

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0389

KELLY DEAN WORTHAN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

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

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ISSUES PRESENTED

1. Whether Worthan's postconviction relief (PCR) petition was time barred.
2. Whether the district court correctly concluded that Worthan failed to present reliable newly discovered evidence (NDE) that he did not commit the offenses for which the jury convicted him.
3. Whether the district court properly exercised its discretion in dismissing Worthan's petition without ordering discovery.
4. Whether the district court properly exercised its discretion in denying Worthan's motion for a new trial in the criminal docket.

STATEMENT OF THE CASE

In 2003, the State charged Petitioner Kelly Worthan with two counts of sexual intercourse without consent (SIWOC) and two counts of incest as to his daughters, nine-year-old O.W. and eight-year-old K.W. (conduct alleged November 1, 2002-April 28, 2003) and tampering with witnesses as to O.W. (Docs. 31, 32.¹)

¹ Citations are from the DC-03-104 criminal docket unless otherwise specified.

On June 21, 2004, a jury found Worthan guilty of all offenses. (Trial Tr. at 1443, 1448-49; Doc. 108.) The district court sentenced Worthan to 130 years of imprisonment with 60 years suspended. (Doc. 187.) The court ordered Worthan to have “no contact” for “the duration” of his sentence with O.W. and K.W. “by any means[.]” (*Id.* at 5, 8.) Worthan and his wife Melissa’s parental rights were terminated in a separate proceeding. (*See* Doc. 216 at 2.)

In 2006, this Court affirmed Worthan’s convictions, finding Worthan’s ineffective assistance of counsel (IAC) claims were not record-based. *State v. Worthan*, 2006 MT 147, 332 Mont. 401, 138 P.3d 805.

In 2007, Worthan filed a first PCR petition in district court, raising IAC claims. *Worthan v. State*, 2010 MT 98, ¶ 6, 356 Mont. 206, 232 P.3d 380. After an evidentiary hearing, the court denied Worthan’s petition. *Id.* In 2010, this Court affirmed. *Id.* ¶ 21. Worthan raised his IAC claims in federal court, which were all denied and dismissed from 2011 to 2013.²

In 2016, Worthan filed a motion “for appointment of counsel” in district court. (Doc. 256.) The district court denied the motion, and this Court affirmed

² *See Worthan v. Law*, CV 11-48-M-DWM (D. Mont. July 27, 2011); *affirmed by Worthan v. AG of Mont.*, 514 Fed. Appx. 671 (9th Cir. 2013); *cert denied by Worthan v. Frink*, 571 U.S. 894 (2013).

(handwritten order on Doc. 260; *State v. Worthan*, 2017 MT 74N, ¶¶ 6-7, 387 Mont. 538, 391 P.3d 99).

In 2015 and 2018, Worthan’s suspended portion of his sentence was twice revoked for contacting the victims. (Docs. 253, 286.)

On April 7, 2020, Worthan filed a second, successive PCR petition in district court, while simultaneously filing a “Motion for New Trial” in the original criminal docket, along with requests for discovery. (DV-20-133, (hereafter PCR Docs), Doc. 2; Docs. 286, 295, 298.) In 2022, the district court denied and dismissed the successive petition without ordering the State to respond. Additionally, the court denied Worthan’s new trial motion in the criminal docket, after the State filed a response and submitted witness affidavits. (PCR Doc. 12; Doc. 323.) Worthan appeals.

STATEMENT OF THE FACTS

I. The offenses

A. Background

Worthan, Melissa, their oldest daughter O.W., middle daughter K.W., and youngest son W.W. lived in North Carolina from 1995 to 1999, and then lived in Texas and Arkansas for several months each in late 1999 or 2000 before moving back to North Carolina. (Trial Tr. at 1077-79, 1133, 1255.)

O.W. started first grade in Texas. (*Id.* at 1261-62.) O.W. testified her dad started doing “bad things” to her while they lived in Texas. (*Id.* at 273.) O.W.’s friend Courtney recalled O.W. mentioning that Worthan’s sexual abuse started when she was just five or six years old. (*Id.* at 1346-47.)

In North Carolina, Melissa and Worthan separated for a few months, but decided to get back together. Next, the family moved to Montana in late 2002. (*Id.* at 1081, 1133.) They lived in a Stevensville apartment complex with three bedrooms and one bathroom. (*Id.* at 1279.) Melissa and Worthan continued having marital and financial problems. (*Id.* 1271-76.)

O.W.’s Stevensville teacher described O.W. as “absolutely” not mildly mentally challenged, but rather was “right in the middle of” the class[.] (*Id.* at 772.) She noted O.W. was “holding her own very well.” (*Id.* at 772.)

B. Offenses against O.W.

O.W. remembered incidents occurring in Worthan’s bedroom in their Stevensville apartment. (*Id.* at 273.) She described the layout of the apartment as well as Worthan’s bedroom, including a bed, closet and computer. (*Id.* at 274, 327-28, 370.)

One time, Worthan called her into his bedroom while she was in the living room. (*Id.* at 274.) He shut and locked the bedroom door with a “click[.]” (*Id.* at 276-77.) O.W. was standing close to the bed. (*Id.* at 277.) Worthan told her to

pull down her pants. She complied. Worthan took off his pants. (*Id.* at 274.) Worthan then “put his private into my private”³ and went “up and down” for “a couple minutes.” (*Id.* at 274-75.) Worthan asked, “Does that feel good?” O.W. didn’t respond, but it hurt. (*Id.* at 281-82.) She described his penis as having a hole in the middle and having lines on it. (*Id.*) Worthan said, “Put your pants back on.” (Trial Tr. at 275.) O.W. complied and went outside or to watch TV. (*Id.*)

Another time, Worthan said, “[O.W.], come in my room.” (*Id.* at 327.) He closed the bedroom door and locked it. (*Id.* at 329.) She remained clothed. (*Id.* at 330.) Worthan told O.W. to get on her knees. (*Id.*) Worthan pulled down his pants and took off his underwear. (Trial Tr. at 330-31.) Worthan told O.W. to open her mouth. (*Id.* at 331.) Worthan “put his private into my mouth[.]” (*Id.* at 330-31.) Then, O.W. saw “white stuff coming out of his private[.]” and observed Worthan rush to the bathroom. (*Id.* at 332.) Worthan told O.W. to go outside or go watch TV. (*Id.* at 331-32.)

