

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0389

KELLY DEAN WORTHAN,

Appellant,

v.

STATE OF MONTANA,

Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Jennifer B. Lint, Presiding

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STATEMENT OF THE ISSUES

- I. Did the District Court err in determining that admissibility is a prerequisite to establish a *Brady* claim and to receive postconviction relief?**
- II. Did the District Court err in finding no evidence existed to support the allegations made in the Petition and Motion except for an affidavit it deemed unreliable, when Appellant submitted voluminous evidence to corroborate the allegations?**
- III. Did the District Court abuse its discretion in failing to rule on Appellant's discovery motion, which provided good cause to believe the State possessed evidence favorable and material to his claim of innocence?**

STATEMENT OF THE CASE

Appellant, Kelly Dean Worthan (Kelly), was convicted of two counts of sexual intercourse without consent in violation of Montana Code Annotated § 45-5-502, two counts of incest in violation of Mont. Code Ann. § 45-5-507, and one count of tampering with a witness in violation of Mont. Code Ann. § 45-7-206. He was sentenced to 130 years in prison with 60 years suspended. (DC Doc 187). Kelly's two daughters, O.W. and K.W. were the victims.

His convictions were affirmed on appeal. *State v. Worthan*, 2006 MT 147, 332 Mont. 401, 138 P.3d 805. Kelly filed a petition for postconviction relief, asserting a claim of ineffective assistance of trial counsel, which was denied by the District Court and affirmed on appeal. *Worthan v. State*, 2010 MT 98, 356 Mont.

206, 232 P.3d 380. In 2011 Kelly filed a pro se writ of habeas corpus under 28 U.S.C. §2254, which was denied in Federal District Court, and which the Ninth Circuit Court of Appeals affirmed. *Worthan v. AG of Mont.*, 514 F. App'x. 671 (9th Cir. 2013).

After eleven years of no contact with his children, Kelly believed he was free to communicate with them once they were adults due to a discrepancy between the transcript at sentencing and the written judgment. (Appendix D: Ex. N Transcript of First Revocation Hearing, 8). In 2015 Kelly had a short phone call with his youngest daughter, K.W. For this, 10 years of Kelly's suspended sentence was revoked. (DC Doc 253). Kelly's older daughter, O.W., requested at the revocation hearing that the no contact order be lifted so that she could talk with her dad at her discretion. (Appendix D at 55-66). After chastising O.W., the District Court said it would not consider her request until Kelly obtained a new psychosexual evaluation with a low-risk "tier 1" designation. (Appendix E: Ex. C:2019.11.26 Affidavit of O.W. (now O.B.) 14-16; Appendix D at 60, 64).

In 2014, B.T.F was convicted of raping O.W. based on assaults that took place at her foster home prior to and during Kelly's trial. (Appendix F: *State v. B.T.F.* Sentencing Transcript).

Following his first revocation hearing, Kelly moved the Court to appoint counsel to investigate a potential recantation from O.W. (which by virtue of the no-

contact order, Kelly was prohibited from doing himself). The District Court appointed B.T.F.'s attorney to represent Kelly, who declared a conflict. The District Court declined to appoint new counsel¹. This Court affirmed the decision. *State v. Worthan*, 2017 MT 74N, 387 Mont. 538, 391 P.3d 99.

Faced with a Hobson's choice of (1) staying quiet and dying in prison while serving the remainder of a sentence for a crime he did not commit; or (2) attempting to prove his innocence by having a third party encourage O.W. to come forward with the truth, he chose the latter. Consequently, in 2018 the District Court revoked the remainder of Kelly's suspended sentence (DC Doc 286). The previously concurrent sentences were made consecutive for Count II (sexual intercourse without consent, 60 years) and Count VI (tampering, 10 years). (DC Doc 286).

Thereafter, Kelly applied to the Montana Innocence Project, which agreed to represent Kelly in November 2019. Kelly filed a Motion for New Trial ("Motion") pursuant to the "interests of justice" standard found at Montana Code Annotated § 46-16-702(1) and second/subsequent Petition for Postconviction Relief with supporting a memorandum ("Petition") along with discovery motions on April 7, 2020. (Appendix C: Memorandum in Support of Petition for Postconviction Relief).

¹ Kelly requested 'private counsel', however, the intention behind his request was to obtain conflict-free counsel.

Over two years, Kelly filed numerous notices to the District Court requesting rulings. On June 20, 2022, Kelly moved for the appointment of a special master or standing master. (DC Doc 322). The next day, the District Court denied and dismissed the Petition. (DV Doc 12). In the corresponding criminal matter, the court denied all five of Kelly's pending motions in a single paragraph, by referring to the legal analysis set forth in the denial of the postconviction case. (Appendix A; Appendix B: DC Doc 323, Order). The court did not rule on the postconviction discovery motion.

Kelly filed a timely Notice of Appeal with this Court on July 19, 2022.

SUMMARY OF FACTS

When the State received allegations of incest against Kelly, it obtained legal custody and removed his children from his home immediately. Yet, when O.W. was being molested in foster care, it did nothing until after it achieved Kelly's conviction. In the face of State witnesses testifying to horrific details about what he did to his daughters, Kelly pleaded with the jury to recognize that someone else was abusing his children. He was right. The State failed to prosecute B.T.F. for raping O.W. until 10 years later. This, despite the fact that O.W. reported disclosing the abuse to her therapist and foster mother at the time. The therapist served as the State's primary expert witness. Information about B.T.F.'s case or O.W.'s claims of abuse were never disclosed to Kelly.

O.W. now avers she has no memory of Kelly abusing her, despite her clear memory of B.T.F.'s abuse, which would have occurred within days of each other. (Appendix E). Her affidavit is corroborated by B.T.F.'s conviction and the charging documents in that case. The fact that O.W. reported abuse to her therapist, the State's expert witness, during her time at the foster home is supported by the State's own sworn affidavit. (Appendix G, *Motion for Amended Information and Supporting Affidavit in State v. B.T.F.*, at 3:9-10).

