IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA-21-0582

KIM NORQUAY, JR.,
aka, Buggz Ironman-Whitecow

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE MONTANA TWELFTH JUDICIAL DISTRICT,
HILL COUNTY,
HONORABLE YVONNE LAIRD, PRESIDING

APPEARANCES:

PHYLLIS M. QUATMAN
Quatman & Quatman, PC
PO Box 153
Whitefish, MT 59937
quatmanp@gmail.com
406-250-8915
Attorney for Appellant

AUSTEN KNUDSEN
Montana Attorney General
215 N. Sanders
Helena, MT 59620-0145

LACEY LINCOLN
Hill County Attorney
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....4

STATEMENT OF THE ISSUES.....6

STATEMENT OF THE CASE.....6

STATEMENT OF FACTS.....9

ISSUE 1: NO MURDER OCCURRED..... 11

A. Victim moved two feet forward after EMTs left him untreated.....11

B. Victim died from hypothermia/hypoxia, not strangulation 16

C. Newly Discovered Evidence Proves Victim Not Murdered 26

ISSUE 2: STATE'S EVIDENCE IS INADMISSIBLE.....27

A. State's crime scene photos altered, fabricated, destroyed..... 27

B. State's crime scene video/copies without chain of custody...31

C. Property logs and tracking records inadmissible.....32

D. Prosecutorial Misconduct corrupted State's evidence/trial....34

ISSUE 3: INEFFECTIVE ASSISTANCE OF COUNSEL.....35

A. The District Court foreclosed pursuing trial counsel's (VDH) strategy.....35

B. VDH failed to challenge accountability to felony murder.....36

C. VDH failed to challenge uncharged/unprovable rape.....36

D. Postconviction counsel committed IAC in investigation and at hearing.....36

ISSUE 4: CUMULATIVE ERROR REQUIRES REVERSAL.....37

STANDARD OF REVIEW.....37

SUMMARY OF ARGUMENTS.....40

ARGUMENTS.....41

CONCLUSION.....51

CERTIFICATE OF COMPLIANCE 53

CERTIFICATE OF SERVICE 54

APPENDIX

TABLE OF CONTENTS:

Exhibit A: Order Denying Petitioner's Revised Amended Petition for Post Conviction Relief (25 pages)

Exhibit B: Photo 42 - Petitioner's Hg.Ex.13A and State's Hg.Ex.20

Exhibit C: **Nathan Oats' 2016 Diagram of Body Location**

Exhibit D: Photo 1, with overlay, from Agent Callender's report, with **metadata** showing it was created (and modified) on 11/25/2006 **at 9:34 AM.** This exemplifies the metadata from all 100 photos on the "Matosich Disk," each with different times but the same date (except for the 8 mathematical duplicates randomly inserted).

TABLE OF AUTHORITIES

Cases:

Cheetham v. State, 2019 MT 290, ¶12, 398 Mont. 131, 454 P.3d 673.....37
Mascarena v. State, 19 MT 78, ¶4, 395 Mont. 245, 438 P.3d 323 37
Ellenberg v. Chase, 2004 MT 66, ¶12, 320 Mont.315, 87 P.3d 47.....37, 43
State v. Rosling, 2008 MT 62, ¶35, 342 Mont.1, 180 P.3d 1102..... 38
State v. Swann, 2007 MT 126, ¶19, 337 Mont. 326, 160 P.3d 511..... 38
Garding v. State, 2020 MT 163, ¶26, 400 Mont. 296,466 P.3d 501 38
Weisbarth v. State, 2016 MT 214, ¶26, 384 Mont. 424, 378 P.3d 1195.... 39
State v. Criswell, 2013 MT 177, ¶49, 370 Mont. 511, 305 P.3d 760 39
State v. Sullivant, 2013 MT 200, ¶17, 371 Mont. 91, 705 P.3d838 39
Maldonado v. State, 2008 MT 253, ¶10, 345 Mont. 69, 190 P.3d 104 ... 39
Whitlow v. State, 2008 MT 140, ¶10, 343 Mont. 90, 183 P.3d 861 39
State v. Baker, 2013 MT 113, ¶42, 370 Mont. 43, 300 P.3d 699 40
State v. Smith, 2020 MT 304,¶16,12, 402 Mont. 206, 476 P.3d 1178 ...40,51
State v. Cunningham, 2018 MT 56,¶32, 390 Mont. 408, 414 P.3d 289 ... 40
Wilkes v. State, 2015 MT 243,¶32, 380 Mont. 388, 355 P.3d 755 45
State v. Reinert, 2018 MT 111, ¶17, n.1, 391 Mont. 263, 419 P.3d 662 ...46

Amado v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014)..... 46
United States v. Price, 566 F.3d 900, 914 (9th Cir. 2009)..... 39
U.S. v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980)..... 50

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) 33, 36
Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 1566 (1995).....39
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065 (1984) ...35
Shinn v. Ramirez, 596 U.S. ____, 2022.....42

Statutes:

Hill County Local Rule (6)(a)(1) 42
Mont. Code Ann. § 1-2-102 42
Mont. Code Ann. § 46-21-104 .....7, 42, 43
Mont. Code Ann. § 46-21-104(1)(c) 42
Mont. Code Ann. § 46-21-102..... 38, 42
Mont. Code Ann. § 46-15-403..... 38
M.R.Evid. Rule 404 50

M.R.Evid. Rule 901 ..... 28, 38, 42

28 U.S.C §2254(e)(2) 42

Sixth and Fourteenth Amendments to the U.S. Constitution, ... 39
Article II, §24 of the Montana Constitution 39

STATEMENT OF THE ISSUES

1. The aggregate judicial mistakes of law and erroneous findings of fact denied Norquay his right to prove no murder occurred in this case and he is innocent.

2. The aggregate *Brady* violations, police tampering with and fabrication of evidence, and instances of prosecutorial misconduct, prove that no competent evidence existed in 2006, or now, to convict Norquay of murder.

3. The aggregate instances of ineffective assistance of counsel—e.g., failing to challenge both cause of death and the State's repeated reference to Norquay raping the victim, without any evidence or charge of rape—prejudiced the jury who otherwise were hung in their verdict.

4. The aggregate issues set forth herein and in Norquay's stricken Amended Petition for Postconviction Relief ("APPCR") are so prejudicial they constitute cumulative error requiring reversal of his conviction.

STATEMENT OF THE CASE

A jury convicted Kim Norquay, Jr., aka Buggz Ironman-Whitecow, ("Norquay") of accountability to felony murder (predicate=aggravated assault) and Tampering with Evidence in November 2008, for which he was sentenced to 65 years MSP in April 2009. This Court denied his direct appeal on March 1, 2011. Norquay, *pro se*, timely filed his original petition

for postconviction relief on May 31, 2012 (Docs.1,2,3). Present counsel was appointed in 2013.

In November 2016, Norquay filed his second discovery motion and petition for DNA testing (Docs.48,49,50) which was fully briefed on January 23, 2017. (Docs.57,58) Judge McKeon retired in November 2016 and newly appointed District Court Judge Yvonne Laird ("J.Laird") assumed jurisdiction in December 2016.

However, J.Laird failed to rule on the above pleadings for 366 days, until January 24, 2018, when she denied them and short-set Norquay's deadline to file his APPCR, giving him only 21 days to complete it. (Doc.71).

Norquay brought his first Writ of Supervisory Control which this Court denied on February 6, 2018 (Doc.79), advising counsel to raise the issue on appeal.

On April 24, 2018, Norquay completed and filed his APPCR pursuant to §46-21-104, MCA (Docs.90,91), totaling 334 pages, and two volumes of exhibits. *Thirty minutes* after that electronic filing, J.Laird, at the State's request, limited the petition to 60 pages citing Hill County Local Rule (6)(a)(1). (Doc.92). The State then moved to strike Norquay's APPCR, exhibits, and juror affidavits relevant to the prosecutorial misconduct claim.

