IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0083

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WES LEE WHITAKER,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable John W. Larson, Presiding

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I. The District Court did not use or satisfy the *Craig* test before allowing Jamie Grubb to testify by video.

The only reason the State wanted Grubb to testify remotely—and a central reason the District Court allowed him to do so—was simply to avoid the hassle of transporting a federal inmate. The State *never once* mentioned the COVID-19 pandemic below as a justification for this remote testimony. And the District Court said it would have let Grubb testify remotely *with or without* the pandemic justification, because it had a longstanding, non-case-specific policy of allowing federal inmates to testify remotely. (Tr. at 398.)

The State now tries to retroactively make the "case-specific finding of necessity" that the District Court never made. *See Maryland v. Craig*, 497 U.S. 836, 858 (1990). Not only are the State's arguments incorrect, but the District Court never found what the State now asserts on appeal—that the state of the COVID-19 pandemic *at the time of trial* necessitated Grubb's remote testimony.

The State citing public health data and CDC recommendations in an appellate brief does not satisfy *Craig*. The U.S. Supreme Court was clear: "The requisite finding of necessity must of course be a *case-*

specific one: The trial court must hear evidence and determine whether" the remote testimony is necessary to further an important public policy. *Craig*, 497 U.S. at 855 (emphasis added); *accord State v. Walsh*, 2023 MT 33, ¶ 10, 411 Mont. 244, 525 P.3d 343 ("[T]here must be a case-specific finding *made by the trial court* that 'denial of physical face-to-face confrontation is necessary to further an important public policy.'") (Emphasis added).

The District Court did not "hear" any of the evidence the State cites on appeal. Nor did it "determine" whether any of this data made Grubb's video testimony necessary. This Court should judge the District Court on the case-specific findings it made (or, more accurately, did not make), not on the findings the State thinks it should have made.

A. The District Court did not make the case-specific findings it was constitutionally required to make.

The State argues the COVID-19 pandemic in general was so serious that it gave the District Court carte blanche to allow Grubb to testify remotely, without the need for an explanation. The court needed to make case-specific findings of necessity.

"This case-specific finding could be witness-specific; for example, that a witness has a particular susceptibility to the COVID-19 virus . . .

Or the case-specific finding could relate to the state of the pandemic in the trial court's locality at the time of the defendant's trial." *Newson v. State*, 526 P.3d 717, 721 (Nev. 2023); *accord C.A.R.A. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 50, 59 (Mo. 2022) ("[W]itness-specific findings of a particular risk associated with COVID-19, such as having an underlying health condition or testing positive for COVID-19 during the time period the testimony is set to occur, are required to meet the necessity prong."). Or, in the case of a federal inmate like Grubb, the case-specific considerations could include that the Bureau of Prisons (or the witness' specific prison) was refusing to authorize inmate transfers near the time of trial, or that the witness' prison was experiencing a surge in COVID-19 cases. The District Court made no findings of the sort.

The general existence of the pandemic, standing alone, does not relieve a district court of its obligation under *Craig*. *Newson*, 526 P.3d at 721 ("Abstract concerns related to the pandemic generally are not an adequate justification for dispensing with a defendant's right to in-person confrontation."); *State v. Stefanko*, 193 N.E.3d 632, 641 (Ohio Ct. App. 2022) (holding courts may not use the pandemic to dispense with

in-person confrontation "as a matter of course and without the determinations contemplated by the United States Supreme Court"). A district court still "must hear evidence and determine whether" remote testimony for a particular witness "is necessary" to further an important public policy. *Craig*, 497 U.S. at 855.

The State cites this Court's decision in *Walsh*, and an Ohio case, *Olman*, to argue the general existence of the pandemic absolved the District Court of its fact-finding obligation under *Craig*. But as the State admits in its brief, the district courts in those cases made explicit, *case-specific* findings of necessity. (Appellee's Br. at 22.) In *Walsh*, for instance, the State notes the district court found "that requiring the witness to travel [from Greece] would violate a COVID-19-related Do Not Travel advisory issued by the U.S. State Department." (Appellee's Br. at 22.) And of *Olman*, the State notes, "The prison where the witness was incarcerated had experienced a surge in COVID-19 cases prior to the trial." (Appellee's Br. at 22.)

