IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 22-84

STATE OF MONTANA,

Plaintiff and Appellee,

-v-

BILLY LEE HENDERSON III,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

ON APPEAL FROM MONTANA'S FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY, THE HONORABLE JOHN W. LARSON PRESIDING

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STATEMENT OF THE ISSUES

The district court erred in denying Billy Lee Henderson's (hereinafter "Henderson's") petition for postconviction relief. The petition relied exclusively on "new evidence" in the form of new testimony, including recantations, from the alleged victim (hereinafter "C.S."). Most reliable was C.S's sworn testimony, at the postconviction evidentiary hearing. The district court's denial was based on two reasons, both of which demonstrated "clearly erroneous" error. One, the district court's denial hinged, in part, on assuming the role of "finder of fact" that C.S. lacked credibility. Second, to the extent the district court was willing to give any credence to C.S.'s the post-conviction statements, including testimony, the court found such new statements, including the recantations, to be "cumulative." Henderson avers that the court could neither legally conclude C.S. lacked veracity, and reject his petition on that basis, nor could the court reasonably conclude, as a matter of fact, that the "new evidence" presented, in support of the petition, was fatally cumulative.

SUMMARY OF THE ARGUMENT

The District Court's denial of defendant/appellant's postconviction petition was clearly erroneous. Substantial evidence of postconviction recantations, in multiple forms, including recorded arguments (fighting) over the phone between Henderson and C.S., and sworn testimony from C.S (postconviction evidentiary hearing) clearly constitute "new evidence" on the single count of conviction, challenged by Henderson. In essence, because C.S. had equivocated, pre-trial, about whether the Sexual Intercourse Without Consent (hereinafter "SIWOC")

charge was valid, the district court regarded her postconviction recantations as somehow cumulative to prior recantations, and as such "not new evidence."

A finding of lack of veracity of the alleged victim (C.S.), and "absence of new evidence" by Henderson appear to be the only grounds upon which the court denied the petition. In effect, Henderson's case was rejected by the lower court precisely for the reason that the SIWOC case against him was so flimsy in the first place – C.S. never fully committed (pretrial) to whether she was the victim of SIWOC, by Henderson. Apparently, in the eyes of the district court, any degree of postconviction recantation by C.S. was immaterial, as such had already occurred (on some level), before Henderson was convicted. If she ever denied "being raped" before the trial (she did), any denials, postconviction, no matter how repeated, detailed, strenuous, or sincere, were resultingly (for the lower court) entirely immaterial, and to no degree may constitute "new evidence." The Court cited the (now) 4-part *Clark* test, and that the "Clark Court held that 'the district court should evaluate the recantation for materiality and its tendency to be cumulative or impeaching . . . .Keeping in mind the aspects of recantations that make them inherently suspect, determinations of weight and credibility are left to the trial judge.'" (Appellant's Exhibit A: Opinion an Order, p. 5, citing *Clark*, ¶ 38) In effect, the Court ignored any precedent (*Berry*) which would have required him to remain neutral as to C.S.'s veracity, but then concedes her veracity only when he can categorize her statements as "cumulative."

STATEMENT OF FACTS

As a preliminary matter, most of the "facts" relevant to the argument will be derived directly from court transcripts, from Henderson's trial, and subsequent postconviction hearing. Therefore, to the extent that these facts comprise the

primary substance of the brief, they will be interwoven into the ARGUMENT section of the brief. So this statement of facts is primarily a procedural history.

Henderson was charged, under DC-18-276 (Missoula County) with 28 counts, including multiple crimes of violence, criminal mischief, violating an order of protection, tampering, etc., as well as aggravated sexual intercourse without consent. The crimes were all allegedly committed "on or about and between the 17th day of April, 2018, and the 5th day of October, 2018." (Second Amended Information). Jury trial commenced November 14, 2018. Henderson was convicted of 19 counts, including 14 felonies. (Appellant's Exhibit B: Judgment, DC-18-276) For the conviction being challenged (SIWOC), Henderson received a 75-year sentence, with none suspended. (Id.) This appeal (of denial of postconviction relief), specifically seeks reversal ONLY of the conviction for Aggravated Sexual Intercourse Without Consent, in violation of Mont. Code Ann. § 45-5-503. Henderson avers that the sum total of trial evidence, in support of the SIWOC conviction includes only:

1) Evidence of "ripped clothes" prior to sexual intercourse;
2) *Implied* absence of consent, based on evidence of violence, many hours prior to the sexual intercourse, and;
3) The following statements, made by C.S., at trial:

Q: "Did you verbalize that you did not want to have sexual intercourse at that point in time?"

A: "Yeah, I told him no, I didn't want to do this right now. That – "

Q: "How did he respond to that?"

A: "He didn't care he just said, I don't care, more or less. He was going to do what he wanted anyways."