FACTS

"Think of the terrible guilt she will have if it didn't happen and we're putting her through all this therapy. Think of the damage it's gonna do to her. Do you understand? I mean, if it happened the therapy is gonna work and she's gonna get through this but if we have to put her through that . . . Do you understand what I am saying? We're gonna have to put her through therapy again if this is a lie and she knows it's a lie it's gonna damage her a lot worse. . . I'm just saying that the harm that we do to put someone through all that deep therapy when they knew it was a lie, think how much damage that would be. It would be like putting you in jail when you didn't do it. Right?" -Chief Barnett interrogating Kelly Worthan, April 28, 2003 (Appendix Q at 35).

Background

Before Kelly was branded as a pedophile, he was a respected veteran who worked long hours to support his family. Tr. Transcr. vol. IV, 1071 (June 18, 2004); Tr. Transcr. vol. V, 1250-1251, 1256, 1260 (June 21, 2004). Kelly and his wife, Melissa, were not perfect parents. *Id.* at 1276. They married young and argued, but tried to shield the kids from their marital issues the best they could. *Id.*

at 1317. Despite their struggles, they both loved their three children. Tr. Transcr. vol. IV, 1071, 1081 (June 18, 2004); Tr. Transcr. vol. V, 1112, 1291 (June 21, 2004).

The children attended Stevensville Schools since late 2002 after moving to Montana from North Carolina mid-semester. Tr. Transcr. vol. III, 790, 795 (June 16, 2004). Even though the children were new to the area, O.W (the Worthans' oldest daughter) was able to make some friends. *Id.* at 787:20-25, 788:1-4.

O.W., age 9, attended a slumber party in April 2003, where her friend C.S. told O.W. she was molested. *Id.* at 731:12-15-734. In return, O.W. allegedly told C.S., "my dad does bad things to me." *Id.* at 726:2-6; 1361:2-12. C.S. relayed to her mother, Tammy, that O.W. had sex with her dad. *Id.* at 720:21-25.

Tammy told O.W.'s mom, Melissa, about the accusation, and though neither believed the accusation at the time, Melissa promptly scheduled a meeting with the school counselor the following Wednesday. Tr. Transcr. vol. III, 724:17-25, 725:1-16 (June 16, 2004); Tr. Transcr. vol. IV, 1115-1117, 1120:8 (June 18, 2004). Kelly came home after a long day of work on Tuesday, and checked the answering machine where he found a message from Tammy referencing O.W's claims. Tr. Transcr. vol. IV, 1117:19 (June 18, 2004); Tr. Transcr. vol. V, 1284 (June 21, 2004). Like any concerned parent, Kelly asked Melissa what was going on, and Melissa explained the situation. Tr. Transcr. vol. IV, 1117-1118 (June 18, 2004) .

O.W. had a history of telling “stories.” Tr. Transcr. vol. V, 1286:7-25 (June 21, 2004). Together, that evening, Melissa and Kelly sat down with O.W. and explained that they were concerned about what she had said because it could have repercussions she had not anticipated, like Kelly going to jail. Tr. Transcr. vol. V, 1320:5-10 (June 21, 2004).

Child Protection Supervisor with Child and Family Services (CFS), Shelly Verwolf (Verwolf), later received a report stating O.W. told someone that Kelly molested her. Tr. Transcr. vol. IV, 936:18-20 (June 18, 2004). In response, Verwolf conducted an unrecorded interview with O.W. in the principal’s office of her school, which she later testified confirmed the report. *Id.* at 938-939:5.

Verwolf removed all three siblings (O.W., K.W., and W.W) from school and took them to the Stevensville Police Department where she and Chief Barnett recorded interviews with O.W. and K.W. Tr. Transcr. vol. IV, 943, 994:1-7 (June 18, 2004).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

With this in mind, it is particularly significant that the recorded interview memorializes leading questions:

Q: Did anything come out of his private parts?

A: (no audible answer)

Q: Okay. What did it look like? Did you see it or did you taste it or what happened?

A. Uhm I saw it.

Q. Okay, and what did it look like?

A. It looked like--kinda white stuff and it oooo like slime.

Q. Slimy? White slime stuff.

A. (no audible answer).” (Appendix I: Ex. O: 2003.04.28 Barnett Verwolf Interview of O.W. 11:32-12:3, 12:27-37, 13:8-23).

Importantly, K.W., flatly denied any abuse at this time, and in the two interviews to follow. Tr. Transcr. vol. IV, 944:24 (June 18, 2004).

Kelly went to the police station when he learned his children were there. Tr. Transcr. vol. V, 1296:5-25 (June 21, 2004). There, Kelly was interviewed by law enforcement about O.W.’s allegations. Kelly searched his brain to explain how O.W. would know details about sex. Kelly later testified that O.W. had inadvertently walked in while he and Melissa were having sex, which could have informed her sexual knowledge. *Id.* at 1315-1316. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After realizing his children were being placed in foster care, Kelly discussed having the children remain in his wife’s care, and offered to move to Missoula or

out of the county so long as the kids could stay with Melissa. Tr. Transcr. vol. V, 1305: 3-25 (June 21, 2004). Instead, the children were brought from the police station to a foster home run by Mya (Mya) and Kevin (Kevin) F. where they were three foster kids among 13 children. Mya and Kevin's 13-year-old biological son, B.T.F. lived in the home as well. Tr. Transcr. vol. V, 859:18-860:10 (June 21, 2004).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Years later, in 2014, B.T.F. pled guilty to raping O.W. [REDACTED] from April 2003 through September 2011. (Appendix F). O.W. explained that B.T.F. raped her every day from the time she entered foster care. (Appendix F. at 10:17). Even after the State removed O.W. and her siblings from Mya and Kevin's foster home, the State approved the children's return to the same foster home when their new placement required respite care. *Id.* at 11:14-23. B.T.F. continued to rape O.W. with impunity during these visits. *Id.*

[REDACTED]

[REDACTED]

[REDACTED] an

[REDACTED]

[REDACTED]

[REDACTED]

Thus, for four months, O.W. endured daily rape without intervention, no doubt made more difficult by the fact that she was entirely isolated from her biological parents, who the State prohibited the children from seeing since they both maintained Kelly's innocence. Tr. Transcr. vol. IV, 1128:1-7 (June 18, 2004).

