IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0528

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT DAN FRENCH,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth A. Best, Presiding

APPEARANCES:

TAMMY A. HINDERMAN
Division Administrator
JEFF N. WILSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
JWilson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA RACKI
County Attorney
ASHLEE KUMMER
Deputy County Attorney
121 Fourth Street North, Ste. 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY

I. The undisputed violation of § 3-15-405 when selecting French's jury panel amounted to substantial noncompliance and justified a hearing to develop the claim.

The State concedes Clerk Henry did nothing "to follow up with people who did not return their jury questionnaire" when French's jury was selected, in violation of § 3-15-405. (Appellee's Br. at 17–18.) The district court misunderstood this fact when it concluded the error did not apply to French.

The same judge presiding over French's case presided over *State v. Hinkle*, Cascade County Cause No. BDC-22-242, where it applied the substantial compliance standard and ordered a new jury panel because it "was undisputed that the panel … [was] not called in accordance with § 3-15-405[.]" (Doc. 239 at 5–7.) The *Hinkle* order did not mention the quantity of exclusions or the impact on an identifiable group caused by the "serious errors" empaneling jurors in Cascade County, but noted the clerk was not certifying non-responders and the sheriff was not personally serving any of them. (Doc. 239 at 2–7.) Based on the *Hinkle* order and the court's undisputed mistake that the violation of § 3-15-405 did not impact French's venire, this matter should be reversed for a

new trial, or at minimum, for a hearing where French may demonstrate the violation's impact on his venire.

A. Failing to serve any non-responders in French's venire undermined the principles of random selection and objective exclusions, even without proof it excluded an identifiable group.

After French filed his opening brief, this Court decided *State v. Hillious*, 2025 MT 53, ¶¶ 30–31, ___ Mont. ___, 565 P.3d 1218, where it denied a similar claim because Hillious did not demonstrate "the statutory violation affected the random selection of his jury or that juror exclusions were based on subjective criteria[,]" or that it excluded "an identifiable group[.]" *Hillious* departed from *State v. LaMere*, 2000 MT 45, ¶¶ 60–61, 298 Mont. 358, 2 P.3d 204, where this Court "expressly overruled" any requirement of "actual prejudice" to "sustain a challenge to the panel under the substantial compliance standard," which may be found "independent[] of the departure's consequences in an individual case." Under Montana and federal precedent, the principles of random selection and objective exclusions may be undermined through the manner or method of the statutory violation. The exclusion of an identifiable group has never been required. *But see Hillious*, ¶ 30.

The requirement that a defendant show actual prejudice or the wrongful exclusion of an identifiable group from his venire is inconsistent with precedent for all the reasons stated in the *Hillious* dissent. *Hillious*, ¶¶ 73–103 (Bidegaray, J., dissenting). It is contrary to Montana precedent, *LaMere*, federal law, and contravenes the plain language of § 3-15-405. "[I]f the legislative intent can be determined from the plain language of the statute, the plain language controls." *State v. Bloomer*, 2025 MT 93, ¶ 9, ___ Mont. ___, ___ P.3d ___. An "interpretation of a statute that gives effect to the Legislature's intention is always preferred over an interpretation that makes the statute void[.]" *In re Guardianship of L.R.T.S.*, 2023 MT 83, ¶ 36, 412 Mont. 157, 529 P.3d 854 (punctuation cleaned up). This Court is "not bound to follow a manifestly wrong decision—even one made in the context of statutory interpretation." *State v. Running Wolf*, 2020 MT 24, ¶ 22, 398 Mont. 403, 457 P.3d 218. The requirement in *Hillious* that a defendant show actual prejudice or the wrongful exclusion of an identifiable group was manifestly wrong and should be overruled.

1. Montana has never required proof of an identifiable group's exclusion or actual prejudice in order to find substantial noncompliance.

Though evidence of a skewed venire certainly helps demonstrate that a violation undermined the goals of random selection and objective exclusions by illuminating the effect of a jury selection violation, it is "the manner [or method] in which the jury was selected" that determines whether a violation was substantial or technical. *LaMere*, ¶ 59. Several Montana cases demonstrate this point.

a. *Landry*.

