IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0582

KIM NORQUAY, JR.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable Yvonne Laird, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Norquay's claim of actual innocence in which he asserted that the victim was not dead when EMTs declared him dead and that law enforcement engaged in a conspiracy to cover up that fact.

2. Whether the court correctly denied Norquay's prosecutorial misconduct claim.

3. Whether the district court correctly denied Norquay's ineffective assistance of counsel claims asserting: (1) that defense counsel would have changed his strategy if he had proof that the evidence had been tampered with; and (2) that counsel was ineffective for failing to object to the State's suggestion that Norquay raped the victim.

4. Whether Norquay established cumulative error.

STATEMENT OF THE CASE

Appellant Kim Norquay, Jr. was convicted of deliberate homicide and tampering with physical evidence in November 2008. This Court affirmed his convictions in *State v. Norquay*, 2011 MT 34, 359 Mont. 257, 248 P.3d 817.

Norquay filed a pro se petition for postconviction relief on May 31, 2012. (PCR Doc. 1.) The case was placed on hold for several years after the court appointed Norquay counsel. Norquay filed his Revised Amended Petition on

June 13, 2018. (PCR Doc. 98.) The court conducted a four-day evidentiary hearing and subsequently denied Norquay's Revised Amended Petition. (Doc. 184, available at Appellant's App. A.)

STATEMENT OF THE FACTS

Throughout Appellant's opening brief, Norquay's counsel misrepresents the evidence presented and makes assertions of fact unsupported by the record. The facts demonstrated by the trial and the postconviction hearing are as follows.

I. The offense

On the evening of November 24, 2006, Norquay was drinking at Mellissa Snow's (Snow) house, along with Lloyd Kvelstad, James Main, Billy The Boy, Jason Skidmore, Joseph Red Elk, and Thomas Anderson. (Trial Tr. at 543-45, 692-95, 877.) At approximately 11:30 p.m., Skidmore, Red Elk, and Anderson left to go visit a couple of girls. (*Id*. at 557-59, 614.) When they left, Kvelstad was still alive. (*Id*. at 559.)

Shortly after 1:00 a.m. on November 25, 2006, Ivy Snow (Ivy) went to Snow's house with Nathan Oats (Oats) and Georgetta Oats (Georgetta). (Trial Tr. at 319-21, 355-56.) When they arrived, Norquay, Main, Snow, and The Boy were still in the house. (*Id*. at 323-24, 330, 340-41.) Oats entered the living room and

noticed that there was a man, later identified as Kvelstad, lying on a couch with his face badly beaten and his pants down around his ankles. (*Id*. at 322, 326, 361.) Oats shook Kvelstad, and Kvelstad's body fell off the couch. (*Id*. at 322, 326, 359.)

Oats yelled for Georgetta to call the police because a person was dead. (Trial Tr. at 326, 337.) Norquay, who was sitting on another couch, told Oats that nothing was wrong with Kvelstad. (*Id*. at 327, 329.) Georgetta called the police and announced that the police were coming. (*Id*. at 327.) Main attempted to leave, but Oats physically restrained him. (*Id*.) While Oats was restraining Main, Norquay fled. (*Id*.)

Paramedics arrived and determined that Kvelstad was dead. (Trial Tr. at 413.) Kvelstad's face had been beaten so badly it looked like a hamburger. (*Id*. at 361.) His pants were around his ankles, and he had fecal matter down his legs. (*Id*. at 413, 477.) There was also a black string around Kvelstad's neck. (*Id*. at 478.)

II. The trial

At trial, Red Elk testified that before he left Snow's house, Main began picking on Kvelstad, who was the only white person in the home. (Trial Tr. at 545-48.) Main verbally assaulted Kvelstad, and Kvelstad said he did not want any problems. (*Id*. at 546-47.) Red Elk testified that Kvelstad began speaking a native language, and that made Main angrier. (*Id*. at 547-48.) Red Elk explained that

Main put Kvelstad into a choke hold twice, and Skidmore did it once. (*Id*. at 550-53.) Kvelstad passed out from the choke holds, but regained consciousness each time. (*Id.*)

Red Elk testified that Norquay began shadow boxing Kvelstad, which including slapping Kvelstad's face. (Trial Tr. at 552.) Kvelstad tried to sit back down, but Norquay would not let him. Norquay had his own pants "ready to unbutton, unzipped, [and] his belt down," and he tried to remove Kvelstad's pants. (*Id*. at 553.) Norquay stated that he was going to "fuck" Kvelstad right there. (*Id*. at 553-54.) Skidmore told Norquay to knock it off. Norquay stopped and said he was just kidding. (*Id*. at 554.) Red Elk testified that he heard Norquay and Main discuss whether they should kill Kvelstad. (*Id*. at 556-57.)

Red Elk testified Anderson came to the house around that time, and Red Elk began speaking to him. (Trial Tr. at 557.) Kvelstad passed out from drinking, and he was moved into a bedroom. (*Id*. at 558.) Red Elk, Skidmore, and Anderson then left together. (*Id*. at 559, 877.) Kvelstad was breathing and was not bloody when they left. (*Id.*)

Snow testified that she did not remember much of what happened the night of Kvelstad's death, but she corroborated Red Elk's testimony about Main placing Kvelstad in a chokehold and fighting with Kvelstad. (*Id*. at 697, 718-21.) She also testified that Norquay went behind Kvelstad and made humping motions. (*Id*. at

700-01.) Snow stated that Norquay removed the string from his sweatshirt while he was at the kitchen table, and he set the string on the table. (*Id*. at 700, 728-29.)

In contrast to Red Elk and Snow, Skidmore testified that he did not see anyone argue with Kvelstad, and nobody placed Kvelstad in a chokehold or pretended to sexually assault him before Skidmore left with Red Elk and Anderson. (*Id*. at 1246-51.)

Assistant Chief of the Havre Police Department (HPD), George Tate, testified that he interviewed Norquay multiple times. During the first interview, Norquay said he left to go buy beer and, when he returned, Kvelstad was lying face down on the couch with his pants down. He stated that he believed Kvelstad was just passed out. (*Id.* at 876.)

Tate noticed that there was blood and fecal matter on Norquay's clothing. (Trial Tr. at 857.) He seized Norquay's clothing, which included a tan hooded sweatshirt and a pair of boxer shorts that had been in the pocket of the sweatshirt. (*Id*. at 859.) The sweatshirt was missing the string for the hood. (*Id*. at 879-80.)

During the second interview, Assistant Chief Tate asked Norquay about the missing string. Norquay initially stated that there had never been a string on his sweatshirt. He later said Main had removed it. (Trial Tr. at 880.) When confronted with Snow's statement that Norquay had removed the string at the kitchen table, Norquay agreed that he had removed the string himself at the table.

(*Id*. at 885.) He claimed he had put it in the garbage can. (*Id.*) Norquay claimed that one end of the string never had a plastic end on it, but the plastic end was located on the floor in the kitchen. (*Id*. at 881, 885.)

