

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0163

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HOLLY ANNE MATHIS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Tenth Judicial District Court,  
Fergus County, The Honorable Heather Perry, Presiding

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS .....3

Disclosures of abuse.....3

Pretrial motions .....4

Trial .....8

Direct appeal .....8

SUMMARY OF THE ARGUMENT .....12

ARGUMENT .....14

I. Standards of review .....14

II. The district court correctly denied Mathis’s claims that the State committed prosecutorial misconduct and engaged in other nefarious actions because the claims could have been raised on direct appeal .....15

A. Postconviction law .....15

B. Most of Mathis’s claims, although framed in the context of newly discovered evidence, are procedurally barred by Mont. Code Ann. § 46-21-105(2), because they either were brought during her direct appeal and she is attempting to reargue the claims, or the claims could have been brought and are now barred from review .....17

1. Mathis’s first “issue,” which argues various forms of prosecutorial misconduct and malfeasance, raises several claims that are procedurally barred and are not based on newly discovered evidence .....19

2.	Likewise, Mathis’s claims regarding subornation of perjury and lack of probable cause are statutorily barred.....	23
III.	Mathis fails to meet her heavy burden and show that her attorneys provided ineffective assistance of counsel .....	25
IV.	The district court did not abuse its discretion when it denied Mathis’s motion for in camera review of the child forensic interviews because postconviction proceedings are not vehicles to reargue issues raised on direct appeal.....	36
V.	The district court correctly denied Mathis’s claim of actual innocence because the evidence she presented in support of her claim was not newly discovered .....	39
	CONCLUSION .....	42
	CERTIFICATE OF COMPLIANCE.....	43

## TABLE OF AUTHORITIES

### Cases

<i>Basto v. State</i> , 2004 MT 257, 323 Mont. 80, 97 P.3d 1113 .....	17
<i>Crabtree v. State</i> , 2022 MT 133, 409 Mont. 211, 512 P.3d 1187 .....	40
<i>Dawson v. State</i> , 2000 MT 219, 301 Mont. 135, 10 P.3d 49.....	29, 30
<i>Ellenburg v. Chase</i> , 2004 MT 66, 320 Mont. 315, 87 P.3d 473.....	15, 16
<i>Ford v. State</i> , 2005 MT 151, 327 Mont. 378, 114 P.3d 244 .....	25, 30, 34
<i>Garding v. State</i> , 2020 MT 163, 400 Mont. 296, 466 P.3d 501 .....	40
<i>Heath v. State</i> , 2009 MT 7, 348 Mont. 361, 202 P.3d 118.....	15, 16, 38
<i>Herman v. State</i> , 2006 MT 7, 330 Mont. 267, 127 P.3d 422.....	16, 38
<i>Kenfield v. State</i> , 2016 MT 197, 384 Mont. 322, 377 P.3d 1207 .....	42
<i>Kills On Top v. State</i> , 273 Mont. 32, 901 P.2d 1368 (1995).....	17
<i>Maldonado v. State</i> , 2008 MT 253, 345 Mont. 69, 190 P.3d 1043 .....	14, 21
<i>Marble v. State</i> , 2015 MT 242, 380 Mont. 366, 355 P.3d 742 .....	passim

<i>Oliphant v. State</i> , 2023 MT 43, 411 Mont. 250, 525 P.3d 1214.....	33
<i>Rose v. State</i> , 2013 MT 161, 370 Mont. 398, 304 P.3d 387 .....	14, 16, 19
<i>Sartain v. State</i> , 2012 MT 164, 365 Mont. 483, 285 P.3d 407 .....	25, 28
<i>Skinner v. Allstate Ins. Co.</i> , 2005 MT 323, 329 Mont. 511, 127 P.3d 359 .....	34
<i>Smith v. State</i> , 2000 MT 327, 303 Mont. 47, 15 P.3d 395.....	37, 39
<i>State v. Allen</i> , 2001 MT 266, 307 Mont. 253, 37 P.3d 655 .....	29, 30
<i>State v. Baker</i> , 272 Mont. 273, 901 P.2d 54 (1995).....	18, 32
<i>State v. Boucher</i> , 2002 MT 114, 309 Mont. 514, 48 P.3d 21.....	17, 22
<i>State v. Clark</i> , 2005 MT 330, 330 Mont. 8, 125 P.3d 1099 .....	40, 42
<i>State v. Cobell</i> , 2004 MT 46, 320 Mont. 122, 86 P.3d 20.....	15, 16, 38
<i>State v. Denny</i> , 262 Mont. 248, 865 P.2d 226 (1993).....	27, 31
<i>State v. Dethman</i> , 2010 MT 268, 358 Mont. 384, 245 P.3d 30 .....	32
<i>State v. Gallagher</i> , 2005 MT 336, 330 Mont. 65, 125 P.3d 1141 .....	35

<i>State v. Mathis</i> , 2022 MT 156, 409 Mont. 348, 515 P.3d 758 .....	passim
<i>State v. Mederos</i> , 2013 MT 318, 372 Mont. 325, 312 P.3d 438 .....	32, 34
<i>State v. Osborne</i> , 2005 MT 264, 329 Mont. 95, 124 P.3d 1085 .....	16
<i>State v. Stutzman</i> , 2017 MT 169, 388 Mont. 133, 398 P.3d 265 .....	10, 11
<i>State v. Thomas</i> , 285 Mont. 112, 946 P.2d 140 (1997) .....	29
<i>State v. Walter</i> , 2018 MT 292, 393 Mont. 390, 431 P.3d 22 .....	33
<i>State v. Wells</i> , 2021 MT 103, 404 Mont. 105, 485 P.3d 1220 .....	35
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	passim
<i>United States v. Black</i> , 767 F.2d 1334 (9th Cir. 1985) .....	9
<i>United States v. Costa</i> , 691 F.2d 1358 (11th Cir. 1982) .....	34
<i>Weaver v. State</i> , 2005 MT 158, 327 Mont. 441, 114 P.3d 1039 .....	30-31
<i>Whitlow v. State</i> , 2008 MT 140, 343 Mont. 90, 183 P.3d 861 .....	25, 26, 30

## Other Authorities

### Montana Code Annotated

§ 46-15-320 .....	7, 9, 23
§ 46-18-222(6).....	36
§ 46-21-101(1).....	15, 16
§ 46-21-102 .....	14, 39
§ 46-21-102(2).....	passim
§ 46-21-104(1)(a) .....	16
§ 46-21-104(1)(c) .....	16, 38, 39
§ 46-21-105(2).....	passim
§ 46-21-105(3).....	17
§ 46-21-201(1)(a) .....	39
§ 46-21-201(2).....	37
§ 46-21-201(4)-(5).....	37
§ 46-21-201(6).....	38

### Montana Constitution

Art. II, § 24 .....	25
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### United States Constitution

Amend. VI .....	25
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## **STATEMENT OF THE ISSUES**

1. Whether the district court correctly denied Mathis's claims that the State committed various forms of prosecutorial misconduct because the claims could have been raised on direct appeal and are now procedurally barred.