The State's own words prove Wes's point: remote testimony in the COVID-19 era passes constitutional muster *only if* the district court makes an explicit finding on the record about *why* the pandemic

necessitates a witness' remote testimony. In *Walsh* and *Olman*, the district courts did that. *See, e.g., Walsh*, ¶ 11 (lauding the district court's "substantive, detailed findings" of necessity for that particular witness' remote testimony). Here, the District Court did not.

In stark contrast to *Walsh*, the District Court mentioned Grubb's remote testimony only twice, in passing, in the years leading up to trial. In May 2020, it lumped Grubb in with *all* witnesses, saying any of them could testify remotely due to the recent emergence of the pandemic. (Tr. at 9, 40.) Then, in January 2021, it briefly reiterated its ruling that Grubb could testify remotely. (Tr. at 397–98.) But in doing so, the court said that "even before COVID" it had allowed federal inmates to testify remotely, and it would continue to do so here. (Tr. at 398.) This hardly qualifies as a case-specific finding that Grubb's remote testimony was necessary to further the specific public policy of managing the COVID-19 pandemic.

The District Court never revisited its ruling on Grubb between January and June 2021, despite a precipitous drop in the pandemic's severity during that time. In those five months, vaccines became widely available. Travel increased. Social distancing requirements were

relaxed. The District Court rescinded its facemask requirement for the trial. (*See* Tr. at 481–82, 559, 569.) And the court noted just days before trial, "we are in a more relaxed status in this particular trial with regard to social distancing." (Tr. at 559.) The court revised nearly all of its COVID-19 precautions in light of the updated public health situation. That is, all but its ruling on Grubb.

Even if the District Court's January 2021 ruling on Grubb could be interpreted as a case-specific finding of necessity (it cannot), any COVID-19-based rationale for that ruling needed updating by the time of the June 2021 trial. At no point did the District Court explain why, in the midst of the summertime lull in the pandemic and a loosening of so many other COVID-19 restrictions, Grubb's remote testimony was still "necessary" at the time of trial.

B. The public health data and recommendations the State cites do not establish the "necessity" of Grubb's remote testimony.

Aside from the fact the District Court did not base its ruling on any of the data the State cites on appeal, that data did not establish the necessity of Grubb's remote testimony. The State says the pandemic was "in full swing" in June 2021, "with the worst to come." (Appellee's

Br. at 17.) But the State also acknowledges the pandemic was in a "summer-time lull in 2021 and a vaccine was available." (Appellee's Br. at 23.) This summer-time lull, combined with a widely available, effective vaccine, warranted a respite in COVID-19 restrictions at the time of Wes's trial—a respite the District Court in fact granted, except for with respect to Grubb.[1]

The State discusses how the "Delta" variant of COVID-19 was just beginning to take root in the United States at the time of trial. (Appellee's Br. at 23–24.) But the same article the State cites in support of this assertion also emphasizes that vaccines were, at that time, widely "available for anyone ages 12 and up in the U.S.," the country was approaching 70% of adults having received at least one dose of the vaccine, and Dr. Anthony Fauci had commented the "good news" was

[1] The State points to a spike in COVID-19 cases in September and October 2021, several months after trial, as evidence that the District Court rightly authorized Grubb's remote testimony. (Appellee's Br. at 23.) What happened with the pandemic months after trial is irrelevant. The District Court did not have a crystal ball and could not have known of a coming spike in COVID-19 cases. In fact, the record shows it was aware at the time of trial that the pandemic was waning, and it acted accordingly by relaxing a number of COVID-19 courtroom restrictions. (Tr. at 481–82, 559, 569.)

that "all vaccines are effective against the delta variant."[2] Besides, the District Court did not express concern about—or even mention—the Delta variant when it loosened its COVID-19 restrictions for trial.

The State also relies on a CDC document that it describes as recommending "that inmates not be transferred to other jurisdictions to testify at court proceedings." (Appellee's Br. at 26.) The State speculates that, "Had the district court required Grubb to attend the trial in Missoula in person, it would have been in contravention of CDC guidelines." (Appellee's Br. at 28.)