Another time, Worthan called O.W. into his room. (*Id.* at 341.) He said, “Do you want to take a shower with me?” O.W. did not respond because she “didn’t want him to do bad things to me.” (*Id.*) Worthan said, “I guess that is okay[.]” and told her to go to the bathroom. (*Id.*) Worthan told her to take her

³ Both O.W. and K.W. would explain the term “private” by circling portions of anatomical diagrams. (Trial Tr. at 335-37, 414-16.)

pants off, then Worthan took his pants off. (Trial Tr. at 342.) Worthan said, “Take all your clothes off[,]” which she did. Worthan got into the shower and told O.W. to get in too. (*Id.*) He was standing at the wall while she was close to the curtain. (Trial Tr. at 343-44.) Once the water was on, Worthan used his hand to “put his private” into O.W.’s “private” and went “up and down” for a couple minutes. (*Id.* at 342-43, 344.) They were both standing, but Worthan was “squatting a little bit.” (*Id.* at 344.) She did not remember any “white stuff.” (*Id.* at 345.) Worthan stopped and said, “Get out of the shower and put your clothes on.” (*Id.*) She left and went to play. (*Id.*)

Worthan continued sexually abusing O.W. up until the day before O.W. disclosed at her school. (*Id.*) O.W. confirmed that the final incident occurred *before* she moved to her foster parents Kevin and Mya Fadely’s house. (*Id.*)

C. Offenses against K.W.

K.W. testified her “real dad” named “Kelly” did bad things to her. (Trial Tr. at 403.) K.W. remembered her family’s Stevensville apartment and affirmed that her dad did bad things to her there. (*Id.* at 404-05.) K.W. remembered the specific furniture and items in the bedroom, matching O.W.’s description. (*Id.* at 412.) Worthan would ask K.W. to come into his bedroom. He would shut the door and lock it. (*Id.* at 405.) He would take her clothes off and direct her to go on his bed. Then, he would put his “private spot” in K.W.’s private spot. (*Id.* at 406.) It hurt.

(*Id.* at 409.) Next, Worthan put his private spot in her mouth. (*Id.* at 410.) “White stuff” came out. (*Id.* at 411.) Next, he took it out and told K.W. to get dressed and get out of the room. (*Id.* at 410.)

Worthan sexually abused K.W. “more than one time.” (*Id.* at 411-12.) K.W. also remembered that her dad’s private spot touched her butt while she was in his bedroom on his bed “more than one time.” (*Id.* at 434.)

II. O.W.’s disclosure

Sometime in April 2003, O.W. was at her friend Courtney’s house for a sleepover. They were playing in Courtney’s bedroom. (Trial Tr. at 719-20, 1355-56.) Meanwhile, Courtney’s mom, Tammy Staat, and Melissa were talking in the living room about Melissa’s marital problems, with Melissa venting about Worthan’s response to her suicide letter and detailing their past breakups. (*Id.* at 720, 755-56, 1135.) Courtney came in and started interrupting them, but Tammy dismissed her. (*Id.* at 721, 757.)

After Melissa left, Courtney told Tammy that O.W. said “her dad hurts her and makes her touch his private place.” (*Id.* at 722.) Even though it was difficult to get the information out of O.W., O.W. told Tammy what her father had done to her. Tammy asked O.W. when this had happened, and O.W. said that it was when she was alone with her father, when Melissa goes to the store. (*Id.* at 720-23,

746-47, 1358, 1365.) O.W. further described the “bad things” as Worthan making her “lick his private place.” (*Id.* at 1365.) She was in a fetal position. (*Id.* at 722.) Tammy asked if O.W. wanted to call her mom, but O.W. said no. (*Id.* at 725-26.)

The next day, Tammy arranged for O.W. and Melissa to come over. (*Id.* at 725.) O.W. couldn’t talk and was “terrified” and “crying,” while “wringing her shirt in her hands.” (*Id.*) She wondered if she would get in trouble because she “didn’t know if it was right or wrong.” (Trial Tr. at 347, 373.) So, Courtney initially disclosed that Worthan was “making [O.W] touch his private place.” (*Id.* at 725-26.) Melissa asked if it was true and O.W. responded, “Yes, he does bad things to me.” (*Id.* at 726.)

Melissa assured Tammy she would take O.W. to the doctor. (*Id.* at 728.) Tammy was a mandatory reporter, but she waited a week or two, hoping Melissa would do something. (*Id.* at 729.) Tammy thought that Melissa was not going to follow up. Indeed, Melissa told Tammy she had not taken O.W. to the doctor. (*Id.* at 729-30.) Tammy knew she needed to report the abuse, and did so to the school counselor, Lonnie Gribnau. (*Id.* at 728-30.)

Meanwhile, Melissa and Worthan confronted O.W. Worthan would testify at trial he told O.W. “Daddy and Mommy will both go away for a long time if you say mean things about them.” (*Id.* at 1320.)

O.W.'s teacher, Linda Gallik, saw O.W. distressed at school. (*Id.* at 784.) O.W. told Gallik she had a secret and "it's really bad." After Gallik took O.W. out into the hall, O.W. told Gallik, "Courtney told everyone my secret." (*Id.* at 783.) Gallik asked if she could share it. O.W. put her head down and said, "I don't want to." (*Id.* at 784.) Gallik assured her it was okay and asked if there was anything she could do. (*Id.*) O.W. began "crying really hard" and worried about being ridiculed by other kids. Gallik assured O.W. she would talk with the kids who knew O.W.'s secret. (*Id.* at 785.) O.W. then finally said, "My secret is I had sex with my dad." (*Id.* at 796, 799, 801.) Gallik reported the abuse to the school counselor, who had already received a report. (*Id.* at 785-86.)

III. The investigation, the tampering, and Melissa's attempts to stop O.W.'s disclosure

On April 25, 2003, Shelly Verwolf of Child and Family Services conducted an initial interview alone with O.W. at school, then contacted law enforcement based on the information O.W. provided. (*Id.* at 938.) Shelly was also already

aware of a March 2003 report to DPHHS that Worthan was involved in “a separate or unrelated matter of sexual abuse.”⁴ (Trial Tr. at 990.)

At Shelly’s initial interview, O.W. was crying and wringing her hands. (*Id.* at 941.) O.W. said that her dad had put his private in her private and in her mouth. (*Id.* at 939, 941.) O.W. explained she wasn’t supposed to talk about it because of Worthan’s warning about him going to jail. (*Id.* at 942.) O.W. also expressed concern about K.W. because she had seen Worthan taking K.W. into his bedroom and locking the door too. (*Id.* at 941-42.)

Shelly placed an emergency protective hold on the Worthan children and transported them to the police station for a law enforcement interview on April 28, 2003. (*Id.* at 943.) In front of Shelly and Stevensville Police Chief Lewis Barnett, O.W. gave consistent disclosures again, saying her dad put his private spot in her mouth and private spot inside her private spot. (*Id.* at 995, 1017, 1024-25, 1027.) Shelly asked O.W. if anything came out of Worthan’s private spot and O.W. replied it was “white stuff, like slime.” She also shared that Worthan made her touch his private spot with her hand. (*Id.* at 1017, 1026-28.) She said when she

⁴ At sentencing, Worthan’s then-adult nieces came forward alleging Worthan had sexually abused them as children, corroborating each other’s accounts. When one niece discovered Worthan had little daughters, she was so concerned that she reported Worthan’s past abuse to a DPHHS hotline in March 2003. (*See* Sentencing Tr. at 30-39, Vol 1.)

touched his private spot, her dad also touched it, and the stuff came out that looked like the same white stuff. (*Id.* at 1028.) K.W. did not disclose abuse. (*Id.* at 944.)

Chief Barnett next interviewed Melissa, whereupon Shelly left the room. (*Id.* at 946-47.) When Shelly arrived at another room where the Worthan children were located, she saw that Worthan was there and was escorting his son W.W. out of the room. (*Id.* at 947.) Shelly informed Worthan that he was not allowed to take the children. (*Id.* at 947-48.) O.W. was curled up in a ball, crying. (*Id.* at 948.)

Shelly approached O.W. and:

asked her, you know, what was wrong. And she was crying. She said that her mom was mad at her. I asked her, you know, how she knew that her mom was mad at her. And she said her mom had come into the room and said she was mad at her, and then she said her dad had also come into the room and told her that she needed to tell them it's not true.

