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 Appellee.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether the court erred by not ordering the Crime Lab to provide Main with raw DNA data that would have enabled his experts to reanalyze a DNA sample that Main had already been excluded from.

2. Whether the district court abused its discretion when it denied Main's amended petition for postconviction relief, filed in his second postconviction proceeding years after his first postconviction case was complete, without ordering a hearing.

3. Whether the district court erred in not applying the actual innocence standard from *Schlup v. Delo*, 513 U.S. 298 (1995), when Main did not raise that claim.

STATEMENT OF THE CASE

Early one morning in November 2006, officers were informed there was a possibly deceased male, later identified as Lloyd Kvelstad, in a residence in Havre. *State v. Main*, 2011 MT 123, ¶ 5, 360 Mont. 470, 255 P.3d 1240 (Main I). Appellant James Joseph Main and his coconspirator, Kim Norquay, Jr., were later charged and convicted of deliberate homicide, felony murder, for their involvement in Kvelstad's death. *Main I*, ¶¶ 8, 10; *State v. Norquay*, 2011 MT 34, ¶ 1, 359 Mont. 257, 248 P.3d 817 (Norquay I). Main's conviction was affirmed on

direct appeal in *Main I*, and the denial of his first petition for postconviction relief was affirmed in *Main v. State*, 2013 MT 350N, 360 Mont. 470, 255 P.3d 1240 (*Main II*).

Main now appeals the district court's denial of his second petition for postconviction relief.

STATEMENT OF THE FACTS

I. Evidence that Main was accountable to or committed an aggravated assault that resulted in Kvelstad's death.

Main was charged and convicted of deliberate homicide under the felony murder rule under the theory that Main was accountable to or committed aggravated assault, and the aggravated assault resulted in Kvelstad's death. *Main I*, ¶¶ 27-28. This Court summarized the evidence that was presented at trial in *Main I*. *See Main I*, ¶¶ 5-7, 29-43. "The State's evidence showed that Main was in a verbal and physical altercation with Kvelstad. Main was seen 'choking out' Kvelstad twice to the point of unconsciousness and causing concern that Kvelstad was going to be killed." *Main I*, ¶ 41; *see also Main I*, ¶¶ 6, 31. A witness, Joseph Red Elk, testified that after Main "choked out" Kvelstad, Main suggested to Norquay that they could kill Kvelstad. *Main I*, ¶¶ 6, 32. But Red Elk testified that Kvelstad was still alive and was not bloody when Red Elk and Jason Skidmore left the house that evening. *Main I*, ¶ 6.

Later that night, Nathan Oats (Nathan) and Georgetta Oats arrived at the house. *Main I*, ¶¶ 5, 7. Nathan discovered Kvelstad on the couch, unresponsive and beaten. *Main I*, ¶ 7. Nathan shook Kvelstad, and his body fell off the couch. (Doc. 7, Ex. 4 at 24-25.) Nathan was "sure" at that time "that this feller was dead." (*Id*. at 16; *see also id*. at 32 (Nathan stating "there was no life in him whatsoever after I made contact with him, . . . there was nothing left.").)

Nathan then told Georgetta to call the police. *Main I*, ¶ 7. In response, Main attempted to flea, but was restrained by Nathan. *Id*. While Nathan was restraining Main, Norquay fled. *Id*.

When paramedics arrived, they examined Kvelstad and determined he was dead. *Main I*, ¶ 5; (Doc. 7, Ex. 7 at 20, Ex. 8 at 18-20, 32).[1] "Kvelstad's face was severely beaten and covered in blood, his pants were down around his ankles, and a ligature made from a hooded sweatshirt (hoodie) string was around his neck." *Main I*, ¶ 5.

Medical Examiner and forensic pathologist Dr. Walter Kemp performed the autopsy. He concluded that the specific mechanism of death was uncertain. Although the injuries to Kvelstad's face were "very impressive," Dr. Kemp did not believe they alone would have caused his death. *Main I*, ¶ 37. Dr. Kemp

[1] Because some exhibits contain multiple documents, the State cites to the electronic page numbers for the exhibits rather than the page number on the document.

concluded that Kvelstad's head injuries, combined with his intoxication, could have caused his death. *Id*. But if Kvelstad was still alive when the ligature was placed around his neck, Dr. Kemp concluded "that would have caused his death." *Main I*, ¶ 38. Dr. Kemp listed the cause of death as "[h]omicidal violence, including blunt force injuries of the head and probable ligature strangulation." *Id*. Main presented testimony from his own expert, Dr. Thomas Bennett, who testified that Kvelstad died by strangulation. *Main I*, ¶ 58 (McGrath, C.J., concurring).

Summarizing other evidence admitted at trial, this Court stated that

> The jury received evidence about Main's assaultive behaviors toward Kvelstad and his admission of having a "[b]ar room brawl" with Kvelstad. The evidence included Main telling Kvelstad "I could break you in half" and "I could kill you," or words to that effect, and initiating a conversation with Norquay about killing Kvelstad. There was evidence of Kvelstad's injuries and blood and DNA evidence of Kvelstad's blood on Main . . . .

Main I, ¶ 43. More specifically, the forensic evidence demonstrated that there were 73 blood stains on Main's right boot, including a large stain on the tongue of his boot that matched Kvelstad's DNA. *Main I*, ¶ 39. Main's overalls contained 150 blood stains, and three of the five tested matched Kvelstad's DNA. *Id*.

II. Direct appeal

Main filed a direct appeal in which he raised three claims: (1) whether the district court erred by denying his motion to suppress statements he made to law

enforcement; (2) whether the district court erred when it denied his motion to dismiss for insufficient evidence; and (3) whether he was denied the effective assistance of counsel. *Main I*, ¶¶ 2-4, 11-53. This Court denied his claims and affirmed his conviction in 2011. *Main I*, ¶¶ 11-54.

Concluding that the evidence was sufficient to allow a jury to find Norquay guilty of deliberate homicide under the felony murder theory, this Court explained that the evidence "was sufficient to permit a jury to infer that Main inflicted or was accountable for blunt force trauma upon Kvelstad that was causally connected to his death." *Main I*, ¶ 43. This Court rejected Main's argument that the evidence was insufficient because there was no evidence linking him to the ligature around Main's neck. *Id*. This Court explained that "'[p]roof that [Main] actually committed the physical act that resulted in the death of [the victim] is not required.' . . . 'All conspirators in a plot to commit a crime are equally guilty of deliberate homicide if during the course of the commission of the crime a death results which is directly attributable to the plot to commit the crime.'" *Id*. (quoting *State v. Cox*, 266 Mont. 110, 119, 879 P.2d 662, 668 (1994)).