2. Whether the district court correctly denied Mathis's claim that her defense counsel provided ineffective assistance of counsel (IAC).

3. Whether the district court abused its discretion when it denied Mathis's motion to obtain T.N.'s and J.M.'s forensic interviews and other confidential records for in camera review.

4. Whether the district court correctly denied Mathis's actual innocence claim because she failed to present new evidence under Mont. Code Ann. § 46-21-102(2).

## **STATEMENT OF THE CASE**

Petitioner Holly Ann Mathis (Mathis) appeals the denial of her motion for subpoena duces tecum and the dismissal of her petition for postconviction relief by the Montana Tenth Judicial District Court, Fergus County (district court). (Doc. 9.) Mathis was charged with two counts of incest after it was reported that she had encouraged her stepson, T.N., to touch her breasts. *State v. Mathis*, 2022 MT 156, ¶¶ 6, 19, 409 Mont. 348, 515 P.3d 758. Mathis was convicted of the first count

following jury trial and acquitted of the second count. *Mathis*, ¶ 19. The court sentenced Mathis to 100 years in prison with 90 years suspended. *Mathis*, ¶ 20. Mathis appealed and her conviction was affirmed by this Court. *Mathis*, ¶ 49. Mathis petitioned for rehearing of the decision and the Court denied her petition. *State v. Mathis*, DA 20-0409, Order (Sept. 6, 2022).

On September 25, 2023, Mathis filed a petition for postconviction relief in the district court and raised several claims in support, including that she found a document in her “personal files” generated by the Department of Public Health and Human Services (DPHHS) that proved that she did not engage in the criminal conduct and was innocent of the crime. (*See* Doc. 1 at 5, 16; Br. at 9, 57.) Mathis also moved for a “subpoena duces tecum” and requested that the district court order DPHHS to produce all records in its possession concerning Mathis for in camera review, including forensic interviews of T.N. and his stepsisters, J.M. and N.M., that were conducted in March and April 2018. (Doc. 4 at 1.)

On January 16, 2024, the district court issued an order denying Mathis’s motion for subpoena duces tecum and in camera review. (Doc. 9.) Furthermore, after reviewing the materials submitted by Mathis, the district court determined that she failed to offer any “newly discovered evidence” since her trial and was not entitled to postconviction relief. (*Id.* at 5-12.) The district court also found that

Mathis failed to establish a procedural error that would support a claim of actual innocence and dismissed her petition. (*Id.* at 12.)

## **STATEMENT OF THE FACTS**

### **Disclosures of abuse**

The Court recounted the following facts in its opinion affirming Mathis’s conviction:

In 2016, Mathis married Timothy Norling Sr. (Norling). Mathis had two daughters from a prior marriage—an eleven-year-old daughter, N.M., and a seven-year-old daughter, J.M. Norling had one son from a previous marriage, T.N., who was nine years old. Following their marriage, Mathis and Norling lived with their three children in Lewistown for the next two years.

On March 29, 2018, N.M. disclosed to a counselor at her school that Norling had sexually abused her. In forensic interviews conducted that same day, N.M. and J.M. revealed they had been sexually abused by Norling while in the family’s home in Lewistown. On April 4, 2018, a forensic interview was also conducted of T.N. in connection with Norling’s case. The April 2018 interview with T.N. was never made available in Mathis’s case. The State has asserted on multiple occasions that, during this April 2018 interview, T.N. “did not make any disclosures about abuse to himself, [N.M.], or [J.M.]” by either Norling or Mathis. On April 25, 2018, Norling was charged with two counts of incest. He eventually pleaded guilty and was sentenced to prison. Mathis finalized her divorce from Norling on June 26, 2018.

In the months following their stepfather’s arrest, both N.M. and J.M. began to see licensed clinical professional counselors to discuss the trauma that resulted from their abuse by Norling. During a counseling session with J.M. on July 16, 2018, J.M. disclosed to her counselor that her mother, Mathis, had sexually abused T.N. by asking T.N. to touch her breasts. The counselor reported J.M.’s

allegation against Mathis to law enforcement, and the State obtained an investigative subpoena of the counselor's records.

Following J.M.'s disclosure, T.N. was interviewed on July 26, 2018. During this interview, T.N. disclosed that Mathis would frequently walk around the house half-naked. He also recounted two specific instances where Mathis had sat in front of him while topless and encouraged him to touch her bare breasts, which he then did. According to T.N.'s disclosure, the first instance of abuse occurred when he was ten years old, while the second instance occurred more recently when he was eleven years old. Based on T.N.'s allegations, the State charged Mathis on August 24, 2018, with two counts of incest. Count I charged Mathis with incest between December 2016 and December 2017, the twelve-month-period during which T.N. was ten years old. Count II charged Mathis with incest between December 2017 and March 2018, which reflected the three-month-period prior to T.N.'s removal from Mathis and Norling's home. The record reflects that the entire July 2018 forensic interview of T.N. was provided to the defense during discovery.

*Mathis*, ¶¶ 3-6.

### **Pretrial motions**

Prior to trial, Mathis moved to obtain confidential criminal justice information (CCJI) from Norling's criminal case "including, but not limited to, police reports, notes, investigations, medical records and reports, and forensic interviews and other information relating to [the] child victims in [Norling's] case." *Mathis*, ¶ 7. Mathis also requested all three children's "psychological and counseling records" and "school records." *Mathis*, ¶ 7.