During the interview, Norquay stated that Main and Kvelstad got into a fight about Thanksgiving and the fact that Kvelstad was white. (Trial Tr. at 881.) Norquay did not explain why Kvelstad's pants were around his ankles. (*Id*. at 882.) Norquay denied that he had ever kicked or assaulted Kvelstad. (*Id*. at 884, 957.)

Tate testified that Main's right hand was swollen, and he had blood on his clothing, an abrasion on his forehead, and a cut on his right pinky knuckle. (Trial Tr. at 839.) Norquay's counsel admitted photographs demonstrating that Main had bruises on his body and injuries to his hands. (*Id*. at 921-48.) Defense counsel established that Norquay did not have injuries like Main did. (*Id*. at 958.) Counsel also elicited Oat's testimony that Main had injuries to his hands and appeared aggressive when Oats discovered Kvelstad's body. (*Id*. at 343-44.) Counsel also established that Norquay's hair was very short, while Main's was long, so the long hair wrapped up in the ligature could not be Norquay's. (*Id*. at 960-61, 1068.)

Norquay's aunt testified that Norquay showed up at her house needing a place to stay one night in November 2006 at 2:30 a.m. (Trial Tr. at 653-54.) The next morning her brother, Kenneth Piapot, noticed blood on Norquay's shoes. When Piapot asked about it, Norquay stated that he had been slaughtering cows.

Norquay attempted to wipe the blood off his shoes. (*Id*. at 653-57.) Piapot testified that Norquay's shoes were slightly covered in blood on both sides. (*Id*. at 673-74.)

Two witnesses testified that Norquay made incriminating statements following Kvelstad's death. Sheila Walker testified that a few weeks after Kvelstad's death she overheard Norquay tell somebody on the phone, "Did you hear I'm a murderer?" and then laugh. (Trial Tr. at 528.) Nicolette Stamper testified that Norquay told her that he had strangled a guy named Lucky[1] using a string from his sweatshirt in order to help his friend. (*Id*. at 1040-41.) Stamper testified that Norquay also wrote a letter to her in which he stated that he had choked Lucky with a string from his sweatshirt. (*Id*. at 1042.)

The State's expert on footwear analysis, Deborah Lougee, testified that the tread on Norquay's shoes was consistent with an impression left on Kvelstad's sweatshirt by a bloody shoe. (*Id*. at 1109.) On cross-examination, Norquay's counsel questioned Lougee about why a photograph of the print did not line up perfectly with an overlay Lougee had created. (*Id*. at 111-15.) Norquay's counsel also presented testimony from a highly qualified expert who criticized the State's expert's conclusion and testified that because of the poor quality of the impression, it was not possible to determine that any shoe matched the print. (*Id*. at 1363-76.)

[1]Kvelstad's nickname was Lucky. (Trial Tr. at 884.)

Norquay's expert stated that the impression was more consistent with Skidmore's shoe than Norquay's. (*Id*. at 1387.)

Deputy State Medical Examiner, Dr. Walter Kemp, performed the autopsy on Kvelstad. (Trial Tr. at 998.) Kvelstad had significant injuries to his face, hemorrhaging around his brain, and a string, which Dr. Kemp referred to as a ligature, around his neck. (*Id*. at 1000-07.) Dr. Kemp testified that Kvelstad died of homicidal violence, including blunt force injuries to the head and probably ligature strangulation. (*Id*. at 1011-12.) Dr. Kemp testified that the ligature would "most certainly" have killed Kvelstad if he was still alive when it was tied around his neck. (*Id*. at 1011.) But Dr. Kemp explained that given Kvelstad's other injuries and the lack of evidence that Kvelstad fought against the ligature around his neck, Kvelstad may have died from blunt force injuries before the ligature was placed on his neck. (*Id*. at 1011-13, 1022-26.) Kvelstad had petechial hemorrhages in his eyes, however, which can be caused by strangulation. (*Id*. at 1024, 1028-29.)

Montana Crime Lab DNA expert, Megan Ashton, testified by a videotaped deposition that Norquay's clothing had blood on it matching Main's DNA profile, and his sweatshirt and one of his shoes contained blood that matched Kvelstad's DNA profile. (Trial Tr. at 1223; Trial Doc. 179 at 45, 47-48, 51-52.)

The jury found Norquay guilty of Deliberate Homicide and Tampering with Physical Evidence. (Trial Tr. at 1581-82.)

III. Postconviction proceeding

A. Initial proceedings

On May 31, 2012, Norquay filed a pro se petition for postconviction relief. (PCR Doc. 1.) His petition did not raise any claim, but in his affidavit he stated that the prosecutor withheld exculpatory DNA evidence of a hair found at the scene, and he vaguely asserted that his counsel failed to properly represent him and cross-examine witnesses. (PCR Doc. 3 at 2.) The court appointed Norquay counsel. (PCR Doc. 6.) Briefing deadlines were vacated at Norquay's counsel's request. (PCR Doc. 8-11.) Norquay's current counsel, Phyllis Quatman, was appointed to represent him in June 2013. (PCR Doc. 14.)

In November 2016, Norquay filed motions seeking a stay of the proceedings, discovery, and DNA testing. (PCR Docs. 49-50.) The State filed responses setting out the evidence against Norquay and explaining that none of the affidavits he provided constituted new evidence and that he had not established that any DNA testing would demonstrate his innocence. (PCR Docs. 57-58.) The State attached the transcripts from the criminal trial, witness interviews, and Norquay's interviews with law enforcement. (PCR Doc. 57, exhibits.) The court concluded

that Norquay did not establish good cause for his discovery request and failed to satisfy the statutory requirements for DNA testing. (PCR Doc. 71 at 10.)

Before filing an amended petition, Norquay filed a motion to exceed the 20-page limit contained in the local rules and to incorporate other pleadings by reference. (PCR Docs. 81, 83.) Norquay then filed a 22-page Amended Original Petition for Post Conviction Relief, along with a 312-page memorandum and two volumes of exhibits. (PCR Docs. 90-91.) The court authorized Norquay to file a combined petition and memorandum 60 pages long and ruled that Norquay could incorporate by reference past filings and exhibits. (PCR Doc. 92.) The court subsequently struck Norquay's amended petition that violated the length requirements and gave him additional time to file an amended petition. (PCR Doc. 96.)

B. Revised Amended Petition

Norquay subsequently filed his Revised Amended Petition for Post-Conviction Relief, Memorandum in Support, and Request for Hearing. (PCR Doc. 98.) As pertinent to this appeal, Norquay's Revised Amended Petition contained the following claims:

Claim 1: Norquay is actually innocent because Kvelstad was not actually murdered. Instead, Kvelstad was hypothermic, he moved two feet, and he later

died of hypothermia or apnea caused by having his head bagged by law enforcement. (*Id*. at 2-3.)