In *Landry*, jury selection involved three boxes of names; the law required panels be drawn from Box 1 until it was empty, then Box 2. *State v. Landry*, 29 Mont. 218, 222, 74 P. 418, 419 (1903). Box 3 could be used only under certain statutory circumstances. *Landry*, 29 Mont. at 222, 74 P. at 419. The court directed the clerk to draw names from Box 3 without those circumstances being triggered. *Landry*, 29 Mont. at 222–23, 74 P. at 419–20.

The use of Box 3 failed to "substantially comply with" "the constitutional requirement" of "uniform[ity]" in the law. *Landry*, 29 Mont. at 224, 74 P. at 420. The Court found substantial noncompliance

without any evidence or discussion of how selecting names from Box 3 instead of Box 1 resulted in the erroneous inclusion or exclusion of a particular group, a skewed panel, or any other form of prejudice. The erroneous use of Box 3—and nothing more—constituted substantial noncompliance.

b. *Groom*.

In *Groom*, the defendant challenged the Rosebud County sheriff's failure to summon nine prospective jurors due to the sheriff's uncertainty whether they were county residents. *State v. Groom*, 49 Mont. 354, 358, 141 P. 858, 859 (1914). The trial court denied the challenge because Groom failed to prove they were Rosebud residents. *Groom*, 49 Mont. at 356–58, 141 P. at 858–59.

This Court found reversible error in requiring Groom prove the sheriff's omission resulted in the exclusion of eligible jurors. *Groom*, 49 Mont. at 357, 359, 141 P. at 858–59. "[T]he presumption prevailed that every man whose name appeared [on the jury list] was competent for jury service, and defendant could rely upon the presumption[.]" *Groom*, 49 Mont. at 358, 141 P. at 859.

The Court did not discuss whether the wrongly excluded jurors were Rosebud residents or not. Since only Rosebud residents were eligible to serve as jurors, the wrongly excluded individuals did not represent a distinct group within the larger pool because they were either residents, thus eligible to serve, or non-residents, thus ineligible to serve. The Court did not identify any form of prejudice resulting from the error. It presumed prejudice based on the violation itself absent "countervailing proof[,]" and reversed because the sheriff failed to "substantial[ly] compl[y]" with the statutes. *Groom*, 49 Mont. at 358, 141 P. at 859.

c. *Diedtman.*

State v. Diedtman, 58 Mont. 13, 190 P. 117 (1920), is another example of substantial noncompliance without evidence of a skewed panel. During voir dire, the court advised the prosecutor it would grant a for-cause challenge of a juror if the prosecutor asked for it, "amount[ing] to the exercise of a peremptory challenge" the court did not possess. *Diedtman*, 58 Mont. at 17–18, 190 P. at 118.

> But the error was made more manifest by the manner of the court than by the ruling itself. The remark, considered in connection with the testimony given by the juror, must have led the remaining jurors to believe that the court entertained

> prejudice against any venireman who manifested a friendly disposition towards the defendant, even though no such prejudice was entertained in fact.

Diedtman, 58 Mont. at 19, 190 P. at 119. The *manner* of the court's ruling was the error, not the ruling itself. The court's statement suggested it would exclude jurors amiable to the defense even though it did not actually do so.

There was no evidence any venireman claimed to be defense-friendly in order to be excused, or that any were excused for being defense-friendly. Nor was there any evidence of veniremen claiming to be prosecution-friendly. In other words, there was no evidence the violation caused Diedtman prejudice, yet this Court reversed based on a "substantial departure from the statutory method" of selecting a jury and exercising challenges. *Diedtman*, 58 Mont. at 18, 190 P. at 118.

d. *Dvorak*.

In *Dvorak*, this Court reversed where the statutory violations were failing to shake the box before drawing names, removal of paper slips rather than capsules, and drawing names outside the judge's presence. *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 169–70, 639 P.2d 62, 63–64 (1981).