The State objected to producing the March 2018 and April 2018 forensic interviews of N.M., J.M., and T.N., and their psychological and counseling records. *Mathis*, ¶ 8. The State argued that Mathis’s request was overly broad but “conceded that ‘an argument could be made that the [April 2018] forensic interview of [T.N.] . . . is ‘exculpatory, as [T.N.] d[id] not disclose any sexual abuse’ by Mathis during that interview.” *Mathis*, ¶ 8 (quoting D.C. Doc. 43 at 7). Nevertheless, the State offered to lodge T.N.’s April 2018 interview for in camera review. *Mathis*, ¶ 8. While the State maintained its objection and argued that Mathis’s request for the children’s counseling records did not outweigh their right to keep this information confidential, it “noted that the only counseling records in its possession were J.M.’s July 2018 counseling records disclosing Mathis’s abuse, which it offered to lodge with the court for in camera review.” *Mathis*, ¶ 8.

The district court issued an order in March 2019 and found that it would conduct in camera review of the children’s records to determine if any exculpatory information was contained within. *Mathis*, ¶ 9. The Court ordered the State to lodge J.M.’s counseling records from July 2018 for in camera inspection, as it had indicated that these records were in its possession. *Mathis*, ¶ 9. However, the March 2019 order did not address the forensic interviews of the children that were conducted in connection with Norling’s criminal case. *Mathis*, ¶ 9. Consequently, “following the March 2019 Order, the State lodged only J.M.’s July 2018

counseling records with the [district] court[,]” and did not lodge the forensic interviews of the children that were conducted in March and April 2018. *Mathis*, ¶ 9. “Notably, Mathis did not—at any point during proceedings before the [d]istrict [c]ourt—raise an objection to the State’s failure to lodge these forensic interviews with the Court based on the instructions provided to the State in the court’s March 2019 Order.” *Mathis*, ¶ 9.

Following in camera review of J.M.’s July 2018 counseling records, the district “court ordered the State to provide the full contents of these records to Mathis, and the State complied.” *Mathis*, ¶ 9. Following the district court’s March 2019 order, Mathis filed a motion asking the court to issue a subpoena duces tecum requiring DPHHS to provide all records for in camera review relating to Norling and Mathis “including[,] but not limited to, notes and recordings of interviews with the three children involved in the relationship between [Norling] and [Mathis] during the time period in question regarding alleged child sexual abuse by [Mathis].” *Mathis*, ¶ 10 (quoting D.C. Doc. 69 at 1-2.)

In July 2019, the district court granted Mathis’s request for a subpoena, and it issued an order requiring the Child and Family Services Division (CFS) to lodge the evidence for in camera review. *Mathis*, ¶ 10. CFS mailed the district court a physical file that contained “151 pages of information.” *Mathis*, ¶ 10. Upon review, the district court ordered the file be turned over to the defense because the

information related to the charges, and Mathis was “facing the possibility of being incarcerated for the remainder of her life.” *Mathis*, ¶ 10. The CFS file was subsequently provided to Mathis, but it “did not contain the forensic interviews of J.M. and T.N. that were conducted in association with Norling’s criminal case.” *Mathis*, ¶ 10. Defense counsel for Mathis did not raise an objection or otherwise bring to the district court’s attention that the forensic interviews were never lodged with the district court. *Mathis*, ¶ 10.

However, prior to trial, defense counsel moved for a pretrial interview of T.N. and J.M. pursuant to Mont. Code Ann. § 46-15-320, which provides that sexual abuse victims under the age of 16 may be ordered by a court to conduct pretrial interviews with the defense only upon a showing of “exceptional circumstances” by the defendant. *Mathis*, ¶ 11. She also asserted that Mont. Code Ann. § 46-15-320 “was facially unconstitutional on due process grounds, as well as unconstitutional as-applied to her case.” *Mathis*, ¶ 11. The district court found that Mathis had not met her burden and denied her request for pretrial interviews. *Mathis*, ¶ 11 (noting that Mathis received both T.N.’s and J.M.’s forensic interviews that were conducted as part of her criminal case).

## **Trial**

At trial, both T.N. and J.M. testified about multiple instances when Mathis had T.N. touch her breasts. *Mathis*, ¶¶ 14-16, 18. Norling testified and claimed to have witnessed “an incident where Mathis told him that she let T.N. feel her breasts and that T.N. ‘liked’ to touch her breasts.” *Mathis*, ¶ 17. “Norling also claimed that he witnessed Mathis hug T.N. while Mathis was wearing a bathrobe and that, while Mathis’s full breasts were not exposed, she ‘buried [T.N.’s] face in her breasts’ and ‘cleavage.’” *Mathis*, ¶ 17.

Although the children described multiple instances of abuse by Mathis, “at the close of testimony, it became apparent that the children’s testimony had largely failed to clarify the specific calendar year during which each instance of abuse had occurred.” *Mathis*, ¶ 18. “The jury returned a verdict which convicted Mathis on Count I of incest committed during the time period between December 2016 and December 2017, and acquitted Mathis on Count II of incest for the three-month time period between December 2017 and March 2018.” *Mathis*, ¶ 19.

## **Direct appeal**

Mathis appealed and the Court addressed three issues: (1) whether the district court correctly denied Mathis’s motion to interview T.N. and J.M.; (2) whether the State’s failure to lodge T.N.’s April 2018 forensic interview with

the district court violated Mathis’s due process right to receive exculpatory evidence; and (3) whether the district court erred by not giving a specific unanimity instruction. *Mathis*, ¶¶ 24, 30-31, 40-41. This Court affirmed the district court on all three issues.<sup>1</sup> *Mathis*, ¶¶ 2, 48-49.

Addressing the first issue, the Court denied Mathis’s claim that Mont. Code Ann. § 46-15-320 was unconstitutional as applied to her. *Mathis*, ¶¶ 26-29. Although Mathis claimed she had a due process right to access the children for interviews, the Court recognized that federal authority has consistently held that “a ‘defendant’s right of access [to a witness] is not violated when [that] witness chooses voluntarily not to be interviewed.’” *Mathis*, ¶ 28 (quoting *United States v. Black*, 767 F.2d 1334, 1338 (9th Cir. 1985)) (citations omitted). This Court recognized that defense counsel had “‘diligently’ requested the opportunity to conduct pretrial interviews with both children. However, T.N. and J.M. each separately declined the defense’s request to conduct these pretrial interviews.” *Mathis*, ¶ 28. Accordingly, the Court found that Mathis’s constitutional challenge failed. *Mathis*, ¶¶ 28-29.