There is no contest regarding whether the "intercourse" element of the SIWOC charge occurred. However, C.S. testified (trial) that she did not believe what occurred was "rape," because she and Henderson were "in a relationship." The first post-trial evidence, presented via postconviction petition, pertains to recorded statements (between C.S. and Henderson – at MSP) during which she recants her trial statement (during a heated argument over the phone) that she told Henderson "no" prior to sexual intercourse. Multiple additional (recorded) phone conversations underscore this recantation. C.S. subsequently contacted the office of current counsel, and gave an additional (recorded) recantation, on January 16, 2020. At the postconviction hearing (August 25, 2021), C.S. testified to (literally) dozens of details about the facts preceding, and during the sex (at issue), and supporting the fact that while sexual intercourse occurred, it was actually consensual. Among C.S.'s many statements, at the hearing, was the following:

> ***"I was going to get into the shower, so I had taken my clothes off to get into the shower. And that's when he started talking to me again and saying I looked good. And I went back over to him and gave him a hug, and we started kissing and stuff. And it kind of led to the floor. And then once we were on the floor, he kind of like was hinting that he wanted me to perform oral sex. He was kind of pushing my head down. And that's when I was saying no. That's the only time I said no. I said, no, I don't want to do that because you don't deserve it right now. I'm mad at you still. I'm not going to do that right now. And then he asked, well, is it okay if I do it to you instead so you won't be mad at me anymore? And I said sure. And that's when he started performing oral sex on me. And then afterwards he was on top first when we were having sexual intercourse. And then that was only for about ten minutes, and then I ended up being on top at the end and for the majority of the sexual intercourse."***

None of these (above-noted) statements, which constitute a mere fraction of the "new evidence" presented at the postconviction hearing alone, were remotely even

hinted upon, during trial. The only "detail" pertaining to the sex, as brought out during trial, was that C.S. said "no" at some point, leading up to the sex. But exactly when she said "no," and precisely what she said "no" "to," were only elucidated at the postconviction hearing (not trial). Regardless, the district court denied the petition, essentially on the grounds that C.S. lacked veracity, and that her post-trial statements (including those from the postconviction hearing) were fatally "cumulative" to what was presented at trial.

STANDARDS OF REVIEW

This Court reviews a district court's denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct. *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501. This Court reviews discretionary rulings in postconviction relief proceedings, including (but not limited to) rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *Hamilton v. State*, 2010 MT 25, ¶ 7, 355 Mont. 133, 226 P.3d 588.

CURRENT LEGAL STANDARDS APPLYING TO POSTCONVICTION CLAIMS

The petition "must be based on more than mere conclusory allegations. It must identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.'" *Kelly v. State*, 2013 MT 21, ¶ 9, 368 Mont. 309, 300 P.3d 120 (quoting *Ellenburg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 473).

¶12 A postconviction proceeding "is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside or correcting a sentence." *State v. Boucher*, 2002 MT 114, ¶ 17, 309 Mont. 514, 48 P.3d 21.

Pursuant to Mont. Code Ann. § 46-21-102. When a petition may be filed:

(1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter:
(a) when the time for appeal to the Montana supreme court expires;
(b) if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires; or
(c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.
(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

ARGUMENT

I. THE DISTRICT COURT EXPLICITY MADE A "FACTUAL DETERMINATION AS TO THE VERACITY OF THE RECANTATION" OF C.S., AS PART OF ITS DENIAL OF HENDERSON'S PETITION, AND DOING SO CONTRIBUTED TO ITS CLEARLY ERREOUS OPINION AND ORDER

State v. Marble effectively returned the "standard for postconviction" for petitions based on new evidence, back to the statutory elements under Mont. Code Ann. § 46-21-102. *Marble v. State*, 2015 MT 242, ¶ 31, 380 Mont. 366, 355 P.3d 742. As a consequence, "a district court may seek guidance from our case law addressing various forms of newly discovered evidence, such as our precedent with respect to recantations." *Id.*, ¶ 36. On the surface, the repudiation of the 5th prong of the *Clark* test (¶ 31), in pure favor of statutory construction, may have "simplified" the postconviction rules on one hand, but has raised new questions,

pertaining to fundamental fairness, on the other. (*Marble*, ¶ 31, overruling, in part, *State v. Clark*, 2005 MT 330, 330 Mont. 8, 125 P.3d 1099)

> As pointed out in Justice McKinnon's dissent from *Marble* (2015),
>
> "Fifth, by announcing a new, lesser burden for obtaining relief, we implicate serious concerns of fairness and equity regarding our resolution of prior claims, particularly those of Barry Beach. (*Marble*, ¶ 50). Aside from the Court's failure to state what that "quantum of proof" is, it is my opinion that a higher burden of proof and a clear standard for evaluating post-judgment claims, whether characterized as "rigid" or not, are necessary to protect the finality of judgments and to ensure consistent and fair evaluation of claims." (*Id.*, ¶ 51)

Study of this Court's review of petitioners' postconviction petitions, since *Marble*, leads the current petitioner (Henderson) to the conclusion that this Court has rendered little in the way of substantive opinion, and therefore little additional context regarding the "new standards for relief for postconviction petitions in Montana," (post *Marble*). Since that case, nearly every petition, appealed to this Court, has been rejected as untimely, or otherwise procedurally barred. Most every other appealed PCR claim (since *Marble*) has pertained to ineffective assistance of counsel claims, and not "new evidence," as from *Mable*, and in this case. In effect, since *Marble*, it appears that this Court has not been in a position of need to shore up some of the ambiguities, leftover from *Marble*, and resulting largely from the elimination of prong 5 of the *Clark* test (*Marble*, ¶ 31). What's important is that Henderson now avers that certain ambiguities in the new standard (whatever it is) remain unresolved, and this petition must therefore make some argument as to what the "new standard" actually is / should be, and how the standard must lead this Court to conclude error, on the part of the lower court.

One key area of ambiguity (as alleged here) remains the question: at what point does the lower court become the "finder of fact" in evaluating the efficacy of a postconviction petition, based on "new evidence," and in particular, victim recantation / clarification ?

