumption that witnesses are competent to testify unless shown otherwise, and it was wrong. *See* Mont. R. Evid. 601.

By preventing Glenn from attacking the sufficiency of the evidence in support of Count III and the State's unfulfilled promise to present Braunreiter's testimony, the court violated Glenn's rights to present a legitimate defense and to effective assistance of counsel, and further undermined the presumption of innocence and the State's concomitant burden of proof. "[P]reventing a defendant from arguing a legitimate defense theory constitutes structural error" that "requires reversal." *Brown*, 859 F.3d 730 (internal quotation marks and citation omitted). *See also United States v. Davis*, 993 F.2d 62, 64 (5th Cir. 1993) ("Given the difficulty of determining the prejudicial impact of the failure to afford summation, the denial of a request for it

is reversible error *per se*."); *Patty v. Bordenkircher*, 603 F.2d 587, 589 (6th Cir. 1979) (trial court erred in applying a harmless error analysis because the *Herring* case "indicated that the strength of the prosecution's case is not a factor"); *United States v. Spears*, 671 F.2d 991, 992 (7th Cir. 1982) ("In *Herring* . . ., the Supreme Court held that it is *per se* reversible error in any criminal trial . . . for the trial court to deny the defendant the opportunity to present a closing argument."). In particular, it is structural error to prevent a defendant from making an argument that attacks the State's failure to meet its burden of proof. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999).

This Court must reverse Glenn's convictions because he was prevented from arguing the State overpromised and underperformed in presenting its case to the jury, a flaw that could have affected how the jury viewed the prosecution's presentation throughout trial on all counts. At a minimum, Glenn's conviction on Count III must be reversed as Glenn was prevented from fully attacking Orth's credibility and arguing the State failed to meet its burden of proof on the solicitation charge due to its unfulfilled promise to present the

testimony of the person allegedly solicited by Glenn to kill Karen. That error was structural, and reversal is required.

Even if it were not, the State could not show that error was harmless beyond a reasonable doubt. Braunreiter was the person allegedly solicited in Count III. The only witness who testified regarding Count III was Orth, a jailhouse snitch who did not like Glenn, who wanted and may have gotten a benefit for doing so, and who previously claimed under oath to have no recollection of this conversation at all. The jury should have been allowed to further question Orth's credibility by considering the State's failure to corroborate his testimony with Braunreiter's testimony. That is especially so after the State told the jury Braunreiter would testify and had already "confirmed" Orth's account—just not in court, under oath, or while subject to cross-examination. The prejudice associated with the court's limitation on Glenn's closing argument was further compounded by the court's refusal to instruct the jury to carefully scrutinize Orth's testimony and view it with care and caution. Given the jury's interest in Orth's notes, it appears they nonetheless had some

concerns on their own, and the limitation on closing may have affected their decision. The conviction on Count III cannot stand.

IV. Prosecutorial Misconduct

A. Background

During opening statement, the prosecutor paraphrased and occasionally quoted several witnesses' unsworn hearsay statements to law enforcement, including those of the alleged eyewitness, Karen. (*See e.g.,* Tr. at 791 (direct quotations); *see also* Tr. at 781-85, 788-89, 791-94, 796, 804 (discussing what "Karen said" or "indicated" to officers).) She also paraphrased Braunreiter's prior statements regarding Count III and then later chose not to call him as a witness. Those statements were not made under oath, nor were they subject to cross-examination.

On direct examination, the prosecutor elicited a detailed account of Karen's prior consistent statements to Sydney police officer Tyler Kammerzell. (Tr. at 1376-80.) Defense counsel objected on hearsay grounds, and the court overruled the objection, telling the jury the statement was being offered for the purpose of allowing them to

determine "whether it's consistent with earlier testimony by Ms. Hardy." (Tr. at 1377.)

During Cochran's direct examination, the prosecutor asked if Karen's testimony in court was consistent with her prior statements to him, to which he responded it was. (Tr. at 1466.) The prosecutor then essentially personally testified regarding "Karen's report" to Cochran by repeatedly paraphrasing portions of her interviews during his direct examination and asking the detective if his investigation "corroborate[d] that report," bore out her statements to the police, produced evidence to support those statements, or indicated her hearsay statements were "true." (*See* Tr. at 1466-78, 1481-82, 1492, 1495, 1498-1504.)