When O.W. was finally permitted to see a therapist in August 2003, Dr. Debra Ruggiero (Ruggiero) never conducted a session without Mya or Kevin present. Tr. Transcr. vol. III, 888:22-889:7 (June 16, 2004). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] By this time, K.W. had denied her

father molested her in three separate interviews (Barnett/Verwolf, Dr. Cindy Miller, and Kay Frey) Tr. Transcr. vol. II, 481 (June 15, 2004); Tr. Transcr. vol. III, 616:8-25, 713-714, 833:4-9 (June 16, 2004). K.W.'s sudden contrary allegation was likely informed by the daily molestations in the bunkbed she shared with her sister. Tr. Transcr. vol. II, 470:19 (June 15, 2004).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The details of these sessions were not disclosed to defense counsel. (Appendix K: Affidavit of Kelly Worthan); (Appendix L: Affidavit of Trial Counsel, Kelli Sather); Tr. Transcr. vol. I, 242:2-4 (June 14, 2004). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This was just weeks before Kelly's trial was set to begin.

Kelly's trial began on June 14, 2004. Among other witnesses, the State called O.W., K.W., Dr. Ruggiero, Mya, and Verwolf. Neither Mya or Verwolf mentioned O.W.'s allegations against B.T.F. and CFS' ongoing investigation when they testified regarding the placement. Tr. Transcr. vol. III, (June 16, 2004) Tr. at 880:11-17); Tr. Transcr. vol. IV, 950:6-15 (June 18, 2004).

To the contrary, there was nothing but positive commentary about Mya, her influence on the girls, and the home she kept, bolstered by her own testimony that, "there's very little that can go on in my house without me knowing much to my older children's dismay." Tr. Transcr. vol. I, 862-864, 889:202-3 (June 14, 2004). Despite her prior request to remove the Worthan children, in her trial testimony, Mya didn't mention it, and left open the possibility of adopting the children. Tr. Transcr. vol. III, 880 (June 16, 2004). Verwolf claimed that Mya probably "needed a break" because she was stressed about the trial process. *Id.*; Tr. Transcr. vol. IV, 950:1-15 (June 18, 2004).

Evolution of O.W.'s Testimony

O.W.'s trial testimony was far more detailed than in her previous interviews. At trial, O.W. mentioned the act of intercourse or "going up and down" Tr. Transcr. vol. I, 274:15-25, 279 (June 14, 2004). She recalled, "He (Kelly) told me to open my mouth, and I did. Then he put his private into my mouth. Then— Then he did something that I don't remember." Tr. Transcr. vol. II, 331-332 (June

15, 2004). O.W. described what a penis looks like, and complained she felt pain during the sex acts. *Id.* at 377-378.

Despite the new details, there were some notable gaps in her testimony. O.W. testified for only thirty minutes on the first day, but in that time, she retorted, ‘I don’t remember’ twenty times, ‘say that again’ five times, and one time she said ‘say the other question’. Tr. Transcr. vol. I, 261:24 (June 14, 2004) O.W. could not recall if she saw ejaculate more than one time. Tr. Transcr. vol. II, 333 (June 15, 2004). Conflicting testimony was given about whether O.W. performed manual sex. *Id.* at 476. [REDACTED]

[REDACTED]

When asked about the discrepancies in O.W.’s testimony, Ruggiero speculated that it was probably because O.W. was so nervous. *Id.* at 476:16-25-478.

O.W. testified that the sexual abuse by Kelly took place in the bedroom. Tr. Transcr. vol. II, 339-342 (June 15, 2004). She initially could not recall abuse occurring at other places. *Id.* After some leading, she claimed that the abuse also took place in the shower. *Id.* (see also Appendix G at 6:15-17 (B.T.F. abused O.W. in shower)).

Contrary to all of her trial testimony, O.W. now states under oath, “I am unsure whether Kelly Worthan sexually abused me.” (Appendix E, ¶11).

Evolution of K.W.’s testimony

K.W.’s trial testimony was very similar to O.W.’s testimony. K.W. testified that “he put his private spot in mine,” and “he put his private spot in my mouth.” Tr. Transcr. vol. II, 406:1-8, 410:1-18 (June 15, 2004). Both girls referenced “white stuff” coming out of the penis during the abuse. *Id.* at 332, 411. K.W. gave conflicting testimony as to whether the molestation involved her buttocks. *Id.* at 423:4-10, 434.

Testimony of Expert Dr. Ruggiero

Dr. Ruggiero provided testimony to counter the allegations that the children were “coached” into making the allegations. *Id.* at 460. [REDACTED]

[REDACTED]

“[O.W.] described disclosing the abuse by Defendant (B.T.F.) . . . to her therapist during the same time period, but reports now that ‘the therapist didn’t do anything.’” (Appendix G at 6:17-20). This is consistent with the lack of testimony Ruggiero provided regarding sexual abuse allegations against B.T.F. in Kelly’s case.

No physical evidence was provided at Kelly’s trial which was consistent with sexual abuse. Tr. Transcr. vol. III, 661, 677 (June 16, 2004).

In contrast, at B.T.F.’s sentencing, the State made the following representations:

“[O.W.] was abused most of the time she was in that home until she was removed. Even when she went back for occasional weekends she was abused. She was given a clean bill of health in April of 2003, right around the time she was placed in (Mya and Kevin’s foster) home. And now she’s testified today, Your Honor, that she has so much scarring that she is unlikely to be able to carry a child to term, which is something that she wants to do.”
(Appendix F at 26:22-25, 27:1-6. (*See also* O.W.’s testimony re: fertility

issues and scarring at 10:6-16; 13) last name edited for confidentiality).

After the Trial and New Evidence

On June 21, 2004, Kelly was convicted of all charges. The children were removed from their foster home the next day. (Appendix M, entry 6/22/04); (App. G at 5:2-3; 6:21-22).

In 2015, O.W. attempted to explain to the Court that she questioned Kelly’s conviction, stating, “things were not adding up.” (Appendix D at 47:21). In response, the Court thoroughly questioned and chastised her, which had a chilling effect on O.W. coming forward to recant her prior testimony. (Appendix E at 14-16); (*see also* Appendix D at 55-66). The Court would not consider lifting the contact restriction between Kelly and O.W. until Kelly was given a low-risk designation by a licensed psychosexual evaluator. (Appendix D at 55-66).