Norquay asserted that an unknown officer, whom he refers to as "Officer X," "tampered with, fabricated, and destroyed evidence that would have exonerated Petitioner Norquay[.]" (*Id*. at 4.) Norquay speculated that photographs taken by an officer when law enforcement first arrived at the scene were destroyed. (*Id*. at 5, 11.) He asserted those photographs would have exonerated him because they would have shown that he was not dead when officers arrived and he later crawled forward. (*Id*.) He asserted there were several anomalies with the crime scene photographs, "proving tampering, fabrication, and destruction of exonerating evidence." (*Id*. at 7.) He also speculated that officers may have purposely bagged Kvelstad's head, knowing he was still alive, "to 'finish him off.'" (*Id*. at 21.)

Claim 2: Norquay's innocence is demonstrated by new statements from Thomas Anderson, Norquay himself who would have refuted the State's evidence if he had testified, new evidence indicating that two distinct fights occurred, and a report questioning the validity of shoe print impression testimony. (*Id*. at 27-28.)

Claim 3: The "police intentionally and in bad faith tampered with, fabricated and destroyed exonerating evidence that proved Lloyd Kvelstad did not die as the result of his injuries or from strangulation." (*Id*. at 31.) Also, law

enforcement intentionally failed to collect and test evidence because they needed someone to blame for Kvelstad's death. (*Id*. at 31-32.)

Claim 4: The State committed prosecutorial misconduct by introducing "evidence of an uncharged and unprovable rape to bootstrap an otherwise weak set of evidence to convict Petitioner." (*Id*. at 33.) Additionally, the State used "false facts" to convict him. (*Id*. at 34.) The State also "continues to commit numerous *Brady* violations" and was obstructing Norquay's access to law enforcement. (*Id*. at 34-35.)

Claim 5: Norquay raised many ineffective assistance of counsel (IAC) claims (*id*. at 37-47), but he raises only two on appeal. Pertinent to this appeal, Norquay argued that his counsel failed to develop a defense to accountability to felony murder (*id*. at 38) and failed to exclude all mention of rape (*id*. at 39, 44).

Claim 10: Cumulative error.[2]

C. State's response

In its response, the State set out the evidence presented at trial establishing Norquay's guilt. (PCR Doc. 108 at 8-35.) The State cited evidence demonstrating that Kvelstad died of ligature strangulation or was already dead when it was placed on his neck. (*Id*. at 17-19.) The State explained that there was no evidence

[2]Norquay raised four additional claims, numbered six through nine, which the district court denied as procedurally barred. (PCR Doc. 98.) He does not challenge that ruling on appeal.

Kvelstad moved after he was declared dead (*id*. at 21-27) or that photographic evidence was altered or destroyed (*id*. at 27-34). The State acknowledged that nine photographs existed that were not contained on the photo logs and the State could not prove those photographs had been turned over to the defense. (*Id*. at 32-33.) But, the State explained that only one of those photographs depicted Kvelstad's body, and that photograph was similar to other photographs that were disseminated. (*Id*. at 33.) Thus, even if those nine photographs were not disseminated, there was not a reasonable probability that the photographs would have changed the outcome of the trial. (*Id*.) The State also explained that its expert had determined that the eight-millimeter video in which law enforcement had documented the crime scene had not been altered. (*Id*. at 33-34.) Further, the State explained why none of the assertions made in Norquay's second claim of innocence demonstrated his innocence. (*Id*. at 35-39.)

The State argued that Norquay failed to establish that the State possessed exculpatory evidence that it failed to disclose. The State argued that Norquay's prosecutorial misconduct claims failed to meet pleading standards because they were unsupported by analysis, and they were procedurally barred because they could have been raised on direct appeal. (*Id*. at 42-46.) The State also documented the evidence that supported the State's inference that Norquay had sexually

assaulted Kvelstad and explained that the State had permissible purposes for admitting that evidence. (*Id*. at 44-45.)

The State argued that many of Norquay's IAC claims were procedurally barred, and they all failed to meet the pleading standards and should be rejected because they did not establish a prima facie claim of ineffectiveness. (*Id*. at 48-54.)

D. PCR hearing

The court held a four-day evidentiary hearing. (PCR Docs. 130, 166.) Before it began, the court informed Norquay's counsel that she needed to present evidence to support the serious allegations she was raising. (12/9/19 Tr. at 2-9.)

Norquay questioned Oats about Kvelstad's body. Oats described how he shook Kvelstad, and Kvelstad fell off the couch. (1/30/20PM Tr. at 92.) Oats was certain that Kvelstad was dead. (*Id*. at 94-95, 125.) Oats described Kvelstad as falling directly off the couch. (*Id*. at 98, 101, 104.) Norquay demonstrated that when Norquay's counsel asked Oats to draw a diagram in 2016, Oats placed Kvelstad's body directly below a couch. (*Id*. at 107-08, 121-22; Plaintiff's Ex. 16.) But Oats also testified that a crime scene photograph, which showed Kvelstad's head ahead of the end of the couch, accurately depicted where Kvelstad's body fell. (1/30/20PM Tr. at 124.)

Norquay presented testimony from Dr. Gordon Giesbrecht, who has a Ph.D. in respiratory physiology and studies hypothermia. (1/30/20PM Tr. at 6-7.) He

acknowledged that he did not have any expertise in ligature strangulation or blunt force trauma. (*Id*. at 9, 60-61.) Giesbrecht also acknowledged that he did not have the expertise in the cause and manner of death that the forensic pathologists had. (*Id*. at 55.) The court allowed him to testify, but concluded that it was "quite clear that the doctor is not an expert in strangulation." (*Id*. at 11-12.)

Giesbrecht testified that he could not know the effect the ligature would have had on Kvelstad because the size of Kvelstad's neck was unknown, and he asserted that the string was 12 inches, rather than 11 inches as Dr. Kemp had stated. (*Id*. at 5, 12-13.) Giesbrecht opined that Kvelstad was possibly hypothermic, rather than dead, when EMTs declared he was dead because it was cold outside, the house did not have heat, Kvelstad was wet, and he believed that Kvelstad's body was in a different location when it was photographed than when it rolled off the couch. (*Id*. at 17-28, 54.) Giesbrecht believed Kvelstad had moved because diagrams and descriptions of where Kvelstad's body was located placed his head even with the end of the couch, but photographs showed his head ahead of the couch. (*Id*. at 56-57, 71.) Giesbrecht also opined that blood would not continue coming out of the wounds on Kvelstad's head if he were dead, and his body would have been stiffer and colder when the coroner examined him if he had died when he was declared dead. (*Id*. at 28-30, 57-61.) Giesbrecht acknowledged Kvelstad did not have gastric hemorrhages, which can be caused by hypothermia.

(*Id*. at 36-39.) Giesbrecht also acknowledged that he relied on information that came from Norquay's counsel. (*Id*. at 52-53.)