(Doc.94) On May 14, 2018, J.Laird granted the State's motion, ordering Norquay to file a revised 60 page APPCR within 30 days (Doc.96).

Norquay brought his second Writ of Supervisory Control on the single issue that §§46-21-101-105, MCA, should control over the local rule. This Court denied that Writ on May 30, 2018 (Doc.97), advising counsel to raise the issue on appeal.

Norquay filed his *Revised* APPCR, 56 pages, on June 13, 2018 (Doc.98). The State filed its response brief on December 8, 2018. (Doc.108). Based upon the *State's newly produced evidence* in that response, Norquay filed numerous motions, the State responded, but J.Laird didn't rule.

On October 18, 2019, J.Laird issued an Order to Set Status Hearing and Hearing on Pending Matters (Doc.130) which was held on December 9, 2019. On January 10, 2020, J.Laird denied Norquay's motions *without providing her reasoning* and set an evidentiary hearing for January 29, 30, 31, 2020. J.Laird held that hearing, finishing on February 6, 2020. (Doc.151)

After 18 months, Norquay brought his third Writ of Supervisory Control based on J.Laird's continued failure to rule. (Doc.179) This Court allowed J.Laird 30 days to respond to the writ, which she did, as did the State, and then denied the writ. (Doc.180)

J.Laird denied Norquay's *Revised* APPCR in a 25-page order

("Order") dated October 1, 2021. (Doc.184) J.Laird made no findings of fact but "set forth a summary of the pertinent testimony provided at the hearing on the Revised Amended Petition." (Order.P.3) Norquay now appeals that Order.[1]

STATEMENT OF FACTS

The State convicted Norquay using the following evidence:

- Gruesome crime scene photos and video;
- A pathologist's testimony that (1) a string ("ligature") around decedent Lloyd Kvestad's neck *may have* strangled him; (2) injuries to Kvelstad's head and face during a group fight that would *not* have caused his death;
- Testimony the string *may have* come from Norquay's shirt but lab evidence that excluded his DNA;
- A shirt with a possible shoe print impression on the back;
- Kvelstad's blood on Norquay's Carhartt jacket and shoe;
- Joseph Red Elk's testimony *he possibly saw* Norquay shadow box, make a humping motion, or slap Kvelstad;
- Nicole Stamper's last-minute testimony Norquay called her drunk from jail, and sent her a letter that disappeared, in which he made

[1] **J.Laird's delays in ruling totaled 3 years 10 months.**

statements implicating him in the fight between Kvelstad and several Native Americans;

- Norquay wiped blood spots off his shoes later that morning;
- *Without any evidence and no charge of sexual assault*, the State repeatedly referenced their theory that Norquay might have sodomized Kvelstad as he lay unconscious and helpless.

The jury initially hung, but after an *Allen* instruction, convicted Norquay after deliberating more than 10 hours.

This appeal turns on two critical facts: **First**, Kvelstad was not murdered, strangled, or beaten to death, evidenced by the fact that *he moved* about two feet forward after EMTs left him untreated at 1:30 a.m., and he *showed signs of life* until 4:45-5:00 a.m., several hours after the State claimed he died. **Second**, the digital evidence in this case is so damaged and inaccurate, it was and is inadmissible. Likewise, the string (murder weapon) was significantly mismeasured and excluded Norquay's DNA. The pathologist, while testifying there were several possible causes of death, never concluded any particular one killed Kvelstad, and failed to consider hypothermia as a possibility. The collection data for the shirt and jacket is missing. Indeed, the entire investigation is so corrupted, it impeaches every officer who testified at Norquay's trial and hearing. Thus, no credible or

competent evidence exists to convict Norquay of any crime.

No court or jury has ever reviewed the facts, arguments, and evidence presented in Norquay's APPCR and exhibits, thus Norquay respectfully asks this Court to review it de novo.[2] Norquay also asks the Court to read his 34-page Proposed Findings of Fact and Conclusions of Law, **Doc.175**, for a concise summary of hearing facts.

ISSUE ONE: NO MURDER OCCURRED

A.

Kvelstad was not dead at 1:30 a.m. because he moved after EMTs left him untreated, and showed signs of life until 4:45 a.m.

1. At the 4-day hearing, Norquay called the first percipient witness at the scene, **Nathan Oats,** who testified on the afternoon of January 30, 2020:

- Oats affirmed the contents of *his prior eight statements* to police, investigators, and jurors in which he stated essentially the same facts.
- Oats walked into Missy Snow's Havre house at about 1:10 a.m. on November 25, 2006, entered the living room, and found Kvelstad face down on a loveseat immediately to Oats' left. Kvelstad's head lay on the left side of the loveseat [as one faces it] where the blood stain on the cushion shows in **Photo 42, Appendix Exhibit B.**[3] Kvelstad's

[2] Pursuant to Rule 12(5), M.R.Civ.P., this Court has available to it the entire record.
[3] aka, State's Hg.Ex.20, Petitioner's Hg.Ex.13A, APPCR-Petition.Group.Ex.7,

pants were down around his ankles and something was smeared down his legs. Oats moved toward Kvelstad and shook him by the shoulder. Oats said something like, "Get up, man, fix yourself, show some respect." After he shook Kvelstad's shoulder, Kvelstad rolled/slid off the loveseat and landed on the carpet in front of it. Kvelstad's arms were next to the sides of his body, face turned south, feet facing east. (January 30, 2022.p.m.p:86-97)

- Referring to **Photo 42**, J.Laird asked Oats to point to exactly **where Kvelstad's head landed** after he rolled off the couch. His answer was: "Right in front, like close to where the cushion is, right there in front." J.Laird asked, "Where were you standing?" and Oats responded, "I was standing right here next to the couch like this." (Id.p.105)
- J.Laird described for the record where Oats pointed on the photograph, showing the location of Kvelstad's head when he landed. "What Mr. Oats stated was that **his head was directly below the cushion in this 13A [Photo 42]** and that he was standing to the north of Mr. Kvelstad's body. That is exactly what he said and where he pointed." (Id.p.105-106)
- Oats authenticated the drawing he made of Kvelstad's body location

Exhibit C, attached,[4] and affirmed it reflected his present memory of that location. (Id.p.99:4-8,107-108)

- Oats explained ***Kvelstad's eyes were open when he found him on the loveseat,*** and Kvelstad was looking toward the south door, like he was eyeballing the door and wanted to be out of there. (Id.p.97:20-25, 108:6-26)
- Oats, a Native American, explained why he assumed the "POW position" when police arrived, stating that, because of the color of his skin, it was easier to just give up when involved in a situation with police officers rather than have them see him as a threat. (Id.p.89, 108,109)
- Regarding his December 2018 statement to Ofc. Barkus, Oats repeatedly confirmed that his 2016 body location diagram was precise and that what he told the court at the hearing was the truth. When he told Barkus Kvelstad might have been a few inches forward, he meant south [toward the exit door]. (Id. 109-114) Oats understood Barkus' questions: "It was the same thing we went over so many times before . . . with everyone who interviewed me. My memory might be a little off *on the size of the house*, but my memory serves me correct."

