IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0094

AARON OLIPHANT,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Mike Menehan, Presiding

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STATEMENT OF THE CASE

This case revolves around a conviction for assault on a minor that was premised on a diagnosis of Abusive Head Trauma ("AHT"), also known as Shaken Baby Syndrome ("SBS"). AHT/SBS is typically diagnosed when doctors observe one or more of a triad of symptoms[1] and are not able to identify any non-abusive cause for the symptoms. Some background on the history and science related to that diagnosis is necessary to understanding the issues in this case.

In 2012, Dr. Guthkelch, the doctor who originated the hypothesis that a triad of symptoms were indicative of abuse, made a startling statement: "SBS and AHT are hypotheses that have been advanced to explain findings that are not yet fully understood. There is nothing wrong with advancing such hypotheses; this is how

[1] Retinal hemorrhaging, subdural hematomas, and brain swelling.

medicine and science progress. It is wrong, however, to fail to advise parents and courts when these are simply hypotheses, not proven medical or scientific facts."[2]

Dr. Guthkelch called for an independent evaluation of the evidentiary basis for SBS/AHT by independent scientists. "Since the issue is not what the majority of doctors (or lawyers) think but rather what is supported by reliable scientific evidence, the evidence should be reviewed by individuals who have no personal stake in the matter, and who have a firm grounding in scientific principles, including the difference between hypothesis and evidence."[3]

Starting in 2014, a neutral group of experts answered that call. The Swedish Agency for Health Technology Assessment and Assessment of Social Services ("SBU"),[4] one of the oldest medical assessment organizations in the world, appointed a panel of experts to review the scientific quality of the SBS evidence base in order to advise whether SBS is a reliable diagnosis.[5] Over more than two

[2] A. Norman Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*. 12 HOUS. J. HEALTH L. & POL'Y 201, 202 (2012).

[3] *Id*. at 207–08.

[4] *About SBU*, SBU, https://www.sbu.se/en/about-sbu/ (last updated Sept. 14, 2020).

[5] Måns Rosén et al., *Shaken Baby Syndrome and the Risk of Losing Scientific Scrutiny*, 106 ACTA PAEDIATR. 1905 (2017). The experts appointed included two pediatricians, experts in forensic medicine, radiology, medical epidemiology, and medical and research ethics. Four of the experts came from the Karolinska Institute, which awards the Nobel Prize in Physiology or Medicine.

years, the expert group formulated their study and systematically reviewed the literature; the group's findings were reviewed by three scientific boards within the SBU and assessed by external scientists before publication.[6]

The panel of experts published their findings, first in an initial report in 2016 ("The Report"),[7] and then in a peer-reviewed medical journal in July 2017.[8] The panel then published a follow-up piece in September 2017 further discussing its findings.[9] The panel explained that "[t]he main problem in the reviewed publications was the high risk of bias due to circular reasoning . . . ."[10] The circular reasoning referenced in the studies is as follows:

[6] Niels Lynøe, Göran Elinder et al., *The Swedish Systematic Review is Not Flawed and Should Not be Ignored*, 108(2) ACTA PAEDIATR. 381 (2018).

[7] *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, SBU (October 2016), https://www.sbu.se/contentassets/09cc34e7666340a59137ba55d6c55bc9/traumatic_shaking_2016.pdf.

[8] Lynøe N, Elinder G, Hallberg B, Rosén M, Sundgren P, Eriksson A. *Insufficient Evidence for 'Shaken Baby Syndrome' - a Systematic Review*, Acta Paediatr. 2017 Jul;106(7):1021-1027.

[9] Måns Rosén et al., *Shaken Baby Syndrome and the Risk of Losing Scientific Scrutiny*, 106 ACTA PAEDIATR. 1905 (2017).

[10] *Id*.

- Possible explanations of the triad are derived from the basic assumption made by the medical/child protection team that, if the triad is present without impact, the infant has been shaken violently;
- That basic assumption is used to conclude that the parent(s) are lying if they cannot explain the triad;
- The clinical determination of AHT/SBS is used as a reference test when a researcher classifies a triad case as a true positive;
- Since no false positive cases of AHT/SBS are recognized, the ostensible diagnostic accuracy is recognized as one hundred percent (100%);

- The basic assumption made by the medical/child protection team is selfreinforced by the 100% diagnostic accuracy.[11]

In sum, the panel found the following: (1) no high-quality studies supporting SBS exist, and (2) no studies based on independently witnessed or videotaped evidence of SBS exist.[12] Instead, a few studies use confessions and/or convictions, while most use "child protection teams" to classify cases as abuse.[13] The problem

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[11] Lynøe N, Eriksson A, *Hidden clinical values and overestimation of shaken baby cases*. *Clinical Ethics*. 2019;14(3):151-154.

[12] Lynøe et al., *Insufficient Evidence For 'Shaken Baby Syndrome'—A Systematic Review* 21–22.

[13] *Id*.

is that "[c]hild protection teams widely assume that when the triad is present, the infant has, by default, been violently shaken. As this assumption is used as the gold standard, the resulting, and extremely high, diagnostic accuracy[14] of the triad is obviously based on circular reasoning and not scientific criteria."[15] The panel found all studies supporting the SBS diagnosis are of "low quality" and carried a high risk of bias, except for two studies of "moderate quality" with additional methodological shortcomings.[16] The panel concluded: "There is insufficient scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking (very low quality evidence)."[17] The Report advised that, given the lack of reliable evidence to support the SBS diagnosis, "***To state on the basis of the mere existence of the triad that it was definitely caused by shaking must, however, be considered incompatible with both doctors' professional ethics and the regulations concerning legal certificates***."[18]

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[14] Note that within the medical community, AHT is said to have "extremely high diagnostic accuracy" because the diagnosis so often results either in a caretaker's conviction or a determination by a child protection team that the child was abused—yet both the convictions and abuse determinations are based on the diagnosis.

[15] Måns Rosén et al., *Shaken Baby Syndrome and the Risk of Losing Scientific Scrutiny*, 106 ACTA PAEDIATRICA 1905, 1907 (2017).

[16] Lynøe et al., *Insufficient Evidence For 'Shaken Baby Syndrome'—A Systematic Review* 5, 20–22.

[17] SBU, *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, *supra* n.7, at 5, 22, 61. [18] *Id.* at 66.

(Emphasis added).