This Court found substantial noncompliance where the process deviated from the relevant statutes without any evidence of prejudice. *Dvorak*, 196 Mont. at 170, 639 P.2d at 64. There was no evidence the clerk favored names on paper, or by failing to use only capsules that the selection was not random. Nor was there any evidence that failing to shake the box resulted in the exclusion or selection of a particular group. The Court made no findings that the clerk wrongly excluded any number of jurors, nor that the method impacted an identifiable cross-section of the community. "The fact that no actual prejudice ha[d] been shown [wa]s irrelevant." *Dvorak*, 196 Mont. at 171–72, 639 P.2d at 65; *Hillious*, ¶ 80 (Bidegaray, J., dissenting).

e. *Tribby*.

In *Tribby v. Northwestern Bank of Great Falls*, 217 Mont. 196, 704 P.2d 409 (1985), substantial noncompliance occurred when the clerk "examined the prospective jurors using questions" from one party, and excused some "for cause without notice to opposing counsel or a ruling by the court." *Tribby*, 217 Mont. at 205, 704 P.2d at 415. This violated two statutes requiring examinations and excusals receive court approval and amounted to dismissing jurors for cause without opposing

counsel present. *Tribby*, 217 Mont. at 205–06, 704 P.2d at 415. This Court reversed under the substantial compliance standard, even though "the class of people excluded d[id] not constitute a cognizable group of constitutional dimensions." *Tribby*, 217 Mont. at 206–07, 704 P.2d at 415–16.

These cases demonstrate that this Court has never, prior to *Hillious*, required a defendant show a distinct group was wrongly excluded by the violation, or another form of prejudice. *Dvorak* called this "irrelevant." Substantial noncompliance may occur through the manner or method in which jury selection strayed from the statutes.

2. Substantial noncompliance under federal law does not require proof of an identifiable group's exclusion or actual prejudice.

As stated in *Hillious*, ¶ 18, this Court's substantial compliance standard "has frequently been guided by federal law[.]" "In order to establish a violation under the [Jury Selection and Service Act of 1968 ("the Act")], a defendant must show that the government substantially failed to comply with *the methods* set forth by statute[.]" *LaMere*, ¶ 56 (citing U.S.C. § 1867(a)(1994) (emphasis added). "A litigant need not show prejudice to establish a substantial failure to comply with the Act"

because, "[a] departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequences in a particular case." *U.S. v. Kennedy*, 548 F.2d 608, 612 (5th Cir. 1977), *overruled on other grounds*, *U.S. v. Singleterry*, 683 F.2d 122 (5th Cir. 1982); *see also LaMere*, ¶ 60. Federal law developed under the Act focuses on the government's adherence to its statutory methods but also considers a large number of erroneous exclusions to contravene the goals of randomness and objectivity—despite no proof that the violation impacted an identifiable group. *See U.S. v. Bearden*, 659 F.2d 590, 600–08 (5th Cir. 1981); *see also Kennedy*, 548 F.2d at 612; *U.S v. Davis*, 546 F.2d 583, 589 (5th Cir. 1977) (concern is for "the procedures themselves" but, if the alleged violations were hidden from the public, concern would switch to their effect on the random nature and objectivity of the process).

In *Bearden*, the Fifth Circuit determined substantial noncompliance for wrongful exclusions has "both quantitative and qualitative aspects." *Bearden*, 659 F.2d at 607. "Quantitatively, a substantial violation generally will not be found if the number of errors

is small." *Bearden*, 659 F.2d at 607. Error rates of 5.6% or less were deemed technical, but a 40.3% error rate was substantial. *Bearden*, 659 F.2d at 607; *see also U.S. v. Hill*, 480 F. Supp. 1223, 1226–27 (S.D. Fla. 1979) (wrongly excusing 31 of 77 jurors deemed substantial without any showing it impacted a cognizable group). "Qualitatively," the question is whether the violation frustrated the "principle of exclusions on the basis of objective criteria only." *Bearden*, 659 F.2d at 607. Using "extrastatutory, subjective criteria in the selection process in contravention of this principle may require a finding of a substantial violation even though the number of errors is relatively small." *Bearden*, 659 F.2d at 607.