(*Id.* at 949.) O.W. would later tell her therapist Dr. Ruggiero that Melissa said “that [O.W.] should have just lied and said it didn’t happen” and that “if [O.W.] got adopted, [Melissa] wouldn’t love her anymore.” (*Id.* at 496-97.)

Consequently, Melissa became subject to a no contact order concerning the children. (*See* Doc. 35 at 2-3.) The district court would also rule that Melissa would be “excluded from any contact with either [O.W.] or [K.W.] during all phases of the trial at which they attend court[.]” (Doc. 74 at 9.)

Chief Barnett also interviewed Worthan on April 28, 2003. (Trial Tr. at 996, 1367.) Worthan admitted speaking to O.W. just before his interview, and further

admitted his prior statement to O.W. about him going to jail if O.W. didn't retract. (Trial Tr. at 998.) Worthan denied the allegations. (*Id.* at 1016.) The children were removed from Melissa and Worthan's care that day. (*Id.* at 512.)

IV. K.W.'s disclosure

Dr. Ruggiero, clinical psychologist, was retained in August 2003 and conducted separate therapy sessions with K.W. and O.W. weekly. (*Id.* at 453, 467.) K.W. did not initially disclose to the police, Shelly, or the forensic interviewer Dr. Miller because she was scared. (*Id.* at 420-21, 482-83.) But K.W. thought Dr. Ruggiero was nice, and Dr. Ruggiero helped her work through her issues. K.W. opened up to her in September 2003. (*Id.* at 417, 421-22.) When K.W. finally disclosed, her foster mom Mya Fadely noticed K.W. "just collapsed" and started crying, curled up to one side. (*Id.* at 875.) She was almost incoherent, hiding her face for 15-20 minutes. (*Id.* at 876.) Dr. Ruggiero was not surprised that K.W. delayed disclosure because K.W. "hadn't had permission all along, to tell." (*Id.* at 482.)

K.W. explained a frequency of incidents of abuse such that "it kind of tended to be one day [O.W.] and then another [K.W.], kind of taking turns." (*Id.* at 489.) K.W. would dread going home because she wondered if it was "going to be a day when it was going to happen" to her. (*Id.*)

V. Melissa’s attempts to influence O.W.’s trial testimony

During O.W.’s trial testimony, Melissa—although subject to a no-contact order and excluded from the courtroom—was standing outside the courtroom glass doorway. (Trial Tr. at 294.) Melissa made an emotional display, crying while standing in the line of sight of O.W. (*Id.*)

Later that day, Dr. Ruggiero saw O.W. “burst into tears” and “shaking” almost “uncontrollably.” (*Id.* at 499.) O.W. went to Mya’s lap “and just clung to her and cried.” (*Id.*) She said, “My mother was here.” (Trial Tr. at 500.) A curative instruction was deemed necessary. (*Id.* at 317-18.)

Later, O.W. testified she was “sad” and “scared” from Melissa’s actions and was worried about what would happen “after the court was done[.]” (*Id.* at 320.) Melissa’s presence impacted her testimony and made it difficult to concentrate. (*Id.* at 321.)

VI. Trial facts related to Worthan’s new allegation of witness coaching and the victims lying

A. Coaching

O.W. found Dr. Ruggiero nice and helpful. (*Id.* at 348.) The prosecutor asked:

STATE: Okay. Did she ever tell you what answers to say?

O.W.: No. She just said to tell the truth.

(*Id.* at 350.) O.W. affirmed this statement again on cross-examination. (*Id.* at 382.) K.W. repeatedly concurred that Dr. Ruggiero “just said tell the truth[.]” Dr. Ruggiero affirmed that urging them both to tell the truth was all that she said in reference to the trial. (*Id.* at 418, 563.)

The prosecutor specifically asked O.W., “Have I ever told you what to say?” O.W. responded, “No.” (*Id.* at 351.)

Foster mom Mya Fadely testified that O.W. and K.W. began living under their foster care in April 2003. (*Id.* at 860.) Mya accompanied O.W. to some appointments with Dr. Ruggiero. The prosecutor asked O.W. whether Mya could have influenced her:

STATE: All right. Outside of Dr. Ruggiero’s office, have you and Mya talked about the bad things?

O.W. replied, “Not really[.]” and explained that Mya had just told her to “tell the truth[.]” (*Id.* at 353.) The prosecutor followed up:

STATE: Okay. Other than that, has she talked to you about the bad things?

O.W.: No.

(*Id.*) Mya concurred that her knowledge was limited to what she heard at therapy sessions with Dr. Ruggiero and that she had no knowledge of the current status of the allegations. (Trial Tr. at 869-71.) Mya never engaged in any discussion about sexual abuse with either O.W. or K.W. (*Id.* at 871, 872-83.) She never counseled

them on any planned answers for trial or even talked about it with the girls, other than telling them to simply tell the truth. (*Id.* at 874.)

Between O.W. and K.W., they never talked about Worthan's abuse with each other, but both of them assumed the abuse was happening when the other was called into Worthan's bedroom, and the door was locked. (*Id.* at 419, 525, 645, 713-14.) The first time they heard each other's account was when Worthan's defense required them to participate together in an assessment. (*Id.* at 419, 351-52.)

B. Assessments of O.W. and K.W.

Dr. Ruggiero looked out for warning signs of coaching, such as non-spontaneous responses, non-age-appropriate language, no relation back to other life events, or a lack of detail in the abuse reporting. (*Id.* at 460.) She also examined any potential motive for coaching, scrutinized the consistency in statements, and analyzed the context of the specific incidents in the framework of the family or family history. (*Id.* at 461.) Ultimately, coaching tends to result in a “‘canned’ response.” (*Id.* at 460-61.)

Dr. Ruggiero assessed that both O.W. and K.W. had spontaneous emotional reactions and disclosures and used age-appropriate language. (*Id.* at 486-89.)

Dr. Ruggiero noted that even after O.W. initially disclosed Worthan's abuse, it was “‘difficult for her’” to relay the information. (*Id.* at 469-70, 479, 512.) Initially, she

would be “crying hard” and “seeking comfort.” (*Id.* at 480.) She would pull out her hair, creating a bald spot. (*Id.* at 590.) She also shared repeated night terrors of Worthan finding her, forcing her to run in terror in her dreams. (*Id.* at 588-91.) As to K.W., initially she had difficulty using any terminology and would simply point to her genital area. The disclosure was “extremely difficult” because K.W. would cry and curl up in the fetal position and couldn’t talk. (*Id.* at 485.)

Forensic interviewer and licensed clinical psychologist Dr. Cindy Miller concurred that O.W.’s account was not “at all” rehearsed or canned. (*Id.* at 827.) Dr. Miller explained that Melissa had proffered several possible alternative explanations to her such as fabrication for attention, getting back at Worthan, or viewing pornography. But given the detail of O.W.’s account and her lack of any anger toward Worthan, Dr. Miller did not think either option was likely. (*Id.* at 828-830.) Dr. Miller also rejected the possibility that O.W. fabricated to have more time with Melissa because O.W. did not abandon her story when she was removed from her mother’s care. (*Id.* at 830.) Finally, O.W. denied ever viewing any images of “people with no clothes on” and didn’t remember seeing any naked pictures of people on the computer. (*Id.* at 831-32.)

