

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.

REPLY BRIEF OF APPELLANT

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

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Appellant Glenn Lee Dibley stands by his arguments in Appellant's Opening Brief and hereby responds to the matters raised by the State in its response brief as follows:

I. The admission of Glenn's incriminating statements elicited by jailhouse snitches after they met with Cochran and the fruits of those statements violated his rights to counsel and prejudiced his defense.

The primary disputed issue on appeal is whether the jailhouse informants' conduct in deliberately eliciting the statements set forth on pages 15 and 20 of Appellant's Brief is fairly attributable to the State for purposes of Glenn's right to counsel claims. The State does not contest on appeal and, thus, has conceded, that this is a question of constitutional law to be reviewed by this Court *de novo*.

(See Appellant's Br. at 34.)

The thrust of the State's argument is that it violates its "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Maine v. Moulton*, 474 U.S. 159, 171 (1985), *only* if certain circumstances are present, *i.e.*, it agreed to provide a benefit to the informant before he deliberately elicited an incriminating statement, *i.e.*, a preexisting *quid pro quo* agreement; or explicitly instructed an informant to obtain

information from the accused; or actively encouraged such behavior. (See Appellee's Br. at 38-40.) In the State's view, it cannot "intentionally create[] 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 "knowing[ly] exploit[] . . . an opportunity to confront the accused without counsel," *Moulton*, 474 U.S. at 179, unless at least one of these facts is shown, or the informant at least admits he did so in hopes of obtaining a benefit from the State.

No decision of the United States Supreme Court holds as much. Rather, the Supreme Court has held that if, under "a combination of circumstances," the government "must have known" their arrangement with an informant "likely would lead to" the informant using his position to deliberately elicit incriminating statements from the accused, the government is responsible when the snitch actually does so. *Henry*, 447 U.S. at 270-71. Given the "infinite number of ways that investigators and informants can combine to elicit information from an unsuspecting defendant" and the diverse circumstances that could result in the government violating its affirmative duty to protect and preserve the right to counsel, there can be no bright line or litmus test

to determine whether an informant's conduct is fairly attributable to the government. *McBeath v. Kentucky*, 244 S.W.3d 22, 32 (Ky. 2007) (quoting *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 906 (3rd Cir. 1999) (McKee, Circuit Judge, concurring)). Although the factors identified by the State may be relevant, they are not the only circumstances that matter, and their absence does not preclude a finding of a Sixth Amendment violation. *See, e.g., Henry*, 447 U.S. at 272-74 (relying on defendant's custodial status and surreptitious nature of the jailhouse informant's conduct).

Indeed, the cases cited by the State prove the point. Contrary to the State's suggestion, the courts in *Thomas v. Cox*, 708 F.2d 132, 133 (4th Cir. 1983) and *United States v. Taylor*, 800 F.2d 1012, 1015 (10th Cir. 1986), explicitly refused to apply a bright-line test and instead considered all the facts and circumstances regarding the relationship between the informant and the government. Specifically, in *Taylor*, 800 F.2d at 1016, the court "declined to infer an agreement" between the government and the informant "merely from the placement of the defendant in [the informant's] cell" where the snitch had one conversation with the accused prior to meeting with law enforcement,

that conversation was initiated by the accused, and there was no evidence the snitch had been attempting to elicit a confession from Taylor or that he intended to do so after the accused was moved into his cell. In contrast, as discussed on pages 12-14 and 17-18 of the Appellant's Brief, the record here shows that after meeting with the snitches, Cochran was aware they had repeatedly used techniques similar to police interrogation tactics to deliberately elicit incriminating information about the homicide charges from their suicidal and despondent cellmate, Glenn. They baited him, threw out "shockers," asked him direct questions about the charges, challenged his statements, lied to him, assisted him with formulating a defense, and implored him to confess before committing suicide to give the alleged victims' families closure. (*See also* Appellee's Br. at 4, 7, 9, acknowledging Cochran knew the informants were eliciting statements.) Cochran was also aware they were "cultivating" Glenn and believed they could "pry" or "peel" a confession out of him, they intended to keep interrogating him, and they intended to report what they pried out of Glenn to him in the future. He did not discourage them from doing so. To the contrary, he set up a future meeting with

Orth, and did not dissuade Hope when the snitch told him that he would contact law enforcement if he obtained more information from Glenn. He allowed them to return to Glenn's cell without discouraging them from interrogating Glenn—conduct he could not engage in himself without violating Glenn's constitutional rights—and reporting back to him.

Similarly, in *Thomas*, 708 F.2d at 133, the court permitted use of statements obtained by a snitch after meeting with law enforcement where the officers actively discouraged him from violating the right to counsel by instructing him not to ask questions and instead just listen. Other cases cited by the State reach the same conclusion.