[4] aka, Petitioner's Hg.Ex.16, Petition Ex.5C

(Id.p.116-117:1-4)

2. Three Havre EMTs arrived about 1:24 a.m. None testified at the hearing, but in their prior 2016 interviews, they believed one checked Kvelstad for a pulse, although they were unsure if it was a radial or carotid artery pulse. EMT Jones stated it would be his practice to turn the body over to check for breath. However, ***it is uncontroverted that no one turned Kvelstad's body over, or moved it, until Officers Wilkinson and Matosich did so at approximately 4:22 a.m.*** as evidenced on the crime scene video. The EMTs agreed they made no effort to resuscitate Kvelstad, warm him, or take him to the hospital.(Petition.Ex.24,25,26;State's Response.Ex.3,4,5)

Petition.Ex.28 sets forth guidelines for EMTs to follow when treating patients, including clearing the airway, checking for breath, and checking for circulation. The EMTs agreed that, had they checked Kvelstad's carotid artery, they would have found the string around Kvelstad's neck and removed it, but ***none of them saw the string***. (Id.)

However, had Kvelstad initially landed at 1:10 a.m. where he is depicted in **Photo 42**—taken of Kvelstad that morning at 3:53 a.m., below—they would have seen the string on Kvelstad's face and the fob in his mouth.

The fact that none of them saw the string and fob shows Kvelstad

was lying two feet back, next to the loveseat where Nathan Oats and Officer Wilkinson (below) said he landed at 1:30 a.m., proving Kvelstad was alive and moved forward after the EMTs left him untreated.

3. **Former Captain Wilkinson** testified on February 6, 2022 (morning) that when he first arrived at Missy Snow's house on November 25, 2006, just before 1:30 a.m., co-defendant James Main was sitting in a chair next to the kitchen table. This chair was the closest one to the living room entrance as depicted on State's Trial Exhibit 2, also used for the body location diagrams in Petition.Group.Ex.5.

- At Norquay's trial, defense attorney Vince Van der Hagen ("VDH") questioned whether Main could see Kvelstad on the living room floor, obviously relying on **Photo 42**, et seq., Captain Wilkinson testified Main was not close to Kvelstad, stating, "He [Kvelstad] was in the other room, out of sight. He would be out of his [Main's} line of sight." (Hg.tx.p.119-120)
- VDH then tried to clarify that the distance between Main, (sitting in the chair), and Kvelstad, (lying where he was shown in **Photo 42**), was close. Wilkinson confirmed his trial testimony at the hearing, "No, Mr. Main would not be able to see where Mr. Kvelstad was lying." (Hg.tx.p.120).

- ***The fact that Main could not see Kvelstad at 1:30 a.m. proves Kvelstad was not at the location depicted in* Photo 42, *but rather exactly where Oats placed him, directly below and adjacent to the loveseat.*** All other witnesses who drew body location diagrams also placed Kvelstad there, including the EMTs in 2016, below.

4. Petition.Group.Ex.5 contains body location diagrams **drawn on a copy of State's Trial Exhibit 2** by percipient witnesses in 2006 and 2016. They place Kvelstad where Oats testified he landed, regardless of whether "they are drawn years after the incident or not to scale." (Order.p.4)

5. Petition.Group.Ex.7 contains crime scene photos time-stamped beginning at 3:47 a.m. showing that by 3:53 a.m. Kvelstad had crawled forward about two feet and a foot to the left from his original landing spot.

6. Petition.Group.Ex.8 contains 2006 blood pooling diagrams drawn by Havre Officer Ciara Ost showing several blood pools and a trail of blood from Kvelstad's landing spot next to the loveseat up to his final resting location in **Photo 42**.

B.

Kvelstad was hypothermic and intoxicated at 1:30 a.m. and died from hypothermia and/or hypoxia hours later.

1. **Dr. Gordon Giesbrecht** (January 30, 2020, afternoon), testified as an expert on hypothermia and the effects of cold on the human body. As he did

in his August 11, 2017 Affidavit (Petition.Ex.3), Giesbrecht opined Kvelstad was alive but hypothermic at the time EMTs checked his pulse. Giesbrecht based his opinion on several factors:

- The circumference of the (wet) string around Kvelstad's neck was not 11 inches, as measured by pathologist Dr. Walter Kemp in November 2006. In fact, when remeasured (dry) in 2016, the string's circumference was 12.25 inches. (Id.13)(Petition.Ex.23)
- Kvelstad was cold when he was found. (Id.p.13)
- It was 7 degrees Fahrenheit outside (Petition.Ex.29,30), the home was unheated except for some heat coming from the oven, the back door was open, and a window in the kitchen was broken. Several people said it was cold enough in the house to see their breath (*see also Coroner Szudera statement, below*). Kvelstad had no thermal protection below his waist, and his T-shirt and light sweater were soaking wet. When insulation is wet, there is heat loss. The length of Kvelstad's exposure to the cold was, at a minimum, three to four hours before he was found (Statements of percipient witness Thomas Anderson-Petition.Group.Ex.22), and up to six to seven hours before he was pronounced dead by Coroner Szudera at 6 a.m. (Id.p.13-19)
- Besides being cold, the reason Kvelstad was unconscious when the

EMTs found him could arise from alcohol (Kvelstad's blood alcohol level was 0.24), head trauma, and the string around his neck decreasing blood flow to his brain. (Id.p.20)

- For a cold patient, it is important to check the carotid artery pulse at the neck, rather than the radial pulse at the wrist, since blood circulates more slowly at the wrist given its distance from the heart. (Id.p.21)
- It can be very difficult to determine if a hypothermic person is breathing due to a slowed metabolism. High alcohol consumption further diminishes breathing and the ability to detect breath. It is not uncommon for people to come into an emergency room without pulse, heartbeat, or venitalation, yet revive after cardiopulmonary bypass. (Id.22-26)
- Giesbrecht considered the crime scene photos, the statements of percipient witness Oats, EMTs' reports, body location diagrams, and blood pooling diagrams. The EMTs found Kvelstad face down, arms to his sides, below the loveseat from which he rolled. Kvelstad's head, when lying on the loveseat, was just next to the armrest and when he rolled off, his head landed below that same location on the carpet. (Id.p.27-28)

- He noted no crime scene photos were taken of Kvelstad in the above position, nor are there any crime scene photos time-stamped before 3:47 a.m. (Petition.Group.Ex.16), (Id.p.28)
- The first photo showing Kvelstad is #40, time-stamped at 3:53 a.m.—2.5 hours after Nathan Oats found him at approximately 1:10 a.m. and shook him, causing him to slide off the loveseat and land as he described. (Id.)
- In these first photos, Kvelstad is about 1.5 or 2.5 feet forward from where others say his head landed when he rolled, and his arms are up, not against his sides. See **Photo 42, Exhibit B** (Id.p.27)
- Giesbrecht commented in his [affidavit] (Petition.Ex.3) that the body had been moved. However, since EMTs and police on scene deny moving the body, and no one else was present, ***the only way for Kvelstad to arrive in that location was if he moved himself.*** Giesbrecht testified there is no other explanation. Dr. Kurtzman, the State's pathologist, agreed that dead people cannot move, below. (Id.p.27-28)
- There is apparent fresh blood coming from Kvelstad's wounds—as depicted in crime scene photos 46, 58, 59—3 hours or more after he supposedly died at 12:30 a.m. (Id.p.28)

- Giesbrecht reviewed the crime scene video and noted Kvelstad, when rolled over at 4:22 a.m., was limp rather than stiff, without rigor mortis. (Id.)
- Giesbrecht explained the term '**paradoxical undressing**' as it relates to hypothermia victims as a viable theory to explain why Kvelstad's pants were pushed down toward his ankles. (Id.p.29-30)
- Coroner Szudera's discovery that Kvelstad's arms were 'warm to the touch' at 6:00 a.m. was particularly unusual if a person had been dead for several hours. Arms tend to grow colder faster since they are further away from the heart. Given Szudera's training and experience, Giesbrecht found it hard to imagine that arms described as warm [were] incorrectly noted by a professional. (Id.p.30-31)
- Because police testified they bagged Kvelstad's head at approximately 4:45 a.m. to 5:00 a.m., Giesbrecht opined that if Kvelstad was hypothermic but breathing, bagging his head would have hastened his death. (Id.p.31-32)
- Giesbrecht disputed Kurtzman's opinion that the furrow underneath the string on Kvelstad's neck was deep. It measured 3/16ths inches *wide*, but the depth was subjective and depended on the body position. If the body was moved—as it was after the police rolled it over,

placed it in a body bag (face up), transported it to the morgue, and to the Crime Lab (face down)—then the depth of the furrow would change. Giesbrecht cited crime scene photo 58 and autopsy photo 008 as examples of this discrepancy. (Id.p.32-36)