In response, the State presented testimony from forensic pathologist Dr. Robert Kurtzman. (1/31/20PM Tr. at 84.) Dr. Kurtzman testified that he reviewed the autopsy report prepared by Dr. Kemp, photographs of Kvelstad's body, and Dr. Giesbrecht's report. (*Id*. at 88-90.) Dr. Kurtzman testified that Kvelstad would have died within five minutes with the ligature around his neck. (*Id*. at 92, 109.) Dr. Kurtzman noted that the ligature created a deep furrow in Kvelstad's skin, even after it was removed. (*Id*. at 91-92, 96.) Dr. Kurtzman explained that the length of the string was irrelevant because photographs demonstrated that the string was tight around Kvelstad's neck, and he could not have survived that. (*Id*. at 96.) Dr. Kurtzman also disputed Giesbrecht's claim that blood would not flow out of the body if the heart was not pumping, calling it "ludicrous." (*Id*. at 97-98, 117-18.) Dr. Kurtzman also explained that the coroner's description of the body's rigidity and temperature was insignificant. (*Id*. at 100-01.)

Dr. Kurtzman noted that Dr. Kemp concluded that the ligature would have killed Kvelstad if he was not already dead. (*Id*. at 95.) In a prior filing, the State provided testimony from Norquay's codefendant's trial in which another forensic pathologist, Dr. Bennett, testified that the probable cause of Kvelstad's death was ligature strangulation. (PCR Doc. 108, Ex. 11 at 1446.)

Norquay presented testimony from Dr. Al Yonovitz, an audiology professor, who examined the eight-millimeter video that Norquay alleged had been altered. (1/31/20AM Tr. at 3-4.) He testified that he made a digital copy of the analog tape he received from the HPD. (*Id*. at 23-24.) Yonovitz opined that the eight-millimeter recording sent from law enforcement may have been altered because it contained pauses in the recording, it was a few seconds longer than a copy that had been made, other information was contained on the video before and after the crime scene recording, and there were synchronization issues. (*Id*. at 42-55, 96.) Yonovitz acknowledged, however, that most of the skips were likely benign pauses of the recording and that he never compared the analog recording to his digital copy to confirm that his copy was accurate. (*Id*. at 44, 56.) During his testimony, the State pointed out that Yonovitz's copy was not the same as the original analog video that was played during the hearing. (*Id*. at 28.) He also acknowledged that he did not conduct a frame-by-frame analysis of the recording and speculated that another expert would not do that. (*Id*. at 72-73.)

The State presented testimony from Doug Lacey, a certified forensic video examiner who had worked for the FBI. (1/31/20PM Tr. at 3-7.) Lacey testified that he received the eight-millimeter crime scene video from the HPD, along with Yonovitz's report and other recordings that had been produced. (*Id*. at 8-10.) Lacey explained that the crime scene video was recorded over an unrelated dash camera

video, so there was a brief segment of the dash camera recording before the crime scene recording, and then more video from the dash camera after the crime scene video ended. (*Id*. at 16-17, 72.) Lacey evaluated the authenticity of the portion of the video containing the recording of the crime scene. (*Id*. at 15, 21-22.) He explained that he digitized the analog video and watched the original analog recording to ensure his digital copy was accurate. (*Id*. at 19.) Lacey explained that he conducted a frame-by-frame analysis of the video to look for any indication that it had been altered. (*Id*. at 24, 27.) He explained that analog recordings contain dots called switch points, which are duplicated if a recording is copied. (*Id*. at 24, 28-29.)

Based on that analysis, Lacey concluded that the content on the tape was originally recorded on that tape and the content was not altered after it was recorded. (*Id*. at 32, 38.) Lacey determined that the tape contained 25 recorded segments, and that the stops were made by stopping, or stopping and rewinding, when producing the recording. (*Id*. at 30-31.) Lacey testified that there were no synchronization problems on his digital recording. (*Id*. at 36.)

Considerable testimony was given about the photographs that were taken of the crime scene. Before the hearing, Norquay produced a report from a forensic examiner, Cody Breunig, who speculated that the photographs may have been altered and that not all of them were disclosed. (PCR Doc. 91-1 Vol. 1 (struck from record), Ex. 16.) In response, DCI Agent Jesse Callender reviewed photographs

stored on the original disks, the photographs on the HPD server, and the CD of disseminated photographs to determine whether there was any evidence the photographs had been altered. (Ex. 108, Exs. 22-24; 1/29/20AM Tr. at 107-29.)

At the hearing, Norquay presented testimony from Callender, rather than Breunig. (1/29/20AM Tr. at 17-106.) On cross-examination, Callender disagreed with Breunig's conclusions and Norquay's allegations about "Officer X." (*Id*. at 107-52.) Callender explained that photographs were taken with a camera that did not store metadata, and there was no evidence metadata was removed from the photographs. (*Id*. at 130.) Other photographs contained metadata from the Image Gear software program, which can alter photographs. But Callender explained that the Image Gear program could be used to reduce the resolution of photographs so they would fit in the software program, and there was no evidence the image was altered. (*Id*. at 130-31.) Callender did not find any other evidence that photographs were altered. (*Id*. at 129-52.)

Assistant Chief of Police Jason Barkus also testified that he compared the photographs on the photo log with the photographs in the database and photographs on a disk that was known to have been disseminated, referred to as the Matosich disk, to determine if all photographs were disseminated. (1/30/23AM Tr. at 25, 29-42.) Barkus found evidence that all but nine photographs of the crime scene were disseminated. (*Id*. at 42.) He could not determine, more than a decade after

the trial, whether the nine photographs had been disseminated. (*Id*.) Only one of those nine photographs depicted Kvelstad's body, and Barkus testified that a similar photograph was disseminated depicting Kvelstad's body. (*Id*. at 45-46.) Barkus did not believe the other eight photographs contained relevant information. (*Id*. at 49.)

The video of the crime scene that was recorded on an eight millimeter tape was played for the court. (*Id*. at 65.) Yonovitz had determined that Barkus had said "I can't believe they came back" when recording the crime scene video outside of the house. (*Id*. at 21.) But Barkus testified that his statement on the video was actually "came back, walking back the way we came," and he made the statement to document his actions. (*Id*. at 21-22.)

Norquay's counsel asserted that several photographs were "missing" because none of the photographs contained time stamps consistent with the time when Officer Virts claimed to have taken five photographs or when the video, which showed an officer taking photographs, was recorded. (1/29/20AM Tr. at 20; 1/30/20AM Tr. at 74-76, 88-89.) But Callender and Barkus explained that there was no way to know whether the cameras were set to the correct time, so it was not known when the photographs were taken, and there was no evidence that photographs were missing. (1/29/20AM Tr. at 148-51; 1/30/20AM Tr. at 74-76, 88.)