See California v. Dement, 264 P.3d 292, 319 (2011), *abrogated on other grounds by California v. Rangel*, 367 P.3d 649 (2016) (law enforcement told informant not to discuss or ask anything specific about charges); *Sincock v. Wyoming*, 76 P.3d 323, 333 (Wyo. 2003) (law enforcement actively “attempted to discourage [the informant’s] offer to obtain information”). In these cases, law enforcement did not remain silent and not explicitly encourage the informant to violate the defendant’s right to counsel; rather, the officers affirmatively discouraged such

behavior and thus satisfied their affirmative obligation to preserve and protect the defendants' rights to counsel. The same cannot be said here.

In addition, in *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997), although the court held the conduct of a preexisting, "roving" informant is not attributable to the government unless the informant has been directed to get information about the particular accused, the court implicitly recognized that the government was responsible for the informant's actions after he met with law enforcement and informed them he had been actively seeking information from the defendant, *i.e.*, the informant had singled the defendant as a target. The court permitted use of the statements gathered by the informant after that first meeting only because the informant "stopped asking questions" and "simply listened," not because his conduct was not attributable to the government. Not so here. The snitches continued to interrogate Glenn after meeting with Cochran and after law enforcement knew he was their target.

Nor is *Brooks v. Kincheloe*, 848 F.2d 940, 942 (9th Cir. 1988) helpful to the State because the informant there deliberately elicited a confession from Brooks but did *not* offer his services to law enforcement

or seek “negotiations” with the prosecutor. When law enforcement found out he had been talking to Brooks about his charges, the State approached him, but the informant did provide any information, stating he wanted to talk to his lawyer. The officers sent him back to their shared cell, asking him only to remember anything the accused might say. The Ninth Circuit refused to grant Brooks habeas relief because the state court found the informant took action beyond merely listening only *before* law enforcement reached out to him, and that conduct was not attributable to the state. Moreover, the government did not intentionally create a situation likely to induce the accused to make incriminating statements outside the presence of counsel by meeting with an uncooperative cellmate who provided no information and, thus, was not even an “informant.”

In contrast, in *Randolph v. California*, 380 F.3d 1133, 1139 (9th Cir. 2004), the informant offered his services to the government, asked for leniency, and provided information. He was then placed back in the cell he shared with the accused without any instructions to act only as a listening post, and later elicited incriminating statements from the accused that he shared with the government. *Randolph*, 380 F.3d at

1147. It is this combination of factors that the *Randolph* court relied on in distinguishing *Brooks* to find a constitutional violation.

Although neither case is on all fours, *Randolph* is closer to this case than *Brooks*. The snitches reached out to law enforcement and offered their services, and Orth specifically asked to “arrange negotiations” with the county attorney. They provided incriminating information that had been deliberately elicited from Glenn, and they indicated they intended to continue to do so. Yet, Cochran did not explicitly discourage them from seeking information for the State, or tell them not to ask questions or engage Glenn in conversations about the charges, or ask them to simply listen to what he had to say. To the contrary, by telling Orth to leave Glenn’s paperwork alone, he implicitly encouraged Orth to continue everything else he had been doing—the baiting, the shockers, the appeals to a suicidal man to reveal the location of the bodies before taking his own life, and the reporting what he gathered to law enforcement. He then sent those snitches back to the cells they shared with Glenn, with the motive, opportunity, and proven capability to elicit information from Glenn and intent to do so. In doing so, the State impliedly accepted the informants’ explicit offers

of cooperation and must have known the likely result of this arrangement was that the informants would elicit additional incriminating statements from Glenn without the assistance of counsel on behalf of the State. *See Randolph*, 380 F.3d at 1144, 1146; *see also* Appellant's Br. at 40-41 and cases cited therein. The State, thus, violated its affirmative obligation to respect and preserve Glenn's rights to counsel in this case and knowingly exploited an opportunity to violate those rights.

The State does not argue on appeal and, thus, has conceded that the informants deliberately elicited the incriminating statements set forth on pages 15 and 20 of Appellant's Brief after meeting with Cochran. Accordingly, all of those statements should have been suppressed.

In addition, as discussed on pages 49-51 of Appellant's Brief, the television and the forensic evidence derived therefrom, should have been suppressed as fruits of the poisonous tree. The State concedes law enforcement relied on statements from Hope's second interview in its search warrant application but contends suppression is not required because "it is reasonable to assume that law enforcement would have

obtained a search warrant” even absent Glenn’s incriminating statements divulged in the second interview. (Appellee’s Br. at 50.) The State cites nothing in support of this “reasonable assumption” test, and this Court should not conduct legal research on its behalf. *See, e.g., State v. Oliver*, 2022 MT 104, ¶42, 408 Mont. 519, 510 P.3d 1218 (“We will not ‘conduct legal research on behalf of a party’ or ‘develop legal analysis that might support a party’s position.’”).