The State fails to give the full picture of the CDC recommendations it cites. The document on which it relies explicitly says under the heading, "Intended Audience," that it is meant "to provide guiding principles for . . . administrators of correctional and detention facilities" to manage COVID-19 "in their facilities."[3] The

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[2] Sara G. Miller, *Delta Variant is 'Greatest Threat' to Eliminating Covid in U.S., Fauci Says*, NBC News, June 22, 2021, https://www.nbcnews.com/health/health-news/delta-variant-greatest-threat-eliminating-covid-u-s-fauci-says-n1271933 (last accessed February 13, 2024).

[3] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://stacks.cdc.gov/view/cdc/107037 (updated June 9, 2021) at 2.

document's audience is prison administrators, not state courts. And its recommendations are not mandatory; they are "guiding principles."

The State cites no evidence that the Bureau of Prisons in general, or Grubb's Illinois prison in particular, actually implemented the restrictions on inmate transfers that this document discusses. Moreover, Grubb's transport to Montana would not have gone against the CDC recommendations. The CDC document itself authorizes individual prisons to "consider when to modify facility-level COVID-19 prevention measures," based on factors such as vaccination levels and virus transmission rates in their facilities and local communities.[4] The CDC document specifically lists several "Baseline prevention measures to always keep in place," and limiting inmate transfers to and from other jurisdictions is *not* one of these measures.[5]

The CDC guidelines left ample room for individual prisons to establish their own policies regarding inmate transfers during the pandemic. The State cites no such policies or practices suggesting that Grubb's prison would have refused to transport him. Had the State

[4] *Id.* at 34–36.
[5] *Id.* at 36.

asked the prison to transport Grubb, it is entirely plausible the prison, operating under its own facility-specific COVID-19 policies (which the CDC explicitly authorized it to do) would have agreed.

But the State never even asked. This is presumably because the State wanted to avoid the hassle of filing a writ and bearing the costs of Grubb's travel. Indeed, the only time the State *ever* asserted any justification for Grubb's remote testimony was in its initial, pre-pandemic motion, which stated simply that transporting a federal inmate was "impractical." (Doc. 75.) The State made no argument, and the District Court made no finding, that the prison was unwilling or unable to transport Grubb.

The State's citations to generalized public health data and CDC recommendations cannot make up for the utter dearth of a record-based, "case-specific finding of necessity" for Grubb's remote testimony.

C. The District Court's rulings on defense witnesses did not apply to Grubb.

The State tries to put meat on the District Court's bare-bones, outdated rulings about Grubb testifying remotely by discussing the court's rulings on other witnesses. (Appellee's Br. at 3–4, 25 (citing Tr. at 225, 269, 292, 296, 309–10, 336, 416–17, 482).) But in every instance

the State cites, the District Court was refusing to issue in-person summonses—and was instead ordering depositions or remote testimony—for various potential *defense* witnesses. (*See* Tr. at 225, 269, 292, 296, 309–10, 336, 416–17, 482.)

Wes did not have a constitutional right to examine his own witnesses face to face. He had a constitutional right "to meet the witnesses *against him* face to face" and "to be confronted with the witnesses *against him*." Mont. Const. art. II, § 24; U.S. Const. amend. VI (emphases added). The District Court's rulings on witnesses Wes wanted to call had no constitutional implications, were not subject to the *Craig* analysis, and thus carried no implicit or explicit findings of "necessity" within the meaning of *Craig*. The State cannot extrapolate from those rulings a case-specific finding of necessity for Grubb's remote testimony.

D. Grubb's video testimony was a poor substitute for face-to-face confrontation.

The State argues Grubb's video testimony satisfied the second, "reliability" prong of the *Craig* test. (Appellee's Br. at 28–29.) In making this argument, the State downplays the absurd number of technical interruptions during Grubb's testimony (there were 10) and how much

easier it is for a witness to lie on video than in person. (*See* Appellee's Br. at 29.) It also makes the demonstrably false claim that "Grubb was required to look Whitaker in the eye" as he testified. (Appellee's Br. at 29.)