To make matters worse, the prosecutor asked Kammerzell to describe Karen's "demeanor" during her interview—even though he already did moments before, *see* Tr. at 1376—and the officer responded by stating "she was believable to" him and the other officer in the room. (Tr. at 1381.)

The court granted, in part, Glenn's motion in limine to exclude certain evidence pursuant to Mont. R. Evid. 402-404 as irrelevant or

unduly prejudicial or as inadmissible uncharged misconduct not offered for a nonpropensity purpose. (D.C. Doc. 115, as amended by D.C. Doc. 267, attached as Appendix N.) The State admittedly violated that Order by publishing to the jury a picture of an AR-15 assault rifle located in Glenn's home during a search of the premises "for a few seconds." (*See* Tr. at 1688-89.) The State violated the Order a second time when it elicited testimony indicating the State had sent a rape kit to the Crime Lab for testing for semen. (Tr. at 2105, 2352; App. N at 17.) It violated it a third time when it admitted a July 10, 2013, letter denying Glenn's passport application due to an outstanding arrest warrant for felony "weapon offense/assault." (State's Ex. 53, DSC00146, admitted at 1422-23; App. N at 16.) Evidence of the forensic examination in Z.H.'s abuse and neglect case had been excluded unless Z.H. testified or the door was opened to such testimony by Glenn, and Glenn's prior arrests had been excluded unless Karen testified regarding her knowledge of a specific incident as affecting her mental state. (*See* App. N at 16-17.) Neither precondition was met here.

In his initial closing argument, the prosecutor asked the jury to consider what motive Karen had to make up her story about the alleged homicides. (Tr. at 2460.) The prosecutor continued:

> And besides which it's not just Karen that has to be making this up for the defendant's story to be true. Imagine what else has to be true.
>
> *Everyone that has ever talked about what the defendant said or did would have to be lying.* It would have to be not just Karen but Pamela Labonte, Will Schmidt, Mark McNerny, Lawrence, Marvin Taber, Nathan Chapin, Brian Riefflin, Tanner Osweiler.

(Tr. at 2461 (emphasis added).)

B. Analysis

The right to a fair trial by jury is guaranteed by the Sixth Amendment to the United States Constitution and by Article II, Section 24, of the Montana Constitution. *State v. Aker*, 2013 MT 253, ¶ 24, 371 Mont. 491, 310 P.3d 506 (citing *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091). Although this Court does not routinely address unpreserved claims on appeal, it "may nonetheless discretionarily review an issue not raised at trial which concerns a fundamental constitutional right" where failure to review the alleged

error "may result in a manifest miscarriage of justice, [or] leave unsettled the question of the fundamental fairness of the proceedings . . . ." *State v. Valenzuela*, 2021 MT 244, ¶ 10, 405 Mont. 409, 495 P.3d 1061 (internal quotation and citations omitted); *State v. Finley*, 276 Mont. 126, 137-38, 915 P.2d 208, 215 (1996), *abrogated on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817 (discussing this Court's "inherent power and paramount obligation" to protect Montanans' constitutional rights).

"When there are multiple errors committed by the prosecutor, the cumulative effect of the misconduct leaves unsettled the question of the fundamental fairness of the proceedings." *State v. Byrne*, 2021 MT 238, ¶ 32, 405 Mont. 352, 495 P.3d 440 (citing *Aker*, ¶ 28). *See also State v. Toner*, 127 Mont. 283, 290, 263 P. 2d 971, 975 (1953) (repeatedly asking the defendant or his witnesses prejudicial and incompetent questions). In addition, the sum of multiple errors of varying types can serve as a basis for reversal under the cumulative error doctrine when the errors, taken together, have prejudiced the defendant's right to a fair trial. *See State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178.

This Court reviews claims of prosecutorial misconduct by determining whether the conduct violated established norms of professional conduct and resulted in prejudice to the defendant's constitutional right to a fair and impartial trial. *State v. Dobrowski*, 2016 MT 261, ¶ 28, 385 Mont. 179, 382 P.3d 490. Montana Rule of Professional Conduct 3.4(e) prohibits a lawyer from alluding in trial to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. "Prosecutors should not bring to the attention of the jury matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments." *State v. Krause*, 2021 MT 24, ¶ 26, 403 Mont. 105, 480 P.3d 222.