Next, although Mathis had not received T.N.’s April 2018 forensic interview from the State, the Court found that she was not entitled to a new trial. *Mathis*, ¶¶ 28-29. In making this determination, the Court applied the two-pronged test for

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<sup>1</sup> Justice Shea, joined by Justice Gustafson and Justice Sandefur, dissented. *Mathis*, ¶¶ 50-60. Justice Sandefur also wrote a second concurring and dissenting opinion. *Id.* ¶ 61.

determining whether to grant a new trial based on the failure to produce potentially exculpatory evidence as established in *State v. Stutzman*, 2017 MT 169, ¶ 28, 388 Mont. 133, 398 P.3d 265. This inquiry “asks: (1) whether the evidence in question is ‘favorable to the defense,’ and (2) whether there is a ‘reasonable probability’ that the evidence ‘could have affected the outcome of the proceedings’ such that ‘the result would have been different.’” *Mathis*, ¶ 34 (quoting *Stutzman*, ¶¶ 28-29) (citation omitted).

Considering the “first prong, Mathis argue[d] that T.N.’s April 2018 forensic interview” was “potentially ‘favorable to [her] defense’ because it could help prove the defense’s theory that T.N. was lying about Mathis sexually abusing him in retribution for Mathis’s assistance in his father’s prosecution.” *Mathis*, ¶ 35. Namely, based on the State’s uncontested assertions “in its January 2019 motion that ‘[T.N.] did not disclose any sexual abuse’ by Mathis during the April 2018 forensic interview, Mathis argue[d] that the interview would have impeached T.N.’s trial testimony, as T.N. testified at trial that Mathis had abused him.” *Mathis*, ¶ 35. Although the State asserted that T.N. was not asked about Mathis’s abuse during the interview because the focus of the interview was about Norling’s crimes—not Mathis’s—“the State conceded . . . that ‘an argument could be made that the [April 2018] forensic interview of [T.N.] [was] exculpatory’” given the impeachment rationale that Mathis raised. *Mathis*, ¶ 35. Consequently, “for

purposes of [the Court’s] analysis,” it accepted “that T.N.’s April 2018 interview satisfie[d] *Stutzman*’s first prong as evidence that was likely ‘favorable’ to the defense.” *Mathis*, ¶ 35.

Turning to *Stutzman*’s second prong, the Court found that “the value of T.N.’s April 2018 interview to impeach T.N.’s trial testimony [was] minimal at best and [was] not likely to have ‘affected the outcome’ of Mathis’s trial. *Mathis*, ¶ 37 (citing *Stutzman*, ¶ 28); see also *Mathis*, ¶ 39 (concluding that T.N.’s April 2018 interview was “not the type of evidence that could have ‘affected the outcome’ of Mathis’s trial”). Citing a hoard of reasons in support of this conclusion, the Court recognized that “Mathis was able to impeach T.N.’s trial testimony through other witnesses in a manner similar to how the April 2018 interview could have been used for impeachment.” *Mathis*, ¶ 37. Thus, the Court concluded that Mathis was not entitled to a new trial because the “strength of the evidence indicate[d] that the jury’s verdict was a ‘verdict worthy of confidence’—even though Mathis never received T.N.’s April 2018 interview.” *Mathis*, ¶ 39 (citing *Stutzman*, ¶ 29).

Finally, addressing Mathis’s argument that her constitutional right to a unanimous verdict was violated because the district court “failed to sua sponte issue a ‘specific-act unanimity’ instruction to the jury,” the Court found that she failed to satisfy her burden for plain error review. *Mathis*, ¶ 41; see also *Mathis*, ¶ 47

(“Based on the totality of the evidence and upon our review of the law respecting specific-act unanimity instructions, we decline to employ the plain error doctrine to review Mathis’s claim that the jury should have been instructed differently.”)).

Mathis petitioned for rehearing, but the Court denied her petition on September 6, 2022. *State v. Mathis*, DA 20-0409, Order (Sept. 6, 2022). Mathis filed a petition for postconviction relief in the district court on September 25, 2023. (Doc. 1.) Mathis’s petition identified 12 claims for relief. (Docs. 1-1.54; Doc. 9 at 5-12.) The district court issued a written order on January 16, 2024, denying all claims for relief and dismissing the petition. (Doc. 9 at 12.) The court also declined to request a response from the State to the petition or conduct an evidentiary hearing. (*Id.* (“The Court will thus not request a response from the State, nor will it hold a hearing.”).)

### **SUMMARY OF THE ARGUMENT**

The district court correctly denied Mathis’s petition for postconviction relief because her conclusory claims of prosecutorial misconduct and actual innocence are not based on new evidence. Rather, the evidence that Mathis maintains would prove her innocence, i.e., “Ex. A,” does no such thing and was provided to her during the underlying proceedings. Because Mathis had this document, in addition to the other evidence that she argues was newly discovered, her claims of prosecutorial misconduct are procedurally barred from postconviction review because she could

have raised them, or did raise them, during her direct appeal. Thus, this Court should affirm the district court's denial of Mathis's prosecutorial misconduct claims, and the dismissal of her other related theories for relief, because they are statutorily barred under Mont. Code Ann. § 46-21-105(2).

Mathis also fails to show that her attorneys rendered ineffective assistance of counsel during her criminal proceedings. Mathis's attempts to find fault with her attorneys' performances utterly fails to satisfy the two-pronged test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). As recognized by the district court, in addition to this Court during her direct appeal, defense counsel diligently and zealously represented Mathis at all stages of her criminal proceedings. Her arguments simply fail to satisfy her heavy burden to show that her attorneys were deficient, and but for counsel's deficiencies, the outcome of the proceeding would have been different.

The Court should also affirm the district court's denial of Mathis's motion to subpoena the children's interviews for in camera review. Per the district court's conclusion that Mathis was not entitled to relief on any of the grounds pled in her petition, it was entirely within its discretion to deny Mathis's motion and decline to further develop the evidentiary record. Mathis fails to show that the district court abused its discretion based on this reasoning.