VII. O.W. and K.W.’s placement

Beginning April 28, 2003, O.W. and K.W. lived with their foster family, the Fadely family, for 14 months. (Trial. Tr. at 879; *see* Doc. 309 at 1; Pet.’s App G. at 5.) Shortly after the move, O.W.’s foster brother Brandon Fadely (Fadely) began sexually abusing O.W., as further detailed below.

A few months before Worthan’s trial in June 2004, the Fadelys expressed an interest in adopting the girls, but Mya testified they ultimately weren’t sure they could follow through because of the “stress of the parents and what they’ve put on the family.” (Trial Tr. at 880.) But, in any event, Mya just wanted to focus on seeing the girls “through the trial” so that they could close that chapter of their lives. She explained she just wanted to be there for when the girls needed her. (*Id.*)

In summer 2004, the girls went to their new adoptive family—J.B. and her husband—in Hamilton. (Doc. 309, J.B Aff., ¶ 3.) Undeterred, Melissa went to Hamilton “on numerous occasions[,]” even showing up at J.B.’s house. (Doc. 309, J.B. Aff., ¶ 4.) In 2008, J.B. decided to give the children a “fresh start” and moved the family to Missouri. (*Id.* ¶ 5.) Melissa continued to send gifts to the children and continued contact. (*Id.*)

VIII. Worthan's next contact

In June 2013, K.W. and O.W. were in North Carolina for their great mother-in-law's 80th birthday. (2/10/15 Tr. at 12.) Worthan called from prison. Worthan's mother-in-law, Pam Cassady, answered. (*Id.* at 15, 32-33.) Worthan explained he was attempting to have a package delivered for K.W. and O.W. through Pam, but the package was late. (*Id.* at 15-16; State's Ex. 1, CD at 1:00-2:00.) Pam affirmed she would repackage it and send it to the girls if needed. (State's Ex. 1 at 2:00–3:10.) Worthan asked to talk with K.W., and Pam thought she wanted to talk and got K.W. on the phone. (*Id.* at 9:30-10:00.)

In speaking with K.W., Worthan repeatedly asked K.W. how she felt about him. Finally, K.W. said, "I don't know if I wanna keep still talking to you, I mean I need to think things thorough" and "get back home, yeah." Worthan nonetheless continued to attempt to influence K.W. to backtrack on her trial testimony, repeatedly asking:

WORTHAN: You know I'd never hurt you right?

K.W.: Hmm hum?

WORTHAN: I mean, do, I mean, do, do you think I hurt you?

K.W.: Hmm. Uh I don't know to be honest I just I . . .I...I
...I...[audible sob].

WORTHAN: Huh?

K.W.: Hmm. Uh, I ... I...I... [sounds like “gotta go”] I don’t know. [crying sounds, then Pam gets back on phone].

(*Id.* at 25:11 -27:30.)

O.W. observed K.W. was crying and “overwrought.” (2/10/15 Tr. at 46.) O.W. was “pissed off” and wanted to scream at Worthan. (*Id.* at 48.) Soon thereafter, a fistfight ensued between the family members. (2/10/15 Tr. at 22, 52-53.) O.W. and K.W. spent the rest of their trip at a cousin’s house. (*Id.* at 21-22.)

According to J.B., as relayed by State investigator James Hulme, both O.W. and K.W. believed that the trip was a “ruse” so Worthan could speak with them. (*Id.*) The children were “distraught” upon arriving home. (J.B. Aff., ¶ 6.) K.W. remained upset about the call “for months.” (2/10/15 Tr. at 22, 24.)

IX. Fadely case

The investigation against Brandon Fadely began in 2011, when Fadely’s adoptive sister B.F. disclosed sexual abuse. (*See* Pet.’s App. G. at 2.) In 2014, O.W. disclosed Fadely’s abuse at a forensic interview. (App. G at 5; Doc. 309 at 2.)

O.W. testified at Fadely’s November 2014 sentencing hearing.⁵ She explained that she was placed at the foster home because “they took me away from

⁵ Melissa continued pursuing O.W., even meeting her “at the airport when [O.W.] arrived” for Fadely’s sentencing. (Pet. App. F at 3.) The prosecutor explained that O.W. was “upset” having Melissa around. (*Id.* at 5.)

a bad situation” at “my other home, from sexual abuse[.]” (Pet. App. F at 9.)

O.W. testified that her 12-year-old foster brother Fadely started abusing her “every night” after “a couple weeks” of living there. (*Id.*) O.W. would be sleeping in a shared bedroom with her foster sisters, on the top bunkbed. Fadely would come up onto her bunk, place his hand over her mouth, point toward K.W. (implying that if O.W. did not allow his conduct, he would rape K.W.), undress her pajama bottoms halfway, and put his penis into her vagina. (*Id.* at 10-11.)

In the State’s charging document, O.W. also disclosed that when the children played “hide and seek,” Fadely would hide with her and “finger” her vagina, while telling her to “be quiet” in the hiding spot. (Pet.’s App. G. at 6.)

X. Worthan’s first revocation

In 2015, Worthan’s first revocation occurred relating to his 2013 phone call to K.W.

State Investigator Hulme relayed J.B.’s account that O.W. had ended up on heroin and a homeless prostitute in east St. Louis, Missouri. (2/10/15 Tr. at 24.) J.B. also alleged that O.W. had recently moved to Montana and started living with Melissa, and that Melissa had begun “trying to convince [O.W.] that [her and K.W.] were brainwashed and that nothing had happened.” (*Id.* at 24-25.) For her part, O.W. testified she did indeed reestablish contact with Melissa when she

turned 17. (*Id.* at 49.) O.W. also confirmed she had recently moved back to Montana and was living with Melissa “on and off[.]” (*Id.* at 46, 54.)

Worthan testified, suggesting the court amend his conditions to have “unlimited” contact with K.W. and O.W, initiated by himself. (*Id.* at 34, 35.) O.W. too wanted to contact Worthan, explaining he was “not going anywhere anytime soon.” (*Id.* at 50.) O.W. further explained that she began investigating the Worthan case, stemming from her recollection from Fadely’s 2014 sentencing when:

an interviewer came forward; and she stated to the judge and to everyone that before entering the foster care of the Fadelys [K.W.] and I and my brother [W.W.], there was no sexual abuse whatsoever. And that’s why I decided to come back, because what I was told is that I was sexually abused, I mean I was abused and all that. And so I came to find answers. Things were not adding up.

(*Id.* at 47.) The State asked O.W. if she understood that it was “not [the witness’s] testimony[.]” O.W. responded, “I guess I’m not understanding in a way.” The State continued:

STATE: Do you understand that maybe you didn’t quite grasp everything that was said there accurately that day?

O.W.: Yes, I guess you can say that.

STATE: And you know that ten years ago we had a long trial in which all those issues were addressed here; right?

O.W.: Yes.

(*Id.* at 54-55.)

The district court conducted a thorough inquiry into O.W.'s aims:

COURT: Initially, I couldn't figure out whether you were here in denial of what your father has been convicted of or you were here with some forgiveness in your heart. But it sounds like you're here investigating.

(*Id.* at 58.) O.W. affirmed she intended to “find more answers for myself, too.”