At some point thereafter a law enforcement officer talked with O.W. and he relayed O.W. no longer wished to speak with Kelly.²

² The State disclosed Officer Jesse Jessop’s affidavit dated August 11, 2020 in its Response to Kelly’s Motion. No contemporaneous notes were provided to corroborate the officer’s recollection of events, which occurred in January 2018.

Upon receipt of the pleadings in B.T.F.'s case, Kelly sent the State a letter demanding disclosure of the evidence related to B.T.F.'s sexual assault of O.W. (Appendix N: Letter from Kelly Worthan to Fulbright dated April 13, 2019). The State's *Motion for Leave to File Amended Information and Affidavit in Support* in the B.T.F. case demonstrates the State's knowledge and non-disclosure of B.T.F.'s ongoing sexual violence against O.W. ***before, during, and after Kelly's criminal trial.*** (Appendix G). The Second Amended Information against B.T.F. shows the State's intent to call Kevin, Mya, O.W., and Ruggiero as witnesses against B.T.F.. (Appendix O: Exhibit I: DC-13-76/Doc.67: 2014.09.10 Second Amended Information.)

Indeed, in a sworn statement the deputy county attorney averred, [O.W.] described disclosing the abuse by Defendant to her adoptive mother and to a therapist during the same time period, but reports now that 'the therapist didn't do anything.' *From review of this investigation, [O.W.] was moved out of Defendant's home to her adoptive home during the Summer of 2004.* (emphasis added). Appendix G at 6:17-22); (Appendix M, entries 6/22/04, 7/6/04, 7/7/04, and 7/12.04).

Kelly has served 18 years of a 130-year sentence, while steadfastly maintaining his innocence. With almost identical accusations, in 2014 B.T.F. received a sentence of 45 years with half suspended. Today, B.T.F. is on parole, freed from a carceral setting, living in Utah. (Montana Dept. of Corrections Offender Information for B.T.F. accessed at

[REDACTED]

[REDACTED] on November 28, 2022.

The new evidence is twofold: (1) information relating to B.T.F.’s contemporaneous abuse of O.W., which was likely witnessed by K.W. and (2) O.W.’s affidavit. The children suffered these abuses during the trial preparation, likely causing the children to conflate their memories of what they were being encouraged to say happened with their dad versus what was waiting for them when they returned back to their foster home.

//

SUMMARY OF THE ARGUMENT

This Court should overturn the District Court’s denial and dismissal of the Petition because the District Court added a requirement that the proposed evidence must be admissible in order to satisfy a *Brady* claim and to obtain *any* postconviction relief. Neither *Brady* nor the Montana postconviction statutes require evidence to be admissible at trial, as both mechanisms, in this case, are being raised post-trial.

The District Court erroneously concluded that the evidence relating to the victims’ subsequent sexual abuse, which occurred prior to Kelly’s trial, would be irrelevant and inadmissible as violative of the Rape Shield Act — without hearing arguments from litigants on the issue. Because O.W. demonstrated no physical

manifestations of sexual abuse after Kelly's alleged abuse, but did report scarring after subsequent abuse per the State's Affidavit, the Rape Shield Act would not bar the evidence of subsequent physical abuse since the exceptions all relate to proof of a condition at issue. (Appendix G).

The fact that O.W. reported the abuse at her foster home to the State's expert witness, per the State's own Affidavit, amounts to a *Brady* violation.

The recantation affidavit states that O.W. has no clear memory of Kelly raping her and that the testimony was the result of "coaching" by the State. Similarly, the other victim, K.W., repeatedly denied being victimized by Kelly, only alleging abuse **after** sharing a bunkbed with her older sister, who was being raped in the same bed on a regular basis.

Furthermore, the District Court was clearly erroneous on seminal determinations: First, when it found no evidence supported the Petition and Motion other than an affidavit it improperly determined was incredible despite voluminous exhibits provided in support, and second, when it determined Kelly failed to explain how the evidence would be used to impeach despite the pages of argument provided to the court.

The District Court dismissed the recantation evidence as inherently unreliable, and as a sole product of Kelly's witness tampering. If a new jury hears that the children were subject to sexual abuse in their foster home and one victim

has now recanted her trial testimony, these facts would change the entire nature of a new trial, and lead to a different result. This new evidence explains why the descriptions of abuse became more detailed over time and why the youngest daughter did not disclose any sexual abuse until she was placed in the foster home. This subsequent abuse undercuts the credibility of the various counselors, doctors and other professionals who worked with the children during that time and opined on the legitimacy of the reports of abuse allegedly perpetrated by Kelly.

Given the nature of the new evidence, the underlying proceeding lacks integrity, and if a new jury heard all of the evidence at issue in this case, a different result is likely.

STANDARD OF REVIEW

Upon reviewing the denial of a petition for postconviction relief, the Court should look to “whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct.” Discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, are reviewed for abuse of discretion. *Wilkes v. State*, 2015 MT 243, ¶ 9, 380 Mont. 388, 355 P.3d 755 (internal citations omitted). “A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” Remand is warranted when

a reviewing court is “unable to determine a district court’s legal conclusions and the facts on which it based those conclusions.” *State v. Difulvio*, 2022 MT 209N, ¶4.

This Court’s “review (of) constitutional questions, including asserted *Brady* violations, is plenary.” *State v. Chavis*, 2019 MT 108, ¶ 7, 395 Mont. 413, 440 P.3d 640 (citing *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 422 P.3d 1219).

The decision to grant or deny a motion for new trial pursuant to Montana Code Annotated § 46-16-702 (1) is reviewed for an abuse of discretion. *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 249, 255, 343 P.3d 1196, 1201. To the extent that a district court makes findings of fact, those findings must be made by a preponderance of the evidence and will be reviewed for clear error. *Id.*

ARGUMENT

I. Admissibility is not a consideration in postconviction relief proceedings.

A. Admissibility is not a requirement for *Brady* Claims

The District Court misstated the law to require evidence be admissible to constitute a *Brady* violation. (Appendix B. at 8, DV Doc 12).