In addition to the deterioration of SBS's scientific reliability internationally, courts all over the United States have noted significant issues with convictions and decisions to terminate parental rights based on AHT/SBS diagnoses. *See, e.g.*, *People v. Bailey*, 999 N.Y.S.2d 713, 724 (Crim. Ct. Monroe Cty. 2014), aff'd, 41 N.Y.S.3d 625 (App. Div. 2016); *Commonwealth v. Millien*, 50 N.E.3d 808, 817–18, 821 (Mass. 2016) (expressing "serious doubt whether the jury's verdict would have been the same" had they heard expert testimony that the child's injuries could have come from the fall [defendant] described); *Commonwealth v. Epps*, 53 N.E.3d 1247, 1267 (Mass. 2016) (stating "We have a serious doubt . . . whether the jury verdict would have been the same had the jury heard expert testimony regarding the possibility that short falls can cause severe head injuries in young children."); *People v. Ackley*, 870 N.W.2d 858, 865-68 (Mich. 2015) (finding a reasonable

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probability the outcome would have been different had an impartial, scientifically trained expert corroborated the defendant's theory of an accidental fall); *Ex Parte Henderson*, 384 S.W.3d 833, 834 (2012) (finding no reasonable jury would have convicted in light of new evidence from expert witnesses that the accidental fall onto concrete described at trial could have caused the child's injuries and death); *Gimenez v. Ochoa*, 821 F. 3d 1136, 1145 (9th Cir. 2016) (stating there is "a

vigorous debate about its validity within the scientific community . . . . The debate continues to the present day."); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 n.10 (N.D. Ill. 2014) (stating current evidence "suggests that a claim of shaken baby syndrome is more an article of faith than a proposition of science."); *In re Yarbrough Minors*, 885 N.W.2d 878, 890 (Mich. Ct. App. 2016) (stating "The science swirling around cases of shaken baby syndrome and other forms of child abuse is highly contested . . . ."); *State v. Edmunds*, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008) (recognizing a "significant and legitimate debate in the medical community").

Against this backdrop of scientific uncertainty, Aaron Oliphant ("Oliphant") was charged with assaulting his four-month-old son, R.O., on the basis of an AHT diagnosis. Yet, Oliphant's trial counsel failed to call an expert to testify at trial to the fundamental issues with AHT as a diagnosis or to testify to other possible explanations for R.O.'s symptoms. *App. B* at 16-20 and 37-40. In fact, trial counsel failed to consult with a medical expert prior to trial altogether. *App. B* at 16-17. In that sense, this case is similar to *Wilkes v. State*, 2015 MT 243, 380 Mont. 388, 355 P.3d 755, where defense counsel did not call any medical expert witnesses or attempt to rebut the State's medical testimony.

On September 27, 2017, Oliphant was convicted of aggravated assault on

R.O. *App. B* at 26. The State's theory at trial was that R.O. exhibited symptoms that could only be caused by a combination of shaking and blunt force trauma, and that the timing of the injuries could be pinpointed to a timeframe in which R.O. was exclusively in Oliphant's care. *App. B* at 17. Oliphant was sentenced to 20 years with 5 years suspended on December 4, 2017. *App. B* at 27. The written judgment was entered on January 30, 2018, which means the conviction became final March 31, 2018. *Id.*

Oliphant did not file an appeal because his counsel advised him, in writing, that there were no appealable issues and his only avenue to seek relief was sentencing review. *Id.* His counsel died shortly after, and was later learned to have suffered through substantial medical issues during Oliphant's trial. *Id.* at 1720, 27.

Oliphant then reached out to the Montana Innocence Project ("MTIP") who began assessing his application and gathering documentation, including his case file to process his application. *App. B* at 55. Once MTIP received and reviewed the trial transcripts in August of 2019, it corroborated that no experts were consulted in preparation for or during trial. *Id.* at 19. MTIP recognized that the diagnosis and testimony needed to be assessed by a medical professional and reached out to experts in the field. Many responded that they could not provide a medical opinion based on incomplete records. *App. B* at 55. However, Dr. John Galaznik, a pediatrician with extensive experience with suspected child abuse

cases, reviewed what MTIP had, and agreed to provide a limited preliminary report, leaving open the possibility to change his opinion when MTIP received complete medical records. *App. B* at 32. Dr. Galaznik wrote that report on December 10, 2019.

MTIP filed a petition for postconviction relief on June 3, 2020, alleging ineffective assistance of counsel and newly discovered evidence in the form of Dr. Galaznik's preliminary expert opinion, which was obtained less than one year before the petition was filed.[18] *App. B* at 3. Oliphant's petition did not ask the Court to immediately overturn his conviction, only to allow discovery and stay the petition until discovery could be completed and an amended petition filed:

> Based on the foregoing, Aaron respectfully prays to this Court for the following relief: 1. Stay this proceeding pending the completion of full discovery; 2. Permit Aaron to file an amended pleading following the completion of full discovery and provide a scheduling order with a deadline to file the amended pleading;

App. B at 57.

A motion for discovery was filed with the petition explaining: (1) the medical records were incomplete, (2) only one expert, Dr. Galaznik, could opine based on the available medical records, and therefore his opinion would be strictly

[18] The District Court's order incorrectly provides a filing date of June 30, 2020. App. A, 2. The case register shows it was actually filed June 3, 2020

preliminary, and (3) other experts could opine on the matter once the petitioner obtained all relevant medical records. *App. G.*

The State responded by arguing only that the petition was untimely because it was filed more than one year after Oliphant's conviction became final, and that Dr. Galaznik's opinion did not constitute new evidence; rather, it was simply an interpretation of existing evidence. *App. I* at 9. The State claimed that Galaznik's opinion was based only on records that were in the possession of Oliphant's trial counsel. *Id.*

Oliphant filed a reply brief noting the untimeliness itself was due to ineffective assistance of counsel. *App. J*. To demonstrate this, Oliphant attached the above-mentioned letter from his trial counsel advising him there were no appealable issues in his case and that his only avenue for relief was sentence review. *App. E*. Oliphant additionally noted the issues with the lack of scientific evidence for the AHT/SBS diagnosis discussed above. *App. J* at 2-5. Finally, Oliphant's reply brief detailed medical records that current counsel had obtained that were not in trial counsel's file and that Galaznik's report relied upon. *App. J* at 9–11.