- Referencing Kurtzman's conclusions, Giesbrecht noted the absence of Wischnewsky hemorrhages does not negate death by hypothermia. (Id.p.37)
- Giesbrecht agreed Kemp and Kurtzman were qualified to conclude Kvelstad was dead at 1:24 a.m. Yet based on all the evidence, there might be an alternate explanation *because the body moved.* Giesbrecht pointed to the body location diagrams, the crime scene **Photos 42**, 43, and the amount of blood on the floor two hours after EMTs declared Kvelstad was dead. (Id.p.55-56)
- Giesbrecht agreed with Kurtzman that gravity *could* be responsible for the large amount of blood under the victim's head as shown in the photos, but *only if he had died at that location.* **If he died from strangulation on the couch, or earlier at 12:30 a.m as the police guessed, the blood would *not* still be able to pour out of Kvelstad's mouth or nose when he rolled to the floor, or after he moved two feet forward.** Crime scene photos time-stamped at 3:53 a.m show

fresh blood at Kvelstad's final resting location. Giesbrecht found it hard to imagine that if Kvelstad died two to three hours earlier from no blood flow to his head, he could leave so much fresh blood at 3:53 a.m. (Id.p.57-64)

- Giesbrecht also relied on the comments of the person who found Kvelstad and rolled him off the couch, (Nathan Oats). (Id.p.64)

2. Coroner Greg Szudera did not testify at the hearing but his report and interview are included in Petition.Ex.11,11i, and discussed in the stricken APPCR.p.51-54. Szudera also testified at Norquay's trial. In summary, he arrived at Missy Snow's house at 6:00 a.m. and found Kvelstad face up on the living room floor. He stated it was very cold in the house, and about 8-9 degrees Fahrenheit outside. Kvelstad's head and hands were *not bagged.* At Main's trial, he testified Deputy Jason Geer bagged the hands and head and put the body in the body bag face up. At 6:00 a.m. ***he found Kvelstad's arms warm to the touch. He found slight rigor and no lividity.*** He based the time of death at 12:30 a.m. largely ***on what police at the scene told him*** they believed had happened.

3. Pathologist Walter Kemp did not testify at the hearing. However, at co-defendant James Main's trial, *he could not say to a medical certainty* the ligature caused Kvelstad's death. (Main.Tx.1025:23-25,1026:1-3). When a

person is living, his heart is pumping and blood will leak out from injuries. If the person is dead, the heart is not pumping, and there is very little blood to leak out. (Main.Tx.1026:20-25,1027:1)

Kemp could not say to a medical certainty Kvelstad died from a combination of injuries to his head combined with alcohol. There were several possible causes of death, and he made his conclusions to fit the facts of the case. (Main.Tx.1004:1-13)

Alcohol alone would not be a cause of death and **Kvelstad's blunt force injuries, though impressive, by themselves would not have caused his death. They were neither lethal nor life threatening. They were all injuries from which Kvelstad would have recovered fully.** (Main.TX.1018:2-25)

Kemp never considered hypothermia as a cause of death, as evidenced by the absence of that theory in his report (Petition.Ex.2) and his testimony. Additionally, Kemp mismeasured the wet "ligature" in 2006 at 11" in circumference, even though the actual length (dry and in 2016) was 12.25 inches in circumference. Thus, the string was not nearly as tight around Kvelstad's neck as Kemp believed and likely even looser than the measurements indicate. Kemp twice amended two autopsy reports before writing Kvelstad's report because he was mistaken on the causes of death.

(APPCR.p.31, 55-59)

Kemp saw no evidence of sexual assault. (Main.TX.1012:9-24, 1013:25, 1014:1-6) "The anus is closed and atraumatic, with no contusions, abrasions, or lacerations identified." (Autopsy.Rpt.Petition.Ex.2.p.2)

4. Pathologist Robert Kurtzman testified in the afternoon of January 31, 2020. Kurtzman did not review all of the items Giesbrecht reviewed and heavily relied on Kemp's autopsy report. (Hg.Tx.p.m.p.84-90) ***"My task was to determine whether hypothermia was a concern in this case or not."*** (Id.p.90:18-19) He was not an expert in hypothermia.

Kurtzman opined the mismeasured length of string around Kvelstad's neck was irrelevant. It was absolutely not possible for someone to live with a string around their neck in the fashion he observed in the photos. ***It would cut off the blood flow to the brain, cutting off the arteries and veins***, and the individual would be unconscious in seconds. Unquestionably the string was tight enough to cut off venous flow and kill Kvelstad within minutes. (Id.p.91-93)

Kurtzman testified the *heart does not have to be pumping* for blood to flow from a body, and it can just leak out. He would expect to find Wischnewsky gastric hemorrhages that indicate death from hypothermia, but Kemp did not note these as present in his autopsy findings. (Id.p.95-98)

Coroner Szudera's finding that Kvelstad's arms were warm to the touch (at 6:00 a.m.) did not change Kurtzman's opinion regarding the cause of death. He characterized the finding as subjective. He noted Szudera found no lividity or rigidity and had used those factors to determine time of death at 12:30 a.m., so he took Szudera's findings with a grain of salt. (Id.p.101-104)

Crime scene photos showing Kvelstad's movement taken three plus hours after the time of death at 12:30 a.m. would not change his opinion. Kvelstad's neck position changing after the string was placed on it would not affect his opinion. (Id.p.105-110)

Regarding Petitioner's Hg.Ex.13A,B,C, Kurtzman did not accept the time of death at 12:30 a.m. Leakage accounted for blood shown in the photographs[5], and the idea that blood can only come out when the heart is pumping "is ludicrous." He compared this to suspending a dead animal and gravity causing blood to flow out. "Any place with an injury that is open, exposing blood vessels, that is where blood can leak out." (Id.p.114-120)

He did not read any statements from Nathan Oats. Confronted with Oats' testimony the day before—that Kvelstad's head landed directly below the bloody cushion on the loveseat, and with Giesbrecht's opinion that

[5] This despite his testimony the string cut off all blood flow to the head and brain.

Kvelstad crawled forward from that position to the one depicted in **Photo 42** (13A)—Kurtzman would not change his opinion on cause of death. His impression would be that the body was moved. "It is not possible for someone who is deceased to move." (Id.p.121-125:1-14)

C.

Newly Discovered Evidence to Challenge Cause of Death

In summary, after trial Norquay discovered no cameras used at the scene collected metadata. All cameras are missing and only 5 disks remain with original photos, many damaged and irretrievable. No scene photo logs exist, despite both Virts and Barkus admitting starting them. No scene evidence logs exist. The video camera is missing and the 'original' 8mm video also appears to be altered and/or missing, with no chain of custody. Multiple DVD copies of it have different content and length, and copies used at the trial had the sound removed.[6] No Havre officer can account for this missing or altered evidence. The string, excluded from having Norquay's DNA, was significantly mismeasured, so its value as a 'murder weapon' is useless, even moreso with Giesbrecht's testimony regarding hypothermia/hypoxia. Kvelstad's shirt was compromised at the scene, evidence shows officers staged numerous photos, below, and no officer can

[6] Thus, jurors didn't hear Wilkinson say, "I wonder if this guy wasn't … didn't die right away?" and Matosich say, "It looks like he urinated on himself" after they rolled Kvelstad over,

explain why they bagged and unbagged Kvelstad's head before the coroner arrived. The totality of this newly discovered evidence proves Norquay didn't murder Kvelstad.