Brady requires the following to establish a due process violation: (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. *State v. Reinert*, 2018 MT 111, ¶ 17, 391 Mont. 263, 419 P.3d 662. (see also *Comstock v. Humphries*, 786 F.3d 701, 708

(9th Cir. 2015) citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); See generally, *Brady v. Maryland*, 373 U.S. 83 (1963)).

“*Brady* evidence can be favorable ‘either because it is exculpatory or impeaching.’” *United States v. Bundy*, 968 F.3d 1019, 1031 (9th Cir. 2020) citing *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). Under the third factor, the “defendant need only show that ‘the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.’” *Reinert*, 2018 MT 111, ¶ 17.

A survey of Federal Circuit Courts of Appeal demonstrates near unanimous agreement that admissibility is not a barrier to *Brady* claims.³

Here, Kelly provided the affidavit of the Deputy Ravalli County Attorney (Appendix G) to demonstrate the evidence was within the State’s possession, and argues the evidence of the victims’ abuse leading up to Kelly’s trial provides a basis to explain how their stories expanded and became more graphic. Furthermore, the evidence shows the State’s key witness, the victims’ therapist, knew about this abuse and did nothing prior to, during, and after Kelly’s trial, thus

³ See, e.g., *Gumm v. Mitchell*, 775 F.3d 345, 363 (6th Cir. 2014); *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. (2012); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004); *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc) (a defendant can establish a viable *Brady* claim by showing that withheld evidence, though inadmissible, would have led to the discovery of admissible evidence); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); but see *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (inadmissible evidence, as a matter of law, is “immaterial” for *Brady* purposes).” *United States v. Garreau*, 558 F. Supp. 3d 794, 796, *2, 2021 WL 4034191 (D.S.D. September 3, 2021).

the evidence is both favorable to the defense and impeaching most of the State's witnesses.

In addressing the third Clark factor, the District Court improperly determined the following:

Whether evidence of B.T.F.'s abuse of O.W. would have been material to the issues at trial depends upon if this evidence would have been relevant or admissible under M.R.E. 401; it would also have the potential to confuse the issues for the jury under M.R.E. 403. See *State v. MacKinnon*, 1998 MT 78, ¶ 39, 288 Mont. 329, 957 P.2d 23 (cross examination regarding unrelated incidents of sexual assault would confuse the issues for the jury); see also § 45-5-511(2), MCA (rape shield statute). As noted above, evidence of the victim's subsequent abuse by another man would not have been admissible in this matter, even under the recent Twardoski ruling, as there are no similar facts, other than this girl was victimized twice. Such testimony would likely confuse the jury and undoubtedly do violence to the protections under Montana's Rape Shield law. Appendix B, 8.

For the reasons stated above, the District Court erroneously required Kelly to establish admissibility in order to perfect his *Brady* claim.

The key issue here is whether Kelly suffered prejudice.

The *Bundy* case is instructive as an analogous scenario to the case at hand. *U.S. v. Bundy*, 968 F. 3d 1019, 1031 (9th Cir. 2020). There, the government's theory was that the defendant intentionally deceived his supporters into taking up arms against the government by telling them that government snipers were surrounding and surveilling him. *Id.* at 1025. Bundy's defense was that he honestly

believed this to be true. *Id.* at 1026. To provide good cause to order the government to provide discovery, the defense attached an affidavit to his motion wherein his co-defendant averred that he saw a camera on a tripod pointing in the direction of Bundy's home. *Id.*

Leading up to trial, the government maintained no such evidence existed. *Id.* This proved false when over the course of a month-long trial, evidence of surveillance and sniper activity in the government's possession surfaced. *Id.*

The District Court held various mistrial hearings and ultimately dismissed the government's case with prejudice. *Id.* at 1029. On appeal, the Ninth Circuit Court of Appeals affirmed based on the flagrant misconduct of failing to turn over *Brady* material which was favorable because it rebutted the government's central tenant that Bundy used "false, deceitful, and deceptive" information to recruit people. *Id.* at 1043.

Similarly, in Kelly's case, the State's theory had one central premise: how could these young girls know such graphic sexual information but for Kelly Worthan's abuse and manipulation? (Appendix Q at 36-48); (see *Bundy* at 28). Kelly offered two answers (1) maybe they are lying and/or coached, or (2) maybe someone else abused them. Tr. Transcr. vol. V, 1291:20-24, 1323:22 (June 21, 2004) ("I asked her if anyone at school had touched her or anything like that.").

Once Kelly was aware of the identity of the abuser, he requested this evidence by attaching the (Ravalli County) Deputy County Attorney's affidavit to his discovery motion. (Appendix G). This evidence was generated by the State and was in their possession. The evidence showed contemporaneous abuse, which was a source of sexual knowledge for the children. It also demonstrates the State, through its expert witness, possessed this evidence prior to and during his trial. Despite its obvious materiality, the evidence was suppressed, and the State achieved a conviction as a result.

At a minimum, the *Bundy* decision is instructive in this Court's determination of whether the State violated *Brady*, robbing Kelly of his constitutional rights of due process, a fair trial, and the ability to prepare a defense.

Kelly's case provides even stronger evidence that the State suppressed evidence because the State had custody of the children, and they were not removed from the foster home until the day after Kelly was convicted. The timing of the children's removal suggests the State was aware of the impact this information regarding abuse in the foster home would have on its case against Kelly.

Additionally, unlike *Bundy*, here the government has never turned over the evidence in its possession which supports his claim that Kelly did not molest O.W. and K.W., but someone else did. Years later we know who that person is: B.T.F. We also know that the time of B.T.F.'s abuse coincides with and provides an

explanation for why O.W.’s accusation intensified over time, contrary the universal truth “memory fades with time.”

This evidence also explains why K.W. denied molestation for months during three separate interviews, but suddenly provided graphic detail of sexual abuse when she visited a therapist with her foster parents present.

Moreover, the details of B.T.F.’s abuse and what was known to State’s witnesses would impeach Mya, Verwolf, and Ruggiero. This evidence goes to credibility, which is always relevant. *State v. Twardoski*, 2021 MT 179, ¶ 29, 405 Mont. 43, 491 P.3d 711, 719. As such, this new evidence not only would have impeached most of the State’s witnesses at trial, it is corroborative of O.W.’s exculpatory affidavit, and would have supported Kelly’s defense at trial. Hence, the State suppressing this evidence is highly prejudicial to the defense.