On January 20, 2022, the District Court denied Oliphant's petition as untimely on the basis that Dr. Galaznik's opinion was an interpretation of existing evidence rather than newly discovered evidence. *App. A*. The District Court did

not address trial counsel's letter telling Oliphant he had no appealable issues and his only avenue of relief was sentence review, nor did the District Court address the fact that a number of the records Galaznik's opinion relies upon were not in trial counsel's file, and thus were not available to Oliphant at trial. *Id*.

The District Court did not address Oliphant's request that the merits be stayed pending discovery and never ruled on the motion for discovery. *Id*.

Oliphant timely appealed from the order denying the petition and respectfully requests that the Court reverse and remand with instructions to grant the discovery motion.

STATEMENT OF THE FACTS

Appellant's recitation of the facts is limited to those relevant to the narrow issues before the Court.

1. The Evidence at Trial

On June 6, 2016, Oliphant's wife, Brittany, took R.O. to the pediatrician. *App. B* at 7. Over the previous two weeks, Oliphant's four-month-old son, R.O., had been coughing, was congested, and had thrown up repeatedly that day. *Id*. The pediatrician diagnosed him with "a viral illness," but administered no treatment. *Id*. R.O.'s symptoms continued the following day, June 7. On June 8, Oliphant watched R.O. alone from 6:00 p.m. to 10:30 pm while Brittany was working. *Id*. R.O.'s symptoms were getting worse, and most worryingly to

Oliphant, he seemed to lose consciousness occasionally. *Id.* at 8. When Brittany got off of work, she called Oliphant, and he asked her to come home immediately because R.O.'s symptoms seemed to be worsening. *Id.* When Brittany got home, they video called her mother, Apryl, a registered nurse. Apryl concluded that R.O. was probably just tired and would be fine. *Id.* The family went to sleep for the night. *Id.*

Early on the morning of June 9, R.O. took a bottle but a few hours later, after taking another bottle projectile vomited. *Id.* at 9. The couple was worried and took him to the emergency room at St. Peter's Hospital. *Id.* There, pediatrician Dr. Michelle Danielson ordered a CT scan which was "pretty nonimpressive, maybe a little bit of extra fluid there, potentially a fracture, but potentially just a growth plate that we see on the skull." *Id.* The radiologist, Peter Pop, found "there is no evidence for intracranial hemorrhage" and "[regarding the] line extending through the right parietal bone from the anterior fontanelle towards the lamboid suture. Its appearance is more consistent with an accessory suture than with fracture." *Id.* Those findings ruled out AHT. *App. F* at 9.

While at the hospital, Oliphant overheard a phone conversation between Brittany and her mother, Apryl. *App. B* at 13. Apryl told Brittany that it sounded like the doctors were suspicious of abuse and that either she or Oliphant might be accused so she needed to protect herself. *Id.*

Despite her records indicating she saw nothing she interpreted as abuse, Dr. Danielson sent the CT imaging to Seattle for an "unofficial overread." *Id.* at 10. The unnamed pediatric neuroradiologist in Seattle who performed the overread opined that "there was evidence of bleeding, . . . skull fractures, [and] that definitely this was a CT consistent with non-accidental trauma." *Id.*[19]

Based on that overread, the doctors at St. Peter's sent R.O. to Salt Lake City for an MRI performed under sedation—the transfer being necessary because St. Peter's had no pediatric anesthesiologist who could sedate R.O. *Id.* The MRI was eventually administered *four days* after R.O. arrived in Salt Lake City. Such a delay is contrary to the standard of care and significantly undermines the reliability of the MRI results. *Id.*

The pediatrician in Salt Lake City overseeing R.O.'s treatment, Dr. Hansen, took R.O.'s history only from Brittany. *Id.* at 11. Brittany told Dr. Hansen that R.O. was "fine" before 6:00 p.m. on June 8 when she left for work and was "not fine" when she came home at 10:30 p.m. *Id.* But at trial, Brittany testified R.O.

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[19] Besides the fractures being apparently non-obvious given that a radiologist and pediatrician initially read them as sutures/growth plates, the fracture diagnosis, particularly the timing diagnosed by the doctors, is puzzling. There was no evidence of any bruising or swelling on the scalp, leaving the question unanswered of how a skull gets hit hard enough to fracture but no bruise, swelling, or other mark is evident the day following the diagnosed assault. But then, the neuroradiologist in Seattle did not see R.O.'s scalp and did not know there were no marks.

was not fine before she left for work—he had been vomiting repeatedly and exhibiting flu-like symptoms for days at that point, and he had been taken to the doctor two days before, on June 6, because of those symptoms. It was also not clear that R.O. was "not fine" when she got home, given that even Apryl, a registered nurse, decided that he was "fine" and probably just tired. *Id.* at 11.

Nonetheless, based on Brittany's statements about the timing of R.O.'s symptoms, Dr. Hansen opined that the diagnosed abuse necessarily occurred during the 6:00 p.m. to 10:30 p.m. period on June 8 when Oliphant was caring for R.O. while Brittany was at work. *Id.* at 25.

In sum, the doctors testified at trial that imaging showed retinal hemorrhaging, subdural hematomas, and skull fractures, which they diagnosed as abusive head trauma and they placed the timing between 6:00 p.m. and 10:30 p.m. on June 8, 2016. *Id.* at 23-26.

2. Oliphant's Trial Counsel

Unknown to Oliphant, his trial counsel, Mayo Ashley, was suffering from esophageal cancer and was undergoing treatment throughout his work on Oliphant's case. *Id.* at 15-16. By the time of Oliphant's trial, Ashley was having significant difficulty hearing, speaking, and eating; he also had very little energy. *Id.* As his secretary of 18 years, Julie Johnson, explained in a declaration attached to Oliphant's petition, "Mr. Ashley was unable to hear his clients, the Court, or

witness testimony at the end of his career." *App. D* at ¶ 12. Further, Johnson explained that "during Mr. Ashley's representation of Mr. Oliphant, Mr. Ashley's health had declined to a point that he was unable to effectively represent Mr. Oliphant." *Id*. at ¶ 31. Ashley died from related complications shortly after Oliphant's trial. *Id*. at ¶¶ 28–30.