The District Court had to satisfy *both* prongs of *Craig* before dispensing with in-person confrontation. Wes emphasizes that the District Court did not satisfy the first "necessity" prong, and that alone amounts to a reversible constitutional violation. (*See* Appellant's Br. at 27–36.)

That being said, the video testimony here was patently inferior to in-person testimony, contrary to the State's suggestions. That is why it is so important to restrict video testimony to the "rare cases" in which it is absolutely necessary. *United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018).

First, Grubb could not have "look[ed] Whitaker in the eye" even if he tried. (*Cf.* Appellee's Br. at 29.) "[I]t is impossible to make true eye contact" via videoconferencing technology, "because the camera and display are not in the same place." *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 845 (Mass. 2021) (Kafker, J., concurring). Either Grubb

was looking at his video display of the courtroom (and thus not making eye contact with courtroom participants via his camera), or he was looking into his camera (and thus not looking at Wes on the video display). Either way, he could not possibly make eye contact with Wes.

Grubb was surely relieved to not have to look in the eye the man whom he was condemning to life in prison through his testimony. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'").

Not only did Grubb get to avoid making eye contact with Wes, but he did not have to look at Wes *at all*. A witness testifying by video may, "unbeknownst to other participants, [ ] choose to completely eliminate the defendant's image from view by selecting active speaker view, pinning other video displays, minimizing [the videoconference program], or simply looking away," all in order to "create emotional distance from the defendant." *Vazquez Diaz*, 167 N.E.3d at 849 (Kafker, J., concurring). For all we know, when Grubb gave his testimony, he was looking at himself in active speaker view, at a Word document with notes for his testimony, or at a game of solitaire.

Had Grubb testified in person and looked away from Wes during critical moments of his testimony, the jury would have noticed and perhaps drawn adverse credibility conclusions. *Coy*, 487 U.S. at 1019 ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."). Instead, Grubb got to deliver his damning testimony without having to look at Wes at all, and without the jury being able to notice if he was averting his gaze.[6]

"Requiring a witness to testify personally at trial serves a number of important policies and purposes," including that it "impresses upon the witness [ ] the seriousness of the occasion," "assures that the witness is not being coached or influenced during testimony," and "assures that the witness is not referring to documents improperly." *Bonamarte v. Bonamarte*, 263 Mont. 170, 174, 866 P.2d 1132, 1134 (1994).

[6] The only time the record confirms Grubb actually looked at Wes is at the start of his testimony, when Wes complained he could not see Grubb's face on the monitor, and Grubb said he could see Wes. (Tr. at 1113.) The record contains no indication Grubb looked at Wes at all during his substantive testimony.

Nothing about Grubb testifying into a camera from a room in his prison impressed upon him "the seriousness of the occasion." Remote testimony "diminishes the gravity of the proceeding" because it "lack[s] the grandeur and solemnity that is palpable when one is physically present in a courtroom."[7] "[T]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." Fed. R. Civ. P. 43(a) advisory committee's note (1996). By contrast, "Virtual proceedings feel less momentous because participants do not go to, enter, and then return from the community's distinctive space dedicated to adjudication."[8] Unlike walking into a solemn courtroom full of lawyers, jurors, and a judge, there was no grandeur to Grubb walking down the hall from his prison cell into a room with a video monitor.

Grubb's video testimony also lessened the jury's "ability to observe demeanor, central to the fact-finding process." *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005). The video feed gave jurors only a "partial view" of Grubb's body (namely, his face) and thus restricted its "ability

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[7] Liz Bradley & Hillary Farber, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 Geo. Immigr. L.J. 515, 551–52 (2022).
[8] Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275, 1319 (2020).

to see and decipher body language and important nonverbal information."[9]

Finally, absent a defense or court representative in the room with a remote witness, there is no way to ensure "the witness is not being coached or influenced during testimony, and that the witness is not improperly referring to documents." *Carter*, 907 F.3d at 1207. Wes expressed this very concern during trial and asked to have a representative present in the room with Grubb during his testimony, but the District Court summarily rejected this request. (Tr. at 398.)