> To summarize, as a district court applies the restated *Berry* test to a motion for a new trial based on a recantation by a prosecution witness, ***the district court is not to make factual determinations as to the veracity of the recantation. Rather, the district court should evaluate the recantation for materiality and its tendency to be cumulative or impeaching, and should determine whether there is a reasonable probability that a new trial would produce a different outcome.*** Keeping in mind the aspects of recantations that make them inherently suspect, determinations of weight and credibility are left to the trial judge. Then, if the *Berry* elements are properly met, a new trial is warranted. If not, the prior judgment stands. *Clark*, ¶ 38.

The essence of the ambiguity is rooted in the natural tension created, by instructing district courts (in cases such as these) that they are to "keep in mind the aspects of recantations that make them inherently suspect," that "weight and credibility are left to the trial judge," but also that "the district court is not to make factual determinations as to the veracity of the recantation." *Marble* effectively eliminated the "*Clark* test" (by eliminating prong "5") but *Clark* otherwise remains valid law. (*Marble*, ¶ 36) Even in this case, the district court cited to *Clark*, as the court's authority, in its Opinion. Still, *Marble*'s abrogation of *Clark* (in part) meant the elimination of the requirement that the lower court assess "whether a new trial has a reasonable probability of resulting in a different outcome." (*Marble*, ¶ 31) In so doing, the Court is no longer required to consider what a jury might do (in light of the recantation evidence) but only to assess (MCA 46-21-102) whether the evidence "*if proved and viewed in light of the evidence as a whole*

would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted."

Henderson avers that one apparently unintended consequence of going to the "statutory test" (above) was to tacitly encourage the lower court to pretextually focus on "weight and credibility of evidence" as an excuse to ignore its directive "not to make factual determinations as to the veracity of the recantation." When the entire "weight" of "new evidence" pertains to a victim recantation, and the only person whose credibility is at issue (in a postconviction hearing) is the victim herself, a lower court will be more tempted to (and in this case, has) *de facto*, "factually determine absence of victim recantation veracity," and justify doing so on "weight and credibility grounds." And because the issue of "the reasonable probability of a different outcome at trial" is no longer a consideration, courts may reflexively rule, based on their existing impressions (from trial) of both the petitioner, and the victim. As the court need no longer contemplate what 12 objective jurors ("a blank slate") might do with the "new evidence," the significance of the new evidence (victim recantation) is likely diminished – when filtered through the mind of the same judge who has already witnessed a jury convict the petitioner. Judges in such positions, under the new "purely statutory test," will be more inclined (than before) to deny postconviction petitions, based on their own (perhaps understandable) prejudice.

Berry, and the modified *Berry* Test (from *Clark*) represented a long-standing attempt to create a test to minimize subjective determinations by the lower courts, in postconviction proceedings based on new evidence. ((see *Berry v. State*, (Ga. 1851) 10 Ga. 511)) These cases still remain good law, but one of the two central issues to this case – the permissibility of judicial determinations re: the veracity of a recanting victim – became less clear, as the result of *Marble*.

Henderson avers that diminishing the value (and applicability) of such long-standing tests, attempting to create reasonable safeguards against maximally subjective determinations, cannot be what this Court intended, by its modifications, from *Marble* (¶ 30-31) As Justice McKinnon pointed out, in her dissent in *Marble*:

> We state we are announcing a new "statutory test" and take comfort in the fact that we are only stating the rule as it has been written by the legislature. However, we have provided no guidance to the district courts and have again changed the rules in a complicated area of jurisprudence, despite attempts made by the *Beach II* concurrence to clarify those rules. We have failed to recognize consistent and well-reasoned Montana case law recognizing distinctions in claims, burdens of proof, and constitutional error regarding post-judgment claims of newly discovered evidence. We arguably have created issues concerning fairness and equity between those claims previously decided under the more "rigid" test and those now to be decided under a test "suited to the quantum of proof required of a postconviction relief petitioner"—whatever that means. *Marble*, ¶ 57.

On page 5 of the district court's Opinion and Order, the court spells out the standard from *Clark*; "the district court should evaluate the recantation for materiality and its tendency to be cumulative or impeaching . . . Keeping in mind the aspects of recantations that make them inherently suspect, determinations of weigh and credibility are left to the trial judge. *Clark*, ¶ 38." The district court conspicuously omitted, from its recitation, from *Clark*, the directive (from that case) in the sentence immediately preceding its chosen language, that "the district court is not to make factual determinations as to the veracity of the recantation." This maxim has been central to postconviction law, since at least *Berry* (1851), because of the obvious, inherent, and recognized dilemma – that any court may otherwise reject the testimony of a recanting witness, based on the fact that they are, by definition, changing their story. Requiring a district court to contemplate

what a new jury might do with "new information," aided in the goal of encouraging judges to limit their existing prejudices when ruling on postconviction petitions.

In this case, the district court cherry-picked the portion of *Clark* that provided the court with the most latitude (in denying Henderson's petition), while ignoring the part that constrains the court's discretion. In spite of the 170 + year old *Berry* rule, *directing "the district court not* to make factual determinations as to the veracity of the recantation," the district court concluded that "given the history of victim tampering and other inconsistent victim testimony in the case, the present recantation is afforded minimal additional weight or credibility. Accordingly, the Court finds that the recantation is insufficient to grant the relief sought." (Opinion and Order, p. 7, l. 1-4) Quite literally, not only did the court "make factual determinations as to the veracity of the recantation," but rendered such factual determination one of its two key reasons for denial of Henderson's petition. What makes the petition's denial "clearly erroneous" is not just the brazen disregard for the rule (from *Berry / Clark*) but doing so in the face of the breadth and depth of the recantation, in comparison with the minimal evidence from trial (supporting the conviction in question). The "evidence" underscoring the disparity is forthcoming, in the next section.