ISSUE TWO - INCOMPETENT AND INADMISSIBLE EVIDENCE

A.

No Competent Photographic Evidence Existed in 2008 or now to Convict Norquay of Murder.

J.Laird relied on selected statements from Expert Callender and non-expert Barkus to conclude no new evidence existed showing tampering or manipulation of photographic evidence, yet she ignored Callender's concession of those facts. She particularly ignored the Breunig report. (Petition.Ex.16)(Order.p.12,13,16,17) However, Norquay's stricken APPCR details further proof in various expert reports and petition arguments. Evidence at the hearing, below, confirms this allegation. The truth is *none of this digital evidence qualifies as competent, reliable evidence under* **M.R.Evid. Rule 901**, and thus none of it is admissible to a court or jury.

Havre PD uses **IMC software** for its records management system, a fact not known to the defense until August 2018, nor were the relevant photos on it, below. Thus the APPCR has no references to **the IMC** or its contents or lack thereof.

The State may not agree certain photos were "wiped" of EXIF data, or

the crime scene video is not the actual one taken from the camera in 2006, but **AG Guzynski** conceded this evidence is unreliable:

1. Regarding the five missing Virts photos. Guzynski stated, "I think there is conclusive proof that there are five photographs missing." (Jan.29.am.p.35:9-10)

2. Re Officer Virts' testimony at the hearing, Guzynski objected, "I think we all heard at length the time of the photographs. Nobody knows whether the cameras were accurate. I think it is hard to represent that we know with certainty what time any of these photographs were taken." (Feb.6.am.p.24:14-19)

3. Again, during Capt. Wilkinson's testimony about photos he took during the crime scene video, Guzynski objected, "What the state of the evidence is, is that we do not know *any of the timing of any of these instruments that took images is correct. To act like it is a certainty to this witness is an unfair question.*" (Id.p.91:10-15)

Additionally, State's expert Callender conceded there is no way to verify the accuracy of the photographic evidence:

1. The point of documenting everything is to make sure images depicted reflect what the officer saw at the time of the crime. (Id.94:3-18)

2. The only way to determine the accuracy of any of the photos' times

and dates would be from other evidence that would tend to corroborate them, evidence such as a photo log written at the time the photos were taken, an evidence log written at the time evidence was collected, officers' reports that detail where and when each photo was taken, or testimony from officers who recalled when and where they were taken. (Id.p.76-79)

3. In the absence of such corroborating evidence, ***there is no way to lay a foundation that the crime scene photos in this case represent the scene as officers first saw it or that the depictions in the photographs accurately reflect whatever they are supposed to show.*** (Id.93)

4. In answer to the question, "We do not know whether the times are accurate [on any of these photos]?" Callender responded, "We don't." In answer to the question, "And we do not know whether the images are accurate or if they were run through a photo editing program, correct?" Callender responded, "Correct." (Id.94)

5. Callender stated there is "no way to tell" what kind of camera took the photos time-stamped between 9:21-9:38 a.m. of Missy Snow's kitchen, since no original information on the photos exists, to wit, the file name or EXIF data, and the camera is missing. (Id.96-98).

6. Callender agreed with Breunig that these kitchen photos, showing *Created by ImageGear, Accusoft Corp.,* **had been altered.** "I cannot say for

sure in what way." (Id.130:25,131:1)

7. ImageGear had the ability to resize large photos and strip EXIF data, if any, but he had no idea what ImageGear could do in 2006, *or whether it altered the visual quality or actually resized those photos.* (Id.130:25-131:1-19) The IMC *might have* stripped the metadata from the photos but only if it needed to resize the images. (Id.) Callender could not say that happened with the 9:21-9:38 images. "No one can." (Id.99:10)

8. Regarding the CD holding 54 exculpatory images of Main's many injuries, there was nothing Callender could read on it. It wasn't copied from the original floppy disk, which is missing. The CD copied from that floppy disk also is missing, making this an unreadable CD, copied from a missing copy of a missing floppy disk. (Id.99-100)

9. Callender agreed any images loaded onto the IMC were only as accurate as the human being doing the input. If a human loaded false photos onto the IMC, the IMC would not know, so Callender agreed with the adage, "Garbage in, garbage out," regarding the accuracy of data uploaded to a device by a human being. (Id.p.103-104)

10. Regarding the *8 sets of duplicate photos*, Callender agreed they are out of chronological order based on the time-stamps and ***whoever duplicated them also named them and picked the order they were listed in. Also,***

someone selected which photos and how many to include on the Matosich Disk from the original 5 photo disks. (Id.139-140,148:4)

11. Regarding the missing 5 Virts photos, Callender testified he agreed there were no [available] photos taken before 3:47 a.m. but "We cannot say for sure the time and date stamps on the devices were accurate" so he couldn't say they were "necessarily missing." "There are photos that we cannot say for sure what device they came from." (Id.149)

12. Callender agreed there were 14 undisclosed photos in the IMC taken between 7:52-9:15 a.m. on November 25, 2006, but he declined to retrieve them for counsel. (January 29, 2020.a.m. Hg.Tx.p.27-30)

13. Calendar explained **Petitioner's Hg.Ex.5** showed the file names for each photo on each of the three mediums is different; the photos are not in chronological order; and 8 exact duplicate sets of photos are included but with different file names and numbers. The first 23 photos on the Photo Log, the Matosich disk, and the IMC contain duplicates, and all were taken or time-stamped between 9:21 a.m. and 9:38 a.m. two hours after the police had cleared the crime scene at 7:20 am. (Id. p.67-69) (**Attached Exhibit D**)

13. **To the question, "Do you really know when *any* of the photos were taken?" Callender answered, "No."** (Id.)

B.

The Crime Scene Video also cannot be authenticated as original.

Rather than summarize the January 2020 hearing testimony from Professor Yonovitz and Doug Lacey, Norquay refers this Court to his Proposed Findings of Fact and Conclusions of Law filed November 23, 2020. (**Doc 175**.p.25-28) The salient fact for this Court is no chain of custody existed on the putative "original" crime scene video, the camera clock wasn't checked for accuracy, and the video camera, like all devices used to capture digital imagery in this case, is missing. The DVD copies of the video number in excess of 4, contain different content and length, and were played to both juries (Norquay's and Main's) *without sound.*

C.

Property Logs 1 and 2 contain crucial evidence discrepancies.

Referring this Court to **Doc 175.p.29-30**, the 'wet' (bloody) items 1351-1359 missing from page 1 on **Property Log 1** (Petition.Ex.14) are the same items Havre PD initially collected from Missy Snow's kitchen. On **Property Log 2** (Petition.Ex.15), dated one year later, these items are listed on the front page in their correct order. Wilkinson prepared both property logs but could not explain this discrepancy. (Petition.Ex.27F)

Given the State conceded the 5 photos Virts took of those same bloody items are missing, as is the camera and disk which captured them,

how can photos 1-23 on the Photo Log and Matosich disk exist, especially with time-stamps 9:21-9:38 a.m.? Since they depict the kitchen and those bloody items, the only explanation is that someone returned to the scene with the bloody items and recreated the missing Virts photos. Yet everyone denied returning to the scene to take those photos, so the answer is unknown.

Whatever the answer, those photos are inadmissible, as are all the photos in this case, the two property logs, the Photo Log, and the Matosich disk. This newly discovered evidence is prejudicial because, had it been used at Norquay's trial, it would have impeached every officer who testified and proved the crime scene was so compromised, no evidence collected at it could reliably be authenticated.