In summary, while Kelly maintains that it is fundamentally unfair to require him to present evidence while denying him the ability to obtain it, he nevertheless has provided this Court with ample evidence to overturn the District Court’s *Brady* determination because the admissibility is not a permissible consideration in that analysis and the required elements are satisfied.

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B. Montana’s postconviction statute requires petitioners to provide ‘all evidence’ supporting the grounds for relief, regardless of admissibility.

A petition must, “identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.” §46-21-104(1)(c), M.C.A.

The District Court erred when it assessed O.W.’s recantation as unreliable without integrating or considering the evidence corroborating her affidavit. Based on the District Court’s discussion of the Rape Shield Act, it acted under a mistaken belief that evidence must be admissible in postconviction proceedings.

Issues of admissibility arise when the benefit of admitting highly persuasive evidence is outweighed by its prejudicial effect to a *jury*. Importantly, in the instant case, there is no jury. The statute contemplates applying the Rape Shield Act only ‘in prosecutions’ where a jury is present. §45-5-511(2-3), M.C.A. (2) “Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions. . . (3) If the defendant proposes for any purposes to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2))” (emphasis added.)

In fact, this Court relied heavily on otherwise inadmissible evidence in *Marble*, by exclusively considering the handwritten letters of a recanting victim.

Marble v. State 2015 MT 242, ¶¶ 9-10, 380 Mont. 366, 369-370, 355 P.3d 742, 744. Similarly, in *Clark*, this Court considered a handwritten letter of a recanting child victim, which had been edited by the child’s guardian for grammatical and punctuation errors. *State v. Clark*, 2005 MT 330, ¶¶ 14-15, 330 Mont. 8, 12-13, 125 P.3d 1099, 1101-1102.

These letters in *Marble* and *Clark* are hearsay and would not be admissible at trial. Mont. Rules of Ev. R. 801(c). Despite this, this Court still considered the inadmissible letters in determining if the elements required for granting postconviction relief had been met. The Court had the opportunity to declare a rule prohibiting the consideration of inadmissible evidence in post-conviction relief proceedings, but clearly did not do so. Instead, it reaffirmed the standard that *all* newly discovered evidence must be considered in light of the evidence *as a whole* to determine whether petitioner did not engage in the conduct he or she was convicted of. *Marble*, at ¶ 36. (emphasis added). Thus, even if evidence is otherwise inadmissible, the District Court must consider it.

The legislature and this Court have made clear that the test in postconviction is whether if proven, the evidence “establish[es] the person did not commit the crime for which they are convicted.” §46-21-102 (2), M.C.A. Notably, there is no qualifier that this must be established by admissible evidence.

By applying admissibility as a requirement of post-conviction evidence, the District Court assails the unambiguous statutory language of section Mont. Code Ann. § 46-21-104(c), which mandates a petitioner must include “all other evidence” with his petition. New evidence contradicting witness testimony at the underlying trial is both material and relevant. Relevant evidence includes that which sheds light on the credibility of a witness. *Twardoski* at ¶ 29.

In this case, the District Court misapplied the Rape Shield Act to inhibit O.W. from using verifiable evidence of her abuse in another case to corroborate her recantation in this matter. In so doing, the District Court eviscerates the legislative intent and public policy behind this law, which is meant to protect victims of sexual violence, not to silence them. See e.g. *State v. Mitchell*, 2019 MT 186N, ¶ 6, 397 Mont. 552, 455 P.3d 443

Alternatively, if admissibility is a barrier for postconviction evidence and *Brady* claims, then the District Court’s determination that evidence of B.T.F.’s abuse was inadmissible due to the Rape Shield Act must again fail because Kelly was not provided an opportunity to argue an exception. See Mont. Code Ann. § 45-5-511(2). The exception states,

Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.
Mont. Code Ann. § 45-5-511(2).

The District Court is aware of the exceptions, evidenced by its reference to the *Twardoski* decision. *State v. Twardoski*, 2021 MT 179; *See also State v. Hansen*, 2022 MT 163, ¶¶ 11-21, *State v. McCaulou*, 2022 MT 197, ¶¶ 22-26, *State v. Ragner* 2022 MT 211, ¶¶ 16-24.)

The District Court distinguished Kelly's case from *Twardoski*, determining the parallel allegations were not sufficiently similar in Kelly's case, as they were in *Twardoski*, where the court ruled in favor of admission. (Appendix B at 8). This ruling ignores that Kelly does not have the full information to make a comparison as a direct result of the District Court's inaction due to the failure to rule on Kelly's discovery motion.

Furthermore, this determination was made without hearing arguments regarding any exception to the Rape Shield Act. What Kelly does know is that the physical evidence introduced at his trial did not corroborate the sexual abuse, but after the abuse by B.T.F., O.W. experienced significant physical scarring. This fact should warrant an exception to the Rape Shield. That O.W. demonstrated physical manifestations of from the B.T.F. abuse but not Kelly's abuse would be directly probative to the ultimate issue at a new trial.

Despite the fact that O.W.'s testimony was used in felony prosecutions for sex crimes against two individuals, the District Court **now** casts her as a totally

unreliable witness whose sworn statements fail to establish a prima facie case worthy of further inquiry. This ignores the plain fact that a new jury is likely to come to a different result if O.W. testifies that she does not recall being abused by Kelly paired with the fact that she had no physical signs of abuse from Kelly but did from B.T.F.'s abuse — a new fact for the jury to consider which would certainly necessitate new expert opinions. Thus, the District Court has deprived Kelly of his due process under Article II § 17 of the Montana Constitution and the 5th and 14th Amendment to the U.S. Constitution by extinguishing his opportunity to make these arguments at a new trial.

II. The District Court's factual finding regarding evidence in support of the Petition and holding that there was no argument provided as to impeachment is clearly erroneous in light of the record.

