IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0473

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PHILIP BRYSON GRIMSHAW,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable David J. Grubich, Presiding

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STATEMENT OF THE ISSUES

1. Montana law requires the court clerk to certify to the sheriff jurors who do not respond to mail notice so the sheriff may personally serve them, and Montana law does not permit the clerk to excuse mail-notice non-responders. This trial court's clerk did not certify non-responders for personal service and instead removed non-responders from jury pool eligibility. Did the trial court err in denying a new trial by reasoning the clerk's illegality was not substantial?

2. Montana Rule of Evidence 615 requires a court to exclude not-presently-testifying witnesses—including expert witnesses—from the courtroom. The trial court ordered witnesses excluded but later reasoned Rule 615 does not apply to expert witnesses and permitted the State to recall a witness whom the State had kept in the courtroom. Did the court err by permitting the State to violate the exclusion order and recall the witness?

3. Should this Court reduce the trial court's vindictive increase in the sentence and restore the original sentence's shorter length?

STATEMENT OF THE CASE

Philip Bryson Grimshaw was convicted of sexual intercourse without consent and sentenced to forty years in prison with twenty of those years suspended. (Doc. 77.) In *State v. Grimshaw*, 2020 MT 201, ¶ 35, 401 Mont. 27, 469 P.3d 702, this Court reversed the conviction and remanded for a new trial.

Before the second trial, the District Court entered a Rule 615 witness exclusion order. (Retrial at 166–67.) Phil objected when the State recalled a witness who the State had kept in the courtroom while the defense presented its case. (Retrial at 451.) Overruling the objection, the District Court held Rule 615(3) exempts expert witnesses. (Retrial at 458–64 (attached at App. A).) Once recalled, the witness testified Phil's theory of the case was a "myth," "not supported anywhere," and was bandied about only by "defense attorneys." (Retrial at 495.) The jury returned a guilty verdict after deliberating five hours. (Docs. 137, 142.)

The same judge who had presided over Phil's original sentencing, the Honorable Deborah Kim Christopher, presided over the second sentencing. Over objection, Judge Christopher increased Phil's

sentence to fifty years with thirty suspended. (Resent. at 74–87 (attached at App. B).) Judge Christopher explained the sentence was based on how Phil appealed, got a reversal "on a technicality," and retried the case; the court inferred Phil lacked remorse because he exercised his rights. (Doc. 167 (attached at App. C) at 10; Resent. at 83–84.)

Phil filed a timely notice of appeal. (Doc. 170.) This Court stayed the appeal for the District Court to rule on whether to order a new trial based on the Cascade County Clerk of Court's illegal assemblage of the second trial's jury pool. (Doc. 174.) The District Court found the clerk did not certify jurors who did not respond to mail notices to the sheriff for personal service and instead drew the jury trial pool only from persons who had responded, "essentially excus[ing] nonresponders as nonresponders." (Doc. 191 (attached at App. D) at 2, 6.) The court nonetheless denied a new trial, reasoning the clerk's illegality was not "substantial." (App. D. at 5–7.)

STATEMENT OF THE FACTS

I. Underlying facts

This Court's prior opinion recites the still-applicable underlying facts. *See Grimshaw*, ¶¶ 4–11. To recount, Phil and T.G.[1] were stepcousins, unrelated by blood, in their early twenties. (Retrial at 214, 223–24; Ex. 12 (offered and admitted, Retrial at 183) at 6:26–6:30, 10:14–10:17, 14:55–15:00.) The two became close after Phil's father died. (Retrial at 216, 224; Ex. 12 at 29:26–29:38.) Phil expressed romantic feelings toward T.G., and T.G. reciprocated. (Ex. 12 at 15:00–15:30, 25:55–26:05.) But T.G. said they could not act on the feelings because they are cousins. (Retrial at 225; Ex. 12 at 25:55–26:05.)

Around 1:00 a.m., T.G. texted Phil, asking what he was doing. Phil responded he was with friends and T.G. should "come party." T.G. countered that Phil should "come drive and [s]moke lol that's what I'm doing." (Ex. 1 (offered and admitted, Retrial at 179–80).) T.G. drove by and partied with Phil and his friends. After a while, she and Phil went for a drive by themselves. (Retrial at 241–43.) Over the course of

[1] Though not required, the brief refers to the complainant by her initials.

several hours, they drank "Twisted Tea," smoked marijuana and cigarettes, laid on the ground near Phil's father's gravesite, and drove around Great Falls. (Retrial at 227–28, 244–45; Ex. 12 at 13:43–13:50.) They returned to T.G.'s apartment near dawn. (Retrial at 229.) They grabbed another Twisted Tea and sat on the couch. (Retrial at 229, 246.)

T.G. eventually went up to her room. (Retrial at 229.) Phil texted T.G., "Goodnight beautiful." T.G. texted back, "Goodnight love." (Ex. 1.) Phil texted T.G., "[C]an I come cuddle with you? I mean, if it's not to[o] much." (Ex. 1.) Phil later explained,

> I remember laying down on her couch. She goes upstairs, goes to lay down in her bed. I text her. I go upstairs. I lay down with her, start cuddling. And then, you know, I start feeling her up. She started feeling me up. And then we have sex. And I faintly remember falling over, and, you know, falling asleep.

(Ex. 12 at 22:49–23:20.)

The two woke up to the reality of having had sex with a cousin, after they had previously decided not to pursue that sort of relationship. T.G. told Phil she did not want what happened to have happened. (Ex. 12 at 16:17–16:38, 19:30–19:43, 22:49–23:20.) Phil blamed himself for initiating the encounter. (Ex. 12 at 16:17–16:38; 19:00–19:12,

23:25–23:35.) Later that day, Phil texted T.G., blamed himself again, apologized, and asked T.G. if she hated him. (Ex. 3 (offered and admitted, Retrial at 179–80).) T.G. responded it was "ok" but "fucked up tho[ugh]." (Ex. 4 (offered and admitted, Retrial at 179–80).)

A week or so later, T.G. went to the hospital for a migraine. (Retrial at 217, 236.) At the hospital, T.G.'s mother pressed T.G. on why T.G. had seemed distant recently. (Retrial at 218–19.) T.G. disclosed the intercourse with Phil. (Retrial at 219.) T.G.'s mother did not get along with Phil's side of the family. (Retrial at 215–16; Ex. 12 at 8:40–8:52, 9:25–9:30.) The story T.G. told her mother and a succession of others cleared T.G. of responsibility: T.G. said she was asleep, and Phil had vaginally, anally, and orally raped and strangled her. (Retrial at 219, 231–32, 255.)