III. Main's first petition for postconviction relief

In April 2012, Main sent a letter to the district court in which he requested counsel and made complaints about his trial and appellate counsel. *Main II*, ¶ 3.

The court construed his letter as a petition for postconviction relief. *Id*. In the petition, Main alleged that his trial counsel, Kenneth Olson, was ineffective for failing to call Main to testify and failing to present proper evidence to the jury. *Main II*, ¶ 5. He further alleged that Olson had a conflict of interest, did not adequately prepare, and did not adequately cross-examine witnesses. *Id*. After receiving a response from the State, an affidavit from Main's trial counsel, Kenneth Olson, and a reply from Main, the court denied his petition for postconviction relief. *Main II*, ¶ 3. The district court concluded that Main's petition failed "as a matter of law for failure to state a claim for relief because it is insufficiently plead and lacks the statutory requirements for a petition for postconviction relief, pursuant to Mont. Code Ann. § 46-21-104(1)." *Main II*, ¶ 8.

Main appealed the denial of his petition for postconviction relief. On appeal he argued that his trial and appellate counsel were ineffective because they failed to address prosecutorial misconduct and judicial bias; (2) that defense counsel failed to investigate and effectively present potentially exculpatory evidence; and (3) that he did not have, and could not have had, an impartial jury because of the racial profiling and media bias in this case. *Main II*, ¶ 5. This Court affirmed the district court's denial of Main's petition for postconviction relief. *Main II*, ¶ 11. This Court noted that two of the three claims he raised on appeal were not raised in

the district court and the third claim was conclusory and failed to meet the requirements for a postconviction claim. *Main II*, ¶ 9.

IV. Norquay's postconviction proceeding

Main's coconspirator, Norquay, filed a timely petition for postconviction relief in 2012. *Norquay v. State*, 2023 MT 165N, ¶ 4, 413 Mont. 532, 534 P.3d 132 (*Norquay II*). His postconviction case dragged on for many years, and in 2018, Norquay filed a Revised Amended Petition for Postconviction Relief. *Norquay*, ¶ 5. Norquay's Amended Petition raised ten claims including a claim that no murder occurred because Kvelstad was not dead when emergency personnel declared him dead and conspiracy theories about law enforcement covering up their later discovery that he was not dead. (*See* Doc. 64, attachment A, available at Appellee's App. H; *Norquay II*, ¶¶ 6-7.)

The court held a four-day hearing at which Norquay had the opportunity to present evidence to support his claims. After hearing considerable testimony, the Honorable Yvonne Laird issued a 25-page order denying Norquay's Amended Petition. (Appellee's App. H.) This Order was later filed in Main's postconviction case and was relied on by the postconviction court. (Appellee's App. H; Doc. 66, available at Appellant's App. A.)

Judge Laird provided a summary of testimony presented at the evidentiary hearing, much of which is pertinent to Main's claims. (Appellee's App. H at 3-15.) The order explained that Norquay relied on Gordon Giesbrecht, who was an expert in respiratory physiology, to support his claim that Kvelstad was not dead when he was declared dead. Giesbrecht testified that "it was possible Kvelstad was hypothermic and not deceased when EMTs arrived at the scene." (*Id*. at 4.) Judge Laird noted that Giesbrecht testified that he based his opinion, in part, on input from Norquay's counsel. (*Id*. at 4-5.)

Judge Laird concluded that Giesbrecht's "understanding of strangulation was limited and conflicted with the opinions of persons qualified to offer such testimony, specifically Dr. Kemp, Dr. Bennett and Dr. Kurtzman." (*Id*. at 5; *see also id.* at 11.) Judge Laird also noted that "Giesbrecht could not testify conclusively that Kvelstad suffered from hypothermia or what Kvelstad's cause of death was." (*Id*.) Judge Laird concluded that Giesbrecht's conclusion that Kvelstad likely died from hypothermia was "based, in large part, on speculation, such as the possible temperature in the residence, Kvelstad's location and condition prior to being in the living room, the alleged movement of Kvelstad after the EMTs left, and input from [Norquay's] counsel, not factual evidence." (*Id*. at 11.) Judge Laird found that Giesbrecht "gave great weight to [Norquay's] assertion that Kvelstad moved on his own volition between the time the EMTs

arrived and the time the crime scene photographs were taken. However, [Norquay] was not able to factually establish such movement occurred." (*Id*. at 12.) Judge Laird also concluded that "the speculative testimony and opinion of Giesbrecht is not new evidence." (*Id*.)

In contrast, Judge Laird found that "Kurtzman unequivocally testified it would not be possible for Kvelstad to live with the string around his neck as depicted in the autopsy photographs and there is no question in his mind that this is a case of ligature strangulation." (*Id*. at 6.) Judge Laird noted that three forensic pathologists "with clear understandings of strangulation have proffered opinions that Kvelstad's death was the result of strangulation." (*Id*. at 12.)

Judge Laird concluded that Norquay failed to prove that Kvelstad moved on his own volition after the paramedics arrived at the scene. (*Id*. at 13.) The court explained that "[t]his assertion is based on hand sketched diagrams of the scene that are not drawn to scale and many of which were drawn almost ten years after the incident. This assertion seems to be an attempt to bolster Giesbrecht's opinion with additional speculation." (*Id*. at 13; *see also id*. at 6 (concluding that the sketches "are not credible evidence Kvelstad was alive and able to move after rolling onto the floor.").)

Judge Laird also discussed the evidence regarding the photographs and video, (*id*. at 7-10), and concluded that Norquay "failed to establish any of the

photographs in the possession of the Havre Police Department were altered, modified, deleted, or intentionally withheld." (*Id*. at 13.) The Court concluded, based on the State's concession, that 13 photographs may not have been provided to Norquay. (*Id*.) But, the court found that only 9 of those photographs were of the crime scene, and only 1 was of Kvelstad's body. (*Id*.) The court concluded that photographs or other media depicting the scene in a consistent manner were provided to Norquay. (*Id*.) The court concluded that "Petitioner's allegations of alteration, modification or deletion of photographs is little more than speculation, based in part on Petitioner's counsel's real or feigned lack of understanding of the technology being utilized." (*Id*. at 14.) The court noted that in 2006, images had to be individually transferred from a camera to the Havre Police Department (HPD)'s storage system using a process that was "labor intensive and prone to human error." (*Id*.)