Ultimately, the point is that while one unintended consequence of *Marble* may have been to tempt judges to approach postconviction petitions of this nature with reduced objectivity, *Marble* did not abrogate the portion of *Clark* that reinforced the longstanding rule, forbidding the district court to deny petitions based on their existing / prejudiced perception of a victim's veracity. Doing so highlighted a clearly erroneous error. Therefore, in effect, the only issue remaining is whether or not the lower court made a "clearly erroneous judgment," in finding

that the recantation testimony of C.S. was "cumulative" to a degree that justified dismissing Henderson's postconviction petition.

II. IN THE CASE AT BAR, C.S.'S VOLUMINOUS POST-TRIAL RECANTATION / CONTEXTUALIZATION OF HER USE OF THE WORD "NO" PRIOR TO SEXUAL INTERCOURSE MAY NOT REASONABLY BE REGARDED AS "CUMULATIVE" TO THE TRIAL EVIDENCE, AND THE LOWER COURT'S FINDING TO THE CONTRARY WAS CLEARLY ERRONEOUS

The lower court also notes that "further, some of the present recantation is *consistent* with testimony taken to trial." (Id., p. 6, l. 16-17) So apparently the court's position is that both consistencies, and inconsistencies in the testimony of C.S. weigh in favor of denying Henderson's petition. "Consistent statements" must be categorized as "cumulative evidence" and "inconsistent statements" simply detract from the veracity of C.S.'s recantation. Where she sticks to her former story (in general terms), her "new" testimony offers "nothing new." Where she strays from her former story, her new information is simply not to be believed.

In assessing whether evidence of the recantations of C.S. are "cumulative," to the extent that Henderson should be denied the setting aside of his conviction (on the SIWOC charge), one must first assess what trial evidence is being "recanted." While technically not "facts discovered after the trial" in support of a petition for postconviction relief, the defense avers that in this case, testimony from Henderson's trial (regarding the conviction at issue) must be considered. After all, under 46-21-102, Montana's postconviction process is an assessment of the evidence which, "*if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.*" One cannot assess what a petitioner has "established" in a postconviction petition without also assessing the "weight of

evidence," from trial, that must be overcome, in order to establish that he "did not engage in the criminal conduct." Since the district court denied the postconviction petition primarily on the grounds of C.S.'s statements being "cumulative," / lacking veracity, her trial testimony (November 14, 2018), her postconviction testimony (August 25, 2021), and her other statements (post trial) must be compared and contrasted (in judging whether they were – in fact – "cumulative.")

TRIAL EVIDENCE

The following is, in effect, taken verbatim, from the opening brief, in the postconviction petition. And the defense avers that the following citations (to the record) effectively encapsulate the cumulative testimony, of C.S., from its various sources, as pertains to the SIWOC conviction in question:

Q: "When, ultimately, did the physical violence begin?"
A: "There was nothing until April 17th" (the dates of the incidents leading to convictions were April 17 – April 22, 2018). (D's Ex. 2, Trial Transcript, p. 428, l. 21-23) She indicated that they had been dating since April of 2017. (p. 447, l. 18 – 19) This was re-affirmed upon cross examination. (p. 494, l. 6-9)

At trial, C.S. gave voluminous and detailed descriptions of various ways that Henderson assaulted her, whether accurate, or not. Regardless of whether Henderson may challenge this account on another occasion, the defense avers that the "evidence" specifically of sexual intercourse without consent, in this case, was limited (at trial) to the following (Trial Transcript, p. 449, l. 2-19 >>>)

A: "He tried to basically force me to give him oral sex. He was pushing my head, like, down to his genital area, and I wouldn't cooperate. Obviously I wasn't in the

mood for anything like that being what was going on. So because I refused to do that, he grabbed my bra to, like, take it off and he choked me with my bra and then kind of, like, tossed that off to the side. And that's when he had sex with me when we were on the floor; like kind of in my hallway by my bedroom."

Q: "Did you verbalize that you did not want to have sexual intercourse at that point in time?"

A: "Yeah, I told him no, I didn't want to do this right now. That – "

Q: "How did he respond to that?"

A: "He didn't care he just said, I don't care, more or less. He was going to do what he wanted anyways."

It should be noted that trial, in this case, produced no eyewitness testimony to the conviction at issue (Count I), other than Henderson, and C.S.. Upon cross examination, C.S. somewhat equivocated as to whether Henderson was guilty of the crime in question (starting on p. 545, l. 12):

Q: "There was some discussion as well about what's been called the rape or sexual intercourse without consent. Were you in a relationship at the time with Billy?"

A: "Yes"

Q: "How did you perceive the nonconsensual sexual encounter at the time?"

A: "Um, it doesn't feel like rape to me just because I was pregnant with his baby and we had been in a sexual relationship for quite some time, and even in the past when we were friends. I didn't really feel like it was rape. But, then, I wasn't consenting to it. I didn't want to do it at the time. So I guess it was just kind of a not clear definition of what it was, I guess, for me."