Neither a SANE examination nor law enforcement's investigation found any physical evidence supporting T.G.'s allegations. (Retrial at 181–82.)

In an interrogation with two detectives, Phil—ashamed and embarrassed about having had sex with his cousin—initially downplayed how close he and T.G. were and denied remembering what

had occurred. (Ex. 12 at 10:12–10:26, 14:10–14:45; 15:50–16:00, 17:42–17:55.) Phil eventually admitted T.G. and he had sex. (Ex. 12 at 16:19–45.) The detectives introduced the idea of the sex not being nonconsensual rape. (Ex. 12 at 14:26–14:32, 18:00–18:03, 21:49–21:52.) Phil recounted T.G. had told Phil she was not okay with what had happened after they woke up. (Ex. 12 at 16:17–16:38.) Phil therefore knew "for a fact she didn't want to," and he thought, "I did something that she didn't want and I did it forcibly." (Ex. 12 at 19:30–19:43, 22:08–22:39.) Following the detectives' leads, Phil said "it might have been a little kind of rape deal." (Ex. 12 at 18:16–18:22.) Nonetheless, Phil's description of the encounter contradicted T.G.'s claim of a nonconsensual and violent encounter: Phil and T.G. had cuddled in T.G.'s bed. (Ex. 12 at 22:49–23:20.) T.G. was awake. (Ex. 12 at 18:33–37, 24:19–24:25.) Phil touched T.G. first but T.G. touched Phil back. (Ex. 12 at 23:52–24:00.) They took off their clothes. (Ex. 12 at 23:52–24:00.) T.G. did not say no. (Ex. 12 at 25:00–25:06, 25:24–25:30.) They had sex. (Ex. 12 at 16:19–45.)

The detectives pushed Phil on why he agreed it was "rape" and "forcibl[e]" when his detailed description suggested it was a consensual

but intoxicated, regretted, and shame-inducing sexual encounter between cousins. (Ex. 12 at 23:38–23:44, 24:26–23:30, 25:21–25:40, 25:50–25:58, 26:07–26:15.) Phil explained he should not have gone to T.G.'s room because they were both drunk. (Ex. 12 at 23:44–23:52.) Phil explained that even if he thought at the time that T.G. wanted to have sex because she was touching him back, she had said in the morning "that she didn't want to." (Ex. 12 at 23:26–23:30, 24:38–43, 24:40–24:45.) Phil explained how T.G. is family and they had previously discussed how they could not act on romantic feelings. (Ex. 12 at 25:38–25:44, 25:58–26:06.)

The detectives grew exasperated: "She's describing as far as what's going on, that was rape, and your acknowledging that, we appreciate that, but at the same time *you're not seeming to understand why it's rape* as far as, [be]cause you think she's touching you first and you keep saying you guy's had sex, so what about it is rape to you then?" (Ex. 12 at 26:53–27:11.) Phil responded, "Actually, I don't know. I don't know how to answer that, sir." (Ex. 12 at 27:13–27:20.)

II. First trial, sentencing, and appeal

At the first trial, the State called Dr. Sheri Vanino, who, over objection, testified that only two to eight percent of sexual assault allegations are false. (First Trial at 384, 386.) The jury convicted, and Judge Christopher sentenced Phil to forty years in prison with twenty years suspended. (First Trial at 465; First Sent. at 515; Doc. 77.)

On appeal, this Court reversed the conviction due to the inadmissible statistical evidence. *Grimshaw*, ¶¶ 27–33. In a "'he said-she said' consent case which turns solely on the credibility of the parties," the District Court's error in admitting the evidence—far from a technicality—unfairly prejudiced the defense and "tipped the scales to an unfair trial." *Grimshaw*, ¶¶ 32–33.

III. Second trial

Before the second trial, both parties moved under Rule 615 for an order excluding witnesses from the courtroom except when testifying, and neither party requested any exceptions. (Retrial at 166.) The District Court ordered that witnesses "can't be in [here] until [they] are released from any further obligations," and the court noted no exceptions to the order. (Retrial at 166–67.)

In its case-in-chief, the State again called Vanino, whose testimony generally explained that sexual assault victims may exhibit unexpected or unintuitive reactions. (Retrial at 282–88.)

The defense's theory of the case was that T.G.'s desire to save face after having had consensual but regretted and shame-inducing sex with her cousin motivated her allegations. (Retrial at 172, 556.) The defense presented evidence that alcohol, marijuana, and fatigue impair judgment and dissolve inhibitions and that Phil and T.G. had previously been seen off by themselves kissing at a party. (Retrial at 347, 369–74.)

After the defense rested, the State recalled Vanino. (Retrial at 451.) The defense objected, noting that, despite the unqualified exclusion order, Vanino had been in the courtroom during the defense's case. (Retrial at 451.) The defense felt "ambush[ed]" by the State recalling Vanino given the exclusion order and the State having provided no notice that it might recall Vanino after she remained in the courtroom. (Retrial at 457.)

The State did not suggest Vanino's presence during the defense's case was unintentional. (*See* Retrial at 451–52.) Instead, the State

attempted to justify Vanino's presence, arguing "the defense could have asked for [its expert witness] to watch Dr. Vanino's testimony, and they did not," and "[w]e believe it is important for the State to be able to call Dr. Vanino" because "[i]t is customary with rebuttal for the expert to watch the other rebuttal expert's testimony, and then rebut it." (Retrial at 451–52.)

The District Court understood the defense's objection "that you believe witnesses were excluded, and that you don't think Ms. Vanino should be able to testify as a rebuttal witness." (Retrial at 453.) But the District Court noted Rule 615(3) contains an exemption for "a person whose presence is shown by a party to be essential to the presentation of the party's case," and the District Court ruled that exemption "says I can't exclude expert witnesses." (Retrial at 458, 463.) The court explained, "I don't even think I can exclude [experts] from the courtroom the way I read [Rule 615(3)]." (Retrial at 460.)

Upon Vanino retaking the stand, the State and Vanino targeted Phil's defense theory in a way they previously had not. The State asked Vanino, "What is the regrettable sex defense?" (Retrial at 495.) Vanino responded,

> So the regrettable sex defense is essentially this idea that people have regrettable sex. They have sex with somebody that they choose to have sex with that is consensual, and then afterwards they decide that they didn't want to have sex with that person after all, *and so the myth, or the defense, is that then the victim goes and reports it as a rape*, which doesn't actually make a whole lot of sense. Maybe in certain circumstances, like a teenager where it gets all around the school, that could make a little sense. But in most cases, it doesn't make a lot of sense.
>
> Because why would you want the whole world and a small community to know that you were engaged in whatever it was if you don't have to; right? So it's not exactly logical. It's not - - you know, *it's not supported anywhere. But I do see it a lot – defense attorneys, not in my practice.*

(Retrial at 495 (emphasis supplied).) Vanino acknowledged the described situation could happen but it wouldn't be common and, indeed, was a "myth." (Retrial at 495–96.)