Likewise, the **tracking records**, **(Hg.Exhibit 8)** discussed in **Doc 175.p.30**, were never distributed to the defense until July 2018 (5 photo disks, 8mm video) and December 2019 (9 'wet' items from kitchen), *after Norquay filed his Revised PPCR*. They show: ***the 5 photo disks, 8mm crime scene video, and those 9 wet items from the kitchen were personally logged into evidence by now-Chief Matosich over 5 hours after other officers logged in the rest of the evidence.*** These records appear admissible and corroborate Norquay's theory that Havre officers staged the kitchen scene to cover up their massive mistake in letting Kvelstad die.

D.

Prosecutorial Misconduct

The tracking records disclose the State ***requesting in December 2014*** the original 5 photo disks and 8mm crime scene video ***and keeping them for 16 months.*** Because J.Laird denied counsel's motion to depose Guzynski on this issue and others, (Motion-Doc.112, Order-Doc.151), and since Guzynski has failed to file an Affidavit under oath explaining his actions, why he requested them and what he did with them remains a mystery.

Likewise, Guzynski specifically defied J.Laird's Order to transmit those same **5 photo disks** to Expert Breunig in March 2018, and instead **took them from Havre police and delivered them to** Callender. (Motion-Doc.84, Order-Doc.93) When counsel objected, J.Laird ruled for Guzynski stating Bruenig could use the bitstream images Callender had created. (Order-Doc.94) Thus, **Breunig was never able to analyze those original 5 photo disks.**

Guzynski strongly objected to Breunig analyzing the 8mm crime scene video, but J.Laird denied that objection, finding Bruenig, as a former Dallas detective, was reliable. (Id.) Prof. Yonovitz analyzed it for the defense.

Guzynski objected to **juror affidavits** gathered for the hearing and

directly proving prejudice from his continual references to Norquay raping Kvelstad when that crime was never charged and Dr. Kemp testified there was no evidence to support it. Guzynski used this allegation to bootstrap an otherwise unprovable case and convict Norquay of Kvelstad's murder. J.Laird's refusal to allow Guzynski's deposition denied Norquay the chance to prove prosecutorial misconduct at his postconviction hearing, a claim for which appeal is inadequate.

ISSUE THREE: Ineffective Assistance of Counsel

A.

J.Laird erroneously foreclosed Norquay from fully pursuing Claim 5 at his hearing by disallowing him to ask VDH questions that could answer those 9 issues listed in her order which she claims are "record based" (Order.p.20-23) and other 'strategies' he failed to pursue—hypothermia, others returning to the crime scene to clean up, DNA testing on Red Elk's black jacket, hair in the ligature, visiting the Rails Inn, or reviewing the prosecution's file. "No evidence has been provided to reflect that any of the actions now alleged by Petitioner to have occurred actually occurred." (Order.p.22-23) Norquay would have pursued these topics with VDH when he testified. Norquay also set forth a vast amount of evidence in his stricken APPCR-p.203-284 and prior relevant pleadings. Norquay incorporates these

documents by reference.

B.

Still, VDH testified he filed a discovery motion when he first began representing Norquay in July 2007. (Petition.Hg.Ex.17). He failed to challenge the accountability to felony murder charge because his strategy was to blame James Main. He relied on Dr. Kemp's report. (Jan.31.a.m.p.117) His strategy would have changed if the evidence was tampered with, or if the police were hiding things or covering up evidence surrounding the cause of death. (Id.p.118-120)

C.

VDH also did not make a motion to exclude evidence of rape or sodomy. He "let the State push that because I think it helped the defense," but he admitted the photographs were "terrible." (Id.p.124-125). He made the decision not to test the hair in the ligature. He agreed that accuracy and reliability of the evidence was important. (Id.p.127-128)

D.

Present appellate counsel also served as postconviction counsel. Pursuant to the recent U.S. Supreme Court decision in *Shinn v. Ramirez,* 596 U.S. __, 2022, Norquay asserts IAC for Caitlin Carpenter and Phyllis Quatman during postconviction proceedings to preserve any federal IAC

claim against postconviction counsel. *Inter alia,* they failed to interview or depose Joseph Red Elk and AG Guzynski, to timely file a federal habeas petition, and to pursue any other claims federal habeas attorneys may raise.

ISSUE FOUR-CUMULATIVE ERROR

Multiple judicial errors together with all other issues discussed, so prejudiced the proceedings at Norquay's trial and postconviction hearing, they rendered the results unreliable, thus requiring reversal of his conviction. Norquay incorporates by reference **all additional claims**, evidence, and arguments set forth in his stricken APPCR and in prior pleadings.

STANDARD OF REVIEW

Issue One: Judicial Mistakes of Law and Erroneous Findings of Fact

This Court reviews a district court's denial of a petition for postconviction relief to determine whether that court's findings are clearly erroneous and whether its conclusions of law are correct. *Cheetham v. State*, 2019 MT 290, citing *Mascarena v. State*, 19 MT 78, ¶4, 395 Mont. 245, 438 P.3rd 323.

Petitioners seeking postconviction relief must bear the burden of showing they are entitled to relief by a preponderance of the evidence. *Ellenberg v. Chase,* 2004 MT 66, ¶12, 320 Mont. 315, 87 P.3d 473.

If some or all of the petition considers newly discovered evidence,

§46-21-102, MCA requires the district court to determine whether newly discovered evidence ... if proved and viewed in light of the evidence as a whole, would establish Petitioner did not engage in the criminal conduct for which he was convicted. If so, he is entitled to post-conviction relief.

Issue Two: Judicial Error allowed the State to prevail with evidence that is incompetent and inadmissible.

Admissibility of evidence is governed by M.R.Evid. Rule 901. If the State's evidence is inadmissible at trial, §46-15-403, MCA, allows for a motion to dismiss for **insufficient evidence** if a rational trier of fact could not find the essential elements of the offense beyond a reasonable doubt. *State v Rosling,* 2008 MT 62, ¶35, 342 Mont. 1. This Court reviews de novo a district court's conclusion as to whether **sufficient** evidence exists to convict. *State v. Swann*, 2007 MT 126, ¶19, 337 Mont. 326.

To establish a ***Brady*** violation, Petitioner must show (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Garding v. State*, 2020 MT 163, ¶26; *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

In order to establish **prejudice**, Petitioner must show the undisclosed

evidence was material to his defense. Evidence is material for purposes of *Brady*, if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995). "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009). *Weisbarth v. State*, 2016 MT 214, ¶26.

Prosecutorial misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant a fair and impartial trial. *State v. Criswell*, 2013 MT 177, ¶49. The issue can be considered for review under the plain error doctrine on a case-by-case basis. *State v. Sullivant,* 2013 MT 200, ¶17, 371 Mont. 91(*citations omitted*).

Issue Three: Ineffective Assistance of Counsel

This Court reviews a claim of ineffective of assistance of counsel de novo. *Maldonado v. State,* 2008 MT 253, ¶10, 345 Mont. 69, 190 P.3d 1043. To prevail on such a claim under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article II, §24, of the Montana Constitution, a petitioner must show the performance was deficient and the deficient performance prejudiced the defense. *See Whitlow v. State,* 2008 MT 140, ¶10, 343 Mont. 90, 183 P.3d 861. To be deficient, counsel's representation

must fall below an objective standard of reasonableness based on prevailing professional norms. *Whitlow,* ¶14. The question is whether the choices made by counsel were reasonable considering all the circumstances. *Id.* A court reviewing counsel's performance "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984)). Ineffective assistance of counsel claims are appropriate for review in a petition for postconviction relief when it is not apparent on the face of the record why counsel took a particular course of action. *State v. Baker,* 2013 MT 113, ¶42, 370 Mont. 43.