Before Oliphant's trial, Ashley told Johnson that he intended to hire a private investigator to interview witnesses and a medical expert; in addition, Ashley told Johnson that there were funds available for a private investigator or a medical expert. *Id.* at ¶ 17, 21. He never did so. Importantly, Johnson stated that "[a]fter trial, Mr. Ashley told [her] he regretted not obtaining a medical expert to rebut the State's evidence." *Id*. at ¶ 26. In addition to his failure to hire a private investigator or a medical expert, Ashley submitted no jury instructions and did not object to any of the State's jury instructions. *App. B* at 16. He filed no pretrial motions. *Id.* Further, both Oliphant and Johnson recall Ashley telling Oliphant that the case was a "slam dunk" because the State had no evidence against him. *App. D* ¶ 25.

At trial, Ashley made minimal opening and closing statements. *App. B* at 18-20. He did not cross-examine two of the State's medical experts, and he conceded in closing—contrary to his opening and cross-examination strategies of

questioning whether any assault occurred—that R.O. was assaulted. *Id.* He failed to raise a single objection during trial. *Id.* at 16.

After the trial, Ashley wrongly advised Oliphant that Probation and Parole would contact him about the presentence questionnaire and interview when in fact Oliphant was supposed to initiate contact. *Id.* at 26. Shortly before sentencing, Ashley finally advised Oliphant that he needed to contact Probation and Parole. *Id.* Oliphant turned in the questionnaire for Probation and Parole but was never interviewed. *Id.* Ashley assured Oliphant that, because there was no interview, sentencing would be continued and, thus, no need for any witnesses to show up and testify on Oliphant's behalf or for Oliphant to prepare a statement. *Id.* Ashley also assured Oliphant that his close relationship with the prosecutor meant he would not serve any prison time. *App. C* ¶ 25. Sentencing was not continued, no witnesses spoke on behalf of Oliphant, he made no personal statement to the District Court regarding culpability, and Oliphant was sentenced to 20 years in prison with five suspended. *Id.*

After sentencing, Oliphant's family contacted Ashley to let him know Oliphant wanted to appeal. Ashley responded with a letter to Oliphant's family saying there were no appealable issues, mentioning nothing about postconviction relief, and telling them the only available avenue for relief was sentence review. *App. E.* Oliphant could not afford to hire another attorney for a second opinion,

nor did he have any reason to believe doing so was necessary as he retained Ashley expecting competent counsel and advice. *App. C* ¶ 35. Further, Oliphant did not know there was a difference between an appeal and a petition for postconviction relief. Finally, Ashley's letter states that he consulted with colleagues about potentially appealable issues and they agreed there were none, indicating to Oliphant that a second opinion was unlikely to be different. *App. E*.

Ashley died on March 29, 2018, days before Oliphant's conviction became final. At that point, all Oliphant knew was that his attorney, and allegedly his attorney's colleagues, believed Oliphant's only avenue of relief was sentence review.

Oliphant subsequently contacted MTIP. During its review of Oliphant's case, MTIP requested trial counsel's complete case file from Johnson, Ashley's former legal secretary. *App. B* at 55. MTIP received Ashley's case file, which was limited, missing several critical documents, including complete medical evidence. *App. G* at 2.

MTIP attempted to obtain the missing medical evidence directly from R.O.'s medical providers. *Id.* On April 4, 2019, requests for medical records, along with a release and authorization signed by Oliphant, were provided to Partners in Pediatrics, St. Peter's Hospital, Seattle Children's Hospital, and Primary Children's Hospital. *App. G* at 2.

Ciox Health provided 45 pages of medical records from Intermountain

Healthcare on April 17, 2019 which were not included in trial counsel's file. *App. J* at 9-11. Dr. Galaznik relied on these in his preliminary opinion, in which he identifies many files still missing which were needed for a full review. *App F.*

After receiving the Ciox Health records, MTIP received a call from an attorney at St. Peter's Hospital who disclosed that after receiving MTIP's request, she called the County Attorney's Office to determine whether she could release the requested records. *App. G* at 3. The attorney from St. Peter's Hospital explained that the County Attorney's Office told her she should not disclose the records. *Id.* Therefore, she told MTIP she would be more comfortable disclosing records pursuant to a court order. *Id.*

Following this conversation, MTIP sent an email to the prosecutor who handled Oliphant's case. *App. H*. The prosecuting attorney stated he would not disclose the records without a court order because he did not want them "out on the street"; he also provided MTIP with his inaccurate personal determination that such records would be of little help to its review of Oliphant's case. *Id.*

Dr. Galaznik gave a preliminary opinion based on the incomplete medical records. Dr. Galaznik's report notes the confusion over whether the imaging showed sutures or fractures, and that none of the imaging showed any sign of scalp swelling over the supposed fractures, meaning they either were not fractures or were not acute: "If there is no demonstrated scalp swelling greater than 4-6mm

over the alleged acute fractures, then these should not be asserted as acute to any degree of medical probability [Kleinman 1992]. Hence, they cannot be attributed to the father and particularly not on 6/09/16." *App. F* at 2.

Dr. Galaznik noted that it appears R.O. was diagnosed with sinus or cortical vein thrombosis ("SVCT"), which can be a differential diagnosis for AHT, and contradicts Dr. Hansen's testimony at trial that all other potential causes for R.O.'s symptoms had been ruled out. *App. F* at 2.

Dr. Galaznik additionally notes that the reason for R.O.'s transfer to Primary Children's Hospital was for an MRI, yet an MRI was not conducted until approximately five days after the alleged assault. Dr. Galaznik then notes that the MRI conducted on June 14 does not support a diagnosis of abuse on a particular day, such as June 9, 2016—which was the date Dr. Hansen testified the diagnosed abuse necessarily happened. Dr. Galaznik noted that the designation of the clots observed in the MRI as "subacute" indicate they were three to seven days old, meaning they could have occurred at any point between June 7 and June 10:

> When the MRI was done, it document[ed] Early Subacute Clots, These would be consistent with being 3-7 days old per published standards. Hence, these could have developed at any point between 6/07/16 and 6/10/16 (possibly before – remember sx [symptoms] on 6/04 and saw PCP 6/06/16), and **cannot be timed to 6/09/16 to any degree of medical probability, much less medical certainty**.
> …

> Hence, I see no way that these intracranial clots can be asserted [to] be the result of an inflicted trauma by any particularly individual to any degree of medical probability, much less medical certainty.

App. F at 3 (emphasis added).