IV. Second sentencing

While Phil was incarcerated following his first trial and sentencing, he had received no write ups; obtained his high school equivalency diploma and helped others do the same as a teacher's assistant; completed phase one of sexual offender treatment and was midway through completing phase two when his conviction was reversed; been chosen to work in the prison's furniture factory; made restitution payments; and, in recognition of his reliability, been granted

off-site responsibilities as an inmate trustee. (Resent. at 66–68, 72–74; Doc. 156, Psychosexual Eval. at 5–7, 20–21[2].) When Phil was released pending retrial, he returned to Great Falls where he worked 45 to 50 hours a week and was promoted to manager, obeyed the terms of his release, cared for his terminally ill mother, and met "the love of [his] life." (Resent. at 30–31, 45–46, 63–70, 74; Doc. 156, Psychosexual Eval. at 5–7.) The psychosexual evaluator who had evaluated Phil both before the first sentencing and the second sentencing found Phil had "matured considerably." (Doc. 156, Psychosexual Eval. at 21.)

Nonetheless, as compared to the original sentence, Judge Christopher increased Phil's sentence by ten years, to fifty years with thirty suspended. (App. B; App. C.) The court claimed the authority to resentence Phil like this was a "brand-new case." (App. B at 81.) The court's "primary" basis for its new sentence was Phil's supposed lack of remorse as inferred from him not apologizing and not pleading guilty "between these trials." (App. B at 80, 83–84.) The court explained,

[2] Phil's waiver of confidentiality in the presentence investigation and psychosexual evaluation reports is limited to information cited from those reports in this brief. Phil reserves the right to object to additional disclosures of confidential information.

> The Defendant was found guilty and appealed. The Supreme Court remanded the case on a technicality. The State offered the Defendant a plea agreement,[3] but [he] decided to try this case again, placing the victim in a situation to testify again.

(App. C at 10.) The court also explained that T.G. had "petitioned the court for a greater[4] sentence" based in part on having to experience "a second trial." (App. C at 10.)

Phil objected to the court unconstitutionally punishing him for exercising his rights. (App. B at 85–86.) In response, the court referenced Phil's initial interrogation but did explain how the interrogation affirmatively demonstrated a lack of remorse. (App. B at 87.) The court explained it was punishing "only the absence" of remorse and not "having any real evidence that goes to that." (App. B at 87.)

V. Jury pool

Phil moved for a new trial twenty-five days after Tina Henry, the Cascade County District Court Clerk, admitted using an irregular process to assemble jury pools. (Doc. 172.) Henry had been clerk since

[3] Though the court asserted there was a plea offer on remand, neither party ever said there was.

[4] In actuality, T.G. had requested "the maximum sentence" at the first sentencing hearing, as well. (Doc. 67, Presentence Invest. at 10.)

January 2020. (6/27/24 Tr. at 4.) She testified in another case in August 2023 that her practice from 2020 to 2023 was as follows: In May or June, she would receive a list of county residents from which she would draw potential jurors for the year, and in August or September she would notify the persons drawn by mailing a letter, questionnaire, and return envelope. (Doc. 172, Ex. 3 at 20.) But "[n]othing" happened to a person who did not respond to the notice. (Doc. 172, Ex. 3 at 21.) Henry designated such persons as "not deliverable" in her jury procurement records. (Doc. 172, Ex. 3 at 21.) Before August 2023, neither Henry nor the county sheriff were aware that Mont. Code Ann. § 3-15-405 required Henry to certify non-responders to the sheriff so the sheriff could attempt personal service. (Doc. 172, Ex. 3 at 22–23.)

After Phil moved for a new trial, this case was reassigned to the Honorable David J. Grubich. Henry testified again and confirmed that the year of Phil's second trial, she was not certifying non-responders to the sheriff's office and the sheriff was not attempting personal service. (6/27/24 Tr. at 29–30.) She "probably" excluded persons who did not respond to her initial mailer from the group from which she pulled and summoned an individual trial's jury pool. (6/27/24 Tr. at 29–30.) The

District Court found Henry "essentially excused nonresponders as nonresponders," but the court refused to order a new trial. (App. D at 5–7.)

STANDARDS OF REVIEW

Whether a violation of the jury formation statutes warrants a new trial is a conclusion of law reviewed for correctness. *State v. LaMere*, 2000 MT 45, ¶ 14, 298 Mont. 358, 2 P.3d 204. This Court exercises plenary review over matters of constitutional interpretation, *State v. Walsh*, 2023 MT 33, ¶ 7, 411 Mont. 244, 525 P.3d 343, statutory interpretation, *State v. Henderson*, 2015 MT 56, ¶ 9, 378 Mont. 301, 343 P.3d 566, and interpretation of rules of evidence, *State v. Pingree*, 2015 MT 187, ¶ 9, 379 Mont. 521, 352 P.3d 1086. Insofar as an evidentiary ruling does not qualify for de novo review, it is reviewed for an abuse of discretion. *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991. A court abuses its discretion by basing a ruling on "an erroneous conclusion or application of law." *Pelletier*, ¶ 12.

SUMMARY OF THE ARGUMENT

Henry substantially violated the jury assembly statutes. She illegally permitted jurors to self-excuse through non-response; she

interfered with the jury pool being based on the objective statutory criteria only; and she skewed the jury pool's sample. Any of these establish substantial noncompliance with the law that is automatically reversible. Phil is entitled to a new trial.

Alternatively, this Court should reverse the conviction because the District Court wrongly and prejudicially permitted the State to recall an exclusion-order violating witness. Expert witnesses are not exempt from Rule 615. The State intentionally having a witness remain present despite an exclusion order demanded that the State be precluded from recalling the witness to the stand. The District Court's failure to do so permitted the State to introduce prejudicial testimony casting Phil's theory of the case as a "myth," "not supported anywhere," bandied about only by "defense attorneys." The State cannot disprove a reasonable possibility the tainted evidence influenced the verdict.