Grubb's video testimony deprived Wes of the many benefits of face-to-face confrontation. This highlights the gravity of the District Court's failure to make a case-specific finding about why it was *necessary* to dispense with this critical constitutional right.

E. The improperly admitted confession testimony was not harmless beyond a reasonable doubt.

The State says any error in admitting Grubb's testimony was harmless, because there was "qualitatively superior" evidence of Wes's guilt in the form of L.M.'s testimony, Jessica's testimony, and Wes's

[9] Bradley & Farber, 36 Geo. Immigr. L.J. at 547.

recorded jail calls. (Appellee's Br. at 33–34.) This evidence was not qualitatively superior to a confession of guilt to a cellmate.

L.M. was a toddler when the alleged abuse occurred, creating obvious doubts about the reliability of her perception and memory. Wes and Jessica clearly had a turbulent and bitter relationship, calling into question her motives for testifying against him. (*See* Tr. at 811–24, 894–903.) And in the recorded jail calls, Wes never admitted to abusing L.M. and instead insinuated Jessica had prompted L.M. to make the accusations. (Ex. 1C at 4:25–5:25.)

Grubb's testimony was that Wes explicitly confessed, in detail, to sexually abusing L.M. (Tr. at 1115–24.) The State now tries to brush over Grubb's testimony as unreliable and something the jury did not take seriously. (Appellee's Br. at 33–34.) But at trial, the State went to great lengths to convince the jury that Grubb's testimony was credible. (Tr. at 1127 (Grubb testifying he received no consideration for his testimony); 1230–32 (Crocker testifying Grubb knew details about the alleged crime he could have ascertained only from Wes); 1620 (prosecutor arguing in closing that Grubb was telling the truth).)

"[A] full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). In the case of an improperly admitted confession, "the State would be hard-pressed to demonstrate that, qualitatively, there is no reasonable possibility that this evidence might have contributed to the defendant's conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735.

II. L.M.'s pre-trial statements were inadmissible hearsay.

Wes argued in his opening brief that the District Court improperly admitted bolstering hearsay evidence on *two* occasions: first, by allowing the State to play the video of L.M.'s forensic interview with Cat Otway; and second, by allowing Adeline Wakeman, the S.A.N.E. nurse, to read to the jury verbatim what L.M. told her during her forensic examination. (Appellant's Br. at 14–18, 21, 39–46.) The State addresses only the admissibility of the forensic interview and does not argue that Wakeman's testimony was admissible. (*See* Appellee's Br. at 17, 34–41.) Both bolstering hearsay statements were inadmissible.

A. L.M.'s forensic interview was not a prior inconsistent statement.

At trial, the *only* explanation the State gave for why L.M.'s prior statements were "inconsistent" with her trial testimony was that she could not specifically recall doing those interviews. (Tr. at 1024–26, 1082–83.) That was also the sole basis for the District Court admitting them. (Tr. at 1026.)

The State now asserts, for the first time, that the *content* of L.M.'s prior statements was inconsistent with her trial testimony. In making this claim, the State nitpicks minute differences in the details of L.M.'s accounts. (Appellee's Br. at 5, 12, 17, 35–36.)

"To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial. The inconsistency must involve a material, significant fact rather than mere details. 'Nit-picking' is not permitted under the guise of prior inconsistent statements." *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004) (internal citation omitted). "[R]elatively immaterial" discrepancies do not make two statements inconsistent. *State v. Smith,* 2021 MT 148, ¶ 30, 404 Mont. 245, 488 P.3d 531. If two statements are "substantially similar, with no substantive difference," they are not

"inconsistent," even if they contain minor discrepancies. *State v. Pitkanen*, 2022 MT 231, ¶ 15, 410 Mont. 503, 520 P.3d 305.

A witness' mere failure to "mention[ ] certain facts in the forensic interview that she did not mention at trial, or vice-versa," does not make her forensic interview "inconsistent with her trial testimony." *Smith*, ¶ 31. Such differences "are better classified as omissions rather than inconsistencies." *Smith*, ¶ 31.