In summary, Dr. Galaznik opined that the medical evidence available to him did not conclusively establish AHT, that the symptoms the State's experts assumed were evidence of AHT could be explained by non-abusive causes, and to the extent any of the evidence might suggest abuse, it is medically impossible to pinpoint the timing of the abuse to a four-hour window—particularly when the MRI relied on by the doctor who decided AHT was the correct diagnosis was conducted approximately five days after the supposed abuse. *Id.*

A questionable diagnosis of abuse, a questionable opinion on the timing of the alleged abuse, and ineffective assistance of counsel led to Oliphant's conviction. He has remained in prison since his sentencing.

SUMMARY OF THE ARGUMENT

I. The petition was timely. Under § 46-21-102, MCA, a petition is timely if it "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."

A. Dr. Galaznik's report is new evidence. The District Court erroneously concluded that Dr. Galaznik's report was based only on an interpretation of the

records available to Ashley and presented at trial and thus was not new evidence. In fact, Dr. Galaznik's report is based in part on medical records that ***were not*** in Ashley's file and were not presented at trial, placing them squarely within the definition of newly discovered evidence.

B. Additionally, the District Court's conclusion—that Dr. Galaznik's opinion was not new evidence because it was an interpretation of existing evidence—violates the postconviction relief statute's mandate that allegations of newly discovered evidence be considered in light of the evidence as a whole. In some cases, an expert opinion might only be an interpretation of the evidence, but in a case based only on expert opinions, an expert opinion can definitively be newly discovered evidence. The difference is determined by doing as the statute requires, which is to view allegations of newly discovered evidence "in light of the evidence as a whole." § 46-21-102, MCA. Viewed in light of the evidence as a whole, Dr. Galaznik's expert opinion "would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted."

C. Oliphant could not have presented his petition earlier. Under *Elliott* and *Wilkes*, in order to present a viable claim for ineffective assistance of counsel based on failure to retain an expert, Oliphant had to show actual expert testimony that could have been presented at trial. *Elliott v. State*, 2005 MT 10, 325 Mont.

345, 106 P.3d 517; *Wilkes v. State*, 2015 MT 243, 380 Mont. 388, 355 P.3d 755. As soon as Oliphant had the expert opinion necessary to demonstrate the prejudice suffered as a result of Ashley's ineffectiveness for failure to call an expert, he filed his petition.

D. If the Court finds that all other avenues for relief are closed, the miscarriage of justice exception should apply to the time-bar here. That exception applies when "the failure to toll on equitable grounds would work a clear miscarriage of justice, one so obvious that the imposition of the time bar would compromise the integrity of the judicial process." *Davis v. State*, 2008 MT 226, ¶ 25, 344 Mont. 300, 187 P.3d 654.

Here, the District Court did not consider the evidence presented that the untimeliness was caused by the ineffective assistance of counsel for which the petition sought a remedy. Thus, Oliphant faces an obstacle outside of his control: the cause of his untimeliness was due to ineffective assistance of counsel, but the Court will not review that same ineffectiveness due to the untimeliness.

Oliphant wanted to appeal, but Ashley advised him in writing not to, and Oliphant, like any reasonable client, believed him. That ineffective advice caused Oliphant to neither file an appeal nor a petition for postconviction relief (the difference between the two being unknown to Oliphant) within the time limits.

Where an attorney's ineffectiveness causes or contributes to the untimeliness, the time bar cannot prevent review of the attorney's ineffective assistance.

II. The District Court abused its discretion in not permitting discovery prior to deciding the timeliness of Oliphant's petition. The postconviction relief statute grants district courts wide latitude in deciding appropriate procedures in each case.

A. Even if Dr. Galaznik's preliminary opinion is not new evidence, it is all Oliphant can present unless and until he has a complete set of relevant medical records that can be reviewed by other experts. But Oliphant was presented with another obstacle outside of his control: because the medical records in Ashley's file were incomplete, he could not obtain the necessary expert opinion to present to the District Court without discovery. Moreover, both the additional medical records, plus the suite of expert opinions that will be available once the medical records are complete (*see Wilkes* ¶¶ 7, 27), will permit Oliphant to make a substantially stronger showing of newly discovered evidence of innocence. It is impossible for him to do so, however, without discovery.

B. The District Court's failure to rule on the discovery motion was an abuse of discretion. This Court cannot review a lower court's decision in the absence of any reasoning or justification. It has thus held that "Failure of a district court to exercise discretion is itself an abuse of discretion." *Clark Fork Coalition*

v. Mont. Dept. of Env't Quality, 2008 MT 407, ¶ 43, 347 Mont. 197, 197 P.3d 482.

III. In conclusion, the District Court's order suffers from multiple defects and should be overturned. Though this case involves a number of complexities, the issues can be resolved simply by a remand with instructions to permit discovery and, after discovery and an opportunity to supplement the petition, to consider any expert reports submitted "in light of the evidence as a whole." Section 46-21-102(2), MCA.

STANDARD OF REVIEW

> We review a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. We review discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. We review de novo the mixed questions of law and fact presented by claims of IAC.

Wilkes v. State, 2015 MT 243, ¶ 9, 380 Mont. 388, 355 P.3d 755 (internal citations omitted).

ARGUMENT

I. The Petition Was Timely

Generally, a petition for postconviction relief must be filed within one year of the conviction becoming final. Oliphant does not dispute that his petition was filed more than one year after his conviction became final.

However, in addition to the one-year timeline after finality, a petition is also timely if it alleges newly discovered evidence that, if proved, would establish the petitioner did not engage in the criminal conduct underlying the conviction:

> 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 . . . .
>
> (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.

§ 46-21-102, MCA.

A. The District Court erroneously concluded that Dr. Galaznik's opinion was based only on existing evidence.

The District Court's ruling—that Dr. Galaznik's opinion was per se not new evidence because it was only an interpretation of existing records—suffers from two errors. First, the District Court erroneously concluded that Dr. Galaznik's report was based on records presented at trial. In actuality, Dr. Galaznik's opinion was based both on existing medical records, plus *newly discovered records*.

The District Court ruled that "[t]he jury was presented evidence from numerous medical practitioners, whose records were made available to the defendant." *App. A* at 6-7. However, the only evidence in front of the District

Court regarding which medical records Oliphant did and did not have available at trial was located in Petitioner's reply brief, in which counsel broke down in painstaking detail what was ***not*** available to Oliphant at trial. *App. J* at 9-11. The State presented no rebuttal to that evidence. *App. I.* Thus, the Court's factual finding that the defendant had these records available is clearly erroneous.