Alternatively, the increased sentence on appeal violates due process, and this Court should reduce the punishment by restoring the original sentence's length. The District Court was actually and presumptively vindictive in increasing Phil's sentence. The court was explicit that it was punishing Phil for exercising his rights to appeal

and retrial after the court got reversed on a supposed "technicality." The court did not identify any objective evidence of new conduct or events that could lawfully justify increasing the sentence. To the contrary, the record established Phil's exemplary conduct since his first sentencing. If this Court does not reverse the conviction, Phil requests this Court use its statutory authority to efficiently and reasonably reduce the sentence to the original sentence's length.

ARGUMENT

I. The District Court incorrectly denied a new trial given the clerk's substantial noncompliance with the law in assembling the jury pool.

Even since before Montana was a state, its laws have mandated following specific, objective procedures for assembling jurors as necessary to provide fair trials. *See*, *e.g.*, *Dupont v. McAdow*, 6 Mont. 226, 229, 9 P. 925, 926 (1886); *see also* U.S. Const. amends. VI, VII (federal jury trial rights); Mont. Const. art. II, §§ 24, 26 (state jury trial rights). And ever since then, this Court has held that failure to substantially comply with the statutorily mandated procedures undermines the jury trial right and is automatically reversible without proof of prejudice. *LaMere*, ¶¶ 19, 72; *see, e.g.*, *Dupont*, 6 Mont. at

229–30, 9 P. at 926–27; *State v. Landry*, 29 Mont. 218, 223–24, 74 P. 418, 420 (1903); *State v. Groom*, 49 Mont. 354, 358, 141 P. 858, 859 (1914); *State v. Diedtman*, 58 Mont. 13, 18, 190 P. 117, 119 (1920); *State v. Porter*, 125 Mont. 503, 242 P.2d 984, 985–86 (1952); *State v. Deeds*, 130 Mont. 503, 509–10, 305 P.2d 321, 324–25 (1957); *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 171, 639 P.2d 62, 64 (1981); *Solberg v. Cnty. of Yellowstone*, 203 Mont. 79, 83, 659 P.2d 290, 292 (1983); *Robbins v. State*, 2002 MT 116, ¶ 16, 310 Mont. 10, 50 P.3d 134 (*Robbins II*).

A substantial jury assembly procedure violation includes a violation that results in "arbitrariness" or frustrates the principles "that jury venires are selected randomly and on the basis of objective criteria." *LaMere*, ¶¶ 57–60. A substantial violation also includes a violation that effectively permits jurors to excuse themselves from service. *LaMere*, ¶ 73. A substantial violation also includes anything more than a "technical irregularity." *Dvorak*, 196 Mont. at 171, 639 P.2d at 64 (citation omitted).

This Court has previously found substantial noncompliance where the clerk telephoned jurors to notify them of jury service, without

mailing or personally serving the notice. *State v. Highpine*, 2000 MT 368, ¶¶ 38–41, 303 Mont. 422, 15 P.3d 938; *State v. Robbins*, 1998 MT 297, ¶ 51, 292 Mont. 23, 971 P.2d 359 (*Robbins I*) (overruled by *LaMere*, ¶¶ 20, 25, but only on the grounds that a substantial violation does not require proof of prejudice for reversal). This Court has also found substantial noncompliance where the clerk put juror names on paper slips, not capsules, and did not shake the box before drawing names. *Dvorak*, 196 Mont. at 170, 639 P.2d at 64. In none of these cases (among others) did this Court demand proof of how the violations actually skewed the jury pool before finding the violations were substantial and thus warranted reversal. *See Highpine*, ¶¶ 38–41; *Robbins I*, ¶ 51; *Dvorak*, 196 Mont. at 170, 639 P.2d at 64.

The law currently mandates the following procedures for assembling jury pools in district court. First, Montana's court administrator provides a district court clerk a list of the jurisdiction's potential jurors derived from voting and driving records. Mont. Code Ann. §§ 3-15-402, -403. Next, the clerk must use a randomized procedure to select potential jurors for the trials in the coming term. Mont. Code Ann. § 3-15-404(2). The clerk may remove a selected person

from the list only if the clerk finds the person has died, permanently moved, is mentally incompetent, or has "been permanently excused under the provisions of 3-15-313."[5] Section 3-15-404(7). In part to gather such information, the clerk "shall serve notice by mail on the persons drawn as jurors and require the persons to respond by mail as to their qualifications to serve as jurors." Section 3-15-405. "If a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally on the person and make reasonable efforts to require the person to respond to the notice." Section 3-15-405. Finally, the clerk must draw and notify the persons necessary to form jury pools for particular trials. Mont. Code Ann. §§ 3-15-501, -503; *see also* § 3-15-405.

Here, Henry's testimony established a substantial departure from the mandated procedures in assembling the jury pool for Phil's second trial. While Henry mailed notices to persons who were selected as jurors for the term and for specific trials, Henry did not certify to the sheriff persons who did not respond to the notices. *Contra* § 3-15-405.

[5] Montana Code Annotated § 3-15-313 states particular criteria for excusals that require the approval of the presiding court.

The sheriff, accordingly, did not personally serve notices on non-responders or make reasonable efforts to get such persons to respond. *Contra* § 3-15-405. Henry, in fact, removed jurors who did not respond to notices from the list of those that could be selected for trial—"essentially excus[ing] nonresponders as nonresponders" (App. D at 5)—though such nonresponse does not, under the law, permit removing a jury from the list. *See* § 3-15-404(7), -313.

The District Court nonetheless denied that Henry's noncompliance with the law was substantial. The District Court's analysis alternately disregarded and misconstrued the law.

First, per *LaMere*, this Court "will not countenance" errors permitting jurors to self-excuse from jury duty—such as through "failing to return the clerk's phone call"—and such errors represent substantial noncompliance. *LaMere*, ¶ 73. Henry's errors permitted jurors to excuse themselves through not responding to a mail notices, and Henry—going a step beyond what happened in *LaMere*, *see LaMere*, ¶ 4—actually removed non-responders from the group from which a trial's jury pool was drawn, "essentially excus[ing] nonresponders as nonresponders." (App. D at 5.) Yet the District Court flouted *LaMere*'s

reasoning establishing violations permitting self-excusal represent substantial noncompliance. The District Court instead adopted its own "judicial notice" that sometimes people do not appear for jury duty. (App. A at 5.) Sure, but that sort of self-exclusion, where the clerk follows procedures, is not a product of statutory violations, and there is no error. Laws like Montana's jury assembly laws do not need to produce perfect outcomes in all situations in order for violations of the law to be substantial. Here, as in *LaMere*, self-excusals flowed from statutory violations. That represents automatically reversible substantial noncompliance that this Court "will not countenance." *LaMere*, ¶ 73.