The defense avers that at trial, the only evidence produced of sexual intercourse without consent (absent <u>implied</u> coercion based on violence preceding

the sex), was evidence of "torn clothes," (again, contextualized for the first time at the postconviction hearing) and that C.S. clams to have simply claimed: "yeah, I told him no, I didn't want to do this right now." In absence of said statement (above), the jury would have been free to conclude that C.S. probably wasn't interested in having sex, but since she said she "didn't really feel like it was rape," the absence of "verbal consent" ("yes") could be regarded as normal, in the context of people who had "been in a sexual relationship for quite some time." In other words, the defense avers that the evidence of "sexual intercourse without consent," at trial, was scant, and has now been clearly, adamantly, and repeatedly recanted (and/ or "explained"). This "new evidence" is clearly enough to permit this Court to conclude a that the lower court judge erred, in making himself the finder of fact, as to the veracity of C.S., and was clearly erroneous in concluding that her various statements, and testimony, were "cumulative" to what was presented at trial.

NEW EVIDENCE

Again, the District Court denied the postconviction petition on the grounds that C.S.'s trial statements, pertaining to the SIWOC conviction, post-trial, were "cumulative" to those made during trial. As this Court can see, C.S. in fact had very little to say, at trial, in support of the SIWOC conviction. At trial, neither counsel for the State, nor the defense really asked questions to encourage C.S. to go into detail, about the sexual act (in question), nor the details of the circumstances preceding the sex. As a result, C.S. in fact offered very little detail, in support of this charge, at trial. The following "new evidence" was all presented to the district court, as part of the postconviction process.

Multiple (recorded) post-trial recantations (via telephone):

The following are synapses (and where possible, direct quotations) of statements made in conversations between C.S., and Henderson, after Henderson was taken to MSP (Deer Lodge) as the result of his convictions for various crimes against C.S. (again, only one of which is being contested, in this appeal). These recorded conversations (between Henderson, and C.S.) have been provided on a single disc, labeled as Petitioner's Exhibit 4 (as presented during postconviction proceedings in the district court). (These recordings are offered cumulatively, on a single disc, labeled as Appellant's Exhibit C)

Call (2) # 8688426: (between Jane Doe and Henderson) BH "You never told me no once . . . and you know that's f***d up." C.S.: "Yeah, that was never supposed to happen, there was never supposed to be . . I did not press charges on that, so I'm sure that can be overturned very easy. So. And I'm pretty sure that's what's gonna happen. Since you have an attorney now." BH: "Why did you say that you said no to me, you never did. You never told me 'no." C.S.: "Not that part, that's where it gets misconstrued. You were forced to give me head where I was like 'no.'"

Call (5) # 8695984: "they (prosecutor) blocked it (my phone) behind my back . . . he called me but I didn't have a visit with him that day. . ." (10:48 >>)

JD: "Billy you ripped my clothes off, I did not willingly take them off,"

BH: "you were down with that though, you act like I did it forcefully, I did not do it forcefully"

CS: "yeah I was thinking about that last night, you were being too big of an asshole to listen."

BH: "so don't sit here and try to fucking lie your way out of it again."

CS: "I'm not, like I said I was thinking about it last night, and I don't remember ever saying 'no.' When I thought about it last night."
BH: "Oh well, that's fucking convenient for you."
CS: "Maybe I didn't say 'no,' but still (wasn't) the way you said it either."
BH: "You saying that you said no, but all of a sudden in the fucking police report, and up on the stand that you said you said no, several times."
CS: "I didn't say that."
BH: "Yes you did."
CS: "But I also was confused by things like that, and I told them that, and they have that too."
(arguing continues, on phone, and escalates)

Listening to these recordings, one can clearly ascertain that the recantations were not "coaxed" by Henderson, but occurred within the context of an argument between the 2 parties, regarding the circumstances of his conviction. The arguing continues: (18:45 >>>)
BH: "you said that Tommy and them brought me back from Great Falls too right? And that you picked me up from Ronnie and Tawny's house?"
CS: "Yeah, none of that really mattered though."
BH: "It doesn't really matter when you fuckin . . . .
CS: "No, not really . . .
BH: "You perjured yourself . . . "
CS: "Yeah, because I forgot, but then I didn't want to change it, and look like a liar, so . . . I didn't, so who cares?"
CS: (20:30 >>>) "K well I'm hanging up, you are just an asshole, you really fuckin are." . . . "And if you expect me to help me in any way, this probably isn't the way you should be talking to me, and making me feel!"

BH: "I don't expect you to help me, I don't need your help."

CS: "Yeah you do, the only way anything good is going to come out of this is if you have my help you dumb ass!"

BH: "I don't expect you to help. I don't need your help. I want to talk to you because you have my kid. I don't want you to do anything . . . ."

Talking, and occasional arguing continues . . . .

(28:00 >>>) BH: "Bullshit, you sure as fucking shit made a jury believe that I raped you. But somehow you didn't even do that, huh?

CS: (***silence***)

BH: "you are pretty good at making people believe shit, even my dumb ass."

CS: "I'm just a liar, right?"

Call (8) # 8701724: (20:32 >>>)

BH: "you have me in here on something I didn't do.

CS: "Yeah I'm gonna talk to them on that. Cause I never said to press charges. **I never said that I said 'no.'** And that I was pissed off at the time." (28:50 >>>) "They tried to make me, make me, and using my f*** ing kids to scare me. Well they did that."

Recorded recantation to Henderson's new counsel:

After the recorded phone calls were produced (from MSP), but prior to their arrival with defense counsel (Henderson's current counsel), C.S. interviewed regarding the circumstances of her testimony, pertaining to the SIWOC conviction, with counsel for Henderson (B. Lande, Stevenson Law Office). Counsel agreed to an interview, after C.S.. repeatedly requested to do said interview, with the law office. Lande met with C.S.. on January 16, 2020. During that interview, C.S. confirmed that she had never had any contact with the office of current counsel (other than leaving messages), prior to the meeting on January 16, 2020. At that

interview, C.S. stated the following (recorded). The recording is labeled as Appellant's Exhibit D (below).