In *Kennedy*, the Fifth Circuit found substantial noncompliance when the clerk filled a shortage in the venire with three volunteers who were randomly selected for a prior trial term, "which deviated from express statutory procedures" and violated the "random selection" requirement. *Kennedy*, 548 F.2d at 610; *Bearden*, 659 F.2d at 603. There was "no question the practices resulted in the nonrandom selection of jurors because the jury clerk" gave these jurors "complete discretion on whether to serve." *Bearden*, 659 F.2d at 603. "[A]llowing

people to decide whether they wish to [serve] is quite the opposite of randomly selecting" jurors. *Kennedy*, 548 F.2d at 611. "[T]he introduction of personal predilections of prospective jurors affects the random nature of the selection process[.]" *Kennedy*, 548 F.2d at 612. "Surely a [court] would be in substantial violation of the [selection] statute[s] if it selected all its jurors by randomly drawing names … and allow[ed] those selected to opt in or out at will." *Kennedy*, 548 F.2d at 612.

"We need not speculate as to what sort of biases will be reflected in a jury chosen on the basis of its members' willingness to depart from their daily business and serve as jurors." *Kennedy*, 548 F.2d at 612. "It is enough to recognize that [this] substantial variable … confound[s] the selection process." *Kennedy*, 548 F.2d at 612. "[W]hen a statutory violation directly affects the random nature of the selection process, there is no need to show that the violation tended to exclude some cognizable group[.]" *Kennedy*, 548 F.2d at 612.

Contrary to *Hillious*, federal law does not require proof of prejudice in order to find substantial noncompliance. The nature of the erroneous method may be sufficient. There is no need to speculate about

biases or show the violation excluded an identifiable group. Because the method used to procure French's venire significantly strayed from the statutory method, this Court should find substantial noncompliance despite no proof it skewed French's jury pool.

Henry violated the principle of objective exclusions. Her method was subjective. No law or court order allowed her to exclude jurors because of COVID-19. *Cf. State v. Hesse*, 2022 MT 212, ¶¶ 26–30, 410 Mont. 373, 519 P.3d 462 (finding no error when, under the direction of the court, the clerk excluded jurors for pandemic-related reasons). As a result, *no one* was personally served by the sheriff. This was not an instance of Henry forgetting to certify a handful of non-responders, or the sheriff unable to serve the entire list after hours of effort.

Henry's faulty method subjectively excluded about one third of the panel for *State v. Hinkle*. In *State v. Brown*, her arbitrary exclusion of the non-responders resulted in such a lack of responses that she had to combine two panels to hold a jury trial. (Doc. 239 at 9.) She used the same faulty method for French's venire. Henry's violation of § 3-15-405 in these cases shows how her method undermined the principle of objective exclusions when she selected French's jury pool.

"Providing prospective jurors with complete discretion whether or not to serve[,]" as Henry did by failing to certify the non-responders for personal service, "negate[d] the statutory mandate of random selection." *Kennedy*, 548 F.2d at 612. The *Kennedy* court called this the "opposite" of random selection. Henry allowed anyone who failed to respond to their jury notice to exercise their "personal predilections" and opt out, which violated the random selection principle.

In sum, the failure to certify and serve the non-responders violated both the principle of random selection and of objective exclusions. French should receive a new trial as a result. Alternatively, French should at least receive a hearing. The court abused its discretion when it failed to recognize that the violation applied to French's jury pool—which the State conceded—and it denied him a hearing. The lack of a hearing prejudiced French because it left him unable to provide evidence showing the impact of the violation while the State hindered his ability to gather evidence. (Appellant's Br at 22 n 4).

B. French's claim was neither waived nor untimely because he acted diligently.

The State agrees courts may grant a new trial "based on information learned through an untimely motion if the interest of

justice requires" under § 46-16-702(1) and *Morse*. (Appellee's Br. at 23.) This was the basis for French's request.