Second, and relatedly, *LaMere* explains errors enabling self-excusal are substantial because they "undermine[] the principle of granting juror excuses only on the basis of objective criteria." *LaMere*, ¶ 73. Yet, in its order, the District Court ruled Henry excusing non-responders as non-responders was itself "an objective criterion." (App. D at 6.) If the District Court's analysis were correct, then, by the same token, the *LaMere* clerk letting off the hook persons who did not respond to telephone calls would also be an "objective criterion."

LaMere, however, says otherwise. *See LaMere*, ¶¶ 73–76. The objective criteria for jury service are those defined by the law. *See* § 3-15-313, -404(7). Nonresponse to mail notice is not among the objective criteria permitting excusal. *See* § 3-15-313, -404(7). Henry excusing jurors on that basis was, in fact, based on Henry's own subjective and arbitrary whim. That, again, is automatically reversible substantial noncompliance.

Third, the District Court denied there was substantial noncompliance because "[t]here is no evidence that the pool or panel selected for the Defendant's trial was anything other than a group of people in our community drawn from the various walks of life." (App. D at 5.) The District Court demanding such evidence to find a substantial violation is plainly erroneous because this Court has, in many cases, found substantial violations without such evidence. *See Highpine*, ¶¶ 38–41; *Robbins I*, ¶ 51; *Dvorak*, 196 Mont. at 170, 639 P.2d at 64.

Moreover, *LaMere* explains that the evidence of prejudice that the District Court required here—the sort of evidence necessary for a Sixth Amendment jury pool violation claim—is not required to establish a substantial violation requiring reversal. *LaMere*, ¶ 62. This was the

very point on which the *LaMere* Court splintered, with the Court's majority holding no such evidence was required, whereas the concurring justices would have held such evidence was required. *LaMere*, ¶¶ 84–85 (Gray, C.J., concurring) (explaining that, in contrast to the majority, the concurrence would ground reversal in "LaMere present[ing] statistic[al]" evidence on the effect of the error on a jury pool's makeup). The *LaMere* majority opinion—not the minority concurrence— controls. A substantial failure to comply with statutory jury assembly mandates does not require the same sort of evidence necessary to establish a Sixth Amendment violation because the statutory mandates are intended to "preempt" Sixth Amendment violations. *LaMere*, ¶¶ 27, 62, 65.

Nor is it difficult to understand how Henry's violations of the law frustrate the random selection of persons for jury duty. Low-income people and racial minorities more frequently change residences within a locality. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 773 (2011). And a sample "that is limited to those who respond to a mail inquiry is

not a random sample of the population surveyed, and . . . such a sample may be biased." *U.S. v. Gometz*, 730 F.2d 475, 482 (7th Cir. 1984). Montana's jury assembly laws mandating personal service compensate for mail notice's deficiencies with regard to those who have recently moved and who are more likely to have low-income and represent a racial minority. Henry's failure to certify non-responders for personal service as the law requires would thus tend to skew the jury pool's makeup.

Henry's noncompliance was substantial for any of the three reasons addressed above. Practically, fairly, and legally, Henry's pervasively unlawful jury assembly procedure was more than a "technical irregularity." *Dvorak*, 196 Mont. at 170, 639 P.2d at 64. Because Henry substantially violated the law in assembling the jury pool for Phil's second trial, the District Court erred by failing to order a new trial.

II. The District Court abused its discretion by permitting the State to violate a witness exclusion order.

A. The District Court misinterpreted Rule 615.

Montana Rule of Evidence 615 states, "At the request of a party, the court shall order witnesses excluded so that they cannot hear the

testimony of other witnesses." The rule, however, does not authorize the exclusion of "(1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." Montana Code Annotated § 46-24-106(1) additionally exempts a criminal case's "victim" from exclusion. *See State v. Wilson*, 2022 MT 11, ¶¶ 34–35, 407 Mont. 225, 502 P.3d 679.

Here, at the parties' requests, the District Court entered an unqualified exclusion order under Rule 615. But later—after the parties rested and Phil objected to the State recalling Vanino because she had remained in the courtroom during the defense's case—the District Court ruled that Rule 615 exempts expert witnesses from exclusion as a matter of the rule's construction. (App. A at 460, 463.)

This Court, however, has held Rule 615's general rule applies to "witnesses, whether lay or expert." *State v. Riggs*, 2005 MT 124, ¶ 24, 327 Mont. 196, 113 P.3d 281. Rule 615 specifies the witnesses to whom exclusion does not apply, and "expert witnesses" is not on the list. Had the drafters of Rule 615 intended a general exception for experts, "they

would have said so, or added a fourth exception." *U.S. v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (interpreting Fed. R. Evid. 615, on which Mont. R. Evid. 615 is modeled) (quoting *Morvant v. Constr. Aggregates Corp.*, 570 F.3d 626, 630 (6th Cir. 1978)).

To be sure, in a particular case, a particular expert witness *may*—just like any other witness—qualify for exemption from exclusion under Rule 615(3)'s terms referring to "a person whose presence *is shown* by a party to be essential to the presentation of the party's cause." (Emphasis supplied.) But the terms of the exemption place the burden "on the party requesting the Rule 615(3) exception to make 'a fair showing' regarding the essentiality of the expert's presence." *Seschillie*, 310 F.3d at 1213 (quoting *Morvant*, 570 F.3d at 630). And answering whether a witness's proffered expert testimony is admissible does not answer whether the Rule 615(3) exception has been established. Admissible expert testimony requires expertise that will "assist the trier of fact to understand the evidence or to determine a fact in issue." Mont. R. Evid. 702. By contrast, Rule 615(3) requires a party to show the witness's presence in the courtroom *while not on the stand* is essential. Thus, in *Riggs*, this Court held an expert was properly

excluded from the courtroom when not testifying, even though the expert's testimony itself was admissible. *Riggs*, ¶ 24. The District Court's conclusion that Rule 615 did not apply to Vanino because she was an expert witness was an abuse of discretion based on "an erroneous conclusion or application of law." *Pelletier*, ¶ 12.