Finally, although Mathis briefly argues that the district court erred and misapplied Mont. Code Ann. § 46-21-102 when it denied her claim of actual innocence, Mathis’s argument is incorrect as the district court properly denied her claims because she failed to present new evidence. Dispositively, Mont. Code Ann. § 46-21-102(2) requires a petitioner to allege “the existence of newly discovered evidence.” Because the evidence that Mathis attached to her petition was not newly discovered, it did not meet the statutory requirements of Mont. Code Ann. § 46-21-102(2) and was properly dismissed.

## **ARGUMENT**

### **I. Standards 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.” *Maldonado v. State*, 2008 MT 253, ¶ 10, 345 Mont. 69, 190 P.3d 1043.

Ineffective assistance of counsel claims are mixed questions of law and fact that are reviewed de novo by the Court. *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387.

The Court reviews discretionary rulings in postconviction relief proceedings, such as “rulings related to whether to hold an evidentiary hearing, for an abuse of discretion.” *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118.

**II. The district court correctly denied Mathis’s claims that the State committed prosecutorial misconduct and engaged in other nefarious actions because the claims could have been raised on direct appeal.**

**A. Postconviction law**

“A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States . . . may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.” Mont. Code Ann.

§ 46-21-101(1). “A person requesting postconviction relief has the burden to show, by a preponderance of the evidence, that the facts justify the relief.” *State v. Cobell*, 2004 MT 46, ¶ 12, 320 Mont. 122, 86 P.3d 20.

“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. A petition for postconviction relief must:

(a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and *clearly set forth the alleged violation or violations*;

....

*(c) 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.*

*Ellenburg*, ¶ 12 (quoting Mont. Code Ann. § 46-21-104(1)) (emphasis in original).

“[A] petition for postconviction relief must be based on more than mere conclusory allegations.” *Ellenburg*, ¶ 16. “A person requesting postconviction relief has the burden to show, by a preponderance of the evidence, that the facts justify the relief.” *Cobell*, ¶ 12.

Furthermore, the plain language of Montana’s postconviction statutes “establishes that the courts lack any authority to consider (hear and entertain) or decide (determine) legal and factual issues that could reasonably have been raised on direct appeal if an adequate remedy of appeal was available to the petitioner.” *State v. Osborne*, 2005 MT 264, ¶ 14, 329 Mont. 95, 124 P.3d 1085 (citing Mont. Code Ann. §§ 46-21-101(1); -105(2)). This is because “[p]ostconviction relief is a means to provide review of collateral claims that could not have been raised on appeal.” *Rose*, ¶ 35.

“A court may dismiss a petition for post-conviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in § 46-21-104(1)(c), MCA.” *Heath*, ¶ 16 (citing *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422); *see also Cobell*, ¶ 12 (“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.”).

**B. Most of Mathis’s claims, although framed in the context of newly discovered evidence, are procedurally barred by Mont. Code Ann. § 46-21-105(2), because they either were brought during her direct appeal and she is attempting to reargue the claims, or the claims could have been brought and are now barred from review.**

A postconviction proceeding “is not another form of appeal from a criminal case, but a separate civil proceeding aimed at vacating, setting aside or correcting a sentence.” *State v. Boucher*, 2002 MT 114, ¶ 17, 309 Mont. 514, 48 P.3d 21.

Pursuant to Montana statutory law,

When a petitioner has been afforded the opportunity for a direct appeal of the petitioner’s conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter.

Mont. Code Ann. § 46-21-105(2). “[G]rounds for relief” includes all legal and factual issues that were or could have been raised in support of the petitioner’s claim for relief.” Mont. Code Ann. § 46-21-105(3).

The Court has “consistently applied this statutory bar in order to ‘prevent the abuse of post-conviction relief by criminal defendants who would substitute those proceedings for direct appeal.’” *Basto v. State*, 2004 MT 257, ¶ 18, 323 Mont. 80, 97 P.3d 1113 (quoting *Kills On Top v. State*, 273 Mont. 32, 60, 901 P.2d 1368, 1386

(1995)). Accordingly, a postconviction proceeding does not afford a petitioner an opportunity to retry the facts of the case or raise issues that could have been raised or were already addressed on direct appeal. *See* Mont. Code Ann. § 46-21-105(2). Furthermore, this Court has found that Mont. Code Ann. § 46-21-105(2)'s "procedural bar applies to issues which were not properly preserved at the trial level for appeal." *State v. Baker*, 272 Mont. 273, 281, 901 P.2d 54, 58 (1995).

Below, the district court recognized that Mathis raised 12 claims for relief in her petition, including suppression of exculpatory evidence, malicious prosecution, witness tampering, and perjury, among others. (*See* Doc. 9 at 5-12.) Recognizing that Mathis's petition was raising a claim of newly discovered evidence under Mont. Code Ann. § 46-21-102(2) and actual innocence, the district court dismissed the petition after finding that it conclusively failed to show that she was "entitled to relief on any of the grounds pled, either by statute or claims of actual innocence." (Doc. 9 at 12.)

On appeal, Mathis's revised opening brief restructures her claims into "four" issues. (*See* Br. at 1-3.) However, many of these issues contain multiple theories for relief based on, what the district court described as, "contorted claims" that Mathis's first husband, Don Mathis, and her second husband, Norling, conspired with the prosecutor, law enforcement, DPHHS, the children, and the children's counselors "to create these claims out of thin air and separate her from her

daughters.” (Doc. 9 at 11.) These assertions stem from a document apparently generated by DPHHS that Mathis says would prove her various claims for relief and show that the State committed misconduct and fabricated the allegations against her. (*See* Br. at 23 (citing Doc. 1.50 at 1-10 (“Ex. A”)).) However, contrary to Mathis’s assertions, these claims are now procedurally barred by Mont. Code Ann. § 46-21-105(2) because they could have been brought during her direct appeal. *Rose*, ¶ 35 (declining to consider petitioner’s postconviction claim that he was denied access to counsel because it could have been brought on direct appeal).