B. The District Court's assumption that expert opinions cannot be newly discovered evidence conflicts with the statutory mandate to examine allegations of newly discovered evidence "in light of the evidence as a whole."

The District Court's ruling erroneously presumes that no expert testimony can ever be newly discovered evidence. This error arises from the District Court's failure to follow the analysis delineated in the postconviction relief statute:

> [A] district court presented with a postconviction petition based upon newly discovered evidence shall utilize the very test set forth in § 4621-102, MCA. It shall determine whether the "newly discovered 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 he or she was convicted.

Wilkes v. State, 2015 MT 243, ¶ 15, 380 Mont. 388, 355 P.3d 755 (citing *Marble v. State*, 2015 MT 242, ¶ 36, 355 P.3d 742, 380 Mont. 366) (emphasis added).

Crucially, the evidence need only be alleged, not proven, in order for the petition to be sufficient to merit further proceedings.

> Section 46-21-102(2), MCA, states that the exception applies when a claim simply "***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 . . . ." Thus, the plain language of the statute does not require that the newly discovered evidence be proven true ***before*** the court can hear the petition for postconviction relief.

Crosby v. State, 2006 MT 155, ¶¶ 14–15, 332 Mont. 460, 463–64, 139 P.3d 832, 834 (emphasis in original), *overruled on other grounds by Marble*, ¶ 31.

More to the point, under the plain language of the statute, the evidence must be considered "in light of the evidence as a whole." Section 46-21-102(2), MCA. This is particularly important in an AHT case where evidence of both guilt and innocence depends solely on doctors' opinions. An expert opinion in a case where such opinions are tangential or merely cumulative to other, more direct evidence is entirely different than an expert opinion in a case such as this one. For example, an expert opinion refuting the State's bullet comparison analysis in a murder case based primarily on multiple eye-witnesses has very little tendency to "establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." However, in a case where the only evidence of criminal conduct is doctors' opinions and the timing of the criminal conduct is based only on doctors' opinions, then a doctor's opinion is necessarily the only evidence that can establish the petitioner did not engage in the criminal conduct. The difference between the two is determined by doing as the statute mandates—considering the newly discovered evidence "in light of the evidence as a whole."

The District Court, however, incorrectly created its own standard for determining what qualifies as newly discovered evidence. In deciding Oliphant's claim of newly discovered evidence, the District Court held, without citation to any authority, that a medical expert's opinion could not qualify as newly discovered evidence because it was only an interpretation of the evidence. *App. A* at 5–6. A moment's consideration of the history of scientific evidence in criminal trials reveals that the District Court's approach is entirely unworkable in cases where the foundational evidence that any crime was committed is an expert's interpretation of physical evidence.

If we follow the District Court's logic in disregarding new expert interpretations of physical evidence, then all exonerees over the past decades based on the discovery that the underlying convictions were based on bunk science would still be in prison. Take, for example, one of the exonerees who were convicted based on the now-debunked theory that an expert could identify "pour patterns" indicative of an accelerant, and thus intentional fire-setting in arson cases.[20] Under the District Court's determination, that person would not be able to present an expert witness who could explain that a "pour pattern" theory was no longer

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[20] Hansen, Mark, *Long-Held Beliefs about Arson Science Have Been Debunked After Decades of Misuse*, ABA Journal, (2015) available at: https://www.abajournal.com/magazine/article/long_held_beliefs_about_arson_science_have_been_debunked_after_decades_of_m

scientifically accurate because new studies revealed that such marks occur in roughly equal frequency in both fires fed with accelerant and those without. That opinion would not be new evidence under the District's Court's analysis because it would only be a different interpretation of the burn pattern evidence presented at trial. Thus, the defendant, though convicted on the basis of bad science and able to present witness testimony supporting that, could never meet the bar for "newly discovered evidence" under the District Court's analysis and, thus, would be forever stuck in prison with no recourse despite being convicted solely on the basis of an entirely debunked myth.

The District Court's distinction between newly discovered evidence and new interpretations of existing evidence is neither necessary nor the correct test. The appropriate test is identified in § 46-21-102(2), MCA: A petitioner can overcome the time-bar by presenting 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." In the case of a crime that is believed to have happened only because of an expert's interpretation of test results, later-identified expert opinions

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that present better reasoned and more scientifically accurate interpretations are often the *only* possible new evidence that can establish a petitioner did not engage in the criminal conduct underlying the conviction.

The District Court failed to conform its reasoning to the statutory mandate. The Court did not look at the evidence as a whole when analyzing Dr. Galaznik's opinion that the medical evidence: (1) may not indicate intentional trauma at all, and (2) to the extent it might indicate trauma, could not possibly pinpoint the timing of any trauma to a four-hour window on June 8, 2016. Nor did the District Court examine whether Dr. Galaznik's opinion, *if proved*, would establish Oliphant did not engage in the criminal conduct of which he was accused, assault.

Thus, the District Court's order is based on a factually erroneous premise—that Dr. Galaznik's expert opinion is based only on medical records provided to Oliphant before his trial—as well as an analysis that mistakenly departs from the statute and has no supporting authority.

C. Oliphant could not have presented a viable petition for ineffective assistance of counsel prior to obtaining Dr. Galaznik's report.

Under *Elliott* and *Wilkes*, in order to present a viable claim for ineffective assistance of counsel based on failure to retain an expert, Oliphant had to show actual expert testimony that could have been presented at trial. *See Wilkes,* ¶¶ 26–27 (citing *Elliott v. State*, 2005 MT 10, 325 Mont. 345, 106 P.3d 517) (petitioner alleging trial counsel was ineffective for failing to present expert testimony must demonstrate actual available expert testimony that could have been presented at trial).

As it stands, Oliphant can only present a preliminary opinion from one expert because of the incomplete medical records. Dr. Galaznik's report likely represents the bare minimum necessary to avoid *Elliott*'s ruling that a petition is defective when it alleges ineffective assistance for failure to call an expert without identifying actual available expert testimony. Had Oliphant filed earlier, before obtaining Galaznik's report, his petition would have been subject to summary dismissal under *Elliott*. Hence, Oliphant's position cannot rightly be regarded as time-barred.

