

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0305

JAMES JOSEPH MAIN, JR.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, the Honorable John W. Larson, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
chadwright@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
DANIEL M. GUZYNSKI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

LACEY LINCOLN
Hill County Attorney
315 Fourth Street
Havre, MT 59501

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUE

Should the district court have allowed for further postconviction litigation and an evidentiary hearing before adopting the findings made by another court in the co-defendant's postconviction case to deny James Main's petition for postconviction relief?

STATEMENT OF THE CASE

The procedural record leading up to the denial of James Main's current postconviction proceedings is lengthy. Before filing the current postconviction petition, Main has been through a jury trial, direct appeal, an initial postconviction petition and appeal of the denial of his first post-conviction petition. The district court also took judicial notice of Kim Norquay's post-conviction proceeding, labeling it a "companion case." (Order Denying Petitioner's Amended Petition for Post-Conviction Relief, D.C. Doc. No. 66, attached as Appendix A.) The following is a brief summary of the procedural history of both cases:

November 25, 2006	Lloyd Kvelstad dies in the early morning hours at a party in Melissa Snow's flop house in Havre, Montana
December 8 and 22, 2006.	James Main and Kim Norquay, Jr. were charged with Deliberate Homicide or alternatively, Deliberate Homicide by Felony Murder (Aggravated Assault).

November 12, 2008	Norquay goes to trial and is convicted of deliberate homicide and tampering with evidence.
February 2-9, 2009	Main goes to trial. Norquay testifies under a grant of immunity. State's DV Ex. 1: 2/2-2/9, 2009, Main Trial Transcript (Main Tr.) at 1174-1176.
May 18, 2009	The honorable Wayne E. Phillips sentences Main to sixty (60) years in the Montana State Prison. Written judgment issued on June 23, 2009.
March 1, 2011	Norquay's conviction is upheld on appeal. <i>State v. Norquay</i> , 2011 MT 34, 359 Mont. 257, 248 P.3d 817.
July 12, 2011	Main's conviction is upheld on appeal. <i>State v. Main</i> , 2011 MT 123, 360 Mont. 470, 255 P.3d 1240.
June 17, 2013	Norquay files post-conviction relief (PCR) petition.
April 2012	Main files document that the district court converts to a PCR petition.
November 19, 2013	The denial of Main's PCR petition is upheld on appeal. <i>Main v. State</i> , 2013 MT 350N, 373 Mont. 441, 318 P.3d 173.
April 24, 2018	Norquay files Revised Amended Petition for Post-Conviction Relief based on new evidence. <i>Norquay v. State</i> , DV 12-93. Norquay's attorneys provide the new information in his PCR petition to Main.

April 26, 2019	Main files PCR petition based on new evidence regarding Kvelstad's death and items not turned over to the defense. <i>Main v. State (II)</i> DV 19-45. (D.C. Doc. 1.)
August 19, 2019	Judge Larson appoints OPD counsel to represent Main in his PCR case. (D.C. Docs. 10 and 11.)
April 17, 2020	Main requests subpoena for DNA raw data generated before the original trial. The State objects and the district court never rules on the request. (D.C. Doc. 21.)
January/February 2020	The Honorable Yvonne Laird holds a four-day evidentiary hearing to consider Norquay's post-conviction claims.
October 1, 2020	Main files his Amended Original Petition for Post-Conviction Relief. (D.C. Doc. 45.)
October 1, 2021	Judge Laird denies Norquay's request for post-conviction relief in DV 12-93. The denial is submitted by the State in Main's PCR case. (D.C. Doc. 64 at Ex. A.)
April 13, 2022	Judge Larson denies Main's Amended Original Petition for Post-Conviction Relief. (D.C. Doc. 66, Appellate Appendix A.)
August 29, 2023	The denial of Norquay's amended post-conviction petition is upheld. <i>Norquay v. State</i> , 2023 MT 165N, __ Mont. __, 534 P.3d 132.

STATEMENT OF THE FACTS

It was around 8 degrees outside and almost as cold inside Melissa Snow's house when people would come rolling through in the evening of November 24 and into the early morning hours of November 25, 2006. (Main Tr. at 418.) Her house did not have heat. Most of the windows were boarded up, but a few were just broken and exposed to the elements. (Main Tr. at 704 *referencing* State's Ex. 35.) From the late afternoon of November 24 to the early morning hours of November 25, almost a dozen people would show up and drink at the house.