While understanding “there was trauma when I was little,” O.W. nonetheless noted that her memories were not “making sense[,]” so she started investigating. (*Id.*)

After a further discussion, the court decided that O.W. should first meet with the State, (*id.* at 56), then talk with Dr. Scolatti to see if he “agrees that your father has been redesignated as a level 1 offender instead of an opportunistic predator[.]” (*Id.* at 60.)

The court found that Worthan violated his no-contact condition by directly calling K.W. and conspiring to have written contact with both daughters during the same time period. (2/10/15 Tr. at 67; Doc. 253 at 4.) The court revoked Worthan's sentence and reimposed the no contact condition. (Doc. 253 at 6, 9.)

XI. Worthan's next contacts with O.W.

Four days after his first revocation judgment, on June 21, 2015, Worthan began contacting O.W. through prison phone calls throughout 2015 and 2016, including 40 calls from Worthan to O.W.'s fiancé Batson, with O.W. on speakerphone for 20 of those calls. Worthan also called his former cellmate,

Ron Nelson, 6 times to arrange for Nelson to instigate contact with O.W., and 7 follow-up calls after Nelson had established contact with her. (Doc. 267, second petition to revoke; Doc. 309, Jessop Aff., ¶¶ 6-8.) Worthan urged Nelson to arrange O.W.’s contact with the Innocence Project, praised Nelson for his efforts in getting to O.W., and further advised Nelson to “make it all about her.” Worthan also urged Batson to convince O.W. to “send me an affidavit” saying “she knows I didn’t hurt her or whatever[.]” (Jessop Aff., ¶ 8.)

XII. Later filings

In 2016, Worthan filed a random pro se motion for appointment of “private counsel” and a supporting brief in district court. (Docs. 259, 260.) Worthan represented that the victim had recanted and referenced the Fadely case and corresponding documents. (Doc. 260.) The district court denied the motion. (*Id.*, handwritten order.) This Court affirmed. *Worthan*, 2017 MT 74N.

XIII. Worthan’s second revocation

In January 2018—regarding the 2015-2016 phone contact from Worthan to O.W. and in preparation for the second revocation—State Investigator Jesse Jessop contacted O.W. (Doc. 309, Jessop Aff., ¶ 2.) O.W. told Jessop that she “unequivocally wanted no contact with Kelly Worthan” and declined to testify at

the second revocation, wanting “nothing further to do with” him. (*Id.* ¶¶ 4, 6.)

O.W. had realized that:

she was being manipulated by Kelly and Melissa Worthan, and their circle of friends, and that the counselor with whom Melissa Worthan had set [O.W.] up to “investigate false memories” was a hoax. [O.W.] adamantly re-affirmed her actual memories of Defendant sexually abusing her during her childhood.

(*Id.* ¶ 4.) O.W. explained she had received unwanted gifts from Worthan—sent through Pam—such as artwork with O.W.’s daughter’s name on it. This was upsetting because she had never shared her daughter’s name with Worthan. (*Id.* ¶ 5.) O.W. discarded the artwork but gave Jessop photos. (*See Id.*, attached exhibit of artwork.)

Regarding Worthan’s multiple phone calls directed at O.W., the district court again revoked Worthan’s sentence, imposing a 130-year sentence with no time suspended. (Docs. 285, 286.) The court imposed a new special no contact condition specifically addressing Worthan’s recent conduct. (Doc. 286 at 7.)

XIV. PCR claims

A year later, O.W. submitted an affidavit claiming her memory of the Fadely abuse was “much clearer” in her mind and she was “unsure” whether Worthan sexually abused her. (Pet. App. E at 2.) The Innocence Project theorized that the State coached O.W. and conspired to cover up the Fadely abuse to implicate

Worthan instead, alleging that the State “knew O.W. was being raped by [Fadely] in the foster home[,]” pointing to an alleged “breakdown in the placement” with the Fadely foster family. (PCR Doc. 6 at 20-21.) Finally, the Innocence Project alleged that the State’s purported concealment of the Fadely abuse constituted a *Brady* violation. (*Id.* at 15.) Thus, Worthan claimed that his “newly discovered evidence” and “*Brady* violations” established that Worthan did not commit the crimes “for which he was convicted” under the NDE statute, Mont. Code Ann. “§ 46-21-102(2).” (PCR Doc. 2 at 5.) The district court dismissed the claims.

SUMMARY OF THE ARGUMENT

Worthan’s second petition is time barred because he did not raise his NDE claim within one year of discovery of the new evidence. By his own statements in district court filings, Worthan proffered the bases of his claims in 2016 but did not file his petition until 2020.

The district correctly dismissed Worthan’s petition because he failed to identify, much less establish, any NDE that he did not commit the crime for which he was convicted. O.W.’s affidavit was not reliable, nor did it constitute NDE because: (1) it was not even a recantation; (2) O.W. had previously consistently implicated Worthan; (3) Worthan and Melissa have serially attempted to harass O.W. and K.W. into changing their testimony; and (4) K.W. has never recanted,

but instead reaffirmed Worthan did sexually abuse her. As to the Fadely documents and the CFS worker's note, these do not—in any way—support Worthan's conclusory allegations of a vast governmental and State witness conspiracy to suppress Fadely's abuse and blame Worthan.

To the extent Worthan alleges NDE of a *Brady* violation, his "evidence" is not reliable because it is based on conjecture and speculation. Nor would Worthan's allegations establish that he did not sexually abuse O.W. and K.W.

As Worthan's claims were meritless and the files and records conclusively showed that Worthan was not entitled to relief, the district court did not abuse its discretion in declining to grant discovery.

Nor did the district court abuse its discretion in denying Worthan's "Motion for New Trial" filed 16 years too late. This Court has explained that the nature of NDE petitions raising PCR claims cannot be equated with motions for new trial because they operate under fundamentally different standards and relief. Worthan cannot simply conjure a PCR petition raising NDE claims into a motion for a new trial by filing it in the original criminal docket to obtain a lower burden.

ARGUMENT

I. The district court correctly denied Worthan’s second, successive PCR petition.

A. Standard of review

This Court reviews a district court’s denial of a PCR petition to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct. *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501. Discretionary rulings made by the district court in a PCR proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. A petitioner seeking to reverse a district court’s denial of a PCR petition “bears a heavy burden.” *Garrett v. State*, 2005 MT 197, ¶ 10, 328 Mont. 165, 119 P.3d 55 (citation omitted).

B. Worthan’s petition is time barred.

In 2007, Worthan filed a first PCR petition and exhausted his claims through state and federal court. He filed another petition in 2020. But Worthan has not only exhausted his PCR remedies previously, he does not meet the “narrow exception” that exists for NDE, reviewable only if it is filed within “one year” after the evidence was discovered, or “reasonably should have [been] discovered.” *State v. Root*, 2003 MT 28, ¶ 18, 314 Mont. 186, 64 P.3d 1035 (citing Mont. Code Ann. § 46-21-102(2)).

Fadely was sentenced in November 2014. Extraordinarily, through Worthan's violations of his no contact conditions again in 2015-2016 by reaching O.W. through third parties from prison jail calls, Worthan told a third party to make "contact with one of two specific lawyers who are associated with the Montana Innocence Project" and attempted to pass information to O.W. through third parties to submit an affidavit. (Jessop, Aff. at ¶ 8.) On June 6, 2016, Worthan asserted in a pro se filing "newly discovered evidence":

Specifically, this "recantation" made by the victim in this case on numerous occasions. The victim (witness) stated that the crime did not occur by the defendant. In fact, the victim was being sexually abused before and during Defendant's trial by Brandon Thomas Fadely who is currently serving time in Shelby, MT, for sexually abusing the victim in Defendant's case. Cause No. DC-13-76.