D. If all other avenues for relief are unavailable, then the miscarriage of justice exception should apply.

In addition to the postconviction relief statute's newly discovered evidence provision, this Court has also recognized an equitable tolling doctrine when the imposition of a time-bar would compromise the integrity of the judicial process. "The District Court must determine whether the failure to toll on equitable grounds would work a clear miscarriage of justice, one so obvious that the imposition of the time bar would compromise the integrity of the judicial process." *Davis v. State*, 2008 MT 226, ¶ 25, 344 Mont. 300, 187 P.3d 654 (internal quotation marks omitted). Like the statutory exception, the miscarriage of justice exception is based on newly discovered evidence. It is based, however, on U.S. Supreme Court jurisprudence, rather than Montana's PCR statute.

Schlup v. Delo, 513 U.S. 298, 316 (1995), laid out a framework for review of postconviction claims that are procedurally barred, which this Court then adopted:

> A *Schlup* procedural, or "gateway," innocence claim alleges that newly discovered evidence demonstrates that 'a constitutional violation has probably resulted' in a wrongful conviction. A *Schlup* claim accompanies an assertion of trial error, which in this case involves [petitioner's] IAC allegation that his counsel failed to use a proper crime scene analysis at trial.
>
> To meet the *Schlup* standard of proof a petitioner need only produce evidence that creates "sufficient doubt about his guilt to justify the conclusion that his [criminal sanction] would be a miscarriage of justice unless his conviction was the product of a fair trial." A *Schlup* gateway petitioner must "show that it is 'likely' or 'probable' that 'no reasonable jury' would find him guilty."
>
> If the *Schlup* petitioner makes the required showing, the petitioner passes through the "gateway" that entitles him to present his constitutional claims of trial error, despite the procedural bars that would normally prohibit such claims.

Kenfield v. State, 2016 MT 197, ¶ 17, 384 Mont. 322, 377 P.3d 1207.

As with Kenfield's claim, Oliphant's petition is based on an ineffective assistance of counsel claim. In this case, Oliphant alleges that newly discovered evidence demonstrates that "a constitutional violation has probably resulted in a wrongful conviction" based on the fact that there are qualified experts who can testify that: (1) AHT diagnoses are not based on *any* scientific evidence, and such diagnoses have an error rate of unknown magnitude; (2) R.O.'s symptoms can be

explained by other causes, such as SVCT and infection (recall R.O. was diagnosed earlier in the week with a "viral infection" by his primary care pediatrician); and (3) that even if R.O. was correctly diagnosed with AHT, it is impossible for the medical evidence to accurately pinpoint the timing of the trauma to a four-hour window.

Additionally, contrary to the District Court's assertion that an expert opinion is not newly discovered evidence because it is merely an interpretation of existing evidence, this Court has expressly noted that exculpatory scientific evidence is exactly the kind of evidence that can validate a *Schlup* claim:

> [B]ecause this Court respects the finality of a verdict, the reviewing court must determine whether the petitioner has supported his innocence claim "with new reliable evidence—whether it be ***exculpatory scientific evidence***, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."

Kenfield, ¶ 17 (emphasis added). That language makes clear that new evidence is not narrowly limited to physical or eyewitness evidence as the District Court's ruling implies.

Moreover, the exception should apply here because untimeliness was itself caused by the ineffective assistance of counsel the petition seeks to have reviewed. Oliphant raised this issue with the District Court, but the District Court never addressed or even mentioned this issue. Oliphant submitted evidence to the

District Court that he told his trial counsel he wanted to appeal, but Ashley's only response was the letter telling Oliphant sentence review was the only available avenue of relief. *App. E*.

Ashley's advice was wrong on two accounts. First, Ashley's trial preparation and performance at trial was so objectively deficient that Oliphant likely had grounds to pursue a record-based ineffective assistance of counsel claim reviewable on direct appeal. The record reveals, for example, that Ashley:

- did not develop any medical evidence or obtain medical expert witnesses despite being on notice that the State intended to call several medical experts;
- could not hear what witnesses were saying during trial;
- did not cross examine several crucial witnesses, including the medical doctors who opined when the trauma occurred;
- gave the jury directly contradictory theories of the case;
- conceded to the jury that an assault had occurred
- failed to file jury instructions or object to the State's proposed instructions;
- failed to file any pretrial motions, including motions in limine; and
- did not object to anything at any point in the trial, including propensity evidence prohibited by Montana Rules of Evidence 404(b); and
- told Oliphant that because of Ashley's close personal relationship with the prosecutor, Oliphant would not go to prison.

Second, Ashley's legal secretary, Johnson, stated in her declaration attached to Oliphant's petition that Ashley told her after Oliphant's conviction that he should have hired an expert. *App. D*. at ¶ 26. That alone shows Ashley himself recognized his work on Oliphant's case was deficient. With this knowledge, it was incumbent upon Ashley that he immediately disclose to Oliphant that an expert

might have made a difference at trial, and advise him to seek review through a claim of ineffective assistance in a petition for postconviction relief. Instead, Ashley erroneously, and egregiously, advised Oliphant that his only avenue for relief was sentence review.

Oliphant had only a high-school education and no prior experience with the criminal justice system. For Oliphant to recognize that he needed to file a PCR petition within one year of his conviction, and for him to succeed on that petition, he would have had to know: (1) that experts could have testified to the unreliability of AHT diagnoses generally, and (2) no medical professional could pinpoint the alleged abuse to a four-hour window. Additionally, Oliphant would have had to arrange for all relevant medical records to be collected and sent to those experts, and subsequently obtain their reports (because, under *Elliott*, he was required to show actual expert testimony that could have been presented at trial). Further, Oliphant would have had to realize that his counsel was deficient for failing to call such an expert, that there is another procedure besides a direct appeal for addressing issues with his conviction, and Ashley was deficient for telling him there were no issues that could get his conviction overturned.

In addition to the miscarriage of justice exception to the time-bar, this Court has recognized its inherent power and paramount obligation to interpret and protect constitutional rights. *See State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996)

(recognizing "our inherent power and paramount obligation to interpret Montana's Constitution and to protect the various rights set forth in that document."). In order to do so, the Court adopted the common law plain error doctrine that permits the Court to review fundamental constitutional issues notwithstanding procedural bars:

> Application of the common law plain error doctrine, as set forth in *Finley,* stems from our inherent power of appellate review and is applicable "notwithstanding" procedural bars when a criminal defendant's fundamental constitutional rights are at stake. Such rights are undeniably at stake here. We do not invoke this power lightly. As *Finley* directs, "we will henceforth use our inherent power of common law plain error review sparingly, on a caseby-case basis, and we will invoke that doctrine only in the class of cases aforementioned."