Norquay questioned four officers who were involved in the crime scene investigation. None of their testimony supported Norquay's conspiracy theory. (*See* 1/30/20 Tr.)

Before Van Der Hagen testified, the court limited his testimony to information about how he formed his strategy in defending Norquay, the quality of his representation, including his experience and training, the support he had from other staff, and whether his activities were consistent with the accepted norm at the time. (1/31/20AM Tr. at 99, 118.) The court permitted Norquay to ask Van Der Hagen questions about his receipt of discovery, but not to question him in detail about individual photographs if he believed that he had received all of the discovery. (*Id*. at 107, 111-13.) The court also prohibited Norquay from asking Van Der Hagen about alleged facts that he would not have been aware of at the time of his defense, such as a discrepancy in the length of the string or who possessed a coat. (*Id*. at 117-18, 132.)

Van Der Hagen believed that he obtained all of the discovery from the State. (*Id*. at 123-24.) He testified that his strategy was to blame Main for Kvelstad's injuries. (*Id*. at 113.) To do that, he emphasized Main's injuries. (*Id*. at 114.) Van Der Hagen also relied on Norquay's statements to form a consistent defense. (*Id*. at 117.) Van Der Hagen explained that it was important to present a credible defense. (*Id*. at 128.) He believed he came up with the best defense he could. (*Id*.)

Van der Hagen consulted with forensic pathologist, Dr. Bennett. (*Id*. at 115-16.) Dr. Bennett believed that Kvelstad died from ligature strangulation. (*Id*. at 116.) Van Der Hagen decided to rely on Dr. Kemp's autopsy report, rather than Dr. Bennett, because Dr. Kemp's conclusion that Kvelstad may have died from blunt force trauma was more helpful to the argument that Main killed Kvelstad because Main had injuries consistent with fighting with Kvelstad. (*Id*.) Van Der Hagen was aware of information he could have used to try to impeach Dr. Kemp, but he did not do so because Dr. Kemp's conclusion was more helpful to the defense than Dr. Bennett's. (*Id*. at 122-23.)

In response to questions from Norquay's counsel, Van Der Hagen agreed that if evidence had been tampered with or not disclosed, that may have changed his strategy. (*Id*. at 118.) But Van Der Hagen believed that his representation was within the norm at the time based on the information he had. (*Id*. at 119.) Van Der Hagen testified that he worked with an investigator trained in forensic science, and he consulted another expert who concluded that he could not provide helpful testimony. (*Id*. at 121.)

Van Der Hagen could not remember why he did not object to testimony about Kvelstad potentially being raped, but he believed he chose to let the State push that issue because he believed it did not implicate Norquay. (*Id*. at 124-25.)

Van Der Hagen pointed out the photographs were "terrible," and the question was who had the motive and willingness to cause that physical harm. (*Id*. at 125.)

Van Der Hagen explained that he did not have the long hair in the ligature tested because it clearly was not Norquay's. The hair was consistent with Main's and Skidmore's hair. That was helpful because it pointed the figure toward them, and away from Norquay. (*Id*. at 127, 130-31.)

Van Der Hagen also testified that he impeached the State's witness, Red Elk, with his prior inconsistent statements, and Van Der Hagen relied on that in his closing argument. (*Id*. at 129, 131-32.)

E. Order denying relief

The district court denied Norquay relief in a 25-page order. (Appellant's App. A.) The court denied Norquay's actual innocence claim asserting that Kvelstad was not murdered. (*Id*. at 2-15.)

The court noted that Norquay was relying on witnesses' sketches of the crime scene to support his assertion that Kvelstad crawled forward after falling onto the floor. (*Id*. at 6.) The court noted that they were not drawn to scale, and six of the sketches were made more than a decade after the event. The court concluded these sketches "are not credible evidence Kvelstad was alive and able to move after rolling onto the floor." (*Id*.; *see also id*. at 13.)

The court found that Giesbrecht's conclusion that Kvelstad "likely" suffered from hypothermia "is based, in large part, on speculation, . . . not factual evidence." (*Id*. at 11.) The court found that Giesbrecht's testimony "very clearly reflected he had a limited rudimentary understanding of strangulation and possible blood loss following death and was attempting to draw inferences from outside his area of expertise to bolster his conclusion regarding hypothermia." (*Id*. at 11-12.) The court noted that Giesbrecht relied on Norquay's assertion that Kvelstad moved after he was declared dead, but Norquay "was not able to factually establish such movement occurred." (*Id*.) The court observed that "[d]espite all the supposition and speculation, Giesbrecht ultimately could not testify conclusively that Kvelstad suffered from hypothermia at the time of Kvelstad's death." (*Id*.) The court found that Giesbrecht's testimony was not new evidence and it did not establish Norquay's innocence. (*Id*.)

Further, the court noted that "[t]hree forensic pathologists with clear understandings of strangulation have proffered opinions that Kvelstad's death was the result of strangulation." The court noted that Dr. Kemp was uncertain whether Kvelstad died from blunt force injuries or strangulation, but Dr. Kemp concluded that "certainly the ligature around his neck would have resulted in Kvelstad's death if he was not already dead." (*Id*.)

The court concluded that Norquay "failed to establish any of the photographs in the possession of the Havre Police Department were altered, modified, deleted, or intentionally withheld." (*Id*. at 13.) The court noted that the HPD "put an extensive amount of time into investigating" Norquay's allegations. (*Id*.) The court concluded that the State demonstrated that all but 13 photographs were disclosed, only 9 of those photographs were of the crime scene, and only 1 of them was of Kvelstad's body. (*Id*.) The court further found that "photographs or other media depicting the scene in manners very similar to the 9 photographs of the crime scene [were] provided to Petitioner." (*Id*.)

The court noted that Callender's testimony explained that the lack of exit data on photographs was due to the limited technology in existence in 2006, rather than removal of the data. (*Id*.) The court also noted that Callender explained that the Image Gear software resized image files, but there was no evidence it altered the content of the photographs. (*Id*. at 13-14.) The court concluded that Norquay's "allegations of alteration, modification or deletion of photographs is little more than speculation, based in part on Petitioner's counsel's real or feigned lack of understanding the technology being utilized." (*Id*. at 14.) The court expressed concern that the State could not establish that it had turned over 13 photographs, but it found that those 13 photographs would not establish his innocence. (*Id*.)

Similarly, the court found there was no evidence the eight-millimeter video was altered. (*Id*. at 14.) The court found that "it became clear during the hearing, based on Yonovitz's testimony and the testimony of Lacey, that the digital copy of the 8mm video made by Yonovitz for his utilization during his review was flawed. Yonovitz's testimony regarding the alteration of the 8mm video was not credible." (*Id*. at 14.) The court also found that Yonovitz's determination about what was stated on the video "was very clearly different" from the words contained on the video when it was played in court. (*Id*.)