(Doc. 260 at 2.) Worthan also referenced "transcripts" from the Fadely case. (*Id.*)

Thus, by Worthan's own admission, by June 6, 2016, Worthan personally affirmed that "the victim" offered a "recantation" on "numerous occasions" and referenced his knowledge of Fadely's abuse—all while referring to his contacts at the Innocence Project to third parties and contacting O.W. from prison.

Resultingly, Worthan had one year to file a PCR petition, but did not file it until April 7, 2020. And at the latest, even as a pro se litigant, Worthan became aware of what was required to pursue his claims by March 28, 2017. At that time, Worthan was on notice by this Court that his error in his previous filing was requesting counsel without first "fil[ing] a petition for postconviction relief" in

district court. *Worthan*, 2017 MT 74N, ¶¶ 6-7. Even by then, his 2020 petition would still be untimely under the NDE time bar.

Here, since the district court did not order the State to respond to Worthan's PCR petition below, this appeal is the first opportunity for the State to raise the procedural defense. This Court should hold that the NDE time bar constitutes an additional and independent basis supplementing the district court's dismissal of Worthan's petition. Thus, Worthan's second petition fails at the outset.

C. Worthan's petition fails to identify any reliable NDE.

Even assuming Worthan's successive petition alleging NDE is "timely filed," the district court must "determine if the evidence is actually 'newly discovered.'" *Garding*, ¶ 39 (citing *Marble v. State*, 2015 MT 242, ¶¶ 34, 36, 380 Mont. 366, 355 P.3d 742).

As a threshold consideration, the district court must examine whether the alleged NDE is reliable under Mont. Code Ann. § 46-21-102. *State v. Beach*, 2013 MT 130, ¶¶ 8, 23, 370 Mont. 163, 302 P.3d 47 (Beach II). Next, the district court must "utilize the very test set forth in § 46-21-102" [the NDE PCR statute] in examining the petition to consider whether the evidence is newly discovered. *Marble*, ¶ 36. In other words, the district court is to consider whether "in light of the evidence as a whole" the petition would establish that "petitioner did not

engage in the criminal conduct for which the petitioner was convicted[.]” Mont. Code Ann. § 46-21-102(2).

For a framework, a district court may “seek guidance from [this Court’s] case law addressing various forms of [NDE], such as our precedent with respect to recantations[.]” *Marble*, ¶ 36. Additionally, a court may consider the “first four factors of the *Clark* test⁶” in evaluating the claim. *Id.* A court must also consider new evidence claims in light of all the evidence as a whole, old and new. *Marble*, ¶¶ 35-39; *Beach II*, ¶ 20. And it is “up to the district court to determine” whether “the proof and evidence will be weighed by the court itself[.]” *Marble*, ¶ 37.

1. O.W.’s affidavit is not reliable evidence that Worthan did not sexually abuse O.W. and K.W.

a. Faded memory

As an initial matter, O.W.’s affidavit is not a recantation; rather her explanation that the Fadely abuse was “much clearer” in her mind evinces a fading of memories with the passage of more time. “Recantation requires a [person] to renounce and withdraw the prior statement.” *United States v. Wiggin*, 700 F.3d 1204, 1216 (9th Cir. 2012.) Even assuming for arguments sake O.W.’s affidavit is

⁶ *State v. Clark*, 2005 MT 330, ¶ 37, 330 Mont. 8, 125 P.3d 1099. The district court found that Worthan’s evidence failed *Clark* factors 3 and 4, which are: “(3) the evidence must be material to the issues at trial; and (4) the evidence must be neither cumulative nor merely impeaching.” *Clark*, ¶ 34. Merely impeaching evidence is when it is “collateral in nature and does not have a direct bearing on the merits of the trial under review.” *Id.* ¶ 25. (citation omitted).

a recantation, it would still be “viewed with great suspicion[,]” especially here because “recantations by child victims of sexual abuse are notoriously unreliable and suspect” and “reality could appropriately contribute to a district court’s evaluation of the credibility of a recantation in those circumstances[.]” *Clark*, ¶ 37 (citations omitted). Considered on its face alone, O.W.’s affidavit does not establish that Worthan “did not engage in the criminal conduct” for which he was convicted.

Worthan offers that because O.W. suffered sexual abuse from Fadely “during the trial preparation,” both O.W. and K.W. must have happened to “conflate” Fadely’s abuse with Worthan’s abuse. (Pet.’s Br. at 17.) But O.W. consistently described Worthan’s abuse and repeatedly implicated Worthan *before* being placed in the Fadely household.⁷ At this time, she told at least seven people about Worthan’s abuse in the Stevensville apartment, including Courtney, Tammy, Linda, Shelly, the forensic medical examiner Dr. Mielke, the forensic interviewer Dr. Miller, and Chief Barnett. (Trial Tr. at 474, 659, 700, 720, 783, 820, 941, 995.)

In O.W.’s detailed disclosures, she unequivocally implicated her “dad.” O.W.’s trial testimony was consistent with her prior disclosures. And unlike

⁷ Indeed, in addition to abuse in Stevensville, O.W. remembered Worthan sexually abusing her as far back as when she was a first grader in Texas.

O.W.'s account of Fadely's abuse in a bunkbed or while playing "hide and seek" at the Fadely house, O.W. described Worthan's abuse as occurring in his bedroom and bathroom in their family apartment. O.W. testified vividly as to the details of the items in Worthan's bedroom, the bedroom door's lock "clicking" when Worthan locked her in, what Worthan said while he was abusing her, and how Worthan ordered her out of the room after every instance of abuse. O.W.'s consistent, repeated disclosures established at trial she did not confuse the subsequent abuse from her 12-year-old foster brother with her adult father's repeated acts of sexual abuse. And Worthan does not argue that K.W. ever suffered sexual abuse from Fadely and mixed up her father for Fadely.

Further, the genesis of O.W. questioning whether Worthan abused her is based on a mistaken belief of what occurred at Fadely's 2014 sentencing. As O.W. explained, her new belief was based on a witness who purportedly said that prior to Fadely's abuse "there was no sexual abuse whatsoever." But that's not what happened at Fadely's sentencing. Instead, a witness who reviewed the forensic medical doctor's April 2003 physical examination of O.W. merely relayed that O.W.'s anal/genital findings were "normal as of that date." (Pet. App. F at 19.) But the examining doctor had testified at Worthan's 2004 trial that while O.W.'s physical exam was normal, that was true with 90% of exams of children reporting such abuse, (Trial Tr. at 662), and gave detailed reasons to the jury why most sexually abused

girls will have normal exams. (*Id.* at 661-75.) O.W. was understandably confused, but the basis of her belief was faulty.