What is more, the State never made a fair showing under Rule 615(3) that having Vanino in the courtroom while not testifying was essential to its case. When Phil objected to the State recalling Vanino, the State responded that Phil "could have asked" to have his expert, like Vanino, remain in the courtroom. (Retrial at 451–52.) The State's response was a tacit admission that a party *needs to ask* for the exception because the exception requires a showing. Here, the State never mentioned anything to the court or the defense about Vanino remaining in the courtroom while not testifying until the defense objected to the State recalling Vanino, after the State and Vanino had already violated the exclusion order. The District Court permitting the State to unfairly surprise the defense at that point represents an abuse of discretion. *See Clark v. Bell*, 2009 MT 390, ¶¶ 37–39, 353 Mont. 331, 220 P.3d 650 (explaining a court abuses its discretion by, midtrial,

altering a pretrial ruling's understood meaning and unfairly surprising a party).

Nor was the District Court's ruling "right for the wrong reason" under the theory that Vanino was called in rebuttal. Just as with "expert witnesses," Rule 615 does not list "rebuttal witnesses" among the groups to which the rule does not apply. The expression of certain things in a fixed list "implies the exclusion of others." *Estate of Cummings v. Davenport*, 906 F.3d 934, 942 (11th Cir. 2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012)). The cardinal rule "not to insert what has been omitted" must prevail in these circumstances. Mont. Code Ann. § 1-2-101. There can be no general rebuttal witness exception to Rule 615 because that would effectively require rewriting the rule and inserting a new exception.

Notably, Montana Rule of Evidence 615 uses identical language to Fed. R. Evid. 615 (1974).[6] And federal courts have held the federal rule applies to rebuttal witnesses the same as others. *See U.S. v. Tedder*,

[6] Since 1974, Fed. R. Evid. 615 has been restyled and amended, but the restylings and amendments do not appear to change the analysis.

403 F.3d 836, 840 (7th Cir. 2005) ("If Tedder wanted this witness available for rebuttal, he should have kept him out of the courtroom."); *U.S. v. Ell*, 718 F.3d 291, 293 (9th Cir. 1983) (explaining Rule 615 applies to rebuttal witnesses and the rule's concerns "are just as valid for a rebuttal witness who has already testified in the case-in-chief as they are for a primary witness"). The federal rulings are just as good when applied to Mont. R. Evid. 615.

The only basis for a rebuttal witness exception is not tenable. *State v. Close*, 191 Mont. 229, 231, 623 P.2d 940, 941 (1981), was an appeal of a June 1976 trial. Montana Rule of Evidence 615 was adopted and took effect subsequently, in July 1977. *See* Credits, Mont. R. Evid. 615. Nonetheless, R.C.M. § 93-1901-2 (1947) would have been in effect during the *Close* trial. That provision stated, "If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses." But, on appeal, the *Close* Court did not mention R.C.M § 93-1901-2 (1947) when it claimed, "Rebuttal witnesses are not within the rule governing exclusion of sworn witnesses from the courtroom during taking of testimony." *Close*, 191 Mont. at 244, 623

P.2d at 948. The only support the *Close* Court gave for its proclamation was a citation, without analysis, to *Sutterfield v. Oklahoma*, 489 P.2d 1345, 1350 (Okl. App. 1971)—an out-of-state case which itself does not justify its ruling. *Close*, 191 Mont. at 244, 623 P.2d at 948; *see Sutterfield*, 489 P.2d at 1350. Notably, in *Wilson*, ¶¶ 33–35, this Court cited but implicitly declined to rely on *Close* in concluding a rebuttal witness was not subject to exclusion not on the basis of being a rebuttal witness but on the basis of being a victim (which Vanino was not).

To the extent necessary, this Court should overrule or recognize *Close* as abrogated. Whatever *Close*'s dubious validity before Rule 615's adoption, *Close* has no validity now, with Rule 615—which specifically designates the witnesses to whom the rule does not apply—having superseded *Close* in governing witness exclusion orders. Under Rule 615's plain terms, neither a rebuttal witness exemption nor an expert witness exemption exists. Accordingly, the District Court abused its discretion in holding Vanino was exempt from Rule 615.

B. The State's violation demanded barring the State from recalling Vanino.

The remedy for the violation of an exclusion order turns on whether the party calling the witness was involved in the violation.

See, e.g., State v. Johnson, 62 Mont. 503, 510, 205 P. 661, 663 (1922) (explaining "the proper remedy to be adopted by the court is to punish the offender for contempt, *in the absence of a showing of connivance or collusion*" by the party offering the testimony) (emphasis supplied). This Court has determined a violating witness should nonetheless be permitted to testify in cases where the record established the party calling the witness was not complicit in the violation and therefore the party should not bear punishment for the violation. *See State v. Wells*, 202 Mont. 337, 347, 348, 658 P.2d 381, 386 (1983) ("It does not appear from the record that the doctor was aware of the restriction. Nor were the [attorney's calling the witness] aware of his presence."); *State v. Lattin*, 154 Mont. 72, 76, 460 P.2d 94, 96 (1969) ("[N]o intention to violate the exclusionary order was shown and there was no connivance, knowledge or participation in the violation by the [party calling the witness]."); *Johnson*, 62 Mont. at 514, 205 P. at 664 ("There was no showing of connivance by the [party calling the witness], or knowledge of [the witness's] presence in the courtroom during the trial."). The flip side of that analysis is, "if the violation of the order of the court by the witness is participated in by the party calling the witness . . . ,

testimony of the witness who has violated the rule [should] be excluded." *Young v. Florida*, 99 So.2d 304, 305 (Fla. 3d Dist. App. 1957) (citing *Rowe v. Florida*, 163 So. 22, 25 (Fla. 1935)).

Here, the record indicates the State participated in Vanino remaining in the courtroom during the defense's presentation of its case. When the defense objected to the State recalling Vanino, the State did not claim her violation of the exclusion order was unintentional or her presence was unknown by the State. (Retrial at 451–52.) Instead, the State argued Vanino's presence was proper and assertedly "customary" (Retrial at 451–52), suggesting the State had purposely kept Vanino in the courtroom despite the exclusion order.

In these circumstances, the remedy of holding Vanino in contempt for violating the exclusion order would have been inapt because the violation was at the State's behest, not Vanino's. The State's responsibility for the violation demanded the State bear the consequences of the violation—namely, that the State be barred from putting Vanino back on the stand. Imposition of that remedy was reasonable and tailored to the violation because it applied only to Vanino's second round of testimony. The District Court erred by

absolving the State of responsibility for its actions and permitting the State's order-violating witness to testify again.[7]

C. The error was prejudicial and requires reversal.

Given the error, the State must demonstrate there is no reasonable possibility that Vanino's second round of testimony contributed to the jury's verdict. *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. To carry that burden, the State must direct the Court to "admissible evidence that proved the same facts as the tainted evidence," and 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." *Van Kirk*, ¶ 44 (emphasis removed).