When Nathan Oats arrived around 1:00 a.m., he did not know what was going on in the house. Lloyd Kvelstad was laying face down on the low couch with his pants pushed down by his ankles. Oats shook Kvelstad and Kvelstad rolled directly off the couch onto the dirty carpet floor. Blood stains match his position on the couch and the short fall to the floor. (State's Ex. 42.) Oats thought Kvelstad was dead, but Kim Norquay, who was sitting nearby on another couch calmly drinking a beer, told Oats that Kvelstad was fine and to leave him alone. (Main Tr. at 263-264.) Oats did not believe Norquay and directed his wife to call the cops. Norquay immediately ran from the house and Oats

tackled another man who came from the back rooms, James Main, to prevent him from leaving. (Main Tr. at 265-266.) For seventeen years, Main's fate would be tied to Norquay's actions that night.

Norquay and Main were charged with felony murder for Kvelstad's death. The State said aggravated assault was the underlying offense for the felony murder charge. Norquay went to trial first and, after he was convicted, he testified in Main's trial under a grant of immunity. One of Main's witnesses, Nathan Morsette, told the jury that Norquay was bragging about the murder after admitting that he strangled Kvelstad with a string and was plotting to get Main convicted for the murder. (Main Tr. at 1298 and 1303.) Despite evidence that Norquay was the only one of the two involved in tying the string around Kvelstad's neck, Main was still convicted for felony murder. (Main Tr. at 1604.)

Norquay was also first to challenge his conviction on appeal. He would claim playing the videotaped deposition of a crime lab expert and the *Allen*¹ instruction given to the jury during deliberations hampered

¹ *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

his ability to show he was not responsible for Kvelstad's death.

Norquay, ¶ 28 and ¶ 33. This Court affirmed Norquay's conviction.

When Main's appeal was considered two months later, this Court rejected Main's argument emphasizing whatever scuffle Main had with Kvelstad earlier in the evening did not lead to Kvelstad's death later the next morning. This Court referenced Norquay's actions over thirty times and concluded there was sufficient evidence to tie Main to Kvelstad's death. *Main*, ¶ 44.

Attorneys started reviewing Norquay's conviction. Discrepancies in photo logs and careful review of the photos showed Kvelstad's body was not in same location as when it rolled off the low couch after he had supposedly died from his blunt force trauma and strangulation injuries. Norquay acquired the services of a renowned Canadian hypothermia expert who concluded Kvelstad was not dead when the EMTs arrived and, because he was wet, he may have died from exposure rather than the assault injuries. This new information was shared with Main. Main then filed his second PCR petition claiming: "[t]his new evidence establishes that Kvelstad's death was likely the result of exposure rather than assault and casts significant doubt on the State's time of

death. Further, Petitioner has discovered evidence that crime scene photos were altered.” (D.C. Doc. No.1 at 3.)

Main pointed the district court to Crime Scene Photos #40 - #43, #46, #47 and are the first photos provided in discovery showing Kvelstad at the scene. They were taken at 3:53-3:57 a.m., or two-and-a-half hours after Oats shook Kvelstad off the couch at 1:22 a.m.. These photos contradict where all the witnesses and blood stains placed Kvelstad in diagrams of the scene, directly below and adjacent to the couch. These photos show Kvelstad moved forward approximately two feet after the EMTs left the scene and before these photos were taken.² Exhibit # 58 shows the string from Kvelstad’s hoodie in his mouth.

In January 2020, Norquay was afforded a four-day hearing before Judge Laird where he presented evidence related to the expert’s hypothermia conclusions and the missing photos. (D.C. Doc. 66 at 11.) On October 1, 2021, Judge Laird denied Norquay’s PCR claims. (D.C. Doc. 64.) Main’s PCR claims and additional claims related to DNA

² Main invited the district court to compare Ex 17.5, body location drawings, with Ex. 19, crime scene photos showing body movement—crime scene photos #40-43, 1148, #58. 18 See Ex. 20, crime scene video. 19 Ex. 27, Breunig Report at 4, 5, 12.

findings were still pending. However, Judge Larson would not grant Main's request for a hearing and summarily denied Main's PCR claims on April 13, 2022. (D.C. Doc. 66.) In deciding the case without a hearing, Judge Larson said the expert findings challenging Kvelstad's cause of death was not "newly discovered evidence" and adopted Judge Lairds factual findings as "persuasive authority." (D.C. Doc. 66 at 12-14.)