The court also concluded that Norquay did not establish that the 8 mm video of the crime scene was altered. (*Id*. at 14.) Because the video was not altered, the court concluded there was no "new evidence." (*Id*. at 15.)

The court characterized Norquay's allegation of a conspiracy involving the police department and an unnamed Officer X as "a speculative and convoluted series of purported events," and concluded that Norquay provided "no testimony

that supports the argument any of the officers involved altered the crime scene, crime scene photographs or crime scene video." (*Id*.)

The court concluded that Norquay did not provide new evidence to support his other claims of actual innocence. (*Id*. at 16-18.) The court also rejected Norquay's other claims that are not pertinent to this case. (*See id*. at 18-25.)

On appeal, this Court rejected Norquay's claims of actual innocence, concluding, "Norquay did not offer new evidence that established he did not commit deliberate homicide." *Norquay II*, ¶ 15. This Court explained that "Norquay's assertion that Kvelstad crawled on the ground and died from hypothermia is not 'new evidence' so much as a new theory as to how Kvelstad died, which is more appropriately argued at trial." *Norquay II*, ¶ 15. This Court noted that the diagrams, witness testimony, and other reports were available at trial. *Id*. This Court rejected Norquay's claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), because Norquay did "not provide any reliable evidence in support of his contention that there was a widespread police cover-up." *Norquay II*, ¶ 18.

V. Procedural history of this postconviction proceeding

A. Main's second petition

On April 24, 2019, Main filed a second Petition for Post-Conviction Relief (Second Petition) and a brief in support. (Docs. 1, 2.) Main attached an affidavit

from Giesbrecht asserting that Kvelstad "was likely hypothermic" on the night of his death. (Doc. 2, Ex. B at 3.) Main asserted that Giesbrecht's opinion was newly discovered evidence that entitled him to a new trial. (Docs. 1, 2 at 5-13.) In the alternative, Main argued that the State violated *Brady* by failing to turn over photographs and failing to inform Main that photographs had been altered**.** (Doc. 1 at 3; Doc. 2 at 13-16.)

Main attached a report from Cody Breunig, who had examined the photographs from this case for Norquay's counsel. (Doc. 2, Ex. G.) Breunig concluded that photographs were "clearly manipulated" before being provided to Main because they did not contain metadata. (*Id*. at 10.) Breunig believed photos had been altered because some of them had the comment "Created by ImageGear" embedded in them. (*Id*. at 18-19.) Breunig also found it "odd" and expressed concern that the number of photos disclosed to Main was exactly 100, that there were 8 duplicate photos, and that "not one photograph seemed of poor quality." (*Id*.)

Main requested an evidentiary hearing on his claims. (Doc. 1 at 3.)

B. The State's response

The State filed a response and attached 31 exhibits. (Doc. 7, available at Appellee's App. A.) The State cited to evidence demonstrating that several people, including EMTs, examined Kvelstad and determined he was dead, and their

conclusions were confirmed by three forensic pathologists who all concluded that Kvelstad could not have been alive with the ligature embedded in his neck. (Appellee's App. A at 7-15 (citing attached Ex. 1 at 359-61, 1002-12, 1447; Exs. 4, 5, 6; Ex. 7 at 19; Ex. 8 at 17, 19; Exs. 9-11, 13).) The State explained that Giesbrecht's conclusion was medically flawed and his opinion was based on erroneous information. (Appellee's App. A at 16-19.)

The State asserted that photographs were never altered, modified, or deleted, and explained why Breunig's conclusions were flawed. (*Id*. at 19-27.) The State explained that Agent Callender with the Division of Criminal Investigation reviewed all of the photographs from the case. (*Id*. at 21-25.) Agent Callender provided an affidavit explaining that 23 of the photos disclosed contained metadata saying created by ImageGear. (Doc. 7, Ex. 23 at 1-3.) He explained that ImageGear was part of the record management system that would resize large images and strip those images of metadata, likely to manage storage space. (*Id*. at 3.) Agent Callender determined that the resized photographs would be visually identical, and the 23 photos containing the ImageGear comment were not of Kvelstad's body and were insignificant. (*Id*. at 3.) The State also attached a report from Agent Callender in which he explained that the Sony cameras the HPD was predominantly using at the time of the homicide did not capture metadata, so the lack of metadata was not evidence of tampering. (Doc. 7, Ex. 19 at 9.) The State

acknowledged that it could not prove that nine crime scene photos had been disclosed to Main, but the State explained that only one of those photos depicted Kvelstad's body, and a nearly identical image was disclosed. (*Id*. at 26.)

The State's exhibits included an interview of Nathan Oats, in which he reviewed a photograph of Kvelstad's body, with Kvelstad's head past, rather than lining up with, the end of the couch. (Doc. 7, Exs. 5 at 5-7, Ex. 20 (the photograph that Nathan was shown); *see also* Doc. 7, Ex. 6 (Nathan Aff.).) Nathan agreed that the photograph showing Kvelstad's head past the end of the couch accurately depicted where Kvelstad fell. (Doc. 7, Ex. 5 at 6-7.) Nathan explained that Kvelstad's body moved forward when he shook it and it fell off the couch because Kvelstad's legs were bent "so it's understandable the way after he hit how he stretched like that." (*Id*. at 5-6.)

C. The appointment of counsel

After the State filed its response, Main requested counsel. (Doc. 8.) The court found "good cause" and appointed Main counsel. (Doc. 10.)

D. Request for DNA evidence

After obtaining counsel, Main filed a motion requesting a subpoena duces tecum to obtain certain DNA records from the Montana State Crime Lab. (Doc. 21, available at Appellee's App. B.) The Crime Lab had provided Main with its report on the DNA evidence during the criminal trial, but Main sought the raw data

files to enable his experts to "reanalyze the DNA work done in this case." (*Id*. at 2-3.) Main noted that the DNA report had excluded him and Norquay as being the contributor to DNA on the hoodie string, but had concluded that Skidmore could not be excluded. (*Id*. at 4.) Main claimed that "re-analysis may potentially uncover the exculpatory evidence that Skidmore's DNA should have been designated as 'included' on the murder weapon in this case." (*Id*. at 5.)