**1. Mathis’s first “issue,” which argues various forms of prosecutorial misconduct and malfeasance, raises several claims that are procedurally barred and are not based on newly discovered evidence.**

In her revised opening brief, Mathis’s first issue raises multiple claims of prosecutorial misconduct by the State, including: (1) that the prosecutor, Deputy County Attorney Jean Adams (Adams) committed “entrapment”; (2) witness tampering; (3) suppression of evidence; (4) tampering with the public record; and (5) the prosecution made a “conclusion-drawing inference” during trial that was not supported by the evidence. (Br. at 23, 31, 38, 40, 42-43.) As mentioned, Mathis asserts that a DPHHS document “discovered in her personal files” shows that the allegations against her were fabricated by Adams and provides support for her claims of prosecutorial misconduct. (Br. at 9.)

Specifically, Mathis argues that “Ex. A”<sup>2</sup> shows that Adams was the first person to contact DPHHS and report the abuse allegations on July 13, 2018. (Br. at 29.) This fact, Mathis claims, contradicts the evidence at trial that J.M. first reported the abuse on July 16 to her counselor, Berg, and proves that the State committed multiple forms of malfeasance, including witness tampering, to secure her conviction. Thus, per Mathis’s theory, this report was exculpatory evidence that was withheld prior to trial and violated her due process rights requiring reversal of her conviction. (Br. at 22.)

Critically, Ex. A, as recognized by the district court, is not newly discovered evidence at all. (*See* Doc. 9 at 5 (“After diligent review of all Petitioner’s filings in this matter, the Court concludes that nothing provided in this record is ‘new’ evidence discovered since trial.”).) In her brief, Mathis claims that the document was withheld before trial, but then admits she found the report amongst her “personal files” in May 2023, after her conviction was affirmed on direct appeal. (Br. at 9.) Indeed, Mathis disingenuously argues “that this report was zealously hidden from the eyes of the defense and the court, and is likely contained in the DPHHS file that the Court refuses to review in camera.” (*Id.* at 24.)

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<sup>2</sup> Mathis attached Ex. A. to her Petition. (Doc. 1.50 at 1-10.)

However, Mathis’s allegation that this evidence was not provided to her prior to trial is undercut by the plain face of the document. As noted by the district court, Mathis “received a large amount of documentation from DPHHS pertaining to any issues even collaterally related to the two counts charged.” (Doc. 9 at 6.) This not only included T.N.’s and J.M.’s July 2018 forensic interviews, but also the hardcopy DPHHS file that the district court reviewed in camera and provided to the defense, i.e., the “151 pages of information.” *Mathis*, ¶ 10. Mathis’s Ex. A was undoubtedly provided at that time as the bates numbering can clearly be observed on the lower right side of the document. (*See* Doc. 1.50 at 1-10.) Indeed, the date that Mathis argues these documents were printed, July 24, 2019, coincides with the timing of the district court’s July 2019 order granting Mathis’s request for the DPHHS file to be produced and lodged for in camera review. (D.C. Docs. 73, 76 (subpoena duces tecum served to DPHHS on 7/23/19).) Mathis fails to show that the district court clearly erred when it found that this report was not newly discovered evidence. *See Maldonado*, ¶ 10.

Because Mathis fails to show that the district court erred by concluding that this report was not newly discovered evidence, her various claims of prosecutorial misconduct are statutorily barred because they could have been raised during her direct appeal. Mathis was free to argue at trial that Adams conspired with Norling and Don Mathis to fabricate the claims, and that the prosecution colluded with

State's witnesses to contaminate the children's memories. However, postconviction proceedings are not the proper vehicle to put forth a theory based on evidence available to the defense prior to trial. *See Boucher*, ¶ 17. (postconviction proceeding "is not another form of appeal from a criminal case")

Furthermore, in support of her procedurally barred argument that the prosecution committed misconduct, Mathis attempts to rehash the arguments she previously made on direct appeal and reasserts that the State violated her due process rights by suppressing T.N.'s and J.M.'s March and April 2018 forensic interviews. (Br. at 38-40.) Adding to the arguments she previously made on appeal, Mathis also contends that the State tampered with the public records by copying and pasting multiple paragraphs from a document in another criminal case to support its argument that the district court should deny Mathis's motion for pretrial interviews. (Br. at 40-42.)

This case, *State v. Gonzalez*, DDC-17-537 (Cascade), was mentioned by the State in its response to Mathis's motion to allow pretrial interviews of T.N. and J.M. (*See* D.C. Doc. 113 at 9.) The State relied on this criminal case in support of its opposition to Mathis's motion for interviews, and even attached an order issued by the judge in that case which denied the defendant's motion to interview the child victim. (*See* D.C. Doc. 113 (State's "Exhibit 1").) Mathis posits that the document supports the claims she made during her direct appeal, specifically that

Mont. Code Ann. § 46-15-320 was unconstitutional and violated her right to access the children for interviews.

Again, however, Mathis is procedurally barred from raising the claims by Mont. Code Ann. § 46-21-105(2) because she already litigated the issue of the children's interviews on direct appeal, including the factual point of whether the children declined to be interviewed. *Mathis*, ¶¶ 28-29. Indeed, this issue was thoroughly argued by the parties when Mathis filed her petition for rehearing. (*See State v. Mathis*, DA 20-0409, Order (Sept. 6, 2022).) A postconviction proceeding does not afford a petitioner an opportunity to retry the facts of the case or raise issues that were already addressed on direct appeal. *See* Mont. Code Ann. § 46-21-105(2). Accordingly, Mathis's claims regarding the children's interviews are statutorily barred.

**2. Likewise, Mathis's claims regarding subornation of perjury and lack of probable cause are statutorily barred.**

Mathis's second "issue" raises a claim of "civil conspiracy" and asserts that law enforcement conspired with Adams to falsely charge and convict her of the crime. (Br. at 43-44.) Mathis further asserts that her rights were violated because the Information was not supported by probable cause and that the officers committed perjury by testifying against her at trial. (Br. at 1, 5, 19-20, 46-51, 60.) In support, Mathis attempts to reframe the officers' testimony into somehow

supporting a theory that, contrary to Berg's trial testimony, J.M. never disclosed abuse by Mathis during a July 16 counseling session. (*See* Br. at 1, 19-20, 35, 46-51, 60.) Although Berg testified that she gave her counseling records to police pursuant to an investigative subpoena (Tr. at 224-26), Mathis contends that police never received those records and thus conspired with the prosecutor to manufacture the allegations so they could interview T.N. and J.M., contaminate their interviews into making allegations, and then illegally charge her by using the false information to support probable cause. (Br. at 9, 31, 45-51.)