The district court also viewed the affidavit with suspicion in light of the evidence as a whole, including Worthan's conviction of tampering and his more recent attempts to contact and manipulate the victims. (PCR Doc. 12 at 8-9.) O.W. and K.W. remained steadfast throughout trial with their allegations, even in light of Worthan's attempts to get O.W. to recant twice in April 2003 and Melissa's attempts to influence O.W.'s testimony during trial. While, after extended pressure, O.W.'s outlook changed in 2015 after living with Melissa, in 2018, O.W. realized she was being manipulated by her parents and reversed course. (Jessop Aff., ¶ 4.) But in 2019, she changed course again, submitting her improbable affidavit that Worthan had pressured her to submit for years.

Finally, O.W.'s affidavit is further unreliable because K.W. has never recanted. In fact, in 2020, K.W. (now L.B.) offered an affidavit unequivocally stating she was the "victim" of "Kelly Worthan." (L.B. Aff. at ¶¶ 1, 5.) She expressed trauma from "being sexually abused by Kelly Worthan." (*Id.* ¶ 5.) K.W.'s trial account of Worthan's abuse remains unchallenged and is notably similar in nature to O.W.'s trial account, with both of them explaining Worthan's pattern of behavior of him ordering them into the room, locking the door, sexually abusing them, and ordering them out.

b. Coaching/physical abuse

O.W.'s new allegation of Dr. Ruggiero and Prosecutor Fulbright coaching her using "flashcards" and "sign language" in training sessions and at trial, along with Mya and Dr. Ruggiero engaging in physical abuse in therapy sessions, is inconsistent with O.W.'s trial testimony whereupon she repeatedly affirmed she liked and trusted Dr. Ruggiero and neither Dr. Ruggiero nor the prosecutor ever told her what to say at trial, other than Dr. Ruggiero telling her to simply tell the truth. And O.W. and K.W. continued therapy with Dr. Ruggiero until 2008 when the family had to move. According to J.B., both girls were "happy going to counseling sessions," and maintained a close relationship with Dr. Ruggiero. (J.B. Aff., ¶ 7.) At trial, K.W. and Dr. Ruggiero concurred with O.W.'s trial testimony that all Dr. Ruggiero ever said in therapy sessions prior to trial was to tell the truth. K.W. says the same now:

Dr. Ruggiero and I talked about the emotional part of testifying, such as being nervous and being afraid of Kelly Worthan, but Dr. Ruggiero did not ever tell me what to say in my testimony. Dr. Ruggiero did tell me many times to just tell the truth. I was not told by anyone what to say in my testimony, including my foster mother at that time, Mya Fadely, the prosecutor, Bill Fulbright, or anyone else. I did not need anyone to tell me what to say because I had personally lived through it.

(L.B. Aff., ¶ 3.) K.W. said "nobody" including "Dr. Ruggiero, Mya Fadely, Bill Fulbright and any other person" ever used "flashcards, hand signs or gestures, or any other prompt" for her testimony, nor did anyone hold her down, sit on her,

or any other physical contact regarding her testimony. (*Id.* ¶ 4.) Prosecutor

Bill Fulbright concurred:

I can say unequivocally that I never used hand signs or any other prompt to tell [O.W.] what to answer at trial. . . . At no time did I tell [O.W.] what answers to give, put words in her mouth, or do anything else to try and influence her testimony.

(Fulbright Aff., ¶ 2.)

2. Fadely documents

Worthan attempts to connect disparate documents together to form an implausible story of a conspiracy involving the prosecutor, DPHHS, Mya, and Dr. Ruggiero—who all allegedly acted to hide the Fadely abuse and implicate Worthan instead. But none of Worthan’s documents even remotely show Worthan did not engage in the criminal conduct for which he was convicted, much less support his theory of a coverup. Rather, as the district court determined, these documents are buttressed only by Worthan’s own unsupported allegations. A mere allegation in a PCR petition does not constitute evidence. *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299.

First, Worthan points to a CFS case worker’s note that Mya wanted the children removed as somehow “evidence” Mya knew about Brandon Fadely’s abuse and was part of the conspiracy to cover it up. But this is merely an allegation. Any disclosure about Fadely’s abuse did not even come to light until B.F. disclosed in 2011. O.W. disclosed in 2014. And at Worthan’s trial, Mya

readily testified as to trial-related stress, but also conveyed the need for stability for the girls and affirmed her commitment to fostering them throughout the trial. Mya also testified that she never discussed or even questioned either O.W. or K.W. about Worthan's abuse, nor did she tell them what to say. O.W. concurred at Worthan's trial, explaining that all Mya said was to tell the truth.

Dr. Ruggiero being listed as a potential witness for the State in Fadely's 2014 charging document is not proof of a conspiracy or exculpatory. It should not be surprising because she was a long-term therapist for both children until 2008. (J.B. Aff., ¶ 7.)

Finally, O.W.'s unmoored statement in the State's 2014 charging document against Fadely that—at some undisclosed time—"a therapist" became aware of the Fadely abuse, does not establish that Worthan did not commit his crimes, but merely shows that O.W. believed that she told somebody about Fadely's abuse, which necessarily occurred subsequent to her allegations against Worthan and moving to the Fadely household.

3. Conclusion

As the district court correctly concluded, Worthan's mere allegations did not constitute NDE and, under *Clark* factors 3-4, Worthan failed to show any materiality in his evidence nor did Worthan even bother to argue his evidence was not merely impeaching. (PCR Doc. 12 at 8-9.) Worthan's PCR claims fail,

particularly against the backdrop of the record as a whole, including Worthan's tampering conviction against O.W. and years-long attempts at manipulating both girls. (*Id.* at 9.)

D. Worthan's alleged Brady violation does not establish that he did not commit the offenses of which the jury convicted him.

In analyzing Worthan's NDE claim under Mont. Code Ann. § 46-21-102(2),⁸ the district court determined that Worthan offered "no credible evidence" of the State's knowledge and suppression of Fadely's abuse, other than O.W.'s unreliable affidavit, which nonetheless did not show Worthan did not commit his crime. (PCR Doc. 12 at 6.) The court continued, "for the State to have breached its duty to disclose, it would have had to discover additional information in the form of O.W.'s abuse by Fadely during Petitioner's initial proceedings and this information would have needed to be exculpatory of Petitioner." (*Id.*) Thus, the district court correctly decided Worthan's *Brady* claim failed to afford relief under Mont. Code Ann. § 46-21-102(2) because it constituted unreliable speculation, not NDE.

⁸ Worthan also raised a *Schlup v. Delo*, 513 U.S. 298 (1995), gateway claim below, but under Subsection "(2)" the NDE statute. (Doc. 2 at 5.) A *Schlup* claim is only reviewable as a procedurally barred claim under Subsection (1). *Beach II*, ¶¶ 95, 126 (McKinnon, J. concurring.) The State does not address the improperly pled claim, which Worthan appears to abandon on appeal. *See Wilkes v. State*, 2015 MT 243, ¶ 19 n.1, 380 Mont. 388, 355 P.3d 755 (Arguments raised in a petition that are not adequately briefed on appeal are abandoned.)

Confusingly, Worthan’s PCR assertion is that the *Brady claim itself* establishes NDE under Mont. Code Ann. § 46-21-102(2), putting the cart before the horse on the merits of his claim. The reality is that, as shown above, the “evidence” purportedly supporting Worthan’s *Brady* claim is not evidence, but speculative allegations. Thus, any *Brady* claim would fail at the outset because no evidence—much less “newly discovered” evidence—even exists. But even assuming *arguendo* that Worthan raised a timely *Brady* claim with reliable NDE—and while the State does not at all concede this Court should reach the merits of the claim—Worthan’s *Brady* claim would still fail.