(1:20 >>) "I told the investigators over and over that I never felt like I was raped. I think they had kind of more of a misunderstanding as far as consent in Montana . . . I asked them several times what they meant by consent. **I never told him 'no.'"** The only thing I think they are going off of is that I had some clothes ripped off. But that doesn't prove that he raped me. Like there was no forcing. I didn't fight back, or anything like that . . . and I was just wondering if there was any way to recant that, since he's been sentenced. And that's the other thing, I'm really upset about, I didn't want to testify and I didn't feel like I had a choice. They pretty much told me that I had to do that." "I just felt so forced into the situation, to do that." "I still just felt so forced into the situation, to do that. It just felt it was kind of traumatic on me . . . (almost died in childbirth) so all that I feel like they just pressured me and kind of talked me into things that I don't think I would have said or done on my own." "Or if I had had my own lawyer, or advice. I just don't know anything about Courts or how anything goes so I just kind of trusted them and went with them and I feel like they took advantage of that, and my situation." (7:40 >>) "this happened over days. So almost a week went by. I was getting my kids ready to go to school, so I don't feel that I was trapped, necessarily, because I could have left during those times, when I was going out of the house. But sometime during those days that we ended up, having sex, and yea he did rip my clothes off, but the rest of it wasn't forced. That was the only part that was aggressive about it, was that he ripped my clothes, my sweater. It wasn't like the underneath, like my bra, my underwear, or my pants, it was just two shirts, a sweater, and like a short sleeved shirt. He ripped my shirt." But you felt like you consented? "yeah, but, I did consent, but I was mad at him at the time because we were fighting, whatever, that's normal, but I still love him. I was with him, in a

relationship, so I did have sex with him, and I guess he got better after that, and things calmed down." (9:25 >>>) "and it wasn't aggressive when we had sex, or anything, so I don't know where the 'aggressive' part's coming from, he didn't hold me down, nothing like that." (10:15 >>) "there was a lot of confusion, if you listen to the recording you can hear me asking, several times like, I don't understand what consent means, and several times I said, I don't feel like this is rape, at all, not rape." Do you feel like you agreed to the sexual encounter? "Yeah, I definitely agreed to it. So . . . " (11:55 >>) "yeah I think I misunderstood what they were saying, and misunderstood the severity of what they were talking about."

Postconviction Hearing

Yet more compelling, in terms of volume, and specific "new information," was the sworn testimony of C.S., as part of the postconviction process. The court held an evidentiary hearing pertaining to the facts alleged in the petition, on August 25, 2021. At that Hearing, C.S. testified, pertaining to her prior recantations (prison recordings, recantations to counsel) and also as pertains to the facts of the case / trial. First, she substantiated that she in fact was the person on the other end of the phone calls. (Transcript of August 25, 2021 Evidentiary Hearing, p. 9, l. 18-21) At the hearing, she substantiated that she was indeed in a state of anger, with Henderson, at the time she recanted, during one or more of those recorded conversations, and that the recantations were (therefore) in no way an attempt to create evidence to "protect" Henderson. (Id., p. 10, l. 7-25) During one of her many vitriolic conversations with Henderson, C.S. admitted that she "never said no," further substantiated at the hearing. (Id., p. 1-7) C.S. admitted she had to pursue Henderson's legal counsel, multiple times, before contact was

made with his office. (Id., p. 11, l. 8-25) Having met with (associate) counsel for Henderson, C.S. admitted, under oath, that the statements previously made to counsel were accurate. (Id. p. 12, 1-10) C.S. admitted that she never met with Henderson's counsel (counsel conducting the evidentiary hearing) until the day of the hearing (August 25). She admitted that counsel admonished her, prior to the hearing, that she was to speak only the truth (at the hearing). (Id. p. 12, l. 21-25)

At the hearing, C.S. conceded that she was NOT recanting any of her trial testimony with respect to Henderson's multiple felony and misdemeanor assault convictions, from the same case (as pertains to this petition). (Id., p. 13, l. 21-25) However, she clarified, based on questions not asked by trial counsel (at trial – either State's counsel, or defense counsel) what happened, regarding Henderson "ripping off her clothes" shortly before sex (the same sex that resulted in the conviction under scrutiny in this petition).

The crux of the appeal remains the issue of whether the trial statements of C.S. were "cumulative" to her post-trial recantations, to the extent that the lower court could dismiss Henderson's postconviction petition (on that basis). Henderson now avers that each and every one of the statements made by C.S., highlighted in bold (below) constitutes an independent "new piece of information," not presented to the jury, at trial, in any form. None of these statements (below) are "cumulative" to evidence, known to the jury, at Henderson's trial.