However, like the claims raised by Mathis in support of her argument that the State committed prosecutorial misconduct, her claim of civil conspiracy is also procedurally barred as she could have raised it during her direct appeal. Mont. Code Ann. § 46-21-105(2). Putting aside whether this claim is even legally cognizable before this Court, Mathis's entire theory in support of civil conspiracy is based on the officers' testimonies at trial and documents provided to the defense during discovery. Because she could have made these conclusory claims during her direct appeal, she is precluded from raising them now. Consequently, her claims of "civil conspiracy," perjury, and lack of probable cause are procedurally barred by Mont. Code Ann. § 46-21-105(2).

### **III. Mathis fails to meet her heavy burden and show that her attorneys provided ineffective assistance of counsel.**

“The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, and by Article II, Section 24 of the Montana Constitution.” *Ford v. State*, 2005 MT 151, ¶ 7, 327 Mont. 378, 114 P.3d 244. When considering a claim of IAC in a postconviction proceeding, Montana courts apply the two-pronged test set forth by the United States Supreme Court in *Strickland*. *Ford*, ¶ 7. “Under that test, the petitioner must show that counsel’s performance was deficient and that the deficient performance prejudiced the defense.” *Ford*, ¶ 7. “A defendant must satisfy both prongs of this test in order to prevail on an ineffective assistance of counsel claim.” *Whitlow v. State*, 2008 MT 140, ¶ 11, 343 Mont. 90, 183 P.3d 861.

“A petitioner seeking to reverse a district court order denying postconviction relief based on ineffective assistance of counsel has a heavy burden.” *Sartain v. State*, 2012 MT 164, ¶ 9, 365 Mont. 483, 485, 285 P.3d 407. “A petitioner claiming ineffective assistance of counsel must ground his or her proof on facts within the record and not on conclusory allegations.” *Ford*, ¶ 7.

To prevail on a claim of IAC, a petitioner must show that her defense counsel’s performance was deficient under the first prong of the *Strickland* test. *Whitlow*, ¶ 14. To satisfy this prong, Mathis must show that her “counsel’s representation fell below an objective standard of reasonableness.” *Whitlow*, ¶ 14.

“In other words, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Whitlow*, ¶ 14 (quoting *Strickland*, 466 U.S. at 688). “[T]here is no ‘checklist’ for judicial evaluation of attorney performance.” *Whitlow*, ¶ 14. Rather, when evaluating an attorney’s performance, the appropriate analysis is “‘whether counsel’s assistance was reasonable considering all the circumstances.’” *Whitlow*, ¶ 14 (quoting *Strickland*, 466 U.S. at 688).

Additionally, when “scrutinizing counsel’s performance, every effort must be made ‘to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’” *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689). Under this analysis, this Court “‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,’ and the defendant ‘must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.’” *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689); *see also* *Whitlow*, ¶ 19 (“The question is not merely whether counsel’s conduct flowed from strategic decisions and trial tactics but, rather, whether it was based on ‘reasonable’ or ‘sound’ professional judgment.” *Whitlow*, ¶ 19).

In her brief, Mathis contends that her attorneys in the case, Adam Larsen (Larsen) and Breena Lecount (Lecount), rendered ineffective assistance during her criminal proceedings. (*See* Br. at 22 (“Holly’s defense team failed to research and represent their client adequately.”), 51-56, 60 (“Holly was also poorly represented by her defense team.”).) Larsen served as Mathis’s primary attorney<sup>3</sup> and ultimately provided a “detailed response to” a complaint filed by Mathis with the Office of Disciplinary Counsel. (Doc. 1.90 at 8-14 (“Ex. R”).) The district court relied on this response, which was attached to Mathis’s petition, in concluding that Mathis failed to show that her attorneys provided IAC. (Doc. 9 at 10 (“It was clear to this Court, through Exhibit R and the extensive citations to the transcripts recited by Petitioner, that this claim fails.”).)

Mathis argues that the district court erred by denying her IAC claims and asserts that defense counsel rendered ineffective assistance during pretrial proceedings, trial, and at sentencing. (Br. at 51-56.) First, Mathis contends that defense counsel was ineffective for failing to investigate the case and advocate on her behalf. (Br. at 51-52 (citing *State v. Denny*, 262 Mont. 248, 865 P.2d 226 (1993)). Specifically, Mathis asserts that defense counsel failed to object, or bring to the district court’s attention, that the State did not lodge T.N.’s April 2018

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<sup>3</sup> The record indicates that Lecount served as cocounsel during Mathis’s trial and worked with Larsen during pretrial preparations, including preparing and filing motions in limine. (*See* D.C. Docs. 11, 122, 157, 173.)

forensic interview as part of the DPHHS file that was reviewed in camera and turned over to the defense. (*See* Br. at 51.) Mathis also faults defense counsel for not noticing that the State’s response to the motion to interview the children supposedly contained a “glaring fabrication,”<sup>4</sup> which was relied on by the district court when it denied the motion for interviews. (Br. at 51-52.)

However, Mathis’s claims that her defense counsel did not honor his duty to investigate the case utterly collapses upon examination of the record. Larsen filed numerous pretrial motions in defense of Mathis, diligently pursued interviews of the children, and took action to obtain confidential information from Norling’s criminal case and the children’s DPHHS records. This included his successful motions to obtain the children’s confidential counseling information and their protected DPHHS records. Based on defense counsel’s dogged attempts to procure these records, Mathis cannot meet her heavy burden to show that her attorneys were ineffective because they failed to investigate her case. *See Sartain*, ¶ 9; *Strickland*, 466 U.S. at 691.

Further, although Mathis argues that defense counsel were ineffective because they did not make further efforts to obtain the children’s interviews after

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<sup>4</sup> Even if the response erroneously referred to the victim as a “she,” and included language that looks like it was transcribed from a brief in *State v. Gonzales*, the factual issue of whether the children declined to be interviewed was litigated during the underlying proceedings and is statutorily barred from being reargued.

noticing that they were not in the DPHHS file, her argument misses the point.