Addressing Norquay's assertions about "Officer X," the court observed that Norquay "sets forth a speculative and convoluted series of purported events regarding the alleged actions of Officer X" and other law enforcement to alter the crime scene evidence, photographs, and video. (*Id*. at 15.) The court concluded that "there has been no testimony that supports the argument any of the officers involved altered the crime scene, crime scene photographs or crime scene video." (*Id*.)

The court concluded that Norquay failed to provide any new evidence to support his second claim of innocence in which Norquay relied on an affidavit from Anderson and argued that other evidence demonstrated his innocence. (*Id*. at 18.) The court characterized the claim as "a broad allegation unsupported by any facts or evidence." (*Id*.) The court noted that it reviewed Anderson's interviews,

in which he made many contradictory statements, and determined that he was "unreliable." (*Id*. at 16.)

The court concluded that Norquay's "allegations of prosecutorial misconduct are not new evidence nor are they supported by fact. They are representative of Petitioner's counsel's dissatisfaction with the overall investigations, prosecution, and trial of Petitioner and are generally speculative in nature, based on conclusory statements, and unsupported by facts." (*Id*. at 19-20.) Furthermore, the court noted that "allegations of misconduct arising during the criminal trial are record based and should have been raised on direct appeal." (*Id*. at 20.)

The court concluded that 9 of Norquay's 15 IAC claims were record based and procedurally barred. (*Id*. at 20.) That included Norquay's claims that counsel failed to develop a defense to accountability to felony murder and failed to exclude all mention of rape. (*Id*.) The court concluded that all of Norquay's other IAC claims were unsupported and lacked merit. (*Id*. at 21-23.)

The court concluded that Norquay's claims six through nine were record based and procedurally barred. (*Id*. at 23-25.) Lastly, the court concluded that Norquay failed to establish any error, so he did not establish cumulative error. (*Id*. at 25.)

STANDARD OF REVIEW

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742.

Claims of ineffective assistance of counsel are questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861.

SUMMARY OF THE ARGUMENT

Norquay's claim of innocence is based on his assertion that Kvelstad was not dead when EMT's determined he was dead. That assertion is demonstrably false. To support the claim of innocence, Norquay's counsel has concocted a wild conspiracy theory about law enforcement engaging in incredible efforts to cover up their realization that Kvelstad was not dead. This is not only refuted by the findings of multiple forensic pathologists, it is also unsupported by any evidence of a law enforcement cover up. The district court correctly concluded that Norquay's claim of innocence was based on mere speculation and properly denied the claim.

Norquay has also failed to establish that the digital evidence was altered or that the evidence is flawed. Norquay's arguments about foundation and the

admissibility of evidence ignore the fact that Norquay has been convicted, and the State does not have an obligation a decade after the trial to establish the foundation of the trial evidence, prove the exact minute when photographs were taken, or provide the cameras that were used. Further, Norquay has failed to establish that the State failed to disclose any material evidence except for a few photographs that may not have been disseminated. Because other photographs depicted the same information, he failed to establish that he was prejudiced if they were not disseminated.

Norquay's IAC claim asserting that his counsel acknowledged that he may have used a different strategy if he knew evidence had been tampered with is meritless because Norquay has not established that evidence was tampered with or that his counsel was deficient for failing to know that. And counsel was not ineffective for failing to object to the suggestion that Norquay raped Kvelstad because that was a reasonable inference that was supported by the evidence.

Finally, Norquay has failed to establish cumulative error because no error occurred.

ARGUMENT[3]

I. Norquay was given an adequate opportunity to present his claims and evidence.

Norquay argues throughout his brief that he was unable to adequately present his claims and evidence because the court struck his Amended Petition. To the contrary, the court appropriately struck Norquay's Amended Petition because Norquay attached a 312-page memorandum, which drastically exceeded the 20-page limit for a brief in Montana Twelfth Judicial District Court Rule 6(a)(1). The court gave Norquay an opportunity to file a new petition and memorandum 60 pages long and also allowed him to incorporate facts from his prior petition. (PCR Doc. 92.) Norquay used only 55 of the 60 allotted pages and raised multiple claims that were procedurally barred. (PCR Doc. 98.) He has not demonstrated that he had any nonfrivolous claim that he was unable to raise.

Second, the limitation on the length of the petition did not limit Norquay's ability to present evidence. The court struck the two volumes of exhibits Norquay attached to his amended petition, but did not prohibit him from refiling any of those exhibits, except for the juror affidavits, with his Revised Amended Petition. (*See* PCR Docs. 91-1, 92.) Norquay did not refile the exhibits.

[3]Norquay's counsel includes 26 pages of argument in her Statement of Fact. Counsel for the State attempts to respond to the arguments raised in both the statement of fact and argument sections.

More importantly, evidence to support Norquay's claims needed to be presented at the evidentiary hearing. (*See* 12/9/19 Tr. at 2-3 (directing Norquay that he needed to provide evidence at the hearing and that his filings tended to "depart[ ] from anything that is factual."); 1/29/20AM Tr. at 10 (informing Norquay that the court "wanted to hear from your witnesses so that the Court could judge their credibility. Because frankly some of the claims that have been put forward, are questionable at best.")).

Norquay was given four days to present evidence to support his claims. He never indicated that he had additional witnesses he wanted to call or requested additional time. He has thus failed to demonstrate that he was prevented from presenting evidence to support his claim. Accordingly, the Amended Petition was properly struck from the record, and Norquay's arguments about it should be disregarded.

II. The district court correctly denied Norquay's actual innocence claims.

A. Norquay failed to meet his burden to demonstrate that he was actually innocent.

Norquay fails to cite any legal authority to support his claim of innocence, in violation of Mont. R. App. P. 12(1)(g). He appears to be raising a claim of innocence under Mont. Code Ann. § 46-21-102(2). A petitioner raising a

substantive claim of innocence under subsection (2) must demonstrate "the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." Mont. Code Ann. § 46-21-102(2); *see also Marble*, ¶ 36. As demonstrated below, Norquay has failed to meet his burden to demonstrate that he did not commit deliberate homicide.

B. Kvelstad was dead when EMTs declared he was dead.

Norquay's assertion that Kvelstad was not dead when EMTs declared him dead is demonstrably false. First, there is no evidence Kvelstad moved after falling off the couch. Norquay relies on imprecise descriptions and drawings, many of which were created a decade after the homicide, to argue that Kvelstad's body did not fall where it was located in the photograph. (*See* Appellant's App. A at 6, 13.) The district court found that these sketches were "not credible evidence Kvelstad was alive and able to move after rolling onto the floor," (Appellant's App. A at 6), which is not clearly erroneous. The only testimony at the evidentiary hearing about the location of Kvelstad's body was from Oats, and he testified that the location of Kvelstad's body in the photograph was consistent with where he remembered Kvelstad's body falling. (1/30/20PM Tr. at 124.) The district court correctly concluded that Norquay did not prove that Kvelstad moved on his own volition. (Appellant's App. A at 12-13.)