To the contrary, the State was required under *Murray v. United States*, 487 U.S. 533, 542 (1988) to prove the officer’s decision to seek the warrant was not prompted by the incriminating statements he learned through unconstitutional means. (See Appellant’s Br. at 49-50.) Cochran testified to the contrary, stating he sought the warrant after and based, in part, on information he learned in the second interview. (Tr. at 225-26.) That testimony is supported by reviewing the face of the warrant application, which indicates it was based *solely* on information learned during Hope’s second interview. (Appellant’s Br., App. H, Application at 2.) Under *Murray*, the warrant was derivative of the constitutional violation that resulted in the State learning that information.

Nor is it reasonable under the facts to assume Cochran would have obtained the evidence the right way if only he had not done it the wrong way and violated Glenn's constitutional rights. Cochran never testified he would have sought a warrant for the television absent the second interview. Indeed, he did not seek a warrant in the month between Hope's first and second interviews. Thus, even if the test were as the State contends—which it is not—the record does not support the State's theory. The television and the forensic analysis of samples obtained from it should have been suppressed as fruits of the poisonous tree.

Finally, the State argues the violation of Glenn's rights to counsel was harmless. The State's argument begins with the proposition that Karen's testimony alone, if believed by the jury, was sufficient to support the jury's verdict on the homicide counts. (*See* Appellee's Br. at 48.) True. But that is the test for sufficiency of the evidence, not harmless error. The harmless error test requires the State to prove there is no reasonable possibility the inadmissible evidence contributed to the guilty verdict. *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735. That test requires an assessment of the *quality of the*

evidence improperly admitted, not just an assessment of the sufficiency and strength of the properly admitted evidence. *Van Kirk*, ¶ 44. The State’s harmless error argument improperly focuses solely on the latter part of the analysis while ignoring the quality and substance of the evidence improperly admitted in this case and the ultimate question of whether it is reasonably possible—not probable, not more likely than not, but just reasonably possible—that the inadmissible evidence contributed to the jury’s verdicts. As such, the State has failed to meet its “high burden” to show harmless error. *See State v. Hoover*, 2021 MT 276, ¶ 23, 406 Mont. 132, 497 P.3d 598.

Indeed, as discussed in Appellant’s Brief at pages 51-53, Glenn’s alleged confessions to two people and objective scientific evidence that blood and Korjack’s DNA were found on a television identified by Karen as being close to where Korjack was standing when he was allegedly shot was some of a very small amount of evidence presented corroborating non-innocent facts in Karen’s story, and it was the type of powerful evidence that juries regularly rely on to convict a defendant. The State presented no other evidence that Glenn confessed to murder or qualitatively similar evidence. Glenn’s admission to Karen that

there was unpleasantness at home due to threats to take the house from him confessed no crime. Nor did Glenn's alleged ambiguous statement to Orth that he "shoul~~n~~a let Karen go." Although the State contends Glenn admitted to Hope that he "shot both men" before Hope's first interview, the record shows otherwise. Hope told Cochran that Glenn "told me straight up man oh hey *they told me* I just walked right in the fucking door and just blasted them, boom." (Appellant's Br., App. G at 4 (emphasis added).) When Hope asked in response, "you shot them in your house?," Glenn told Hope again, "*that is what they are saying. I didn't shoot anybody.*" (*Id.*) Hope understood Glenn was talking about the charges against him, not confessing to murder. That the detectives attempted to twist that original statement into an actual confession does not change what Hope stated initially: It was not a confession. At trial, Hope confirmed Glenn "finally admitted to me what was going on . . . shortly before I left" his cellblock, which

was long after his first interview with Cochran. (Tr. at 2049, 2066.)

The prosecutor clarified:

When [defense counsel's] asking you about times that the defendant initially wouldn't admit to the killings, that changed later; is that correct?

A. Yes, it did. It dramatically changed later.

Q. *In the first interview you had – you had with detectives, he had not yet made his admissions.*

A. No. *He had not.*

Q. *But then later, he did –*

A. Yes.

Q. –make admissions –

A. Yes, he did.

(Tr. at 2089-90 (emphasis added).) Hope did not elicit a confession until after his first meeting with Cochran. That statement was inadmissible, and it cannot carry the State's burden to show harmless error.

The State further relies on the snitch testimony regarding the solicitation charges, arguing that evidence demonstrated Glenn's "consciousness of guilt" of the alleged underlying murders. (See Appellee's Br. at 49.) First, there was no testimony that Glenn admitted he wanted Karen dead *because he actually killed Korjack and*

Orozco. To the contrary, Palmer testified Glenn told him he wanted Karen dead because she was his ex-girlfriend, she was the reason he was in jail, and he didn't like her, Tr. at 2015-16, and Orth testified Glenn told him that he blamed Karen for his incarceration, Tr. at 1931. When a witness concocts a story out of thin air that could result in the accused spending the rest of his life in prison for crimes he did not commit, the accused may be motivated to silence the witness and prevent her anticipated inculpatory testimony *even if that testimony is false*. That self-preservation motive can be supplemented by feelings of betrayal if the person making the false accusations is a former lover, such as Karen. At best, the evidence related to the solicitation charges was weak evidence of "consciousness of guilt," and it certainly was not the qualitative equivalent of two alleged confessions to murder from Glenn's own lips or DNA and blood evidence corroborating non-innocent details in Karen's account.