The District Court found there was no evidence supporting the claims in the Petition other than the affidavit of O.W., which it determined was not credible:⁴

Most significantly, the recantation is not compelling. In her affidavit, O.W. states: "The only clear memory I have of sexual abuse by [Petitioner] is what Dr. Ruggiero told me during therapy and prep sessions" and "I am unsure whether [Petitioner] sexually abused me." Petition, Ex. C, Aff. of O.B., ¶¶ 10–11. O.W. also alleges misconduct by the State and her therapist without any basis or explanation. *Id.* at ¶ 5. To accept O.W.'s recantation, one must accept that officers of the Court, professional therapists and psychologists all of whom swore an oath to further the law and protect

⁴ (See "Improbable" (App. B at 2), "Here, the Petitioner alleges that the State knew of B.T.F.'s abuse of O.W. during the time leading up to trial but kept it a secret, thereby violating Brady and Montana law. However, the Petitioner offers no credible evidence to support his contention other than the allegations contained in O.W.'s recantation. Pg 6 "Do not show that the State knew of B.T.F.'s abuse in the first place" pg 6. "Petitioner's contentions implausibly assume O.W.'s abuse in foster (word edited for confidentiality) home was known to the State at the time of Petitioner's trial" pg 10.) "Unsupported statements of the victim" pg 6)

victims instead conspired to manipulate this victim; and ignore that the Petitioner himself was convicted of tampering with O.W.'s disclosure. (Appendix B at 9.)

In *Wilkes*, the Court made clear that, "A district court must adequately address a petitioner's postconviction relief claims before dismissing them." *Wilkes v. State* 2015 MT 243, ¶ 12, 380 Mont. 388, 391, 355 P.3d 755, 758. Without more analysis by the District Court, it is challenging to assess whether its finding was based on mistake of fact, law, or the result of clear error. Thus, Kelly addresses each possibility in turn.

i. **The District Court's factual finding that 'no credible evidence' exists to support the Petition is clearly erroneous.**

In support of these allegations, Kelly provided the Court with: documents relating to B.T.F.'s criminal conviction based in part on sexually abusing O.W. (see Appendix J, App. G, Appendix P, and Appendix O), notes of the social worker leading up to Kelly's trial (Appendix F), O.W.'s statement at B.T.F.'s sentencing hearing (Appendix F), O.W.'s statement at Petitioner's revocation hearing (Appendix D). The Clerk of Ravalli County District Court received these documents. (DV Doc. 2, DC Doc. 295-298).

This evidence provides context and explanations O.W.'s trial testimony. She was young. She was scared. She was taken from the only home she ever knew to a home where she was molested daily, and the State 10 years later convicted that

person for abusing her. It removed her from that home the day after Kelly was convicted as a result of its investigation. (Appendix G). It is not speculation, conclusory, or improbable. Kelly (like the District Court in B.T.F.'s criminal case) has relied on the Deputy Ravalli County Attorney's affidavit made under oath. If the affidavit is not credible, then the District Court was wrong to rely upon it in B.T.F.'s criminal case.

In that same affidavit, the State avers that O.W. told her therapist about B.T.F.'s abuse and she "didn't do anything." Years later, in 2015, O.W. appeared before the District Court, expressing that things weren't adding up about Kelly's conviction, and requested that she be allowed to speak with her father without the Court's prohibition. Again, she was chastised, and in summary, told she didn't know what she thought she knew. In 2020, O.W. provided an affidavit to Kelly's counsel. The District Court immediately sealed the proceedings. In 2022, the District Court determined that O.W.'s recantation was not reliable or credible because the evidence that was good enough to convict another man of abusing her could not be used to corroborate her recantation in these proceedings.

Accordingly, the Court's factual finding that Kelly provided no evidence supporting his claims other than O.W.'s affidavit is demonstrably incorrect. This mistake prejudiced Kelly because the evidence he provided was not fairly and

completely assessed by the Court prior to its order denying and dismissing both his Petition and Motion.

ii. **The District Court improperly assessed the credibility of O.W.'s affidavit.**

Furthermore, the District Court improperly assessed O.W.'s credibility. In *Crosby*, the Court made clear "Under this test, the court does not pass on the ultimate truthfulness of the recanting testimony; rather, provided the five *Clark I* factors are satisfied, the court leaves the determination to the fact-finder on retrial." *Crosby v. State*, 2006 MT 155, ¶ 21, 332 Mont. 460, 139 P.3d 832 (overturned on other grounds, provides persuasive authority per *Marble*.) The *Marble* decision is also instructive here, where this Court overturned the lower court, based in part, on its determination of the recanting victims' affidavit was not credible. *Marble*, at ¶ 11.

In the instant case, the District Court determined O.W.'s recantation was not credible in large part because Kelly was convicted of tampering with O.W. (App B at 6). By removing the conviction, the District Court's assessment of credibility falters. This circular logic demonstrates why *Crosby* and *Marble* leave the final determination of credibility to a jury, unaware of a defendant's past conviction.

iii. **The District Court abused its discretion by failing to review the argument regarding impeachment.**

As to factor (4), the Peititioner's former counsel states that she, 'would have used this evidence to impeach the State's witnesses had it been provided'. There is no further explanation as to how the alleged new facts could have been used as impeachment and the Court will not engage in speculation as to how the evidence could impeach any of the witnesses; moreover, impeachment evidence alone is insufficient to merit a new trial." (Appendix B at 8-9, citing *Clark*, ¶ 34.)

The above demonstrates the court did not consider the argument before it.

In summary, Kelly alleges in his memorandum the State coached O.W. and K.W.'s testimony and that much of the graphic detail elicited by the State under a theory that the children would not know this graphic detail but for Kelly's abuse is impeached by evidence of concurrent sexual abuse by a foster brother(s) which the State had in its possession, and failed to disclose to the defense. Further, the State had legal custody of the children and only removed them from the foster home after it achieved Kelly's convictions.

O.W. now recants her express testimony averring that, though the abuse allegedly happened within days of each other, she has no memory of Kelly molesting her, while she has vivid memories of B.T.F. molesting her and the State coaching her. In summary, this evidence would impeach most of the testimony provided by the State at trial. (Appendix C at 17-29).

The new evidence also directly contradicts many arguments made at trial by the State's witnesses, including: (1) that K.W. only reported abuse after finding

safety in the foster home, (2) that Mya F. was actually supervising and caring for the many children in her home, and (3) the skills and credibility of the doctors and therapists who worked with the children and claimed that their behavior and trauma had improved over their time in their foster home is now seriously undermined. Tr. Transcr. vol. V, 1409 (June 21, 2004).