Issue Four: Cumulative Error

"[T]he cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Smith*, 2020 MT 304, ¶16, 402 Mont. 206, 476 P.3d 1178, citing *State v. Cunningham,* 2018 MT 56, ¶32, 390 Mont. 408, 414 P.3d 289. "The defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Cunningham,* ¶32. This Court reviews a District Court's evidentiary rulings for abuse of discretion. *Smith*, ¶12.

SUMMARY OF ARGUMENTS

Issue One: Lloyd Kvelstad was not murdered. He died from hypothermia and hypoxia due to the EMTs and police failing to treat him at the scene. By applying the wrong law and striking Norquay's APPCR and exhibits, J.Laird failed to consider the totality of Norquay's evidence, legal authorities, and arguments that prove this cause of death.

Issue Two: J.Laird's errors allowed the State to prevail with evidence that was either (1) intentionally tampered with, fabricated, or destroyed in violation of *Brady v. Maryland,* or (2) totally incompetent and inadmissible pursuant to M.R.Evid. Rule 901. She also allowed the prosecutor's misconduct to go unchecked, permitting an otherwise hung jury to convict him.

Issue Three: Trial counsel ("VDH"), *inter alia*, failed to challenge the prosecution's use throughout trial of an uncharged rape, prejudicing jurors. Also, VDH would have changed much of his strategy had he known of police tampering with the evidence or the State's inability to authenticate it.

Issue Four: J.Laird's aggregate evidentiary rulings and erroneous findings of fact so prejudiced the proceedings, Norquay neither received a fair hearing nor his right to a reversal of his conviction.

ARGUMENTS

ISSUE 1 - J.Laird's Errors Regarding Cause of Death, APPCR Claim One

A. **Cause of Death:** J.Laird erred by following Hill County Local Rule (6)(a)(1) rather than §46-21-104, et seq., MCA, which was specifically passed to address postconviction relief. §1-2-102, MCA, states, "When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." Here, the Legislature clearly intended to provide specific guidelines for postconviction relief, superseding local briefing rules relative to Norquay's APPCR.

§46-21-104(1)(c),MCA sets forth specific elements for postconviction petitions.[7] By restricting the length of the petition, J.Laird denied him the opportunity to fully develop the factual basis of his claims in State court and foreclosed pursuing those claims, especially ineffective assistance of counsel, in federal court under 28 U.S.C. §2254(e)(2). *Shinn v. Ramirez*, 596 U.S. ___, 2022. The *Ramirez* Court noted that because §2254(e)(2) is a statute, it had no authority to amend it. (*Id.* at 16) It further noted the importance of a State court's ability to rely on the state-court record. (*Id.* at 18-19)

Here, J.Laird had no authority to ignore §46-21-104, MCA, which

[7] It requires petitioners to "identify all facts supporting the grounds for relief" and to "attach to their petition affidavits, records,or other evidence establishing the existence of those facts." It must be accompanied by a supporting memorandum, including appropriate arguments and citations and a discussion of authorities.

does not include a page limit. Moreover, unless this Court considers Norquay's APPCR, exhibits, and newly discovered evidence, it cannot rely on the state-court record before it.

J.Laird accused Norquay of presenting "as fact a great deal of speculation ..." but held a hearing "to ascertain the credibility of the witnesses Petitioner was relying on to support his *Revised Amended Petition* and claims of new evidence." (Order.p.2,3) She then wrote she'd considered "all underlying filings in this matter including legal arguments and affidavits." (Id.3) However, since she struck Norquay's APPCR and its exhibits, that is not possible. She also gave no reasons for denying Norquay's post-response motions, indicating she had not read those pleadings. (Doc.151)

Norquay's burden of proof in postconviction was only *by a preponderance of the evidence. Ellenberg v. Chase,* 2004 MT 66, ¶12, 320 Mont. 315, 87 P.3d 473. Yet by relying primarily on evidence presented at the hearing, J.Laird incorrectly applied a higher standard of proof. For example, she ruled "Giesbrecht could not testify ***conclusively*** that Kvelstad suffered from hypothermia or what Kvelstad's cause of death was," (Order.p.5), but ignored Kemp's inability to do the same. (Order.p.6)

Although Geisbrecht is the leading expert in the world on the effects

of cold on the human body and has a physics background, J.Laird found Kurtzman's ***guess*** more persuasive—that hypothermia was not a factor and three different blood pools under Kvelstad's head were caused by gravity—i.e., blood just leaked out as it would with a *suspended* animal carcass (nevermind that Kvelstad was prone throughout the period in question).

J.Laird also ignored the blood pooling diagrams from Ofc. Ciara Ost and the fact that Kurtzman was unaware (1) the photos of Kvelstad, if reliable, were taken over three hours after his purported time of death, and (2) Nathan Oats had just testified the day before that Kvelstad's head landed two feet back from where it was in **Photo 42**—beneath the bloody loveseat cushion. Even Kurtzman admitted Kvelstad's forward movement was impossible because "deceased people can't move."

Because she struck Norquay's APPCR and exhibits, J.Laird erroneously concluded Giesbrecht didn't base his estimation of the indoor temperature at the crime scene "on any evidence set forth in the record." (Order.p.5) Yet Petition.Ex.29,30 (*see* APPCR.p.50), plus Chief Matosich's hearing and trial testimony, and Coroner Szudera's report and interview, corroborate his estimation.

Likewise, J.Laird's finding that the [body location] drawings "are not

credible evidence Kvelstad was alive and moved" is only true if they are *taken alone* for proof of that fact. When considered together with other proffered evidence, above, they prove that Kvelstad did not die from his injuries nor from the string around his neck. He died from hypothermia and hypoxia.

J.Laird failed to consider Norquay's legal arguments and authorities in his APPCR and disallowed summations at the end of the hearing. After noting Norquay's "manner of providing legal authority is unusual" (Order.p.10), she clearly didn't consider that authority. For example, she discounted this Court's finding in *Wilkes v. State*, 2015 MT 243, 380 Mont. 388, 355 P.3d. 755 (2015) (See APPCR p.64-66) that the District Court "misapprehended the effect of Wilkes's evidence and erred by holding Wilkes to a standard that was improperly high." (Id. at ¶32) Instead J.Laird applied a standard that was closer to beyond a reasonable doubt.

J.Laird ignored the expert testimony of Prof. Yonovitz because he declined to state his copy was a "precise" copy (Order.p.9), although he testified it was an accurate and reliable digital copy *of the entire 8mm tape.* Yet she believed Doug Lacey, who admitted he mistakenly compared his 8mm copy to Yonovitz' annotated copy, and had neither viewed the entire 8mm tape he'd been sent nor made an accurate, reliable (or precise) copy of

it. In fact, Lacey only copied the portion *he deemed relevant.*

J.Laird also found the testimony of Barkus more credible than Yonovitz when Barkus had no expertise in analyzing digital information, either photographic or video. (Order.p.9.10)

J.Laird asserted Norquay produced no newly discovered evidence (Order.p.11-15) and blamed this on a VDH's *lack of due diligence,* despite this Court removing that requirement premised on the holding in *Amado v. Gonzalez,* 758 F.3d 1119 (9th Cir. 2014); (*State v. Reinert*, 2018 MT 111, ¶17, n.1) Yet J.Laird found no fault in VDH's failure to investigate hypothermia as a cause of death (Order.p.20-23). She ignored newly discovered digital 'anomalies' even though VDH testified that, had he known about any tampering with or fabrication of evidence, or a cover-up, he would have changed his strategy. J.Laird also used lack of due diligence to dismiss Dr. Giesbrecht's opinion on cause of death. (Order.p.11,12:20-26).