The State has not met its burden to show it is not reasonably possible that Glenn's alleged detailed confessions and the objective scientific evidence from the television contributed to his homicide convictions, and those convictions must be reversed.

II. The district court abused its discretion and prejudiced Glenn's substantial rights when it refused to give his special credibility instruction.

The State argues this case is controlled by this Court's decisions in *State v. Long*, 274 Mont. 228, 907 P.2d 945 (1995), and *State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247, without directly addressing Glenn's arguments on pages 59-62 of Appellant's Brief that those cases are factually distinguishable, or, alternatively, they should be reconsidered in light of Supreme Court precedent and recent data regarding the prevalence of jailhouse snitch testimony in prosecutions resulting in wrongful convictions. Neither decision addressed *On Lee v. United States*, 343 U.S. 747 (1952) or *Hoffa v. United States*, 385 U.S. 293 (1966), and both predated *Banks v. Dretke*, 540 U.S. 668 (2004). Neither defendant requested an instruction based on the one approved of in *Hoffa*. *Long* did not involve a jailhouse informant but rather a paid undercover informant, and the Court did not consider the unique pressures that such jailhouse snitches face—or the pervasiveness of the vast marketplace for snitch testimony. *See, e.g., Connecticut v. Arroyo*, 973 A.2d 1254, 1260-61 (Conn. 2009) (special credibility instruction required whenever a jailhouse informant testifies, regardless of whether

the informant received a promise or benefit). And *DuBray* simply relied upon the reasoning in *Long* without any additional analysis. Plus, in neither case was the snitch's testimony the only evidence that the defendant committed the crime, as it is with respect to the solicitation charges in Glenn's case. As such, this Court should either find those cases distinguishable from this case or determine those cases were manifestly wrong, at least to the extent they held the general witness credibility instruction is sufficient in a case involving an alleged jailhouse snitch whose testimony alone is used to support a murder conviction.

Contrary to the State's suggestion, Glenn's proposed instruction, like the instruction in *Hoffa*, properly instructed the jury only to "carefully scrutinize the testimony given and the circumstances under which" the snitches testified, including their "motives" and "access to . . . Defendant's paperwork," for the purpose of determining whether the snitches' self-interest was shown at trial. (Appellant's Br., App. K; *Hoffa*, 385 U.S. at 312 n.14.) This careful scrutiny is justified and required by the inherent risk associated with the presentation of jailhouse informant testimony, namely, that a jury should not too

lightly reach a verdict based solely on the testimony of a witness who may have a good reason to lie. *See, e.g., United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir. 1976) (*en banc*). Mirroring *Hoffa*, the proposed instruction told the jury to carefully consider whether one or more of the informants was self-interested, but it did not require it to so find:

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.

(Appellant’s Br., App. K; *Hoffa*, 385 U.S. at 312 n.14.)

That is, the instruction suggested the inmates “may have a good reason to lie,” *see Garcia*, 528 F.2d 580, and thus *might be less credible to the extent the jury concluded they were self-interested*, not simply because they were inmates. (See Appellee’s Br.at 54.) It did not instruct the jury the witnesses were self-interested. Nor did it direct the jury to disregard their testimony altogether, even if it found they were self-interested. Rather, the instruction required the jury only to consider self-interested testimony—if indeed it was self-interested—with caution and *to carefully weigh it with all other evidence presented*.

That the State presented no other evidence regarding the solicitation charges does not render the instruction unwarranted—to the contrary, it renders it crucial to Glenn’s defense in this case.

Although the State contends such an instruction is appropriate only if the defendant proves the jailhouse snitch sought and received a benefit, that is not what the Supreme Court suggested when it stated a “defendant is entitled” to “careful instructions” whenever “serious issues of credibility associated with the government’s use of informers, accessories, accomplices, false friends, or any . . . other betrayals” are present in a case. *On Lee*, 343 U.S. at 757. Nor is it what the *Hoffa* instruction provided. Other courts require or allow instructions similar to that requested here. *See, e.g., Dodd v. State*, 993 P.2d 778, 784 (Okla. Ct Crim. App. 2000) (whenever jailhouse informant’s testimony is given, the jury must be instructed to consider it with greater care than the testimony of an ordinary witness and to determine whether it has been affected “by interest or prejudice against the defendant”); *Arroyo*, 973 A.2d at 1261-62 (“In light of this growing recognition of the inherent unreliability of jailhouse informant testimony, we are persuaded that the trial court should give a special credibility instruction to the jury

whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit.”); 10th Circuit Court of Appeals, Pattern Crim. Jury Instr. 1.14 (indicating testimony of someone who provides evidence against someone else for a personal reason or advantage must be examined and weighed with greater care and the jury must determine whether it was affected by self-interest or prejudice against the defendant).