SUMMARY OF THE ARGUMENT

Rather than being swept up into the same treatment as Kim Norquay, James Main was entitled to his own PCR evidentiary hearing where he could present the evidence from his investigation about new evidence related to Lloyd Kvelstad's death. The district court delayed ruling on Main's request to obtain the raw data created from the DNA testing done before the original trial. New testing methods could have revealed the DNA of previously unidentified DNA contributors found on the string tied around Kvelstad's neck. Main's DNA request relates to how new evidence about the cause of death had a different impact on his own PCR claims. Unlike Norquay, Main wanted to show how his

early minor scuffle with Kvelstad did not cause his death much later the next day.

After making the initial statutory determination that his claims were not frivolous and could warrant relief, the district court then prevented Main from fully investigating and presenting his PCR case. The district court simply delayed and defaulted to another district court's denial in Norquay's PCR case. One district court judge cannot rely on the factual findings of another district court judge as "persuasive authority." Even if similar to Norquay's claims, Main was entitled to an independent review.

Main was presenting evidence about Kvelstad's death that was not available at his original trial. This new evidence was tied to the State's failure to turn over crime scene investigation photographic evidence. Thus, Main presented a procedural claim of innocence that should have given him the opportunity to for judicial review. The district court's interpretation of Mont. Code Ann. § 46-21-102 conflicts with that statute's underlying constitutional due process gateway criteria to protect criminal defendants coming forward with new evidence of innocence.

STANDARD OF REVIEW

This Court reviews a district court's denial of a postconviction relief petition to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct.

State v. Turner, 2000 MT 270, ¶ 47, 302 Mont. 69, 12 P.3d 934.

Discretionary rulings in postconviction relief proceedings, including rulings relating to whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Soraich v. State*, 2002 MT 187, ¶ 13, 311 Mont. 90, 53 P.3d 878 and *Ford v. State*, 2005 MT 151, ¶ 6, 327 Mont. 378, 114 P.3d 244.

Collateral proceedings in state court have taken on a more important role than ever before. The United States Supreme Court has limited consideration of factual evidence in federal habeas corpus proceedings review to the factual information first presented in the state court. *Shinn v. Ramirez*, 596 U.S. 366, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022). In *Shinn*, the majority of the Court interpreted AEDPA³ to hold, above and beyond the normal procedural defaults, federal

³ The Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254.

habeas courts may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record. *Shinn*, 596 U.S. at 381. The three dissenting jurists noted that the majority’s new position “prioritizes maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system.” *Shinn*, 596 U.S. at 406 (J. Sotomayor, *dissenting*). Applied here, the discretionary power of the district court must not be used to limit further review of what may be an extreme malfunction of the trial process by foregoing a hearing in favor of adopting the findings of another court.

ARGUMENT

- I. **The district court abused its discretion when it denied James Main’s post-conviction proceedings without a hearing.**
 - A. **The district court should have let James Main obtain and submit the DNA raw data for expert review.**

After the new information came to light about Kvelstad’s cause of death, James Main sought the readily available DNA raw data generated by the Montana State Crime Lab before his trial. DNA evidence was crucial at trial because it showed various items of Main’s clothing had Kvelstad’s blood on it. However, DNA obtained from the

most important piece of evidence – the string wrapped around Kvelstad’s neck – excluded Main from one of the three other possible contributors. With new available testing methods for mixed DNA samples, Main hoped to identify the people who had most likely handled and presumably tied the hoodie string around Kvelstad’s neck. D.C. Doc. 23 at 2-4.) The State opposed the release of the raw data. (D.C. Doc. 22.) Without a ruling on obtaining the DNA evidence for over a year, Main filed a notice alerting the district court to the outstanding request for the underlying DNA raw data. The district court never ruled on Main’s DNA request and instead summarily denied his entire petition without any mention of the DNA request. Main’s simple request for the available and existing DNA raw data was not being used as a broad discovery device. *Heath v. State*, 2009 MT 7, ¶¶ 26-27, 348 Mont. 361, 202 P.3d 118.

In *Heath*, trial defense counsel said he would only respond to IAC allegations at a hearing and then subsequently died before ever responding to Heath’s IAC claims. *Heath*, ¶¶ 7-8. The district court denied Heath’s PCR claims without holding an evidentiary hearing because it felt there would be no value in holding a hearing without his

now deceased attorney. *Heath* ¶ 20. This Court cautioned against the district court making purely speculative guesses about what would come out in the hearing. *Heath* ¶ 23. Instead, the district court should have given Heath the opportunity at a hearing to “fully explore” Heath’s IAC claims, even if his prior attorney would not be there to respond. *Heath*, ¶ 24. With the death of his counsel, Heath should have been provided reasonable alternative means to find the information, including a hearing, to prove his PCR claims. *Heath*, ¶ 27.