In her second round of testimony, Vanino claimed "the regrettable sex defense"—the State's label for Phil's defense—was a "myth." (Retrial at 495.) It "[c]ould . . . happen," but it was "not supported anywhere." (Retrial at 495–96.) Vanino only saw it from "defense attorneys, not in my practice." (Retrial at 495.) Because there was no

[7] If this Court cannot discern the State's participation in the violation, Phil requests the Court remand for a hearing on that fact.

"admissible evidence that proved the same facts" as the tainted evidence did about the so-called regrettable sex defense, the State cannot carry its burden to direct this Court to admissible evidence proving the same facts. *Van Kirk*, ¶ 44.

Nor can the State demonstrate that, qualitatively, there is "no reasonable possibility [the tainted evidence] might have contributed to" Phil's conviction. *Van Kirk*, ¶ 44. Expert evidence can be "powerful" to jurors. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). The tainted expert testimony directly attacked Phil's theory of the case that T.G. made up her allegations to absolve herself of responsibility for a regretted sexual encounter between cousins. The expert's attack told the jury—with the imprimatur of science and expertise—that the idea that the defense's theory was a "myth," "not supported anywhere," not "logical," and something made up by "defense attorneys." (Retrial at 495–96.) Jurors who might otherwise have held reasonable doubts in accordance with the defense's theory of the case would have found it difficult to ignore expert testimony stating the defense's theory was unreasonable, *i.e.*, a "myth." In what is "ultimately a 'he said-she said' consent case which turns solely on the credibility of the parties,"

Grimshaw, ¶ 33, the tainted testimony was qualitatively powerful. Because the State cannot demonstrate no reasonable possibility that the District Court's error might have contributed to the verdict, the conviction must fall.

III. Alternatively, the increased sentence violates due process.

A. Due process prohibits and preempts vindictive sentencing.

The Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee due process of law.

Punishing a person's exercise of a right is a "basic due process violation." *State v. Baldwin*, 192 Mont. 521, 525, 629 P.2d 222, 225 (1981); *accord U.S. v. Goodwin*, 457 U.S. 368, 372 (1982). These due process violations come in two sorts: (1) actual vindictiveness claims, which require "objective proof" of a court or state-actor punishing a defendant "for doing something that the law plainly allowed him to do"; and (2) presumptive vindictiveness claims, which require a possibly-vindictive actor to rebut and overcome an applicable presumption of vindictiveness through qualifying evidence. *State v. Roundstone*, 2011 MT 227, ¶¶ 38–39, 362 Mont. 74, 261 P.3d 1009 (citation omitted).

A presumption of vindictiveness applies when a defendant overturns a conviction and, upon remand, receives an increased sentence. *North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969). While the federal constitution does not bar an increased sentences following a successful appeal, due process requires (1) "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" and (2) "that a defendant be freed of apprehension of such a retaliatory motivation." *Pearce*, 395 U.S. at 723, 725. As a bulwark against such apprehension, a presumption of unconstitutional vindictiveness applies when a judge imposes an increased sentence after a successful appeal. *Pearce*, 395 U.S. at 726. To overcome the presumption, the sentencing judge must justify the increased sentence based on "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" and such "factual data . . . must be a part of the record." *Pearce*, 395 U.S. at 726; *accord Wasman v. U.S.*, 468 U.S. 559, 569 (1984) (explaining that "where the presumption applies, the sentencing authority . . . must rebut the presumption that an increased sentence . .

. resulted from vindictiveness," or the increased sentence is unconstitutional).

To put a finer point on it, to overcome a presumption of vindictiveness, the court must "affirmatively explain the increase in its sentence," *U.S. v. Jackson*, 181 F.3d 740, 746 (6th Cir. 1999), through "objective information in the record justifying the increased sentence," *Goodwin*, 457 U.S. at 374; *accord State v. Jackson*, 2007 MT 186, ¶ 14, 338 Mont. 344, 165 P.3d 321. The required objective information must be "conduct or an event, other than the appeal, attributable in some way to the defendant," *U.S. v. Rapal*, 146 F.3d 661, 664 (9th Cir. 1998), that "occurred subsequent to the original sentencing proceeding," *Wasman*, 468 U.S. at 572. And the conduct or event must be sufficient to cast "new light upon the defendants 'life, health, habits, conduct, and mental and moral propensities,'" thus justifying an increased sentence. *Wasman*, 468 U.S. at 570–71 (citation omitted, emphasis supplied).

Special rules protecting a defendant's exercise of rights also apply where a sentencing court justifies a sentence based on "lack of remorse." *State v. Rennaker*, 2007 MT 10, ¶ 51, 335 Mont. 274, 150 P.3d 960. A defendant's exercise of rights to maintain innocence and against self-

incrimination may prevent the communication of remorse for an offense. *Rennaker*, ¶ 50. Thus, "[i]f a court chooses to sentence a defendant based upon lack of remorse, it cannot infer lack of remorse from a defendant's silence" and, instead, "must point to affirmative evidence in the record demonstrating lack of remorse." *Rennaker*, ¶ 51.

Here, after Phil's first successful appeal, the District Court increased the sentence by ten years. The District Court's sentence violated due process because the District Court was (1) actually vindictive, (2) presumptively vindictive, and (3) attributed the sentence to lack of remorse not affirmatively demonstrated.

B. The District Court was actually vindictive and violated due process by increasing the sentence based on Phil exercising his rights.

Proving actual vindictiveness requires "objective proof" of a court being "motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do." *Roundstone*, ¶ 39.

This case has such objective proof—the District Court explicitly attributed its increased sentence to Phil exercising his rights. At resentencing, the court explained it was a "big issue" that, on remand, Phil did not enter a guilty plea and instead went to retrial. (App. B at

83–84.) In the written judgment, the court explained it based its sentence on that "[Phil] was found guilty and appealed," that "[t]he Supreme Court remanded the case on a technicality," that the State supposedly "offered the Defendant a plea agreement" on remand," and that Phil's choice to retry the case "plac[ed] the victim in a situation to testify again." (App. C at 10.) The court also noted the complainant's request for an increased sentence based on "a second trial." (App. C at 10.) By its own words, the District Court increased Phil's sentence based on him successfully appealing and then retrying the case. The court punished Phil for doing things "the law plainly allowed him to do." *Roundstone*, ¶ 39. That establishes actual vindictiveness and a due process violation. *Roundstone*, ¶ 39.

C. Alternatively, the District Court was presumptively vindictive and violated due process by failing to identify objective information that could justify the increased sentence.