The prosecutors here repeatedly brought to the attention of the jury matters that the prosecutors knew or should have known to be inadmissible. The State presented to the jury evidence that Glenn owned an assault rifle, was suspected of raping someone in this case, and had an outstanding warrant for a felony assault or weapon charge. It did so despite Glenn having obtained a court order excluding such

evidence and despite the State's acquiescence below that the evidence was not admissible and it would not seek to admit it unless certain conditions were met—which they were not. *See State v. Partin*, 287 Mont. 12, 20, 951 P.2d 1002, 1007 (1997) (State's acquiescence to motion in limine concedes inadmissibility on appeal). That evidence bolstered the State's portrayal of Glenn as a "David Koresh" type character, Tr. at 782, 838, who resorted to violence to solve all of his problems, *see* Tr. at 2398. Such evidence is inadmissible precisely because it is highly prejudicial and irrelevant and creates the risk that the jury will penalize Glenn for his "bad" character or prejudge him without allowing him to defend himself. *See State v. Derbyshire*, 2009 MT 27, ¶ 51, 349 Mont. 114, 201 P.3d 811.

The prosecutors also brought to the attention of the jury inadmissible hearsay statements. During opening statement, "counsel may briefly state his or her case and *the evidence he or she expects to introduce* to support the same . . . if those statements are made in good faith and with reasonable ground to believe the evidence is admissible." *State ex rel. Fitzgerald v. Dist. Ct. of Eighth Jud. Dist. In & For Cascade Cty.*, 217 Mont. 106, 121–22, 703 P.2d 148, 158 (1985) (emphasis added)

(citing 75 Am. Jur.2d 291 Trial, § 208). Here, the prosecutor did not describe what she expected the testimony of the State's witnesses would be; rather, she described what the State's witnesses *had already said to law enforcement* at a time when they were not under oath or subject to cross-examination. That is, she repeated what she anticipated would be prior consistent statements of the witnesses during opening statement. But prior consistent statements of witnesses generally are inadmissible hearsay and improper bolstering testimony, regardless of whether the witness testifies at trial or not. *See, e.g.*, 81 Am. Jur.2d Witnesses §§ 900-01; *State v. Smith*, 2021 MT 148, ¶ 19, 404 Mont. 245, 488 P.3d 531 (discussing M. R. Evid. 801(d)(1)(B)). And such statements are never admissible unless the declarant testifies at trial and is subject to cross-examination regarding the prior consistent statement. *Smith*, ¶ 19.

Nor could the State justify repeating Karen's detailed out-of-court statements during opening statement by arguing those statements were offered for their "effect on the listener." While "officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for

their presence and conduct," they "should not. . . be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay." 2 McCormick On Evid. § 249 (8th ed.). All that need be and should be said is that "the officer acted 'upon information received,' or words to that effect." 2 McCormick On Evid. § 249.

Here, the prosecutor bolstered Karen's testimony—the "eyewitness" to the alleged murders—by letting the jury know she had previously told essentially the same story before, thereby inviting the jury to assume that mere repetition rendered her story more trustworthy. This error was multiplied when the prosecutor elicited Karen's prior consistent statements to Kammerzell regarding the homicides; asked Cochran whether her report to him was consistent with her trial testimony; and repeated her out-of-court statements while questioning Cochran regarding the investigation. The prosecutor did not need to repeat, and the jury did not need to hear, Karen's prior statements line-by-line to understand why an investigation occurred. In doing so—repeatedly—the prosecutors improperly bolstered the testimony of the only alleged eyewitness to the murders by letting the

jury know that she had repeated the same story several times before. But a lie is a lie no matter how many times it is told. And, contrary to what the district court instructed the jury below, determining whether a person has previously made consistent statements outside of court is *not* a proper purpose for repeating a witness's otherwise inadmissible hearsay.