Second, Dr. Kurtzman and Dr. Kemp testified that Kvelstad could not have survived with the string around his neck. (1/31/20PM Tr. at 92, 95, 109.) Norquay misrepresents Dr. Kemp's testimony to suggest that he believed Kvelstad could have survived with the string around his neck. (Appellant's Br. at 9, 22-23, 49.)[4] While Dr. Kemp was uncertain whether Kvelstad died of blunt force trauma or ligature strangulation, he conclusively testified that Kvelstad could not have survived with the ligature on his neck. (Trial Tr. at 1011-13.)[5] The district court properly relied on the testimony from forensic pathologists, who were trained to determine the cause of death, instead of speculation from Giesbrecht that Kvelstad may have been hypothermic. (Appellant's App. A at 4, 12.) As the court noted, Giesbrecht was not an expert in strangulation and did not conclusively testify that Kvelstad suffered from hypothermia. (*Id*.)

Dr. Kurtzman's testimony also refutes Norquay's claim that Kvelstad would not have bled on the floor unless he was still alive when he fell there. Dr. Kurtzman

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[4]Norquay cites to the transcript from Main's trial. (Appellant's Br. at 22-23.) These assertions of fact should be struck because Main's transcript is not part of the record in this case. *See* Mont. R. App. P. 8(1). If the testimony is considered, it does not support Norquay's assertions. Dr. Kemp testified in Main's trial that if Kvelstad "was alive at the time the ligature was placed that would have caused his death." (*State v. Main*, DA 09-0475, Tr. at 1007; *accord id*. at 1025-26.)

[5]Norquay's counsel's blatant misrepresentation of Dr. Kemp's testimony is representative of her disregard for accuracy throughout this proceeding.

called that "ludicrous" and pointed out that blood is a liquid that will flow through a wound without the heart pumping. (1/31/20PM Tr. at 117-18.)

C. Norquay's speculation about the digital evidence does not establish his innocence.

Without any evidence that Kvelstad was alive after he rolled off the couch, Norquay's claim that no murder occurred fails. Norquay speculated that law enforcement altered digital evidence to cover up their discovery that he was alive after they determined he was dead. Because he was dead, as demonstrated by Drs. Kemp and Kurtzman, the premise of that argument fails.

Further, Norquay has failed to provide any evidence demonstrating that evidence was altered. The only expert who testified about whether the photographs were altered was Callender, who did not find any evidence the photographs were altered. (Appellant's App. A at 8; 1/29/20AM Tr. at 129-52.) Norquay asserts that the district court "ignored the Breunig report." (Appellant's Br. at 27.) But, Norquay had an obligation to present testimony from Breunig if he wanted the court to consider Breunig's opinion. He did not do so. Instead, he presented testimony from Callender, who refuted Breunig's opinion. (1/29/20AM Tr. at 107-52.) The district court's finding that Norquay "failed to establish any of the photographs in the possession of the Havre Police Department were altered, modified, deleted, or intentionally withheld" (Appellant's App. A at 13), is not clearly erroneous. The court correctly observed that Norquay's allegations that

photographs were altered were merely speculation. (*Id*. at 14.) Speculation that photographs may have been altered is insufficient to establish that law enforcement officers engaged in a complex scheme to modify the crime scene evidence.

Similarly, the court found that Yonovitz's testimony about the video "was not credible," (*id*. at 14), which is not clearly erroneous. The court correctly observed that "it became clear during the hearing . . . that the digital copy of the 8mm video made by Yonovitz . . . was flawed." (*Id*.) Further, Lacey was more qualified and relied on technical expertise, while Yonovitz relied on speculation and a flawed copy of the video. (*Compare* 1/31/20 PM Tr. at 3-82 (Lacey), *with* 1/31/20AM Tr. at 3-98 (Yonovitz).) In sum, Norquay failed to establish that any digital evidence was altered or that it could establish his innocence.

None of Norquay's other assertions about digital evidence demonstrate his innocence. Norquay asserts that the photographs lack metadata, cameras and the camcorder are "missing," the video lacks a chain of custody and appears to be altered, and the photographs are unreliable because there is no evidence about the exact time they were taken. (Appellant's Br. at 26-29.) None of these assertions meet Norquay's burden to demonstrate that he is actually innocent. As demonstrated above, he failed to demonstrate the video was altered.

There is also no requirement that cameras capture metadata, that the State retain every camera used to capture a picture, or that the State be able to prove the

exact minute every photograph was taken. Norquay has been convicted and is no longer presumed innocent. *See Marble*, ¶ 29. He has a burden to demonstrate that he is actually innocent, and simply pointing to insignificant information that cannot be proven or no longer exists more than a decade after his trial does not establish his innocence.

Further, nothing about the order of items on the property log or the time when items were placed on the property log supports Norquay's speculation that officers "staged the kitchen scene to cover up their massive mistake in letting Kvelstad die." (Appellant's Br. at 33.)

Although the transcript states that the prosecutor conceded that "there is conclusive proof that there are five photographs [from Officer Virts] missing" (1/29/20AM Tr. at 35), that appears to be a transcription error or a misstatement from the prosecutor, likely omitting the word "not." The context in which that statement was made demonstrates that the State was asserting that there was not conclusive proof that the photographs were "missing." (*Id*.) Further, two witnesses testified that they could not determine the Virts photographs were missing. (1/29/20AM Tr. at 148-49; 1/30/20AM Tr. at 74.)

Finally, arguments about the foundation and inadmissibility of evidence needed to have been made at trial and raised on direct appeal, rather than in postconviction. Because they do not demonstrate actual innocence and could have

been raised on direct appeal, they are procedurally barred. *See* Mont. Code Ann. § 46-21-105(2).

D. Norquay's other assertions do not establish his innocence.

Norquay also asserts that the string was mismeasured and Kvelstad's shirt was compromised. (Appellant's Br. at 26.) As Dr. Kurtzman testified, the length of the string is irrelevant. (1/31/20PM Tr. at 96.) It was embedded in Kvelstad's neck, and all of the forensic pathologists who reviewed the case determined that it caused his death, unless he was already dead. (*Id*. at 92, 95; Doc. 108, Ex. 11 at 1446.) Further, it is not clear what Norquay is referring to with Kvelstad's shirt, and he has failed to demonstrate that it establishes his innocence.

Norquay also argues that problems with the digital evidence "calls into question" all of the other evidence obtained by law enforcement, including the DNA evidence. (Appellant's Br. at 48.) There is no legal authority to support this argument. Also, Norquay has failed to demonstrate that officers engaged in any improper conduct with the digital evidence, so there is no reason to question their investigation.