The State opposed the release of additional DNA evidence because it was not relevant to the claims Main had made in his petition. (Doc. 22, available at Appellee's App. C.) The State argued that there was not good cause for release of the DNA evidence because it could not establish that Main did not participate in an aggravated assault that resulted in Kvelstad's death. (*Id*. at 3.)

The district court never directly ruled on this motion.

E. Amended Petition

At Main's request, the court took judicial notice of the transcript from the four-day evidentiary hearing in Norquay's postconviction case when it became available. (Docs. 32, 35.)

Instead of filing a reply to the State's response to his petition as the court had directed (Doc. 29), Main filed a document labeled Memorandum in Support of Amended Original Petition for Post-Conviction Relief (Amended Petition). (Doc. 48, available at Appellee's App. D.) Despite the title, Main did not file any

document labeled an amended petition, and the memorandum was treated as an amended petition. (*See* Docs. 51, 58, 61.)[2] The State therefore refers to it as the Amended Petition. Main attached 32 exhibits.

Main argued that: (1) the State violated his rights under *Brady* because the HPD "failed to disclose crime scene photos and their knowledge that photos did not show the body in its initial position in the crime scene"; and (2) police "hid exculpatory evidence that the police investigation was incompetent, as well as evidence of spoliation of the crime scene. They also hid evidence that the body moved after E.M.T.'s arrived." (Appellee's App. D at 1.)

In his Amended Petition, Main criticized the testimony presented at his trial and attempted to place the blame for Kvelstad's death on Skidmore. (Appellee's App. D at 6-10.) Relying on small pieces of the voluminous record and misrepresentations of the record,[3] Main asserted that the HPD violated *Brady* when it disseminated inaccurate photos of the crime scene, hid exculpatory evidence

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[2] Appellant states that he filed an Amended Original Petition for Post-Conviction Relief and cites to document 45 (Appellant's Br. at 3), but document 45 is a shorter version of the memorandum contained in document 48, and document 45 was struck at Main's request. (Docs. 49-50.)

[3] For example, the Amended Petition states that at Norquay's hearing, Nathan "testified for the first time that the crime scene photos of the body (offered at trial) did not accurately depict the position of the body . . . as he found it shortly before police arrived at 1:22 a.m." (Doc. 48 at 18 (quoting Ex. 18, 1/30/20 PM Tr. at 105).) To the contrary, Nathan testified that the body fell in front of the couch, but he agreed that a photo showing the body with the head a foot or two past the couch was accurate. (Doc. 48, Ex. 18, 1/30/20 PM Tr. at 104-05, 123-24.)

related to the time and cause of death, and failed to disclose that the HPD tampered with the crime scene. (*See* Appellee's App. D at 10-27.) Like Norquay, Main asserted that the HPD deleted photos, subjectively selected photos to disseminate, and restaged photos with evidence that had previously been placed in the evidence locker. (*Id*. at 20-27.)

Although Main continued to insist that Kvelstad's body moved, his only mention of Giesbrecht was his claim that Giesbrecht's theory about hypothermia was one possibility for why the body moved. (*Id*. at 32.)

F. The State's response to Main's Amended Petition

In response to the Amended Petition, the State argued that Main's claims were untimely because he did not meet the standard for a postconviction claim based on newly discovered evidence under Mont. Code Ann. § 46-21-102(2). Also, the State argued that Main failed to cite legal authority supporting his position, failed to cite with specificity what images were allegedly not provided to him, and failed to make any argument that the second and third prongs of a *Brady* claim had been established. (Doc. 58, available at Appellee's App. F at 5-7.)

The State rebutted Main's assertions of fact. The State explained that Main's assertion that Kvelstad was alive after he was declared dead was refuted by three forensic pathologists who all concluded that he could not have been alive with a ligature embedded in his neck. (*Id*. at 15.)

The State discussed the diagrams that several witnesses had drawn and explained why they did not demonstrate that Kvelstad's body had moved. (*Id*. at 20-26; Doc. 48, Ex. 17.5, available at Appellee's App. E.) The diagrams were imprecise drawings, many of which were made long after the homicide. (*See* Appellee's App. E.) Nevertheless, the diagram from one EMT placed Kvelstad's head past the end of the couch, where it is located in crime scene photographs. (Appellee's App. E at 19 (Kelly Jones diagram).) Significantly, Nathan also stated that the photograph showing Kvelstad's head past the end of the couch accurately depicted where Kvelstad's body fell. (Doc. 7, Ex. 5 at 6-7, Ex. 6; Doc. 48, Ex. 18, 1/30/20 PM Tr. at 123-24.)

And the State explained that Agent Callender's investigation of the photos demonstrated that there was no evidence the photos had been altered. (Appellee's App. F at 15.)

G. Main's reply

Main argued in his reply that his petition was timely under Mont. Code Ann. § 46-21-102(2) because he filed it within one year of discovering new evidence. (Doc. 61 at 2-3, available at Appellee's App. G.) He continued to claim that the body moved and that police conspired to destroy photos and restaged the crime scene to take misleading photos. (*Id*. at 9-10.)

Main requested that the court hold a hearing on the petition to establish whether crime scene photos accurately showed the crime scene; whether the police were aware the photos did not accurately depict the crime scene, yet nevertheless testified falsely that the photos were accurate; whether police returned to restage photos in the kitchen in the early morning using evidence that had already been taken to the police station; what was contained in the HPD's record management system; and how the suppressed evidence could have assisted counsel. (*Id*. at 12-13.)

H. Order Denying Petitioner's Amended Petition for Post-Conviction Relief

While Main's Amended Petition was pending, Judge Laird issued an order denying Norquay's postconviction petition. The State filed Judge Laird's order in this case. (Appellee's App. H.)

Relying on Judge Laird's order dismissing Norquay's petition for postconviction relief, Judge Larson denied Main's Amended Petition. (Appellant's App. A.) The court found that the Amended Petition was timely because the State acknowledged that nine photographs of the crime scene may not have been turned over and Main discovered his purported new evidence when Norquay filed his petition for postconviction relief less than a year before he filed his original petition in this case. (*Id*. at 7-8.)

Addressing Main's claim of innocence, the court stated, "[s]imilar to Judge Laird's finding, this Court finds any speculative testimony and opinion of Giesbrech[t] is not new evidence, as all conditions relied upon by Giesbrecht were known to Petitioner prior to the criminal trial." (*Id*. at 14.) The court further found "that diagrams of the scene and any witnesses relied upon to demonstrate the alleged new evidence were also available and known prior to the criminal trial." (*Id*.)