In any event, the jury should have been allowed to determine whether the snitches here received a benefit for their testimony. *See State v. Blackcrow*, 1999 MT 44, ¶ 21, 293 Mont. 374, 975 P.2d 1253 (whether a person qualifies as an accomplice for purposes of the accomplice corroboration rule is a matter of fact to be determined by the jury unless undisputed). The State concedes Palmer asked for and received a benefit in this case. (Appellee’s Br. at 56.) And there was evidence from which the jury could have concluded that Orth sought a benefit when he asked to initiate negotiations with the prosecution and he actually received one in the form of a sentence that included no jail time whatsoever instead of a partially suspended sentence that may

have resulted in his detention. (See Appellant's Br., App. C at 1; Tr. at 1935-36, 1965-67.)

The jury was not fully and fairly instructed on the special credibility concerns associated with the jailhouse snitches' testimony, instructions to which Glenn was entitled under *On Lee* to specifically counteract what has long been known—that such testimony is often unreliable and untrustworthy—and what is becoming increasingly clear—that such testimony too often leads to wrongful convictions. The State relied on testimony from jailhouse informants to support all of the charges against Glenn, emphasizing the testimony of Orth and Hope during closing argument and arguing the jury did not have to rely on Karen's testimony alone because Glenn had confessed and confirmed her story. And the only evidence that Glenn offered to pay anyone to kill Karen was the testimony of Palmer and Orth. Their testimony was not only crucial to the State's case, it was the State's case. Thus, the lack of a special credibility instruction violated Glenn's substantial rights and undermined the jury's verdicts on all four counts. At a minimum, his solicitation convictions must be reversed accordingly.

III. The court violated Glenn’s constitutional rights when it refused to allow him to argue there was reason to doubt his guilt due to the State’s failure to call Braunreiter.

The State first contends Glenn waived the constitutional arguments he raises on appeal. (Appellee’s Br. at 62.) To be sure, defense counsel did not mention his constitutional rights to counsel or to present a defense in so many words. But he did argue as follows:

And so my point -- my position here is that the state certainly can call John Braunreiter. They don’t have to.

But if they don’t, and given that he’s the basis of count three, I can argue that’s a huge hole in their case, and *they haven’t met their burden by not calling the main witness that’s the basis of count three.*

. . . .

Your Honor, all I’m asking for is, in closing argument, to be able—and I don’t need to belabor the point but at least be able to touch on the fact that Mr. Braunreiter did not testify.

The jury did not have the benefit of hearing from him, and that’s something that they should consider.

. . . .

Well, I—I just—I think *the fact that he didn’t testify goes to the overall argument for proof beyond a reasonable doubt.*

(Tr. at 2347-50 (emphasis added).)

Defense counsel preserved the argument he was entitled to argue the State failed to meet its constitutional burden to prove Glenn's guilt beyond a reasonable doubt by choosing not to call Braunreiter. And the district court fully understood that was the argument, stating "ordinarily I'd agree," Tr. at 2347, but disagreeing in this case because Braunreiter would not "qualify" as a "witness" "*if* [the State] can't call him because he won't cooperate," Tr. at 2349 (emphasis added). As such, this Court should address the merits of that decision, which was the basis for sustaining the State's objection during defense counsel's closing argument.

Additionally, parties on appeal may "bolster their preserved issues with additional legal authority or [make] further arguments within the scope of the legal theory articulated to the trial court." *State v. Tome*, 2021 MT 229, ¶ 21, 405 Mont. 292, 495 P.3d 54. Glenn's argument on appeal is not "an entirely new theory," nor has he "significantly changed" his overall theory or claim on appeal. *Tome*, ¶ 21. His argument merely bolsters the argument his defense counsel made below, *i.e.*, that he had a right to point out the missing witness when discussing whether the State met its constitutional burden of proof.