The State argues French acted untimely and therefore waived any claim to challenge the jury panel by filing his motion for new trial after the 30-day deadline under § 46-16-702(2), and by failing to object five days prior to trial under § 46-16-112. The underlying issue regarding the State's arguments, the district court's rationale, and related to this Court's discussion in *Hillious*, ¶¶ 35–42, is that French lacked the knowledge, or means of knowledge, to discover the error sooner through no lack of diligence on his part.

French had "a right to rely on the judge and clerk to follow their statutory duties" and had no reason to know § 3-15-405 was being violated until he learned otherwise. *Solberg v. County of Yellowstone*, 203 Mont. 79, 84, 659 P.2d 290, 292 (1983); Mont. Code Ann. § 26-1-602(15). French's reliance on the "means of knowledge" rule from civil law is not "misplaced." *See Hillious*, ¶ 38. The federal deadline for criminal defendants to challenge their jury panel contains a similar rule, requiring challenges "within seven days *after the defendant discovered or could have discovered*, …" the violation. *Bearden*, 659 F.2d

at 595 (emphasis added). *Hillious* provided no reason why the rule is appropriate in civil matters but not criminal proceedings. The logic of the rule is sound and should apply to criminal matters where this Court is "particularly sensitive to the fair trial rights of defendants." *See Suzor v. International Paper Company*, 2016 MT 344, ¶ 29, 386 Mont. 54, 386 P.3d 584.

Additionally, the record here reveals how the Cascade County defense attorney in *State v. Brown* discovered the issue prior to trial in his case. *See Hillious*, ¶ 38 (stating defense counsel in Cascade County raised the issue pretrial, thus there was means for Hillious to do so). The attorney discovered the problem after he "received an email from the clerk's office" advising that the clerk "combined two panels due to lack of response to jury summons." (Doc. 239 at 9, 13.) The attorney discovered the issue pretrial because the clerk reached out to inform him of a problem with his client's jury panel. This led to the investigation and confirmation that the clerk and sheriff violated § 3-15-405, which resulted in so many non-responses that the clerk needed to combine two venires in order to have enough jurors for the upcoming trial. (Doc. 239 at 9, 13.)

The clerk's email to counsel in *Brown* marked the earliest point at which Cascade County defendants could discover the error and no longer presume that jury officials followed their statutory duties. French filed his motion for new trial within 30 days of the clerk's email and 18 days after the clerk testified about her process. The motion was timely under the circumstances.

Contrary to the State's argument, § 46-16-112 would not be rendered "meaningless" if the court considered jury panel challenges under § 46-16-702(1) and *Morse*. (Appellee's Br. at 25.) The good cause requirement in § 46-16-112 ensures that only defendants with "good cause" for an otherwise untimely jury panel challenge may withstand the regular deadline. The good cause exception would be rendered meaningless if courts refused to consider it when evaluating challenges under § 46-16-112.

The State cites *Hillious*, ¶ 39, and several cases from other jurisdictions to argue for strictly interpreting the time bar for jury selection challenges and "ensure the orderly administration of justice." (Appellee's Br. at 25.) These cases offer nothing significant for evaluating timeliness under Montana law. However, some show the

willingness of courts to review jury panel challenges on their merits, even if untimely raised.

Coleman v. Thompson, 501 U.S. 722, 746 (1991), discussed why federal courts should honor state timelines when evaluating postconviction claims based on state convictions. It is irrelevant here. *Davis v. U.S.*, 411 U.S. 233, 238–41 (1973), discussed time bars under federal Rule 12(b)(2) in relation to federal habeas claims. It has little use regarding Montana law. Of note however, the district court in *Davis* held a hearing to evaluate whether good cause existed for an otherwise untimely challenge before determining there was not because the facts concerning jury selection "were notorious and available" to the defendant pretrial. *Davis*, 411 U.S. at 238. French had no reason to suspect problems with his jury pool prior to trial.

Bearden, 659 F.2d at 595–600, discussed at length whether the defendants exercised diligence in relation to the "discovered or could have been discovered" requirement under federal law for postconviction challenges to jury selection errors. *Bearden* shows that the orderly administration of justice includes a meaningful opportunity to establish the claim, including a hearing, from which diligence can be evaluated.