The court also rejected Main's *Brady* claim, finding that Main "failed to establish that the Havre Police Department intentionally withheld exculpatory photos or otherwise staged the crime scene." (*Id*. at 13-14.) The court concluded that Main could not establish the second and third elements of a *Brady* claim. (*Id*. at 14.) The court elaborated, stating that Main "cannot establish that the prosecution suppressed favorable evidence or that had the purported altered or deleted images been disclosed a reasonable probability exists that the outcome of the trial would have been different." (*Id*.) Accordingly, the court denied Main's Amended Petition. (*Id*.)

SUMMARY OF THE ARGUMENT

Postconviction petitioners are not entitled to discovery unless they can demonstrate good cause. The district court did not abuse its discretion when it

failed to order the Crime Lab to provide Main with raw DNA data for a sample from the ligature because Main did not establish that the data could provide evidence of his innocence. Significantly, Main had already been excluded as a contributor to the sample, and identifying the source of the DNA would not establish that Main did not participate in the aggravated assault that resulted in Kvelstad's death. Because the results were not probative of Main's guilt, the court did not abuse its discretion when it failed to order the Crime Lab to release the DNA data.

Similarly, the district court did not abuse its discretion when it denied the Amended Petition without holding a hearing. The only basis Main relied on for review of his untimely claim was Mont. Code Ann. § 46-21-102(2), which requires a petitioner to present "newly discovered evidence that, if proven and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted." On appeal, Main continues to assert that Kvelstad's body moved and argues he was entitled to a hearing to explore Giesbrecht's theory that Kvelstad was hypothermic. But, there is no evidence that Kvelstad's body moved or that he was alive when EMTs arrived. To the contrary, the evidence demonstrates that he was dead and could not have been alive with the ligature embedded in his neck.

The postconviction statutes require a petitioner to support his claims with affidavits, records, and other evidence supporting the grounds for relief. Mont. Code Ann. § 46-21-104(1)(c). Speculation and unsupported claims do not provide a basis for a hearing. Giesbrecht's speculation and Main's unsupported insistence that the body moved were not sufficient to require a hearing because the evidence conclusively demonstrated that Kvelstad was dead. Because Main failed to provide any credible evidence to contradict the evidence conclusively demonstrating that Kvelstad was dead, he was not entitled to an evidentiary hearing.

Main's argument faulting the district court for failing to apply *Schlup* should be rejected because Main did not raise a claim of actual innocence under *Schlup* in the district court. Because he did not preserve this claim, it should not be considered on appeal. Even if the claim is considered, it should be rejected because Main has not presented reliable evidence demonstrating that no reasonable juror would have found him guilty with the purportedly new evidence, which is required to prevail under *Schlup*.

And, *Schlup* merely provides a gateway to obtain review of a procedurally barred constitutional claim. Main asserted a *Brady* claim, but he failed to demonstrate that the State suppressed exculpatory evidence or establish a reasonable probability that, if suppressed evidence had been disclosed, the

outcome of the case would have been different. The State conceded that it may not have turned over nine photographs of the crime scene, but those photographs did not reveal any information that was not portrayed in the other photographs that were provided. Therefore, Main failed to establish that his right to exculpatory evidence was violated.

ARGUMENT

I. Standard of review

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

The petitioner has the burden of proving by a preponderance of the evidence that he or she is entitled to relief. *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 127 P.3d 422. A petitioner seeking to reverse a district court's denial of a postconviction relief petition "bears a heavy burden." *Garrett v. State*, 2005 MT 197, ¶ 10, 328 Mont. 165, 119 P.3d 55 (quoting *State v. Cobell*, 2004 MT 46, ¶ 14, 320 Mont. 122, 86 P.3d 20).

II. The court did not abuse its discretion when it failed to grant Main's request for raw DNA data on a sample from which Main had been excluded.

A postconviction court has the discretion to determine whether discovery should be conducted. *Marble*, ¶ 37. The postconviction statutes authorize a court to order discovery where a party has demonstrated "good cause." Mont. Code Ann. § 46-21-201(4). This Court has explained that a petition for postconviction relief should not serve as a broad discovery device. *Heath v. State*, 2009 MT 7, ¶ 27, 348 Mont. 361, 202 P.3d 118. "The petitioner may not conduct a 'fishing expedition' in an attempt to establish the right to an evidentiary hearing." *Id*.

The court did not abuse its discretion by not granting Main's request for raw DNA data because the data he sought could not have established that he did not commit deliberate homicide under the theory that he was accountable for an aggravated assault that resulted in a death, which Main would have to prove to obtain any relief on a petition. *See* Mont. Code Ann. § 46-21-102(2).

The DNA report prepared by the Crime Lab before trial demonstrated that Main and Norquay were excluded from the DNA sample contained on one end of the hoodie string that was used to strangle Kvelstad. (Appellee's App. B, Ex. 2 at 1.) The sample contained a mixture of DNA from at least three individuals, and Skidmore could not be excluded as a contributor. (*Id*.) Main sought the raw DNA data to reanalyze the DNA sample to determine whether the presence of

Skidmore's DNA could be confirmed and whether other contributors could be identified. (Appellee's App. B.)

Main's request is exactly the type of fishing expedition that is not allowed. The identification of the individuals who contributed to the DNA sample on the ligature would not undermine Main's conviction because: (1) Main was already excluded as a contributor before trial; (2) the conviction did not require the State to prove that Main was involved with placing the ligature on Kvelstad's neck, *Main I*, ¶ 43; (3) the presence of Skidmore's DNA on the ligature would not be inconsistent with the State's assertion that Main participated in an aggravated assault that resulted in Kvelstad's death; and (4) the DNA could have been placed on the ligature previously, by individuals who had no involvement in the homicide.

The only person who specifically linked Main to the ligature was Norquay, who told an officer that Main used Norquay's hoodie string to strangle Kvelstad. *Main I*, ¶ 35. But this Court explained that a lack of evidence linking Main to the ligature did not undermine his conviction because, under the felony murder rule, no proof that Main committed the physical act that resulted in the death was required. *Main I*, ¶ 43. Considerable evidence linked Main to an aggravated assault that resulted in Kvelstad's death, including testimony that Main choked Kvelstad out twice during the evening, Main "came up with the idea of trying to kill [Kvelstad]," Main told Kvelstad he could kill him, Main later told a woman in

the house that Kvelstad was dead and asked her to tell law enforcement that they had been "in the back room making love" when Kvelstad had died, and Main admitted he had fought with Kvelstad, in addition to DNA evidence demonstrating that Main had a significant amount of Kvelstad's blood on his clothing. *Main I,* ¶¶ 29, 31-35, 39.