At the hearing (August 25, 2021), C.S. made clear that after her "clothes being ripped off" by Henderson, that they "***were talking for about ten minutes.***" (Id., p. 14, l. 6-13) She was asked: "***So did you ever regard the ripping of your clothes as having anything to do with any sexual contact between you and Mr. Henderson, consensual or otherwise?" A: "No, it wasn't about that.***" (Id., p. 14, l. 14-19) She made clear at the evidentiary hearing, for the first time (not brought up at trial) that: "So ten minutes after some of your clothes were ripped

off, you're still wearing your bra and your pants and underwear?" A: "Uh-huh." (Id. p. 15, l. 3-6) After the ten minutes were over (approximately), and while still wearing her bra, pants, and underwear, C.S. testified (evidentiary hearing) that

> ***"I was going to get into the shower, so I had taken my clothes off to get into the shower. And that's when he started talking to me again and saying I looked good. And I went back over to him and gave him a hug, and we started kissing and stuff. And it kind of led to the floor. And then once we were on the floor, he kind of like was hinting that he wanted me to perform oral sex. He was kind of pushing my head down. And that's when I was saying no. That's the only time I said no. I said, no, I don't want to do that because you don't deserve it right now. I'm mad at you still. I'm not going to do that right now. And then he asked, well, is it okay if I do it to you instead so you won't be mad at me anymore? And I said sure. And that's when he started performing oral sex on me. And then afterwards he was on top first when we were having sexual intercourse. And then that was only for about ten minutes, and then I ended up being on top at the end and for the majority of the sexual intercourse."*** (Id., p. 15, l. 20-25, p. 16, l. 1-18)

C.S. reiterated that she explicitly "***said yes" to oral sex***, and was asked "did you feel coerced into doing so? In other words, ***did you feel like you were going to suffer some form of abuse if you didn't consent to the oral sex that he was offering you?" A: "no, not at all.***" She made clear she felt like she had a choice, and regarded the oral sex as fully consensual. (Id., p. 17, l. 7-13) With respect to the actual sexual intercourse, itself, C.S. stated the following: "***Well, not long after he started performing oral sex, I was wanting it then and I <u>voiced</u> that, because I asked him to lay down and switch positions for me to get on top***." (Id. p. 17, l. 16-19) She conceded that none of the details pertaining to the actual sexual intercourse (itself), the primary element for the conviction for sexual intercourse without consent, was "(n)ever touched on at trial whatsoever." (new evidence) (Id., p. 17, l. 20-22) Moreover, as circumstantial evidence of the

consensual nature of the encounter, she estimated that the sexual episode ***went on for "an hour and a half I would say.***" (Id., p. 17, l. 23-25) She conceded "during that hour and a half period" ***she never told Henderson "no, stop, I don't like this, this needs to end now," or "anything whatsoever to discourage him from continuing the sexual encounter.***" (Id., p. 18, l. 1-12) In fact, she admitted that she "***encourage(d) him to continue" the sexual encounter.*** (Id., p. 18, l. 14-16)

At the evidentiary hearing, C.S. claimed that her trial statements were "no(t)" "directly contrary" to what she said at trial, in response to State's counsel Mickelson's questions to her, about the encounter. (Id., p. 18, l. 21-25) While seemingly contrary (to her trial testimony) she explained that "***I was still really angry and upset about the entire situation (at the time of trial). I wasn't over what happened. I think that contributed to it. I was also really sick after having my baby. During the trial it was hard for me to remember or recall any of the events. So I had a piece of paper that I was reading off of, and I was trying to listen to questions at the same time. And I kept getting confused and lost. And I really had no idea how the events went done or the order of anything. I totally did not remember a thing. I had seizures while I was in the hospital, and it gave me amnesia to the point where I even forgot that I had children. But when I started healing and getting the medication, my memory did come back though.***" (Id. p. 19, l. 2-17) When asked again about the discrepancy of State's counsel's question (at trial): "did you verbalize that you did not want to have sexual intercourse at that time? A: Yeah, I told him no. I didn't want to do this right now." (Id., p. 18, l. 17-22), C.S. stated (about that question, at trial): "I feel like I misunderstood it." And that when she said that she "said no" (at trial) she meant: "well he hinted – when he pushed my head down, when he hinted, and when I said, no, I don't want to do that because I don't think you deserve it right now. I was kind of having an attitude towards him because I was still angry. But I wasn't

saying no, as in I didn't want to do anything." (Id.. p. 19, l. 22-25, p. 20, l. 1-6) C.S. affirmed that there was "***nothing nonconsensual***" about the entire sexual encounter, and that it was "***entirely consensual.***" (Id., p. 20, l. 7-12) She reaffirmed that she never said "no" with respect to actual sexual intercourse (on the day in question). (Id, p. 22, l. 24-25, p. 23, l. 1-2)

With respect to her physical condition leading up to the trial, during her interactions with law enforcement, and also during the trial, she clarified that her child (the result of her apparent post-partem condition) was born less than 2 months prior to the trial. (Id., p. 20, l. 13-19) She noted that she suffered the following conditions after the birth (five days later): "***eclampsia, seizures, extremely high blood pressure, brain swelling, lost vision, kidney and liver (failure).***" (Id., p. 21, l. 1-4) She noted "***the healing took an extremely long time for me to get back to myself and not be sick anymore. I actually almost lost my life when I was in the hospital. So I feel like my mind (was) very foggy and not clear at that point in time.***" (Id., p. 21, l. 5-11)

Regarding the "notes referenced during trial" she stated "***when I met with Ryan (State's counsel) the day before trial, we were kind of going over my statements. And that's what I was holding was a copy of that that I was reading off of, because I couldn't remember anything. I literally would have said 'I don't know' to every question.***" (Id., p., 21, l. 16-21) Regarding the temporary nature of her above-noted cognitive condition (at the time of trial), C.S. was asked: "Did that change over time? Is your memory improving?" A: "***Yes. I actually forgot that I even had children and thought that I was still living with my mother like when I was a teenager. But it slowly starting coming back, along with all the other memories. So it was temporary.***" (Id., p. 21, l. 24-25, p. 22, l. 1-3) On cross, by State's counsel, she affirmed his suggestion that at the time of trial, she was suffering from "short-term amnesia." (Id., p. 24, l. 20-23)