French received no such opportunity after the district court incorrectly concluded the violations did not even apply to his jury.

State v. Dangcil, 256 A.3d 1016, 1027 (N.J. 2021), simply stated that New Jersey law required a "showing of actual prejudice" to overcome the regular time limitations for jury panel challenges, "[o]therwise, time limitation are strictly enforced[.]" *Dangcil* reveals that New Jersey has a good cause exception for venire challenges but requires a showing of prejudice. Montana has no such requirement.

Kirtdoll v. State, 496 P.2d 1396, 1397 (Kan. 1972), involved a jury panel challenge first raised on appeal of Kirtdoll's postconviction relief petition without it ever being raised prior. French raised his claim far earlier, at the trial court level.

People v. Gratz, 192 N.W.2d 304, 305 (Mich. Ct. App. 1971), addressed a pretrial jury panel challenge. The *Gratz* court made no holding regarding timeliness. *See Hillious*, ¶ 39. However, it did hold that when a defendant establishes a statutory jury selection violation, the defendant "does not have the additional burden of showing that he will be or has thereby been harmed." *Gratz*, 192 N.W.2d at 309. "[I]t is also important that officials charged with the selection of jurors

understand that if they fail to proceed in accordance with the statute … they will be made to do it over again." *Gratz*, 192 N.W.2d at 307. Michigan does not require proof of prejudice for jury selection challenges.

People v. Dixon, 552 N.W.2d 663, 667 (Mich. Ct. App. 1996), did not involve merely a waiver of the defendant's jury panel challenge due to it being untimely. *See Hillious*, ¶ 39. Dixon forfeited consideration of the issue on appeal after failing to create a factual record supporting his claim when the trial court offered to summon the jury clerk to testify about the selection process. *Dixon*, 552 N.W.2d at 667. This additional detail shows that the Michigan court was willing to hold a hearing and allow Dixon to develop a record in support of his claim even though it was otherwise untimely. French never received such an opportunity.

In sum, none of the collective cases cited by the State or in *Hillious*, ¶ 39, to support strict interpretations of timeliness for jury panel challenges, are binding on this Court. Nor do they offer anything notable regarding timeliness under Montana law and the circumstances of French's case. The record shows how this issue first appeared in

Cascade County and that French did not lack diligence in discovering or raising the issue. His claim should be considered timely.

II. The evidence identified by the State does not corroborate K.K.'s prior inconsistent statements.

The State's argument that sufficient corroborating evidence exists to sustain French's conviction contains four fatal errors. The State ignores the definition of corroborative evidence and fails to distinguish this matter from *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981). The State mistakenly relies on K.K.'s prior inconsistent statements to corroborate themselves. And the State makes a shallow effort to suggest the prior inconsistent statements are consistent with each other, making them reliable and therefore corroborative, which is contrary to *State v. Giant*, 2001 MT 245, ¶¶ 30–34, 307 Mont. 74, 37 P.3d 49.

A. Corroboration requires independent evidence to prove the same point as the prior inconsistent statements.

"Corroborative evidence" is "additional evidence of a different character to the *same point*." Mont. Code Ann. § 26-1-102(3) (emphasis added); *State v. Dineen*, 2020 MT 193, ¶ 12, 400 Mont. 461, 469 P.3d 122. The "point" requiring corroboration here was K.K.'s prior

inconsistent statements claiming French penetrated her sexually. The State concedes that no one saw French penetrate K.K. (Appellee's Br. at 15.) At trial, the State failed to produce any other evidence that could corroborate K.K.'s prior statements. It had no video footage or DNA. The State cannot point to any evidence of K.K.'s demeanor at the time of the incident, when she made the statements, or while on the stand that showed French penetrated her. Nor can it point to any physical sign, injury, or an incriminating statement from French. None of the corroborating evidence found in the cases cited by the State is present here. (Appellee's Br. at 11–13.)

Instead, the State points to K.K.'s parents' testimony that she slept at French's house. (Appellee's Br. at 15–16.) Proof that K.K. stayed at French's house falls woefully short of corroborating that French committed any sexual, criminal, or offensive act upon K.K. while she was there. That leap in logic is too big.