Given the lack of probative value of the DNA sample on the ligature and the strength of the evidence against Main, the court did not abuse its discretion when it declined to issue a subpoena duces tecum requiring the Crime Lab to release additional DNA data.

III. The district court did not abuse its discretion when it denied Main's Amended Petition without holding an evidentiary hearing.

A. Postconviction procedure

The postconviction statutes are demanding in their pleading requirements. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2); *Ellenburg*, ¶ 12. In addition, a postconviction petitioner has

the burden of proving, by a preponderance of the evidence that he or she is entitled to relief. *Ellenburg*, ¶ 12. Mere conclusory allegations and self-serving statements are insufficient. *Kelly v. State*, 2013 MT 21, ¶¶ 9-11, 368 Mont. 309, 300 P.3d 120.

A district court may "dismiss a PCR petition without ordering a response if the petition and records 'conclusively show that the petitioner is not entitled to relief' as stated in § 46-21-201(1)(a), MCA," or may "dismiss a petition without holding a hearing if the petition failed to satisfy the procedural threshold set forth in § 46-21-104(1)(c), MCA." *Marble*, ¶ 38 (citing *Hamilton v. State*, 2010 MT 25, ¶¶ 10-11, 355 Mont. 133, 226 P.3d 588).

"[P]ostconviction proceedings are not a fishing expedition or discovery device in which a petitioner, through broad allegations in a verified petition, may establish the right to an evidentiary hearing." *Robinson v. State*, 2010 MT 108, ¶ 18, 356 Mont. 282, 232 P.3d 403. In *Heath*, this Court held that the district court erred in denying Heath an evidentiary hearing where Heath's defense counsel's death created "unique circumstances" making it difficult to determine defense counsel's reasons for his actions. *Id*. Yet in other cases, this Court has affirmed a district court's order denying a petition for postconviction relief without holding an evidentiary hearing where the petitioner either failed to state a claim upon which

relief could be granted or failed to provide the required evidentiary support for the claims. *Hamilton*, ¶¶ 10-32; *Herman*, ¶¶ 24-52.

As explained below, Main failed to provide evidentiary support for his claims and without that, he was not entitled to an evidentiary hearing.

B. Main has abandoned the basis for relief he relied on in the district court and, therefore, has no preserved claim for relief.

Main filed his Second Petition in April 2019, six years after this Court affirmed the denial of his first petition for postconviction relief. (Doc. 1); *Main II*. Because his Second Petition, which initiated this case, was not filed within one year of the date his conviction became final, his petition was untimely under Mont. Code Ann. § 46-21-102(1).

In Main's Amended Petition, he failed to provide any basis for the court to review his untimely petition. (*See* Appellee's App. D at 16-32.) After the State pointed out that Main failed to provide any authority to review his untimely claims, he argued in his reply that his petition should be reviewed under Mont. Code Ann. § 46-21-102(2). (Appellee's App. G.) In denying Main's Amended Petition, the district court found that the evidence Main relied on to argue the body moved was not "new evidence." (Appellant's App. A at 14.)

On appeal, Main acknowledges that it "may be true" that his purported evidence challenging the manner of Kvelstad's death was not newly discovered

evidence under Mont. Code Ann. § 46-21-102(2), but he argues the court should have applied *Schlup v. Delo*, 513 U.S. 298 (1995), instead. (Appellant's Br. at 20-25.) This is incorrect because Main did not raise a claim of actual innocence under *Schlup* in the district court. (*See* Docs. 48, 61.)

This Court has explained that "[a] party may not raise new arguments or change its legal theory on appeal. The reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 307 (citations omitted). Here, Main improperly faults the district court for not addressing a claim that he never raised.

Because Main has now abandoned the only basis he provided in the district court for review of his untimely petition, and is instead relying on an unpreserved claim, this Court should affirm the district court's denial of his Amended Petition without further review of the merits.

C. Main is not entitled to relief under Mont. Code Ann. § 46-21-102(2).

If this Court reviews whether the district court correctly denied the Amended Petition under Mont. Code Ann. § 46-21-102(2) without conducting a hearing, this Court should affirm because the district court's findings and the evidence in the record demonstrate that Main has not met and cannot meet his burden to present

newly discovered evidence that, if proved, would establish that he did not commit deliberate homicide under the felony murder rule.[4]

Montana Code Annotated § 46-21-102(2) provides that

> [a] claim that alleges the existence of newly discovered evidence that, if proven and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

Montana Code Annotated § 46-21-102(2) provides an avenue for a petitioner to present a stand-alone claim of actual innocence. *See Marble*, ¶ 33. Main failed to provide actual evidence, rather than speculative and unsupported assertions, to support his claim. As a result, he was not entitled to an evidentiary hearing.

1. The evidence Main relies on is not newly discovered.

The only purported evidence Main relies on in his appeal is the opinion of Giesbrecht regarding hypothermia and the evidence that he may have obtained if he had been able to conduct further analysis on the DNA from the ligature.

[4] After deciding that Main filed his petition within one year of obtaining new information, the district court's order appears to incorrectly address the merits of Main's *Brady* claim, rather than addressing whether the evidence qualified as newly discovered and whether it could establish that Main did not commit the offense. However, the court later correctly found that Giesbrecht's opinion was not new evidence. For the reason explained in this brief, the district court correctly denied the Amended Petition, even if the analysis was flawed.

(*See* Appellant's Br. at 24.)[5] But Main does not even contest the district court's finding that Giesbrecht's opinion was "not new evidence." (*See* Appellant's App. A at 14.) Rather, Main acknowledges that it "may be true" that the evidence did not qualify as newly discovered. (Appellant's Br. at 20.)

New expert analysis based on information that existed at the time of trial is not "newly discovered evidence" that can be relied on to demonstrate innocence under Mont. Code Ann. § 46-21-102(2). *Garding v. State*, 2020 MT 163, ¶¶ 40-42, 400 Mont. 296, 466 P.3d 501; *Garding*, ¶ 42 (noting that considering such evidence "would significantly undermine the finality of convictions"). Because Main did not provide newly discovered evidence, he could not meet his burden under Mont. Code Ann. § 46-21-102(2) and was not entitled to a hearing.