Even if this Court were to conclude otherwise, it may nonetheless reach the merits of the argument under plain error review and should do so in this case. This Court has the “inherent power and paramount obligation” to protect Montanans’ constitutional rights. *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996), *abrogated on other grounds by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817. Plain error review is appropriate where an unpreserved claim “implicate[s] a criminal defendant’s fundamental constitutional rights, . . . where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *Finley*, 276 Mont. at 137, 915 P.2d at 215 (adopting test for plain error review). *Accord State v. Valenzuela*, 2021 MT 244, ¶ 10, 405 Mont. 409, 495 P.3d 1061. Although this Court has occasionally stated that an appellant may not make a request for plain error review for the first time in his reply brief, *see, e.g., State v. Strizich*, 2021 MT 306, ¶ 33, 406 Mont. 391, 404, 499 P.3d 575, 585, *cert. denied*, 212 L. Ed. 2d 594, 142 S. Ct. 1699 (2022), this Court, recognizing its inherent power and obligation to protect constitutional

rights and prevent injustices, has also *sua sponte* invoked its discretionary power of plain error review, even when no party requested it on appeal, *In re K.E.G.*, 2013 MT 82, ¶¶ 18-19, 369 Mont. 375, 298 P.3d 1151, *overruled on other grounds by In re B.W.*, 2014 MT 27, ¶ 15, 373 Mont. 409, 318 P.3d 682 (*sua sponte* invoking plain error review to reverse restitution order in violation of applicable statutes where error implicated youth’s fundamental constitutional rights).

Moreover, where, as here, the State argues for the first time in its response brief that an error is allegedly not preserved—despite a lengthy discussion regarding the issue below and an explicit ruling on it—the appellant’s first opportunity to respond to that procedural defense is in his reply brief. In doing so, the appellant is not raising a new issue or claim of error for appeal—Glenn’s claim remains that his fundamental constitutional rights were violated and reversal of his conviction is required. Rather, he is simply responding to a new defense raised in the appellee’s brief, as he is authorized to do under Mont. R. App. P. 12(3) (“The reply brief must be confined to new matter raised in the brief of the appellee.”).

As discussed in Appellant’s Brief, Glenn’s rights to present a meaningful defense to Count III relating to the State’s failure to meet its constitutional burden of proof and to the effective assistance of counsel in doing so were violated by the district court’s refusal to allow him to comment on the State’s failure to present Braunreiter’s testimony and to argue his absence constituted a reason to doubt the State’s case. That argument was particularly crucial to the defense here, where *the State’s only admissible evidence* supporting that charge was the testimony of a jailhouse snitch who allegedly overheard a portion of Glenn’s conversation with the missing witness, the prosecutor had already told the jury the substance of the missing witness’s out-of-court statements, and where the jury was not even instructed regarding the special credibility considerations applicable to such snitch testimony. This Court should invoke its discretion to review this error.

Contrary to the State’s assertion, the record does *not* “indicate[]” it chose not to call Braunreiter because he would not cooperate and testify. (*See* Appellee’s Br. at 63.) Although that was the judge’s “guess,” the deputy county attorney did not confirm that assumption, stating only, “I think that was part of it, yes, Your Honor.” (Tr. at

2345.) Nor could it have been the reason because, as discussed on pages 24-25 and 68 of Appellant's Brief, the prosecution was well aware of Braunreiter's threats prior to trial but still intended to call him to testify, informing the court the State was aware of the risks in doing so and going so far as to recite for the jury his unsworn and uncontroverted out-of-court statements. The prosecution was also aware that Braunreiter contended the deputy county attorney had reneged on his offer of leniency. What had changed was that the court had ruled that Braunreiter would be allowed to testify that he believed the deputy county attorney had reneged on that offer—and the deputy county attorney could take the stand if he wanted to refute that testimony. It was only after that ruling that the State chose not to call Braunreiter. (*See also* Tr. at 1825-26, 1828-29.)

The court never found as a matter of fact that Braunreiter would not take the oath and testify or that he was otherwise unavailable or incompetent to testify as a witness for the State. Rather, the court simply indicated *if* the State had called him and *if* he had refused to follow the rules, he would not have been allowed to testify. But that is not the same thing, and it cannot be sufficient justification for

preventing Glenn’s counsel from commenting on Braunreiter’s absence during closing argument—absence that was at the State’s choosing and admittedly, *at least in part*, for reasons unrelated to Braunreiter’s threats to disrupt the process. As discussed on pages 65-67 of Appellant’s Brief, the State’s failure to put a relevant witness on the stand is a common defense argument relating to the State’s burden of proof in a criminal case and a legitimate defense theory. The district court had no discretion to prevent Glenn from making that argument based on guesses and assumptions not supported by evidence in the record.

That error was not cured by the State’s failure to object when defense counsel argued in closing that one of the jailhouse informants did not “participate” in the process. (*See* Appellee’s Br. at 64.) That vague statement was not the equivalent of criticizing the State for not calling an available and important witness to the stand to corroborate the testimony of jailhouse snitch Orth, or arguing that the failure to do so provides a reason to doubt Glenn’s guilt. *See State v. Makarchuk*, 2009 MT 82, ¶¶ 11, 26, 349 Mont. 507, 204 P.3d 1213 (approving of prosecutor’s argument to the effect “when the Defendant is trying to put

a fact in front of you they have the opportunity to call other witnesses besides the Defendant [to support that fact]. . . . Did they call [those witnesses] to the stand? No.”). What is good for the goose is good for the gander, especially given it is the State who bears the burden of proving the defendant’s guilt beyond a reasonable doubt—not the defendant who bears the burden of proving his innocence. Glenn should have been permitted to comment on the State’s failure to call Braunreiter to testify, not simply Braunreiter’s failure to participate.