Like *Heath*, Main specifically targeted further information to prove that, despite his scuffle with Kvelstad the prior evening, someone else tied the string around Kvelstad’s neck and the resulting lack of care led to his death. Re-examination of the existing DNA evidence with more sophisticated statistical analysis could clarify who handled the string found around Kvelstad’s neck. Not only was Main’s sought after DNA information relevant, the raw data was easily amenable to new DNA analysis specifically designed to more thoroughly evaluate DNA mixtures like the mixture present on the string around Kvelstad’s neck. The district court should have provided Main the reasonable alternative DNA testing request. Summarily dismissing Main’s PCR

claims without letting him evaluate the DNA raw data or present that information at an evidentiary hearing was an abuse of discretion. *State v. Lawrence*, 2001 MT 299, ¶ 16, 307 Mont. 487, 38 P.3d 809 (remanding for PCR evidentiary hearing when a possibility of valid IAC claims existed.)

B. The evidentiary hearing in Kim Norquay’s case could not act as a substitute for holding an evidentiary hearing regarding James Main’s PCR claims.

The district court summarily dismissed Main’s petition without the benefit of discovery or an evidentiary hearing. “If a district court finds that the allegations in a petition are without merit or would not otherwise entitle a petitioner to relief, a district court may deny an application for postconviction relief without holding an evidentiary hearing.” *State v. Cobell*, 2004 MT 46, ¶ 12, 320 Mont. 122, 86 P.3d 20.

Here, the district court made the initial determination that Main’s new PCR petition had enough merit to warrant a response from the State of Montana. Pursuant to Mont. Code Ann. § 46-21-201(1)(a), a district court must not only review the State’s response it must also review the existing record before it can dismiss a petition for postconviction relief. The district court went on to make the additional

finding that, after reviewing the State's response, Main's PCR petition had enough merit to appoint counsel and order additional briefing. *Off. of State Pub. Def. v. Montana Eighteenth Jud. Dist. Ct.*, 2011 MT 97, ¶ 7, 360 Mont. 284, 255 P.3d 107(explaining the necessary review a district court needs to conduct before appointing PCR counsel.) Despite these early findings of merit which would warrant continued PCR litigation, the district court stopped short of holding an evidentiary hearing.

The better course of action is to provide postconviction petitioners with the opportunity for an evidentiary hearing when potential claims for relief exist. *See, State v. Schaff*, 2001 MT 130, ¶ 10, 305 Mont. 427, 28 P.3d 1073. The district court in *Schaff* summarily dismissed his PCR claim about misleading advice from his attorney to plead guilty because there existed a valid change of plea record on which the court could make the decision about whether Schaff's plea was voluntary. But Schaff's claim involved what took place before the change of plea and was not documented in the record. This Court remanded for an evidentiary hearing so Schaff could present any non-record based IAC claims. *Schaff*, ¶ 10.

Schaff shows that the procedural rules cannot be unreasonably applied to short circuit potential PCR claims. "Unlike civil complaints, the postconviction statutes are demanding in their pleading requirements." *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. The due process statutory safeguards courts are supposed to engage in when pleading and evaluating postconviction petitions. When a post-conviction petition has been properly pled and a response ordered, the best way to resolve factual disputes is to conduct an evidentiary hearing. *Heath*, ¶¶21-24.

Other states similarly require a postconviction hearing when the defendant has identified specific expert testimony that could help exonerate the defendant. *Haskell v. State*, 336 So. 3d 406, 407 (Fla. Dist. Ct. App. 2022). Given the limited opportunities for collateral proceedings, Main should have received a hearing to fully explore the differences between his supported PCR allegations and those made by Kim Norquay. *See, State v. Lewis*, 2007 MT 16, ¶ 21, 335 Mont. 331, 151 P.3d 883 (trial counsel's decision not to raise speedy trial claim should be fully considered by district court in post-conviction proceedings.) *See also, Williams v. State*, 2002 MT 189, ¶ 27, 311 Mont. 108, 53 P.3d 864

(Petitioner entitled to have the additional issues he raised in his amended petition independently considered by the district court.)