Regarding her feelings about the fact that Henderson still stands convicted of Aggravated Sexual Intercourse Without Consent (of her), she stated that she (feels) "***very guilty because its wrong. He did not rape me. I feel that I was confused by the meaning of what consent was, so maybe my answers were not correct at the time of trial.***" (Id., p. 22, l. 19-23) She affirmed, at the hearing, that (on that day) she ***did not "fabricate or exaggerate anything to help him.***" (Id., p. 23, l. 3-5) She affirmed, on cross examination, that "I just don't want him charged with something he didn't do. And when I initially reported this, I said nothing about sexual assault. It was only until after the police officer, Detective Erickson, searched my house and saw ripped clothes on the floor and asked me about it." (Id., p. 35, l. 22-25, p. 36, l. 1-3)

Regarding consistency / inconsistency between these statements (evidentiary hearing), and trial, C.S. noted that ***(at trial) "I didn't say it was consent, but I also didn't say no. So that's where I got confused.***" (Id., p. 37, l. 15-17) On re-direct (evidentiary hearing), C.S. conceded the inconsistency, not between her trial statements and her statements of that day (August 25) but between her previous statements to law enforcement (upon which State's counsel relied heavily on August 25) and her statements of that day. (Id., p. 39, l. 3-6) She admitted that she had previously given (detailed) untruthful statements to law enforcement, about what Henderson had done to her, with respect to the SIWOC allegation. (Id., p. 39, l. 11-15) Her reasons for being "untruthful" in her statements with law enforcement (pre-trial) were: "***I think just my anger with him and being so upset and feeling like if I did not cooperate with him being convicted, that I would lose custody of my children, even my baby that wasn't born yet. And that's what really scared me into saying things that weren't true.***" (Id., p. 39, l. 16-24) She said that she thought her parental rights were at risk because "as soon as everything happened, they said they had to involve child services to make sure the children in

the home were safe. So I had to do all kinds of things and start drug testing for them and everything." (Id., p. 40, l. 1-8) Q: "And did anyone specifically lead you to believe that if you didn't testify the way they wanted, it could go worse for your custody situation?" A: "***Yeah. I didn't want to testify at all. I expressed that numerous times that I didn't want to testify and have him really convicted of it . . . I guess just with the amount of them coming over and the reports that they were bringing, I felt intimidated that they would take my kids if we were back together and he was in the home.***" ***Q: "Did you literally feel pressure to exaggerate what occurred to satisfy law enforcement?" A: "Yes."*** Finally, C.S. admitted that she was still angry at Henderson, both at the time of giving her statements to law enforcement, and at trial, and that her anger (at those times) "influenced the truthfulness of (her) statements." (Id., p. 41, l. 2-8)

At trial, the details about the time frame between the last assault (by Henderson upon C.S.), the sexual encounter, were not covered. Details about the act itself, clearly relevant to whether the encounter was consensual, were not covered. As C.S. admitted that she was "still angry" with Henderson both when making statements to law enforcement, and during trial itself, presumably, she would have been less forthcoming with such details at the time of trial. Moreover, her physical condition, and its effect on her cognitive functioning, and state of mind, at the time of trial, were never (previously) addressed. If the lower court was in fact required to take C.S. at her word - that she suffered from many cognitively-influencing, if not debilitating conditions at the time of her statements to law enforcement, and trial - she was (at that time) not even in an appropriate condition to be commenting on what effects such conditions might have been having on her. So, all of this is "new evidence" as well. Finally, C.S. admitted that at the time of trial, she was influenced by genuine fear that testimony, inconsistent with the wishes of law enforcement, could impact her custody of her

children, including her child not-yet-born. She admitted that this fear influenced the truthfulness of her testimony, to the detriment of Henderson. Clearly, she would not have admitted this at the time of trial, for the precise reason that such fear influenced her testimony, in the first place. This is all "new evidence" as well. There should be no question that a) the "MSP recording recantations" (post trial), recorded recantations to Henderson's counsel (post trial), and C.S.'s testimonial recantations from August 25 (with detailed explanations) all constitute "new evidence." Therefore, by definition the statements are "not cumulative," and the lower court's finding to the contrary was "clearly erroneous."

CONCLUSION

Henderson has clearly met the statutory criteria, under Mont. Code Ann. § 46-21-102, for postconviction relief. Existing legal precedent has established time-tested rules pertaining to the limitations of judicial discretion as a "finder of fact." Case law (*Berry*) has established that "the district court is not to make factual determinations as to the veracity of the recantation. Rather, the district court should evaluate the recantation for materiality and its tendency to be cumulative or impeaching." To the extent that the lower court discounted the testimony of C.S., regardless of the number of occasions, venues, and volume of her recantations and contextualization, ruling on the basis of the court's perception of her absence of veracity was "clearly erroneous." Yet more erroneous was the lower court's finding that, in spite of the very limited evidence and testimony presented at trial (re: the SIWOC conviction), the volume of what was presented in support of postconviction relief was "cumulative." This Court should recognize that individually, and in tandem, these errors should place the matter of Henderson's guilt or innocence, on the single count in question (aggravated sexual intercourse

without consent), back into the hands of the jury. Said conviction should be ordered vacated.

Respectfully submitted this 6th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Time New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material, and the work count as calculated by Microsoft Word is not more than 10,000 words, excluding certificate of service and certificate of compliance.

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