The State contends this error does not require automatic reversal on direct appeal because the Ninth Circuit concluded it could not provide habeas relief to a state prisoner under 28 U.S.C. § 2254(d)(1) because there is no “clearly established Federal law, as determined by the Supreme Court” holding a restriction on closing argument constitutes structural error. Notably, the State also concedes, as it must, that the Ninth Circuit later held on a direct appeal that preventing a defendant from presenting a legitimate theory of defense *is* structural error. (See Appellee’s Br. at 65.) The court’s ruling here prevented Glenn from fully attacking Orth’s credibility on the basis of lack of corroboration—an error that was compounded by the lack of a

special credibility instruction regarding jailhouse informant testimony—and from arguing there was reason to doubt Glenn’s guilt based on the State’s failure to call Braunreiter, the alleged solicitee, to testify. Those are legitimate defense arguments regarding Count III that went to the heart of the State’s case-in-chief and that Glenn was entitled to present.

Moreover, the State relied on each of the charges in this case to bolster the others: because two jailhouse informants testified Glenn had solicited someone to kill Karen, it was more likely that he did so on each count. And because Glenn had solicited two persons to kill Karen, it was more likely that her story was true. The error, thus, infected all of the charges. Reversal of Glenn’s convictions is required.

Even if this Court were to conclude the harmless error test applies, the State has not met its high burden to show there is no reasonable possibility that the error contributed to the jury’s verdict on Count III. The State’s evidence on Count III consisted of uncorroborated testimony from the snitch Orth regarding a portion of a conversation he allegedly overheard—a conversation he denied overhearing during his sworn testimony in the hearing on Glenn’s

motion to suppress. (See Tr. at 1984-85.) Contrary to the State’s argument, there was a significant difference between what Glenn was “allowed” to argue—an unnamed witness did not participate—versus what he should have been allowed to argue about the State’s failure to call Braunreiter under *Makarchuk* and *State v. Parr*, 129 Mont. 175, 182-83, 283 P.2d 1086, 1090 (1955). That is a particularly strong reason to doubt Glenn’s guilt and that the State met its burden of proof. Yet, the district court told the jury to “disregard” Braunreiter’s absence and any guesswork about why he did not testify. (Tr. at 2477-78.) At a minimum, Count III must be reversed.

IV. The cumulative effect of the prosecutor’s misconduct, in conjunction with the prejudice described above, was to deny Glenn a fundamentally fair trial, which this Court should remedy through plain error review.

The gist of the State’s argument is that even if Glenn has shown a “few imperfect statements or questions asked” by the prosecutors, he is not entitled to relief because those errors were unintentional or inconsequential or both. (Appellee’s Br. at 68.) But, as discussed in Appellant’s Brief, the errors in this case were neither few nor inconsequential when viewed cumulatively. They permeated the trial from opening statement through closing argument. And at every stage,

the prosecutors, whether intentionally or through inattentiveness or negligence, repeatedly shirked their duties to refrain from engaging in improper methods of obtaining a conviction and “to strive to promote justice and the rule of law,” *State v. Criswell*, 2013 MT 177, ¶ 57, 370 Mont. 511, 305 P.3d 760 (McGrath, C.J., concurring), and invited the jury to convict Glenn based on irrelevant, highly prejudicial evidence, improper inferences, and a flawed understanding of the State’s burden of proof. His trial was not merely imperfect; it was fundamentally unfair.

In particular, the State concedes a witness’s prior consistent statements are not admissible for the truth of the matter asserted but claims Karen’s numerous hearsay statements were admitted only to explain its investigation. Not so. Notably, the State cites only the prosecutor’s relatively short examination of Kammerzell, Appellee’s Br. at 70-71—and ignores the prosecutor’s lengthy questioning of Cochran, during which the prosecutor himself recited Karen’s prior statements in detail, as discussed on page 73 of Appellant’s Brief. Moreover, during Kammerzell’s testimony, the court instructed the jury that Karen’s prior statements were offered to allow the jurors to determine “whether

it's consistent with earlier testimony by" Karen, *i.e.*, whether it bolstered or undercut her trial testimony—not to explain the officer's actions as the State contends. (Tr. at 1377.) But "a witness [can] not be supported by evidence of prior consistent statements because no amount of repetition makes the story more probable." 1977 Comm'n on Rules of Evid., Cmts., Mont. R. Evid. 801, subsection (d). "[M]ere repetition does not imply veracity." *State v. Scheffelman*, 250 Mont. 334, 340, 820 P.2d 1293, 1297 (1991) (quoting Weinstein & Berger, Weinstein's Evidence, 801-105 to -151 (1988)). Thus, prior consistent statements made after any motive to fabricate arises are inadmissible *precisely because they have no bearing upon truthfulness or veracity and are unfairly prejudicial because a jury might nonetheless be improperly swayed to find they do based on repetition alone.* *Scheffelman*, 250 Mont. at 340, 820 P.2d at 1297. Here, the jury was instructed to use Karen's statements to Kammerzell for the very reason they were inadmissible in the first place: to determine whether she was consistent and thus more credible. As for the examination of Cochran, the jury was never instructed for what purposes it could—or could not—use