2. The evidence Main relies on does not establish that he did not commit deliberate homicide.

Further, a hearing on Giesbrecht's hypothermia theory was unnecessary because the evidence elicited at Norquay's hearing conclusively demonstrated Kvelstad was dead when EMTs declared he was dead, and there is no evidence that

[5] Main appears to have abandoned the conspiracy theories made below alleging that the HPD purposely failed to turn over photographs and restaged the crime scene to create inaccurate photographs. That is reasonable given the lack of evidence to support the outlandish allegations made below. Judge Laird correctly found that no testimony "support[ed] the argument any of the officers involved altered the crime scene, crime scene photographs or crime scene video." (Appellee's App. H at 15.)

he subsequently crawled two feet. Main repeatedly insists that Kvelstad's body moved. But as this Court aptly stated in *State v. Crabtree*, 2022 MT 133, ¶ 21, 409 Mont. 211, 512 P.3d 1187, "insistence is not evidence."

Main fails to cite any evidence on appeal for his assertion that the body moved. (*See* Appellant's Br. at 6.) In his Amended Petition, Main misrepresented Nathan's testimony, claiming that he testified that a photograph showing Kvelstad's head past the end of the couch did not accurately show where Kvelstad's body fell. (*See* Appellee's App. D at 18; *see also* Appellee's App. G at 6.) To the contrary, Nathan testified that Kvelstad's body fell in front of the couch, but he also testified that the photograph showing Kvelstad's head past the end of the couch *was accurate*. (Doc. 48, Ex. 18, 1/30/20 PM Tr. at 104-05, 123-24.) That was consistent with his earlier position that the photograph was accurate. (Doc. 7, Ex. 5 at 5-7, Ex. 6.)

Similarly, Main inaccurately relied on Kurtzman's testimony in Norquay's hearing to assert that Kurtzman conceded at the hearing that Kvelstad's body was moved. (Appellee's App. G at 6; *see also* Appellee's App. D at 19.) Rather, Kurtzman merely testified, in response to a hypothetical question, that if the body was in two different positions, he would conclude that "the body was moved" because "it is not possible for somebody who is deceased to move." (Doc. 48,

Ex. 18, 1/31/20PM Tr. at 125.) That does not undermine his conclusion that Kvelstad was dead or establish that someone moved the body.

The diagrams Main relied on also did not provide evidence that Kvelstad's body moved. The diagrams are imprecise drawings, many of which were done many years after the homicide. (Appellee's App. E.) Some of the diagrams are incomprehensible. (*See id*. at 3-5.) Others simply show a body in front of a couch, near the end, but are not precise and were made years after the event. (*See id*. at 7-17.) And a diagram from one of the EMTs placed the body past the end of the couch, where the photos showed the body, refuting Main's claim that the body moved. (*Id*. at 19.) Judge Laird correctly concluded that the diagrams were "not credible evidence Kvelstad was alive and able to move after rolling onto the floor." (Appellee's App. H at 6.)

These drawings did not refute the proof from Main's trial and Norquay's hearing demonstrating that Kvelstad could not have been alive with the ligature embedded in his neck. Three forensic pathologists conclusively determined that Kvelstad could not have survived after the ligature was placed around his neck. (Doc. 48, Ex. 18 1/31/20PM Tr. at 92-95; *id*. at 111 (concluding he would have died within minutes); Doc. 48, Ex. 18 1/30/20PM Tr. at 44-45; *Main I*, ¶¶ 38, 58.) In contrast, Giesbrecht, who was not an expert in strangulation (Appellee's App. H at 4), speculated that it was "possible" that Kvelstad was alive when EMTs arrived.

(Doc. 48, Ex. 18 1/30/20PM Tr. at 17-28, 54.) Giesbrecht based his opinion, in part, on information he received from Norquay's counsel that was not contained in official reports. (*Id*. at 49-53.)

Main failed to meet his burden under Mont. Code Ann. § 46-21-104(1)(c) to provide evidence that would establish, if proved, that he did not commit deliberate homicide under the felony murder rule, as required under Mont. Code Ann. § 46-21-102(2). Instead, the evidence conclusively demonstrated that Kvelstad was dead.

This Court gives trial courts the discretion to determine whether a hearing is necessary. *Marble*, ¶ 37. Main's speculation that Kvelstad was not dead, which was contrary to the evidence, did not establish a right to an evidentiary hearing. Main did not provide any reliable evidence indicating that, if he had been given a hearing, he could have established that he did not commit the offense he was convicted of. As a result, the court did not abuse its discretion when it failed to provide a hearing, and it did not err when it denied Main's Amended Petition.

D. Main is not entitled to relief under *Schlup*.

1. Main waived this claim by failing to raise it in the district court.

As explained above, Main did not raise a claim of actual innocence under *Schlup* in the district court. Because Main did not raise this claim in the district

court, this claim is waived and should not be reviewed on appeal. *See Martinez*, ¶ 17.

2. Main has not established that he is entitled to the miscarriage of justice exception under *Schlup*.

If this Court reviews Main's *Schlup* claim, raised for the first time on appeal, this Court should deny the claim because Main failed to provide evidence that would satisfy the miscarriage of justice exception under *Schlup*. *Schlup* provides a petitioner with a gateway to obtain review of an otherwise barred claim of constitutional error. *Schlup*, 513 U.S. at 315; *State v. Beach*, 2013 MT 130, ¶ 14, 370 Mont. 163, 302 P.3d 47. A *Schlup* actual innocence claim "alleges that newly discovered evidence demonstrates that 'a constitutional violation has probably resulted' in a wrongful conviction." *Beach*, ¶ 14 (quoting *Schlup*, 513 U.S. at 327). To satisfy the actual innocence standard under *Schlup* to obtain review of a constitutional claim, 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; *see also Beach*, ¶ 16 (the petitioner must "show that it is 'likely' or 'probable' that 'no reasonable jury' would find him guilty").