The District Court acted arbitrarily when it determined Kelly provided no explanation of the impeachment value, despite Kelly's argument memorialized in his memorandum (Appendix C at 17-29).

iv. A new trial is warranted under the interests of justice standard.

The facts of the *Morse* case are instructive as to whether a new trial is warranted in this case since both cases involve a victim recantation. *Morse*, at ¶ 35.

As properly recognized by the District Court, to prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test:

- (1) The evidence must have been discovered since the defendant's trial;
- (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part;
- (3) the evidence must be material to the issues at trial;
- (4) the evidence must be neither cumulative nor merely impeaching; and

(5) the evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome.

Morse, at ¶ 51.

In *Morse*, the defendant was convicted of sexual intercourse without consent after a jury found that Morse had digitally penetrated his girlfriend's adult daughter during a massage. *Morse* at ¶¶ 10-11. The victim initially alleged and testified that she felt Morse penetrate her body and felt suspected ejaculate between her legs, but when no semen was found by the crime lab, she claimed it was vaginal fluid.

Morse at ¶ 15. After trial, the victim participated in several interviews with State investigators, and the prosecutor, where she recanted her trial testimony, claiming to have no feeling in her body from the waist down. *Morse* at ¶ 12. In her new statements, she claimed that the source of the wetness she previously reported ... was from her own urine. *Morse* at ¶¶ 12-13.

Based on the fact that the recantation evidence was not discovered within the 30-day statutory time limit for a new trial set forth at Mont. Code Ann. § 46-16-702(1), the district court denied Morse's motion as time barred. *Morse* at ¶ 16.

This Court affirmed that the interests of justice did not foreclose a new trial for Morse versus the remedy of postconviction relief that the district court felt was most appropriate. *Morse* at ¶ 25. A new trial was so ordered. *Morse* at ¶ 36.

Here, as in *Morse*, the victim has recanted material portions of her trial testimony, now claiming that she has no clear memory of being molested by her father and she is unsure whether it happened. That statement is akin to the recantation in *Morse*, and would equate to reasonable doubt before a new jury. The recantation evidence here was newly discovered, material, and is not “merely impeaching.” Under the fifth factor, a new trial in this matter has a reasonable probability of resulting in a different outcome. The interests of justice would be served by granting Kelly a new trial.

III. The District Court abused its discretion by failing to rule on Kelly’s *Motion for Discovery* in the Postconviction proceedings.

A. Good Cause Exists to Order Discovery

“The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the court has ordered or to which the parties have agreed.” §46-21-201(4). M.C.A.

"Good cause is generally defined as a 'legally sufficient reason' and is referred to as “the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused.”” *City of Helena v. Roan*, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3d 601 (quoting *Black's Law Dictionary* 251 (Bryan A. Gainer ed., 9th ed., West 2009)). *Brookins v. Mote*, 2012 MT 283, P29, 367 Mont. 193, 202, 292 P.3d 347, 354, 2012 Mont. LEXIS 355, *15-16 (Mont. December 11, 2012).

In this matter, Kelly has provided good cause demonstrating the evidence exists, is in the State's possession, and is material to his consistently held belief that his children were being abused by someone else, instead of him. (*See generally* App. G). The District Court cannot ignore the persuasiveness of the evidence supporting this argument because it previously relied upon this evidence in granting the State leave to file criminal charges against B.T.F.

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

The District Court's failure to rule on the motion for discovery in the postconviction proceedings was 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) ("Failure of a district court to exercise discretion is itself an abuse of discretion.")).

Marble determined the statutory language is the standard for a petitioner on post-conviction when arguing newly discovered evidence. *Marble v. State*, 2015 MT 242, p 29-30, 355 P.3d 742, 747-748. It reads, "*if* proved and viewed in light of the evidence as a whole [the newly discovered evidence] *would* establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted" §46-21-102(2), M.C.A. (emphasis added). It is important to note that by the District Court failing to rule on this motion, it defied the permissive language

of the statute which clearly contemplates future development of the facts through discovery procedures, which section 46-21-201(4) Montana Code Annotated expressly authorizes.

Similarly, the District Court's order denying all motions in the criminal matter is devoid of legal reasoning applicable to those proceedings. (Appendix A) To the extent that the District Court relied upon its ruling in the postconviction matter to justify the order in the criminal matter, this is an incorrect application of law.

Thus, the District Court abused its discretion in failing to employ conscientious judgment with regards to the discovery motion in the postconviction proceedings and Kelly has endured a substantial injustice as a result because he has not been able to utilize the information in the State's possession to provide 'all evidence' supporting his innocence, as Montana law demands. For this reason, Kelly prays for this Court to reverse the District Court's order denying and dismissing his Petition and Motion with instructions to permit the discovery requested.

CONCLUSION

For the foregoing reasons Kelly prays this Court:

- (1) Overturn the District Court's Order denying and dismissing his Second Petition for Postconviction Relief on the merits.

- (2) Alternatively, overturn the District Court's Order denying and dismissing the Second Petition for Postconviction Relief and remand the matter, directing the State to provide Kelly discovery regarding the witnesses and investigation of B.T.F.'s abuse of O.W. and others to the extent that abuse was either known to or relates O.W. and K.W.
- (3) Reverse and remand the case for a new trial in the interests of justice pursuant to Montana Code Annotated § 46-16-702(1).

Respectfully submitted this 2nd day of December, 2022.

By: /s/Sarah M. Lockwood
Sarah M. Lockwood
Attorney for Appellant

By: /s/ Caitlin Carpenter
Caitlin Carpenter
Attorney for Appellant

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; and the word count calculated by Microsoft Word for Windows is 9804, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

C. /s/ Sarah Lockwood
Sarah Lockwood

APPENDIX

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Rhonda Harris' case notes, CFS	App. M
2019.04. 13 Letter from Worthan to Prosecutor	App. N
DC-13-76, Doc.67: 2014.09.10 Second Amended Information, State v. Fadely	App. O
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CERTIFICATE OF SERVICE

I, Sarah Marie Lockwood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-02-2022:

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