Karen's numerous statements recited therein. (*See* Appellant's Br. at 73, discussing questioning.)

The State further concedes "it would have been better" had the prosecutor not repeated numerous unsworn and uncontroverted out-of-court statements made by the prosecution's witnesses to law enforcement during opening statement. Indeed. But the State argues no harm, no foul, because the jury heard the same statements from the witnesses themselves. (*See* Appellee's Br. at 70-71.) Although this Court has occasionally held the admission of prior consistent statements is harmless if the declarant testifies, that cannot logically constitute the test for prejudice where the very reason for the evidentiary rule excluding their admission in the first place is the danger associated with repetition. Because the harm arises from repetition, repetition cannot render admission harmless. *See Aker v. Fletcher*, No. CV 17-86-H-JTJ, 2022 WL 3585711, at *4-5 (D. Mont. Aug. 22, 2022) (explaining this Court's harmless error analysis fails to account for the reason for the rule).

The prosecutors repeatedly recited Karen's prior consistent statements, elicited Cochran's opinion that her testimony was

consistent with those statements, and presented concededly “improper” testimony that those statements were “believable” to the officers, *see* Appellee’s Br. at 69. The court then inexplicably ordered the jury to consider the consistency between Karen’s in-court and out-of-court statements to determine her credibility. Under these circumstances, there can be little doubt that the prosecutors’ repetition of her statements had the desired effect: to bolster Karen’s testimony on an improper basis. The effect was not minimal, as the State’s case relied heavily on Karen’s alleged eyewitness testimony—and her prior consistent statements to law enforcement—and the evidence “corroborating” her story.

Regardless, Braunreiter did not testify. Yet, the jury heard his unsworn, unfronted hearsay statements regarding Count III during the prosecutor’s opening statement. And the jury was further instructed not to even consider why he was not there. This Court has held “[t]he assertion of facts in an opening statement which are not proved during trial may constitute grounds for a mistrial if there is a reasonable possibility that the inadmissible evidence contributed to the conviction.” *Scheffelman*, 250 Mont. at 339, 820 P.2d at 1296 (citing

State v. West, 190 Mont. 38, 42, 617 P.2d 1298, 1300 (1980)). In *West*, 190 Mont. at 42, 617 P.2d at 1300, this Court reversed a conviction where the prosecutor recited hearsay statements that a third party made to law enforcement during opening statement, which were later deemed inadmissible. Here, the prosecutor similarly told the jury that Braunreiter confirmed the tale told by the State’s only witness on this solicitation charge, admitting Glenn offered to pay him to kill Karen. Because it is unlikely the jury was able to disregard those damning statements, and the jury was directly instructed not to consider why Braunreiter did not so testify himself, this error cannot be deemed harmless.

Finally, the State writes off the prosecutor’s statement in closing argument that to believe Glenn’s story, the jury had to find all of the prosecution witnesses were “lying” and “mak[ing] up” their testimony as a mere “exaggeration” and not a misstatement of the law or its burden of proof. (Appellee’s Br. at 71; *see also* Tr. at 2460.) “Glenn’s story” was that the State did not satisfy its burden of proving he committed two murders beyond a reasonable doubt—including but not limited to its burden to prove the alleged victims were dead. But the jury did not

have to find Orozco and Korjack were still alive to acquit Glenn. Nor did it have to find that all of the State's witness were lying in order to find he was innocent. All it needed to find as a matter of law was that there was reason to doubt that Glenn murdered them. The prosecutor's argument to the contrary had the effect of diluting its burden of proof and shifting to Glenn the burden of disproving every piece of evidence presented by the State, and it significantly impaired Glenn's substantial constitutional rights.

As discussed above and more fully in Appellant's Brief, the prosecution's errors cannot be dismissed as a few imperfect and inconsequential statements. The cumulative effect of these errors was to render Glenn's trial fundamentally unfair and to undermine confidence in the jury's verdicts, including most notably but not limited to his conviction of soliciting Braunreiter. This Court should reverse his convictions accordingly.

CONCLUSION

This Court should reverse Glenn's convictions.

Respectfully submitted this 18th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,487, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
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CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-18-2022:

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