Since *Schlup* was decided, federal circuit courts have disagreed on whether the "new reliable evidence" required by *Schlup* requires the evidence to be merely newly presented or to be newly discovered evidence that was not available at trial

through the exercise of due diligence. *Fontenot v. Crow*, 4 F.4th 982, 1032-33 (10th Cir. 2021); *Kidd v. Norman*, 651 F.3d 947, 952-53 (8th Cir. 2011). It is unnecessary in this case for this Court to decide whether *Schlup* requires a different analysis than this Court has applied under Mont. Code Ann. § 46-21-102(2), which requires evidence that is newly discovered, because Main's evidence does not satisfy the remainder of the *Schlup* standard.

A court presented with new evidence must scrutinize that evidence to determine whether it is new *reliable* evidence. *Beach*, ¶ 8 (citing *Schlup*, 513 U.S. at 324). "To determine if the evidence is 'reliable,' the reviewing court must analyze 'whether the new evidence is trustworthy by considering it both on its own merits and . . . in light of the pre-existing evidence in the record.'" *Beach*, ¶ 8 (quoting *Doe v. Menefee*, 391 F.3d 147, 161 (2d Cir. 2004)).

In *Beach*, this Court held that a district court erred in relying on Beach's purported new evidence because the evidence was primarily hearsay, internally inconsistent, and inconsistent with the evidence presented at trial. *Beach*, ¶¶ 68-78. Because Beach's new evidence was not reliable, he did not meet the requirement that he provide new reliable evidence. *Beach*, ¶ 78. Further, this Court concluded that Beach's new evidence did not establish that a reasonable jury would not likely convict him. *Id*.

Giesbrecht's opinion that Kvelstad may have merely been hypothermic is not reliable because it conflicts with the other evidence demonstrating that Kvelstad was dead. The EMTs who examined Kvelstad and Nathan determined that Kvelstad was dead, and three forensic pathologists have concluded that he could not have been alive with the ligature embedded in his neck.

Further, speculation from a purported expert does not establish a likelihood that no reasonable juror would have found a defendant guilty. In *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003), the Ninth Circuit held that a psychologist's opinion that Griffin "'*may* not have been able to form the required intent for the crime,'" did not satisfy Griffin's burden under *Schlup* "because it is speculative on its face." *Griffin*, 350 F.3d at 965 (emphasis added). The court also explained that evaluations from psychologists "merit little weight" because "'a defendant could . . . always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion.'" *Id*. (quoting *Harris v. Vasquez*, 949 F.2d 1497, 1515 (9th Cir. 1990)).

Like the opinion of the psychologist in *Griffin*, Giesbrecht's opinion failed to satisfy Main's burden of proof to demonstrate actual innocence because it was speculative on its face. Giesbrecht acknowledged in Norquay's hearing that he could not say that Kvelstad was alive when EMTs examined him. Rather, he testified that it was "possible" Kvelstad was alive. (Doc. 48, Ex. 18 1/30/20PM Tr.

at 54.) Because he was merely speculating, his testimony could not establish that Norquay was innocent.

And while Giesbrecht is not a psychologist, the *Griffin* Court's conclusion that new psychological evaluations "merit little weight" because a defendant could always hire an expert who would reach a favorable conclusion demonstrates that new expert evaluations will rarely be sufficient to demonstrate actual innocence.

Examining Giesbrecht's opinion in light of the other evidence further demonstrates that Giesbrecht cannot establish Main's innocence. Main's argument that Kvelstad was not actually killed is refuted by the opinions of three forensic pathologists who concluded that Kvelstad could not have survived with the ligature embedded in his neck. Additionally, EMTs who examined Kvelstad determined he was dead. Speculation from Giesbrecht, who was not an expert on strangulation, that Kvelstad might have been hypothermic does not establish that no reasonable juror would have found Main guilty. Main did not provide evidence that would satisfy the *Schlup* standard to obtain review of an otherwise barred constitutional claim.

3. Main also failed to establish that his right to exculpatory evidence under *Brady* was violated.

A defendant who passes through the *Schlup* gateway by establishing actual innocence is merely entitled to review of an otherwise barred claim of constitutional error. *Schlup*, 513 U.S. at 315. Main argued in his Amended Petition that the State violated *Brady* by failing to provide him with photographs, which he alleged would have demonstrated that the body moved and that law enforcement altered and staged photographs. Rejecting that claim, the district court concluded that Main "cannot establish that the prosecution suppressed favorable evidence or that had the purported altered or deleted images been disclosed a reasonable probability exists that the outcome of the trial would have been different." (Appellant's App. A at 14.)

On appeal, Main does not challenge that conclusion or make any argument about *Brady*. (*See* Appellant's Br.) Main has thus failed to demonstrate that he was entitled to a hearing on this claim or that the court erred in denying his *Brady* claim.

To establish a *Brady* violation, "the defendant must show: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings

would have been different." *Garding*, ¶ 26. Main failed to provide any evidence that would establish that the State suppressed evidence favorable to Main. Nor did he establish a reasonable probability that the outcome of the proceedings would have been different if any suppressed evidence had been turned over.

The State conceded that, when an officer compared the photographs that were contained on the HPD's database to the photographs that it knew were turned over to defense counsel, the State could not establish that nine photographs of the crime scene had been turned over to the defense. (Appellee's App. F at 28-31.) But Main failed to establish that any of the photographs were exculpatory. Judge Laird found that only one of those nine photographs depicted Kvelstad's body, and other similar photographs were disclosed. (Appellee's App. H at 13.) Main failed to provide any evidence that the failure to disclose some photographs was exculpatory when a large number of photographs and a video of the crime scene were disseminated.

Main asserted that the photographs would have provided evidence of a conspiracy to cover up the fact that the body moved, but Main failed to provide any evidence to support his conspiracy theories. Under Mont. Code Ann. § 46-21-104(1)(c), a petitioner must provide affidavits, records, or other evidence establishing the existence of the facts alleged. Because Main did not put forth any

evidence that would support his assertions that undisclosed photographs were favorable to Main, his petition was not sufficient to require an evidentiary hearing. And because there is no evidence that any photographs existed that would have established that Kvelstad was alive, as Main claimed, he did not establish a reasonable probability that the outcome of the proceedings would have been different. Main therefore failed to allege a colorable *Brady* claim, and no hearing was required.

CONCLUSION

The district court did not abuse its discretion when it failed to order the Crime Lab to provide Main with DNA data because it would not have established his innocence. Similarly, the court did not abuse its discretion when it denied his Amended Petition without a hearing. Accordingly, the court's denial of his Amended Petition should be affirmed.

Respectfully submitted this 17th day of April, 2024.

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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 9,577 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-17-2024:

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