To make matters worse, the prosecutor elicited testimony from Kammerzell, a sworn police officer, vouching for Karen's credibility. It is plain error to elicit or admit opinion testimony regarding the credibility of a witness's statements regarding the offense, particularly where the person giving the opinion is a police officer. *Hayden*, ¶¶ 30-31. *See also Byrne*, ¶ 23 ("A witness may not comment on the credibility of another witness's testimony, nor can a prosecutor elicit such testimony."). Kammerzell was not a lay witness; he was an experienced law enforcement officer testifying on behalf of the State. As such, he should have known better than to vouch for the eyewitness's credibility or should have been prepped accordingly. *See Whiteplume v. State*, 841 P.2d 1332, 1341 (Wyo. 1992) (presuming an experienced law enforcement officer would know better than to

answer the question, "What did you do next?" with the answer "I made the determination that she had been raped"). Under *Byrne* and *Hayden*, his testimony was improper and should not have been elicited or provided by a representative of the State.

In addition, the prosecutor paraphrased Braunreiter's hearsay statements regarding Count III to the jury during opening and then chose not to call Braunreiter to testify at all. They didn't need to. The jury had already heard the incriminating statements he made to law enforcement, straight from the prosecutor's mouth. Of course, those statements were not made under oath or subject to cross-examination and were not even arguably admissible under any theory. They should not have been presented to the jury in opening statement. Yet, defense counsel was prevented from even mentioning, and the jury was prohibited from considering, Braunreiter's absence from trial or the State's failure to present testimony to back up their opening statement or to corroborate Orth's snitch testimony on Count III.

Finally, during closing argument, the prosecutor essentially told the jury it could believe Glenn's story and acquit him only if it found all of the government's witnesses lied under oath. That argument is "both

flawed and improper." *Fensterer v. Delaware*, 509 A.2d 1106, 1112 (Del. 1986). It's flawed because telling the jury that to acquit Glenn it would have to disbelieve *all* of the State's witnesses was logically equivalent to saying that the jury would have to convict Glenn if it believed *any* of the State's witnesses. That proposition is false. No person other than Karen and the jailhouse snitches testified that Glenn shot anyone. Most of the witnesses, including the ones specifically named by the prosecutor in closing, simply corroborated certain innocent details of Karen's story—details that did not definitively prove Glenn's guilt on their own or in combination. For example, Tanner Osweiler testified Glenn ordered replacement window glass on March 28, 2013, and paid cash when he picked it up the following day. (Tr. at 1190-96.) His testimony did not prove beyond a reasonable doubt that Glenn committed murder; thus, the jury did not have to find Osweiler purposefully lied under oath to acquit Glenn of murder.

The prosecutor's statement was also improper because the jury did not need to find that Osweiler—or any of the State's witnesses—were liars, or even simply wrong, to acquit Glenn as a matter of law. Reasonable doubt about Glenn's guilt was all that was required. "The

jury is not required to choose between the State's and the defendant's version of the facts," and Glenn "had no affirmative burden to disprove the testimony of the [State's witnesses], as the prosecutor's statement implie[d]." *Fensterer*, 509 A.2d at 1112. Whether Glenn's "story" was true was not the question; the question was whether the jury had reasonable doubt of Glenn's guilt. The prosecutor's statement had the effect of diluting the State's burden of proof and requiring Glenn to prove an alternative theory of the case. *Fensterer*, 509 A.2d at 1112.

Recognizing the weaknesses in its case, the prosecutors improperly bolstered Karen's questionable testimony by repeatedly referring to her inadmissible prior consistent statements and presenting an officer's testimony vouching for her believability, and tried to discredit Glenn through the presentation of highly prejudicial evidence of his bad character and uncharged misconduct. The other evidence supporting his convictions consisted of the statements of three inherently unreliable jailhouse snitches and the out-of-court statements of a fourth whom the State chose not to call as a witness. Yet Glenn was improperly denied the opportunity to comment on that witness's absence during closing, or to have his jury instructed to view the

remaining snitches' testimony with the caution and care to which he was entitled. The State further drug out a long line of witnesses who testified regarding innocent facts only, and then told the jury it needed to find all of them had committed perjury in order to acquit Glenn. The combined effect of these numerous errors rendered Glenn's trial fundamentally unfair. This Court should exercise its discretion to review these claims under the plain error doctrine and reverse his convictions. Because this Court cannot have confidence in the guilty verdicts rendered under these circumstances, it should reverse those convictions accordingly.

CONCLUSION

This Court should reverse Glenn's convictions.

Respectfully submitted this 4th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 16,987, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
TAMMY A. HINDERMAN

APPENDIX

CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-09-2022:

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