State v. Whitehorn, 2002 MT 54, ¶ 18, 309 Mont. 63, 50 P.3d 121 (citing *Finley*).

The plain error doctrine is typically applied where the procedural bar stems from failure to raise a constitutional issue in the district court. However, as this Court noted in *Whitehorn*, the doctrine has been used in postconviction relief cases to reach issues barred by other procedural rules. For example, *Whitehorn* noted that in *Parker v. Crist*, 190 Mont. 376, 621 P.2d 484 (1980), this Court relied on the plain error doctrine to review an issue with the information charging the defendant that was untimely raised in a second postconviction relief petition and that had not been raised in the trial court, on appeal, or in the first postconviction petition. *Whitehorn*, ¶ 17 (citing *Parker*).

Here, there is not only a significant constitutional violation—ineffective assistance of counsel in violation of Article II, § 24 of the Montana Constitution and the Sixth Amendment of the U.S. Constitution—but that violation was also the direct cause of the procedural default at issue.

Overall, the question that naturally arises from the factual circumstances here and the resulting procedural issues is: if Oliphant is time-barred from presenting his claims now, at what previous point could he have realistically presented them? In other words, for a person in Oliphant's position, is there no remedy, despite the exceptions outlined in this section?

II. It Was an Abuse of Discretion for the District Court to Fail Permitted Discovery and Stayed All Other Matters Until Discovery Was Complete

District courts have wide discretion in deciding appropriate procedures, including granting discovery, before making any substantive decisions on a petition. *Marble v. State*, 2015 MT 242, ¶ 37, 355 P.3d 742, 380 Mont. 366 ("It will be up to the district court to determine within the options provided in § 46–21–201, MCA, whether the proof and evidence will be weighed by the court itself, whether discovery and a hearing should be conducted, [etc.]").

As discussed above, Oliphant needed expert testimony to meet the requirements of *Elliott* and *Wilkes* for making out a viable claim of ineffective assistance of counsel. In order to get expert witness testimony, he needed

complete medical records. And in order to get complete medical records, he needed court-ordered discovery. Hence, he asked the District Court to stay all other proceedings regarding his petition and permit discovery and a supplemental petition after discovery completed. The District Court neither granted nor denied this request, but instead simply ignored it.

A. It is fundamentally unfair to require a petitioner to present evidence while denying him the ability to obtain the required evidence

Dr. Galaznik's preliminary expert opinion, and the new medical records it relies on, are the only new evidence Oliphant can show unless and until he is permitted discovery, which is the only possible way for him to obtain a complete set of relevant medical records. Only then can those records be reviewed by other available experts and lead to additional expert reports.

Under *Elliott* and *Wilkes*, in order to present a viable claim for ineffective assistance of counsel based on failure to retain an expert, Oliphant had to show actual expert testimony that could have been presented at trial. *See Wilkes,* ¶¶ 26–27 (citing *Elliott v. State*, 2005 MT 10, 325 Mont. 345, 106 P.3d 517) (petitioner alleging trial counsel was ineffective for failing to present expert testimony must demonstrate actual available expert testimony that could have been presented at trial). Oliphant could not obtain expert opinions that would more firmly establish his innocence because the medical records in Ashley's file were incomplete. Both

the additional medical records, plus the suite of expert opinions that will be available once there are complete medical records (*see Wilkes* ¶¶ 7, 27), would permit Oliphant to make a substantially stronger showing of newly discovered evidence of innocence. It is fully impossible for him to do so, however, without discovery.

The medical experts contacted by Oliphant's postconviction counsel say the medical records are clearly incomplete, and they cannot make definite determinations on an incomplete record. *App. H* at 7. However, Oliphant cannot obtain the full records without court-ordered discovery because, prior to filing the petition, all attempts to acquire them were stymied.

PCR counsel sought medical records from all of R.O.'s medical providers. Oliphant's parental rights were never terminated, and parents are generally entitled to obtain their children's medical records. Several providers, however, either: (1) refused to provide the relevant medical records, and/or (2) called the County Attorney's Office to ask if they should provide the records and were told not to release them without a court order. Hence, Oliphant requested discovery and asked the District Court to stay the proceedings until discovery was concluded.

Although these issues were presented to the District Court in a motion for discovery, the District Court neither granted nor denied the discovery motion. In fact, the District Court failed to address any of these issues in its order dismissing

Oliphant's petition.

B. The District Court's failure to exercise discretion on the discovery motion was itself an abuse of discretion.

More simply than issues of fairness, new evidence, and discovery, the District Court's failure to rule on Oliphant's motion for discovery was an abuse of discretion. "Failure of a district court to exercise discretion is itself an abuse of discretion." *Clark Fork Coalition v. Mont. Dept. of Env't Quality*, 2008 MT 407, ¶ 43, 347 Mont. 197, 197 P.3d 482 (citing *State v. Weaver*, 276 Mont. 505, 509, 917 P.2d 437, 440 (1996)). Likely the most logical result here would be a reversal of the order dismissing Oliphant's petition with instructions to permit discovery.

CONCLUSION

The District Court's order erroneously concluded that Dr. Galaznik's report was merely an interpretation of existing medical records. It then presumed, based on no authority, that merely because it was an expert opinion, Dr. Galaznik's report could not constitute "newly discovered evidence," without considering the report "in light of the evidence as a whole." The District Court then failed to address the evidence presented to it that the untimeliness was itself caused by the ineffective assistance of counsel the petition sought to have reviewed. Finally, it failed to rule

on Oliphant's request that discovery be granted and all else be stayed until discovery was completed.

At this stage in the proceedings, Oliphant is only asking for discovery in order to complete the medical records and obtain expert opinions regarding the AHT diagnosis in this case so he can present a complete picture of the evidence relevant to guilt and innocence. The District Court did not rule on the discovery motion, however, nor on Oliphant's request that proceedings on his petition be stayed pending completion of discovery.

Hence, Oliphant asks that his case be remanded to the District Court with instructions that he be permitted to conduct discovery and any expert opinions he proffers be "viewed in light of the evidence as a whole" as the statute instructs courts to do when considering claims of newly discovered evidence.

Respectfully submitted this 27th day of May, 2022.

By: /s/ Caitlin Carpenter
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 9,233 words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Caitlin Carpenter
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CERTIFICATE OF SERVICE

I, Caitlin Carpenter, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-27-2022:

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