1. The District Court did not recognize the applicable presumption of vindictiveness attaching to an increased sentence.

At resentencing, the District Court claimed to "have the authority" to "be looking at this as a brand-new case and a brand-new trial based

on all the circumstances I ha[v]e in front of me," and to sentence Phil based on a new assessment. (App. B at 81.)

The District Court misunderstood the law. Because a defendant must be "freed of apprehension" of court retaliation following a successful appeal, *Pearce* applies a presumption of vindictiveness to constrain the sentencing judge's ability to impose an increased sentence on remand. *Pearce*, 395 U.S. at 725. Given the presumption, the imposition of an increased sentence requires the judge to "affirmatively identify[] relevant conduct or events that occurred subsequent to the original sentencing proceeding" that justify the increase. *Wasman*, 468 U.S. at 572. This is very different from a de novo sentencing under Mont. Code Ann. § 46-18-201 wherein a court may impose any authorized sentence "considering all circumstances of the offender and the offense." *Beach v. State*, 2015 MT 118, ¶ 11, 379 Mont. 74, 348 P.3d 629. Though the District Court claimed to have researched the issue (App. B at 81), the court misunderstood the applicable presumption of vindictiveness.

2. The District Court did not identify objective evidence qualifying to overcome the presumption of vindictiveness.

Having misunderstood the law, the District Court did not rebut the applicable presumption of vindictiveness. The court explained the "primary" basis for the increased sentence was the court's subjective assessment that Phil lacked remorse. (App. B at 80, 83–84.) That was not objective evidence of a conduct or an event occurring after the original sentencing other than the exercise of rights. *See Wasman*, 468 U.S. at 572; *Rapal*, 146 F.3d at 664. Nor would the District Court's subjective assessment of lack of remorse cast new light on the situation. *See Wasman*, 468 U.S. at 570–71. Indeed, at the first sentencing, the same judge viewed Phil in a similar light, making a similar subjective assessment that Phil lacked remorse at that time. (Doc. 77 at 8.)

In fact, the only changes since Phil's first sentencing were that (1) Phil had matured significantly and (2) he exercised his rights to appeal and retrial. Neither of those changes could reasonably or constitutionally justify an increased sentence. Yet the State and the PSI author both acknowledged that, apart from those things, "nothing has changed since the Court sentenced the Defendant the first time"

and the "circumstances of the offense" and the "events" were "all exactly the same." (Doc. 156, Presentence Invest. at 12; Resent. Tr. at 11.) To be sure, the complainant continued to express hurt and to request the "maximum sentence." (Remand Complainant Impact Letter.) But that was the same as the first sentencing hearing. (Doc. 67, Presentence Invest. at 10.) To sum it up, there was nothing—and the District Court pointed to nothing—that could overcome the presumption of vindictiveness and justify the increased sentence.

Regardless of whether the District Court was actually vindictive, "due process compelled the district court to affirmatively explain the increase in its sentence in order to overcome the *Pearce* presumption of vindictiveness," and, here, "the reasons given by the [D]istrict [C]ourt fail to ensure that a nonvindictive rationale led to the second, higher sentence." *Jackson*, 181 F.3d at 746. Accordingly, the District Court's increased sentence violated due process.

D. Alternatively, the District Court violated due process by punishing "lack of remorse" inferred from the exercise of rights.

Finally, "[i]f a court chooses to sentence a defendant based upon lack of remorse, it cannot infer lack of remorse from a defendant's

silence" and instead "must point to affirmative evidence in the record demonstrating lack of remorse." *Rennaker*, ¶ 51. Yet here, the District Court faulted Phil for lack of remorse because he had not said "'I'm sorry'" and because "there's no remorse evidence presented." (App. B at 87.) Contrary to *Rennaker*'s command not to "infer lack of remorse from a defendant's silence," *Rennaker*, ¶ 51, the District Court inferred Phil's lack of remorse from him not apologizing.

Though the District Court also referred to Phil's "comments" in his interrogation with detectives, the court did not cite specific statements. (App. B at 87.) In fact, as defense counsel below noted, Phil in the interrogation blamed himself for the sexual encounter. (Resent. at 69–70.) And the District Court's written explanation of its "lack of remorse" inference tied the inference directly to Phil's exercise of rights. (App. C at 10.) Because the court inferred lack of remorse from the exercise of rights and did not point to affirmative evidence demonstrating lack of remorse, the District Court violated due process. *Rennaker*, ¶ 51.

E. The requested, authorized, efficient, and apt remedy is to restore the original sentence.

In an appeal of a criminal case, this Court may "reduce the punishment imposed by the trial court." Mont. Code Ann. § 46-20-703(4). This authority exists so this Court may (1) "do complete justice" and give the parties "a complete answer" on appeal and (2) reduce the "expense" and "compilation of records" that would be necessary with more proceedings. Criminal Law Commission, § 46-20-703 Comment. Phil requests this Court exercise its authority to reduce the punishment imposed by restoring the original sentence of forty years of imprisonment with twenty of those years suspended.

A prevailing party's choice of remedy may prevail so long as law and equity afford it. *See, e.g.*, *State v. Munoz*, 2001 MT 85, ¶¶ 33–34, 305 Mont. 139, 23 P.3d 922 (holding a defendant's choice of remedy controls after the State's plea agreement breach). Here, Phil's requested remedy would restore this case to status quo ante, leaving the parties in neither a better nor worse position than they were before the original appeal. With the increased portion of the sentence being a due process violation and illegal, the requested remedy addresses the illegality—no more and no less. Unlike in most cases, reducing this

sentence as proposed would not require this Court to weigh sentencing factors—the trial court already weighed the factors in deciding upon the initial sentence that is being restored. Finally, the requested remedy matches § 46-20-703(4)'s purposes of efficiently resolving this matter. This Court should therefore exercise its authority under § 46-20-703(4) to reduce Phil's sentence by restoring his original sentence.

If this Court declines to reduce the sentence as requested, Phil waives his due process claim. After what happened at his second sentencing hearing, another resentencing hearing would be more punishment than remedy to Phil. Thus, this Court may first decide, assuming a due process violation *arguendo*, whether the appropriate remedy would be to restore the original sentence. Should this Court decide against that remedy, Phil waives the due process claim, and the Court's decision on the remedy moots the necessity of analyzing the merits of the due process claim.

CONCLUSION

This Court should reverse the conviction. Alternatively, this Court should reduce the sentence by restoring the original sentence.

Respectfully submitted this 24th day of January, 2025.

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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 9,511, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-24-2025:

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