White Water shows why the evidence that K.K. stayed at French's house is inadequate for corroboration. In *White Water*, the State needed to corroborate White Water's former stepdaughter's prior inconsistent statement alleging White Water put his hands down the back of her

pants, moved his hand toward the front, and then digitally penetrated her vagina. *White Water*, 194 Mont. at 88, 634 P.2d at 638. The girl's mother testified that White Water stayed at the house while the girl was home. She testified that he was seen next to the girl. She even testified that White Water's hand was down the back of the girl's pants. *White Water*, 194 Mont. at 86, 634 P.2d at 637.

But the mother testified she did *not* see White Water's hand down the *front* of the girl's pants. *White Water*, 194 Mont. at 88, 634 P.2d at 638. This Court affirmed the dismissal of the charge because there was no independent evidence corroborating the girl's prior inconsistent statement regarding penetration. *White Water*, 194 Mont. at 90, 634 P.2d at 639.

If the mother's testimony in *White Water* was insufficient to corroborate penetration, then under no scenario could this Court conclude that sufficient corroborating evidence of penetration existed from the testimony that K.K. slept at French's house. The State fails to distinguish *White Water* or explain why its holding is unsound.

B. One prior inconsistent statement cannot corroborate another.

The State's reliance on K.K.'s prior inconsistent statements to corroborate themselves is in error. This Court has previously held that corroboration is sufficient as "long as each element of the offense finds support in some *independent*, reliable evidence of guilt *besides the prior statement*[.]" *State v. Torres*, 2013 MT 101, ¶ 27, 369 Mont. 516, 299 P.3d 804. (emphasis added).

The State argues, "K.K.'s parents corroborated … that [K.K.] reported French's oral penetration of her to her dad the day she went home[,]" and that "K.K.'s later statements corroborated her initial disclosure to her dad." (Appellee's Br. at 15.) But all of the statements K.K. made to her parents and during the forensic interviews are the prior inconsistent statements admitted at trial to impeach K.K. after she failed to testify to any unlawful act by French. (Appellee's Br. at 7.) K.K.'s initial disclosure to her father that French "put his front butt in [her] mouth[,]" was one of the prior inconsistent statements admitted to impeach her. "K.K.'s later statements" to her mother and during the forensic interviews were too. The State admitted all of these prior inconsistent statements to impeach K.K. Thus, the State failed to

provide any "independent" corroborating evidence "besides the prior statement[s.]" *Torres*, ¶ 27.

C. This Court does not analyze the reliability of prior inconsistent statements to determine corroboration.

The State asserts that when K.K.'s "consistent" statements are "viewed as a whole, there is sufficient evidence" to affirm the conviction. (Appellee's Br. at 16.) The statements are *not* consistent, and therefore are not reliable, as French already explained. (Appellant's Br. at 40.) Moreover, in *Giant* this Court "decline[d] to continue down the path of analyzing the reliability of each and every type of prior inconsistent statement as many states have done." *Giant*, ¶ 34. Instead, this Court established a "bright-line rule … that require[s] prior inconsistent statements admitted as substantive evidence of guilt be corroborated in order to sustain a conviction." *Giant*, ¶ 34. Therefore, this Court cannot assess K.K.'s prior inconsistent statements for reliability nor find corroboration within them. (*See* Appellant's Br. at 40.)

The State fails to show K.K.'s prior inconsistent statements were corroborated by other evidence. The conviction related to K.K. must be reversed.

CONCLUSION

Based on the arguments above and in his opening brief, French requests this Court remand in accordance with the remedy requested in his opening brief. (Appellant's Br. at 41.)

Respectfully submitted this 21st day of May, 2025.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Jeff Wilson
JEFF N. WILSON
Assistant Appellate Defender

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 4,996, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeff Wilson
Jeff N. Wilson

CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-21-2025:

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Mardell Lynn Ployhar (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Electronically signed by Kat J. Hahm on behalf of Jeff N. Wilson
Dated: 05-21-2025