First, Worthan fails to identify any exculpatory evidence. Worthan implies a mutual exclusivity between Fadely’s abuse and Worthan’s abuse of O.W. But Fadely’s subsequent abuse of O.W. does not show that Worthan did not abuse her. In fact, O.W. affirmed at Worthan’s trial that the very last time Worthan sexually abused her was *before* she moved to the Fadely household, apparently the night before her allegations against her dad broke and “this woman called me out of the [class]room.” (Trial Tr. at 345-46.) Nor does Worthan identify, argue, or show impeaching evidence, or evidence that bears on the “reliability of a given witness” as “determinative of guilt or innocence[.]” *Giglio v. United States*, 405 U.S. 150, 154 (1972). There is no impeaching value to speculative allegations of hypothetical knowledge of State witnesses regarding Fadely’s abuse. Indeed, at

Worthan's trial, defense counsel asked Dr. Miller about how the girls' removal to the Fadely household might have impacted the girls' allegations. Dr. Miller responded:

[O.W.] could [give details about the offense] and that what she was reporting was consistent with what I had been told she had said to Shelly and to a police officer. And so given that, the timing doesn't seem to fit about coaching because the allegations arose—the reason they were removed was because the allegations arose. So they came up first.

(Trial Tr. at 837.) Worthan cannot claim impeachment value to O.W.'s source of sexual knowledge either, because O.W. described her knowledge of things like, for example, Worthan's "white" and "slim[y]" ejaculate to Shelly and Chief Barnett before even living with the Fadelys. (*Id.* at 1017, 1026-28.)

Nor could Worthan show that the State suppressed Fadely's abuse. The same prosecutor who handled Worthan's trial affirmed that the State was not even aware of O.W.'s Fadely allegations until her disclosure in 2014, or 10 years after trial. (Doc. 309 at 1-2, 18.) Indeed, 2014 was when the State charged Fadely, so Worthan cannot argue the State suppressed any Fadely documents at Worthan's 2004 trial. Worthan explained in his petition that his "new evidence" was "discovered" in 2019 when the Innocence Project's investigator went to the Ravalli County courthouse and made photocopies of some Fadely documents, (Doc. 2 at. 5), which Worthan himself already asserted he had knowledge of since 2016. And while Worthan appears to implicitly speculate that Dr. Ruggiero must

have known about the Fadely abuse prior to Worthan’s trial, and that such hypothetical knowledge should be imputed to the State, (Pet.’s Br. at 24), it “cannot be said that the prosecution suppressed evidence about which it was unaware, evidence that an expert had independently obtained[.]” *See Garding*, ¶ 35. Nor does any evidence exist that Dr. Ruggiero assisted in Worthan’s prosecution or made strategic decisions about the charges.⁹

Finally, Worthan fails to show how any of the Fadely information “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *State v. Ilk*, 2018 MT 186, ¶ 37, 392 Mont. 201, 422 P.3d 1219 (citation omitted). For all the reasons Worthan’s “evidence” is unreliable and speculative under Mont. Code Ann. § 46-21-102(2), it is not material either. *Ilk*, ¶ 31 (In *Brady* claims, the defense must make a showing of more than “mere speculation about materials in the government’s files.”)

E. The district court properly denied Worthan’s motion for discovery.

A district court may dismiss a PCR petition if the petition, files, and records “conclusively show that the petitioner is not entitled to relief.” Mont. Code Ann. § 46-21-201(1)(a). *Marble*, ¶ 30. Mere conclusory allegations are insufficient to

⁹ Dr. Ruggiero is a private practitioner without any associations. She began treating O.W. and K.W. “as clients to help deal with the emotional” damage beginning in 2003. (Trial Tr. at 454-56, 459.)

support a petition. *Id.* ¶ 38. A petitioner’s failure to show he is entitled to relief may result in dismissal of the petition. *Id.* ¶¶ 31, 38. A postconviction proceeding may “not serve as a broad discovery device” with which to embark upon “a ‘fishing expedition’ in an attempt to establish” grounds for PCR relief. *Heath*, ¶ 27. It is “up to the district court to determine” whether “discovery and a hearing should be conducted[.]” *Marble*, ¶ 37.

Worthan did not have any NDE. Rather, he had conclusory allegations as to the Fadely documents, and an unreliable, immaterial, and merely impeaching affidavit in light of the evidence as a whole. Because the district court ruled that the petition, files, and records conclusively show that Worthan is not entitled to relief (Mont. Code Ann. § 46-21-201(1)(a)), the district court was well within its discretion to not order discovery. (*See* PCR Doc. 12 at 4-9.)

II. The district court properly denied Worthan’s new trial motion.

A. Standard of review

The decision to deny a motion for new trial is reviewed for an abuse of discretion. *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 259, 343 P.3d 1196.

B. Discussion

A new trial motion “must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the prosecution” and is only

granted if “required in the interest of justice.” Mont. Code Ann. § 46-16-702(1)-(2). Worthan’s deadline to file his motion passed on July 21, 2004. Worthan’s 2020 motion was untimely.

Worthan claims that *Morse* excuses his 16-year delay. But, in *Morse*, two months after the defendant was convicted at a jury trial, but prior to sentencing, the defendant filed an untimely motion for new trial based on a victim recantation made after trial. *Morse*, ¶ 14. This Court specifically noted that because *Morse* had “not been sentenced,” he had “no right of appeal” and could not have filed a PCR petition. *Morse*, ¶ 35. “Under the circumstances of this case” this Court held that the motion for new trial was proper. *Id.*

A few months after deciding *Morse*, this Court decided *Marble*. In *Marble*, this Court concluded that it had erroneously applied the standard governing a motion for a new trial based upon new evidence, pursuant to Mont. Code Ann. § 46-16-702, to claims of new evidence of innocence raised in postconviction. *Marble*, ¶¶ 29-31. This Court unequivocally stated, “Because the PCR petitioner is presumed guilty following the entry of a judgment of conviction, his burden when seeking postconviction relief based upon [NDE] should be greater than that imposed upon a petitioner seeking a new trial under § 46-16-702, MCA.” *Marble*, ¶ 29. This Court concluded “[W]e have erred in equating a motion for new trial with a postconviction relief claim based upon [NDE] because, while a motion for

new trial does—by definition—contemplate a new trial, postconviction proceedings are in no way tethered to such relief.” *Id.*

At the same time Worthan filed his PCR petition in 2020, he also filed a “Motion for a New Trial” in the criminal docket, raising the same claims. Worthan cannot simply rename a PCR petition as a motion for new trial in order to obtain a lower burden of proof for a NDE claim. This is not merely based on the nature of Worthan’s claims but the status of Worthan’s conviction. “[A] PCR petitioner is presumed guilty following the date upon which his conviction has become final,” while a defendant who has “timely requested a new trial” does not yet have the presumption of guilt. *Marble*, ¶ 28. The district court did not abuse its discretion in denying Worthan’s meritless filing.

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CONCLUSION

This Court should affirm the district court's denial of Worthan's second/subsequent PCR petition. The Court should also affirm the district court's denial of Worthan's motion for a new trial.

Respectfully submitted this 14th day of March, 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 9,998 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ *Roy Brown*

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CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-14-2023:

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