J.Laird showed overt bias against Norquay's counsel, e.g. accusing her of providing Giesbrecht with "input … not factual evidence," (Order.p.11,5); having a "feigned lack of understanding of the technology being utilized."(Order.p.14); and concluding "[allegations of prosecutorial misconduct] are representative of Petitioner's counsel's dissatisfaction with the overall investigation, prosecution, and trial of Petitioner." (Order.p.19)

(*See also*, tense colloquy between J.Laid and counsel, Jan.29.p.m.Hg.Tx.p.132-134) J.Laird's personal bias negatively affected Norquay and improperly favored the State.

J.Laird's errors are not harmless. They destroyed Norquay's chance to present a credible, exonerating explanation for Kvelstad's death, prejudiced his right to a fair and impartial hearing, and denied him his right to reversal of his conviction and a new trial.

ISSUE 2-The State's Evidence Was Unreliable and Inadmissible

***Brady* Violations**

The State and J.Laird both *concede* none of the digital evidence is reliable. "The dates [and times] associated with the crime scene photos were only as accurate as the setting on the camera capturing the images. Thus, such dates are not necessarily a very reliable method for verifying the time the photograph was actually taken. Additionally, the five floppy disks have and will continue to degrade over time." (Order.p.8)

Further, there is no independent evidence to corroborate the dates, times, and content of the digital evidence, rendering inadmissible (1) all Havre PD photos (2) the November 25, 2006 Photo Log; (3) the contents on the 5 photo disks; (4) the content of the IMC and Havre procedures for uploading, or not, crime scene photos and other evidence; (5) the putative

original 8mm crime scene video; and (6) all DVD copies of the video.

This unreliable and corrupted evidence undermines the integrity of the entire crime scene investigation, impeaches the conduct and testimony of every officer involved, and calls into question the efficacy of how officers collected Norquay's jacket and sweatshirt, Kvelstad's shirt, and whether that evidence is contaminated. It undermines the quality of the swabs and other items collected for DNA testing, the string around Kvelstad's neck, and any physical evidence officers collected, or failed to collect, at the scene.

Dr. Kemp's expert opinion is abrogated by his mismeasurement of the string, his failure to consider hypothermia as a cause of death (given the cold temperature and Kvelstad's wet and nearly-naked condition), his reliance on Havre officers' version of the facts, his prior two mistakes on autopsy reports regarding cause of death, and his failure to question time of death.

On the other hand, if the State and J.Laird insist that the times and dates in the metadata are *reliable enough*, then the metadata, in conjunction with other evidence, proves (1) Kvelstad was alive at 1:30 a.m. and moved by 3:53 a.m. (**Photo 42**); (2) he actually succumbed to hypothermia/hypoxia around 5:00 a.m. (crime scene video) (Coroner Szudera, "Arms warm to the touch" at 6:00 a.m.); and (3) Havre PD intentionally destroyed, damaged, fabricated, and distributed this evidence.

They provide **the reason** Havre PD misdirected the coroner as to Kvelstad's time of death, misdirected the pathologist through facts they imparted, manipulated Kvelstad's body by bagging and unbagging his head and hands before and after the coroner arrived, and later staged the crime scene to re-take photos in the kitchen, using the 'wet' evidence still sitting in the police garage to do so. **That reason** was to conceal their negligence in failing to treat Kvelstad at 1:30 a.m. by removing the string, warming him, resuscitating him, and transporting him to a hospital for treatment.

Had they done so, per Dr Giesbrecht and Dr. Kemp, Kvelstad would have lived. He wouldn't have died from his injuries or intoxication, and the string wasn't tight enough to kill him, so he wasn't strangled.

Prosecutorial Misconduct

The State used this highly suspect evidence to convict Norquay of Kvelstad's murder. Since the evidence against Norquay was so sparse, they repeatedly intimated he raped/sodomized Kvelstad—an unconscious, beaten, *white* man lying helpless in a house full of Native Americans, or "a bunch of drunken winos." (Order.p.19). They did this despite contrary evidence of **no** sexual assault (Kemp and a rape kit proved no such crime occurred), and without witnesses or injuries to prove such an assault. The prosecutors simply **made it up to inflame the jury. Otherwise they would have**

charged it as the predicate felony for underlying the murder.

The State might argue this evidence was harmless and non-prejudicial because other "overwhelming" evidence allowed the jury to convict Norquay of murder. That also is untrue. The facts detailed in **Norquay's Claim Two, APPCR.p.80-145**, prove Norquay did nothing to injure Kvelstad, had no motive to do so, and others, like James Main, Jason Skidmore, and Missy Snow ***admitted to choke-holding, beating and kicking Kvelstad***. Norquay's DNA was excluded from the string but Skidmore's matched within one loci. Norquay had no injuries when examined, unlike Main and Skidmore. In short, there is *nothing connecting Norquay to Kvelstad's injuries* and the State knew that before trial.

Without waiving any facts and arguments in the APPCR.p.163-202, **Claim Four,** this misconduct *alone* should be grounds for reversal. "A defendant must be tried for what he did, not who he is." *U.S. v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); M.R. Evid. 404.

Additionally, tracking records show Guzynski knew in December 2014 the evidence was faulty. He objected to everything in postconviction, from witness interviews to holding a status conference. He delayed responding in a timely manner. He stole key hearing evidence as Norquay prepared his APPCR (5 photo disks and 8mm video) in violation of a direct

order from J.Laird. Thus, the State's misconduct is indisputable.

ISSUE THREE-Ineffective Assistance of Counsel, Claim 5

Without waiving claims and arguments in APPCR.p.203-282, VDH's hearing testimony showed he (1) would have changed his trial strategy had he known about any faulty evidence or a police cover-up and (2) thought his failure to object to Guzynski's use of his client's uncharged and unprovable rape of Kvelstad ***was helpful to the defense***. Under no standard is this defense objectively reasonable, and it swayed jurors to convict. This claim alone should reverse Norquay's conviction.

Issue Four-Cumulative Error, Claim Ten

Without waiving arguments in his APPCR.Claims 6-9, p.283-302, and pursuant to this Court's recent ruling in *Smith v. State*, supra, the above aggregate errors deprived Norquay of his due process right to a fair and impartial hearing on the facts he developed during his 8-year investigation and reversal of his conviction.

CONCLUSION

Norquay respectfully asks this Court to review de novo his stricken APPCR, two volumes of exhibits, prior pleadings, and newly discovered evidence developed before or at his January 2020 hearing. Norquay asks this Court to reverse J.Laird's decision, reverse his convictions, and remand this

for a new trial.

Dated this 25th day of August, 2022.

Phyllis M. Quatman
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rule of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Google Docs is not more than 10,000 words, excluding the cover page, table of contents, table of authorities, certificate of compliance, and the certificate of service (electronic).

Dated: this 25th of August, 2022

Phyllis M. Quatman, Quatman & Quatman, P.C.
Attorney for Kim Norquay, Jr.

CERTIFICATE OF SERVICE

I, Phyllis M. Quatman, hereby certify that I have served true and **electronic** copies of the foregoing Appellant's Opening Brief to the following on August 25th, 2022:

Chad Wright
Office of the State Public Defender, Appellate Division 2
P.O. Box 200147
Helena, MT 59620-0147

Austin Knudsen - Montana Attorney General
215 N. Sanders
Helena, MT 59620

Lacey Lincoln - Hill County Attorney
315 4th Street
Havre, MT 59501

CERTIFICATE OF SERVICE

I, Phyllis M. Quatman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-25-2022:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Kim A. Norquay
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Lacey Lincoln (Govt Attorney)
315 Fourth Street
Havre MT 59501
Representing: State of Montana
Service Method: eService

Electronically Signed By: Phyllis M. Quatman
Dated: 08-25-2022