Main also did not need to prove his innocence based solely on the pleadings without an evidentiary hearing. “The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only allege — not prove — reasonably specific, nonconclusory facts that, if true, would entitle him to relief.” *Aron v. United States*, 291 F.3d 708, 715 n. 6 (11th Cir. 2002). This approach makes sense because if the defendant was required to prove the facts that would entitle him to relief before being granted an evidentiary hearing, the hearing itself would be unnecessary. The district court had already determined Main’s claims were not frivolous. Otherwise, it would not have ordered the State to respond to his PCR petition. If the court was following the statutory procedure, it then independently reviewed Main’s PCR petition and the State’s response and concluded there was enough merit in Main’s claims to appoint counsel. Mont. Code Ann. § 46-21-201(1)(a). Having met these procedural hurdles, the district court should have held an evidentiary hearing as well.

The expert testimony Main proposed could have included testing with the new DNA techniques to clear up the identification of other suspects contributing DNA to the string tied around Kvelstad's neck. More importantly, Main's expert testimony could have included some sort of explanation about why Kvelstad's body clearly moved forward after rolling off the couch. No other witnesses have said anything other than the body was in the same location as indicated in the admittedly incomplete crime scene photos. Dr. Gordon Gieschbrecht put in his affidavit that Kvelstad was alive and moved forward after he fell off the couch, thus his death could have been caused by subsequent actions wholly unrelated to Main's scuffle earlier in the evening. It would then be Judge Larson's duty to independently review the credibility of Dr. Gieschbrecht findings rather than deferring to Judge Laird.

This Court previously noted that it appreciated Judge Laird's "commitment to carefully considering the matter and not issuing a less deliberate order to dispose of the matter." *Norquay v. Twelfth Jud. Dist. Ct., Hill Cnty.*, No. OP 21-0342, (Aug. 17, 2021). Judge Larson's PCR denial was anything but deliberate. His reliance on Judge Laird's factual findings does not comport with the statutory duty of the

postconviction court to review the record or this Court's holdings that postconviction issues should be "independently considered." *Williams* ¶ 27 *see also Notti v. State*, 2008 MT 20, ¶ 63, 341 Mont. 183, 176 P.3d 1040⁴ (Affirming denial after district court reviewed extensive PCR filings and held evidentiary hearing to consider expert testimony and voir dire claims.) The factual contradictions between Main's potential expert testimony and those used by the State should have been resolved by the *presiding* district court judge at an evidentiary hearing. *See DeMarco v. United States*, 415 U.S. 449, 450, 94 S. Ct. 1185, 1186, 39 L. Ed. 2d 501 (1974) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts."). Deferring to another district court to do the work is unacceptable.

The district court's reliance on Judge Laird's findings cannot conclusively show that Main was entitled to no relief on the claims that he asserted and there should not have been an evidentiary hearing. *See, Fitzpatrick v. State*, 194 Mont. 310, 318, 638 P.2d 1002, 1007 (1981) (district court erred when it found petitioner's claims about his counsel

⁴ *Overruled on other grounds by Whitlow v. State*, 2008 MT 140, ¶ 63, 343 Mont. 90, 183 P.3d 861

failing to investigate were speculative and dismissed his successive PCR petition without holding an evidentiary hearing.) The sufficiency of Main's allegations in his petition and the district court's denial of his request for materials to support his petition, compelled an evidentiary hearing.

C. Main's expert opinion and evidence about the manner and time of Kvelstad's death should have been evaluated even if it was potentially available at trial.

The district court held that Main's claims challenging the manner of Kvelstad's death did not qualify as "newly discovered" evidence because Main and his trial counsel could have brought up the same information before his first trial. Consequently, the evidence was discoverable. While this may be true, Mont. Code Ann. § 46-21-102 cannot be used to defeat the very purpose it was modeled after. Main submitted his expert evidence to pass through the "actual innocence" gateway. The fact that the expert evidence was not presented to the jury because it was not available at the time of trial is sufficient to satisfy the threshold of being new evidence for purposes of applying an analysis under *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Pursuant to *Schlup*, this Court must consider how a reasonable juror would view the new evidence: “[T]he standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. A petitioner must persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329. In this evaluation, a court is authorized to consider all evidence, wrongfully admitted or wrongfully excluded from trial:

In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on “actual innocence” allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.... The habeas court must make its determination concerning the petitioner's innocence “in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.

Schlup, 513 U.S. at 327–28 (*citation omitted*). *See also*, *State v. Pope*, 2003 MT 330, ¶¶ 56-59, 318 Mont. 383, 80 P.3d 1232.