In both her forensic interview and trial testimony, L.M. gave substantively the same account on the facts that mattered: In both, she said that when she was three years old, her mother's ex-husband, Wes, was living with them at their home in Missoula, and Wes sexually abused her on multiple occasions. He did this by touching both the inside and outside of her vagina—which he told her to call her "diamond"—with both his fingers and his penis.[10] The abuse stopped once she told her mother what Wes was doing. (*See* Tr. at 780–98; Ex. 2.)

[10] The State incorrectly claims L.M. did not testify at trial that Wes "penetrated" her. (Appellee's Br. at 12, 35.) When the prosecutor asked L.M. on direct examination whether Wes touched her "on the inside of your private parts or on the outside or both," L.M. answered, "Both, I think." (Tr. at 790.)

The State harps on minor, immaterial discrepancies between L.M.'s forensic interview and her trial testimony, such as L.M. not mentioning at trial that Wes's genitals were "hairy," L.M. not remembering at trial whether "blood" had come out of Wes's penis, and L.M. saying in the forensic interview the abuse happened "between two and four times" but saying at trial it happened "more than once." (Appellee's Br. a 35–36.)

All of the so-called discrepancies to which the State cites are either the result of different questioning tactics between Otway and the prosecutor, *cf. Smith*, ¶ 31, not material, or not discrepancies at all. L.M.'s forensic interview and trial testimony were "substantially similar, with no substantive difference." *Pitkanen*, ¶ 15. The forensic interview was not a prior inconsistent statement under M. R. Evid. 801(d)(1)(A). (*See* Appellant's Br. at 39–42.)

B. Wes did not open the door to the State playing L.M.'s forensic interview for the jury.

The State contrives an entirely new legal theory on appeal about why the forensic interview was admissible: that Wes "opened the door" to it. (Appellee's Br. at 15, 17, 37–39.) Below, the State *only* asserted the forensic interview was admissible as a prior inconsistent statement

under M. R. Evid. 801(d)(1)(A). And the District Court *only* considered and ruled on that theory. (Tr. at 1024–26, 1082–83.) "A party may not raise new arguments or change its legal theory on appeal." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207. This Court should ignore the State's novel theory of admissibility on appeal.

Besides, Wes did not open the door to the State playing the forensic interview when he discussed it in his opening statement, as the State claims. (*See* Appellee's Br. at 37–39.) In the State's opening statement (which came first), the State explicitly discussed Otway's forensic interview with L.M., suggested Otway's interview tactics were sound, and told the jury Otway would "tell you what L.M. told her in detail." (Tr. at 759.) The State opened the door to the forensic interview before determining if it was even admissible. The State cannot now punish Wes for its own actions.

C. The admission of this improper bolstering evidence was not harmless.

The State claims any error in admitting the bolstering hearsay statements was harmless. The State agrees with Wes that "repetition of a declarant's testimony using out-of-court statements might lead to bolstering in some cases." (Appellee's Br. at 41; *see* Appellant's Br. at

43–48.) The State's introduction of the forensic interview and Wakeman's testimony did exactly that—bolstered L.M.'s testimony through the force of repetition.

The State falsely claims the introduction of the forensic interview did not prejudice Wes because it gave Wes "fodder for cross-examination on L.M.'s faulty memory." (Appellee's Br. at 41.) It did no such thing.

True, Wes could have cross-examined six-year-old L.M. about inane discrepancies such as why she neglected to mention in her trial testimony that he had hair on his genitals or why she could not keep straight whether the abuse happened "between two and four times" or "more than once." But that would not have convinced the jury L.M. was lying; it would have portrayed Wes as grasping at straws and baselessly attacking a young child.

L.M.'s forensic interview did not conflict with her trial testimony; it bolstered it. The State cannot show there is "no reasonable possibility" that unfairly bolstering the credibility of Wes's accuser might have influenced the outcome of the case. *Van Kirk*, ¶ 44.

CONCLUSION

The District Court violated Wes's constitutional right to confront Grubb face-to-face. It also abused its discretion by letting the State bolster L.M.'s testimony with inadmissible, prior consistent hearsay statements. These errors, together or separately, demand reversal.

The State concedes Wes's sexual assault conviction violates double jeopardy and must be reversed.

Respectfully submitted this 23rd day of February, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,754, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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