Norquay's counsel continues to make extremely serious assertions that officers staged photographs and then "misdirected the coroner . . . [and] the pathologist . . . to conceal their negligence in failing to treat Kvelstad." (Appellant's Br. at 49.) She further asserts that Kvelstad would have lived if

officers would have treated him. (*Id*.) These claims are not only unsupported by the record, they are clearly refuted by Dr. Kemp's and Dr. Kurtzman's testimony. (Trial Tr. at 1030; 1/31/20PM Tr. at 92.)

III. The district court correctly denied Norquay's prosecutorial misconduct claim.

Norquay argues that the State improperly failed to send five original disks containing photographs to his expert. But the court ordered that the State did not need to send the original disks because the State had provided a digitally equivalent copy of the disks. (PCR Doc. 93.) The State sent Norquay's expert the analog crime scene video, as ordered by the court. Further, there is no evidence of prosecutorial misconduct at the trial involving digital evidence.

Norquay cites to *Brady v. Maryland*, 373 U.S. 83 (1963), in a heading and in the standard of review, but he fails to provide any analysis connecting the *Brady* standard to any evidence. Because he failed to develop an argument under *Brady*, this claim should not be reviewed. *See Griffith v. Butte Sch. Dist.*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321 (stating this Court will not consider unsupported issues or arguments and will not conduct legal research on a parties behalf or guess as to a party's precise position).

Further, Norquay has failed to demonstrate that *Brady* was violated. "To prove a due process violation under *Brady*, a defendant 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." *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 422 P.3d 1219. The court found that the State could not prove that 13 photographs were disseminated. (Appellant's App. A at 13.) But only 9 of the photographs were of the crime scene, and only 1 was of Kvelstad's body. (*Id*.) The court correctly found that "photographs or other media depicting the scene in manners very similar to the 9 photographs of the crime scene [were] provided to Petitioner." (*Id*.) Norquay thus failed to demonstrate that he was prejudiced even if he did not receive those photographs. (*Id*.)

Norquay argues that cameras are missing, but he has not made any showing that the cameras have any evidentiary value. Norquay has failed to establish that the State suppressed any evidence in its possession that was favorable to the defense or a reasonable probability that the outcome would have been different if evidence had been provided.

Norquay also argues that the State committed prosecutorial misconduct by suggesting that Norquay may have raped Kvelstad. The district court correctly concluded this claim was procedurally barred because it could have been raised on

direct appeal. (Appellant's App. A at 10-20.) Thus, the claim should not be reviewed on the merits.

Further, there was substantial evidence to support the inference that Norquay raped Kvelstad: Red Elk testified that before Red Elk left, Norquay unzipped his pants, tried to remove Kvelstad's, and said he was going to "fuck" Kvelstad; Kvelstad's pants were down to his ankles when his body was found and he had feces down his legs; Norquay admitted he had feces on his pants and boxer shorts; and a witness provided hearsay testimony indicating that Norquay told another person that he had sex with Kvelstad. (Trial Tr. at 553-54, 819, 976-77, 1277.) The lack of forensic evidence of a sexual assault did not demonstrate it did not occur. (*See* Trial Tr. at 1017, 1214.) Given the quantity of evidence indicating that Norquay raped Kvelstad, the State's suggestion that that may have occurred was a reasonable inference from the facts. (*See id*. at 1489-90.) Further, it was an appropriate comment on the evidence because it was made to show that physical evidence was consistent with Red Elk's testimony. Evidence of the potential rape was also admissible because it was part of the same transaction as the homicide and was relevant to the intent and motive to kill Kvelstad.

IV. Norquay has failed to demonstrate that the court erred in denying his ineffective assistance of counsel claims.

Norquay attributes only one paragraph to arguing IAC in the argument section of his brief and raises only two claims.[6] These claims can be rejected because they lack any analysis, *see Griffith*, ¶ 42, and also fail on the merits.

A defendant arguing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. Norquay has failed to establish deficient performance or prejudice.

First, Van Der Hagen's statement that he would have changed his strategy if evidence had been tampered with or not disclosed (1/31/20AM Tr. at 118) was merely theoretical. It is meaningless without Norquay demonstrating that evidence was tampered with or that material evidence was not disclosed. Norquay has not shown that evidence was altered in any meaningful way or that material evidence

[6]Norquay asserts that he is not waiving arguments raised in the Amended Petition, but arguments raised in a petition that are not adequately briefed on appeal are waived. *Wilkes v. State*, 2015 MT 243, ¶ 19 n.1, 380 Mont. 388, 355 P.3d 755; *Riggs v. State*, 2011 MT 239, ¶ 7, 362 Mont. 140, 264 P.3d 693. Norquay also attempt to incorporate facts and arguments set out in other documents, which is prohibited by the appellate rules. *State v. Ferguson*, 2005 MT 343, ¶¶ 40-43, 330 Mont. 103, 126 P.3d 463.

was not disclosed. He has therefore failed to demonstrate that Van Der Hagen's strategy was flawed. Norquay has also not shown that Van Der Hagen's investigation was inadequate, so he has failed to demonstrate that Van Der Hagen was deficient for failing to have additional information. He has failed to demonstrate deficient performance or prejudice regarding the trial strategy.

Second, Norquay has not demonstrated that Van Der Hagen was ineffective for failing to object to the State's discussion of rape. There was substantial evidence indicating that Norquay expressed interest in raping Kvelstad, and there was evidence that Kvelstad may have been raped, in addition to physical evidence linking Norquay to the potential rape. Norquay was also not prejudiced by Van Der Hagen's failure to object because there is not a reasonable probability the court would have sustained the objection. Nor is there a reasonable probability that it would have affected the outcome given that the evidence would still have been admissible, and the evidence suggested that Norquay raped Kvelstad.

Norquay argues in his statement of fact that he was prevented from asking Van Der Hagen about claims the court concluded were record based or about other strategies. (Appellant's Br. at 35.) To the contrary, the court's limitations were appropriate, and did not inhibit Norquay from pursuing evidence of any potentially meritorious claim. The court allowed Norquay to question Van Der Hagen about his strategy in defending Norquay and the quality of his representation.

(1/31/20AM Tr. at 99, 118.) The court appropriately limited Norquay so that he was asking questions relevant to the *Strickland* standard. The court prohibited Norquay from asking Van Der Hagen about information that Van Der Hagen would not have known at the time of the trial. (*Id*. at 111-13, 117-18, 132.) That was reasonable because Norquay could not demonstrate that Van Der Hagen was deficient for failing to act on information he did not know.

Further, Van Der Hagen's testimony demonstrated that he provided quality representation that was based on his consultation with experts and the evidence available, which included the injuries to Main, statements Norquay had made to law enforcement, and the conclusions of Drs. Kemp and Bennett. (*See id*. at 113-28.)

V. Cumulative error

Because Norquay has failed to demonstrate that any error occurred, he has not demonstrated that he was prejudiced by cumulative error.

CONCLUSION

The district court's denial of Norquay's Revised Amended Petition should be affirmed.

Respectfully submitted this 17th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,909 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Mardell Ployhar
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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-16-2023:

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