Main’s evidence about Kvelstad’s death was new because it was not presented to the jury. *See*, *Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir.

2015) (considering newly presented evidence “of opinions from a psychiatric expert that [petitioner] recently retained”), *Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012) (finding that “new evidence” is “evidence not heard by the jury”), *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003) (“All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial.”), and *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (holding that “habeas petitioners may pass *Schlup*’s test by offering ‘newly presented’ evidence of actual innocence”). *Gomez*, 350 F.3d at 679 (“All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial.”)

New evidence includes “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” *Schlup*, 513 U.S. at 324. *Schlup*’s “new reliable evidence” threshold requires only “newly presented evidence,” i.e. – evidence which was not presented at trial – as opposed to “newly discovered” evidence. *Griffin*, 350 F.3d at 963. In *Griffin*, the petitioner was permitted to offer “evidence that he discovered prior to the entry of his guilty plea, but did not offer into evidence then, namely hospital records from the early 1970s that were in his possession at

commencement of trial ...” as new evidence of mental illness undermining confidence in his guilty plea. *Id.* at 961, 963. Where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the *Schlup* gateway to allow consideration of otherwise barred claims. *Carriger v. Stewart*, 132 F.3d 463, 478–79 (9th Cir. 1997).

Here, the district court improperly restricted the fundamental miscarriage exception by concluding that the “new evidence” necessary to support a claim of actual innocence under *Schlup* must be newly available, rather than just newly presented. DC Doc. 66 at 14. “New” evidence under *Schlup* does not mean that the information was unavailable at the time of trial. *Gable v. Williams*, 49 F.4th 1315, 1322 (9th Cir. 2022)⁵ citing *Larsen v. Soto*, 742 F.3d 1083, 1093–94 (9th Cir. 2013). Main’s proposed expert testimony was newly presented even if the photos and evidence it was based on existed at the time of his trial.

⁵ *Cert. denied sub nom. Steward v. Gable*, 143 S. Ct. 1796, 215 L. Ed. 2d 678 (2023)

Main needed to only present evidence of innocence strong enough "that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Carriger*, 132 F.3d at 478 quoting *Schlup*, 513 U.S. at 316. The district court should not have used Mont. Code Ann. § 46-21-102(2) to restrict Main's right to show how the previously unexamined evidence about Kvelstad's movement and the origins of the string around his neck related to Main's innocence – separate from Norquay. Main should have had the opportunity to meet the miscarriage of justice standard, by presenting the new evidence about Kvelstad's death.

Without a hearing, Main had no opportunity to show how Dr. Geisbrecht's findings and the relevant DNA findings could persuade "a reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The Montana provisions of Mont. Code Ann. §46-21-101 et seq., are derived from the Uniform Post Conviction Procedure Act and are essentially similar to the federal habeas corpus statute (28 U.S.C. § 2255). The language of Mont. Code Ann. § 46-21-104 cannot be utilized, as Judge Larson did, to limit the

available remedies under *Schlup*. Without the ability to present evidence at a hearing, Main could not meet his burden of “by a preponderance of the evidence that the new information he sought to submit justified relief”. *State v. Peck*, 263 Mont. 1, 3, 865 P.2d 304, 305 (1993). Without an evidentiary hearing and direct questioning of the evaluation of Main’s witnesses the district court also could not meet its obligation to independently review Main’s post-conviction claims. *Soraich* ¶ 24.

CONCLUSION

The most important part of the postconviction process is a hearing where the petitioner can receive the assistance of counsel. A hearing entitles the petitioner to prove allegations which otherwise may be impossible to prove. The hearing entitles the petitioner, by statute, to the assistance of counsel to help investigate, present and support the postconviction claims. The possibility of re-hashing evidence submitted in a related proceeding does not mean that a hearing should not be held. *Schaff*, ¶ 10. This Court should reverse the district court’s denial of Main’s Amended Petition for Post-Conviction Relief and remand for further DNA discovery and an evidentiary hearing.

Respectfully submitted this 3rd day of January, 2024.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Chad Wright
CHAD WRIGHT
Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 5,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
Chad Wright

APPENDIX

Order Denying Petitioner’s Amended Petition for Post-Conviction
Relief.....App. A

CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-03-2024:

Daniel M. Guzynski (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

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

Electronically signed by Kim Harrison on behalf of Chad M. Wright
Dated: 01-03-2024