“The relevant inquiry in an ineffective assistance of counsel claim asserting the failure to investigate is not what could have been done, but whether counsel’s choices were reasonable.” *State v. Allen*, 2001 MT 266, ¶ 28, 307 Mont. 253, 37 P.3d 655 (citing *Dawson v. State*, 2000 MT 219, ¶ 137, 301 Mont. 135, 10 P.3d 49) (concluding it was reasonable for Dawson’s counsel not to pursue further investigation where there was no evidence that further investigation would be beneficial). “Defense counsel’s duty is ‘to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’” *State v. Thomas*, 285 Mont. 112, 119, 946 P.2d 140, 144 (1997) (citing *Strickland*, 466 U.S. at 691). “A decision not to investigate must be assessed for reasonableness in light of all of the circumstances of the case, ‘applying a heavy measure of deference to counsel’s judgments.’” *Thomas*, 285 Mont. at 119, 946 P.2d at 144 (citing *Strickland*, 466 U.S. at 691).

Here, in his letter in response to Mathis’s complaint to the ODC, Larsen explains that the defense did not continue to pursue the interview because “[w]e ultimately concluded that the potential evidentiary value was not worth the continued battle of attempting to procure this interview, as the initial allegations came from J.M. and not T.N.” (Doc. 1.90 at 9.) Larsen also explained that the defense “had ample opportunity to discredit T.N.’s disclosure based on cross-exam

of him, his grandmother, and his best friend J.G., both of whom confirmed no prior disclosure of abuse by T.N.” (*Id.*) Indeed, as recognized by this Court, the defense was “able to impeach T.N.’s trial testimony through other witnesses in a manner similar to how the April 2018 interview could have been used for impeachment.” *Mathis*, ¶ 37 (noting that T.N.’s friend and grandmother all testified that he never disclosed the abuse).

Consequently, based on the limited evidentiary value of these interviews, and the lack of evidence that further investigation into them would be beneficial, Mathis cannot meet her burden to show that counsel’s performance fell below an objective standard of reasonableness, or otherwise was unreasonable under prevailing professional norms. *Whitlow*, ¶ 14, *Allen*, ¶ 28, *Dawson*, ¶ 137. Thus, Mathis fails to satisfy the first prong of *Strickland*. *Whitlow*, ¶ 14.

Further, for the sake of argument, even if counsel rendered deficient performance by not objecting at the time and requesting the production of T.N.’s April 2018 interview, Mathis cannot satisfy *Strickland*’s second prong and show that this interview was so crucial to her defense that counsel’s failure to make further inquiries prejudiced the defense. *Ford*, ¶ 7. This Court has found that “[i]n cases where counsel fails to conduct adequate pretrial investigation we focus our inquiry as to what information would have been obtained from such investigation and whether such information would have produced a different result.” *Weaver v.*

*State*, 2005 MT 158, ¶ 21, 327 Mont. 441, 114 P.3d 1039 (citing *Denny*, 262 Mont. at 255, 865 P.2d at 230).

Here, critically, not only did the State provide Mathis with the children’s forensic interviews conducted in July 2018, but both T.N. and J.M. testified at trial and were subject to cross-examination. As discussed, although T.N. affirmed that he disclosed Mathis’s abuse to two people, both of these people testified at trial and contradicted his testimony upon steadfast questioning from defense counsel. Thus, T.N. was thoroughly impeached as a witness during trial without the assistance of the interview. Given that any value of this interview was limited as T.N. did not allege that Mathis abused him during this interview, and did not discuss the abuse until the July 2018 interview, Mathis cannot show that failure to obtain the April 2018 forensic interview prior to trial prejudiced her defense because possession of this information prior to trial would not “have produced a different result.” *See Weaver*, ¶ 21.

In addition to her arguments regarding defense counsel’s performance during pretrial proceedings, Mathis also contends that her attorneys were ineffective during her trial. (Br. at 52-55.) Mathis contends that defense counsel failed to call an expert witness to opine about “parental alienation,” and criticizes both attorneys’ cross-examinations of the State’s witnesses, including Paula Samms, Norling, and DPHHS employee Daniel Laughlin. (*See id.*) Mathis also

faults her defense team for calling Don Mathis as a defense witness, but then not inquiring into whether the allegations originated with the prosecution. (*See Br. at 53-54.*) Mathis thus appears to contend that defense counsel’s questioning of Don Mathis was deficient because they failed to expose Adams’s “entrapment.” (*Br. at 53.*)

“An ineffective assistance of counsel claim cannot succeed when predicated on counsel’s failure to take an action which, under the circumstances, would likely not have changed the outcome of the proceeding.” *State v. Mederos*, 2013 MT 318, ¶ 25, 372 Mont. 325, 312 P.3d 438. This Court has recognized that failure of counsel to make a frivolous claim is not IAC. *Baker*, 272 Mont. at 283, 901 P.2d at 60. Indeed, “courts must accord great deference to defense counsel’s exercise of judgment in determining appropriate defenses and trial strategy.” *State v. Dethman*, 2010 MT 268, ¶ 19, 358 Mont. 384, 245 P.3d 30 (citation and internal quotation marks omitted).

Here, Mathis cannot meet her burden, based on her conclusory allegations regarding her attorneys’ performances during trial, that her representation fell below the constitutional standard of assistance identified by the first prong of *Strickland*. Notwithstanding that the jury ultimately acquitted Mathis of one of the counts of incest, it is obvious from the record that Mathis’s defense counsel thoroughly prepared for trial and completely tested the State’s case. As noted by the district court, defense counsel “filed motions, interviewed witnesses, poured

over documents, and vigorously cross-examined witnesses in an effort to discredit their testimony with the jury.” (Doc. 9 at 10-11.) Indeed, the record reflects that defense counsel thoroughly questioned the State’s witnesses and mined ample impeachment material at trial. *See Mathis*, ¶ 37.

Mathis’s contorted and conclusory theory that Adams worked with Mathis’s ex-husbands to manufacture the allegations against her is not supported by the facts. Both T.N. and J.M. testified at trial and credibly recounted multiple acts of abuse by Mathis. (1/28/20 Tr. at 204 (J.M. replying, “Because I saw it happen,” when asked by the prosecution how she knew the abuse “happened”).) The evidence against Mathis was strong, was established by multiple witnesses at trial, and was not simply one person’s word against another.

Thus, even if counsel could have done a better job in trial, that still does not satisfy the *Strickland* standard. *See Oliphant v. State*, 2023 MT 43, ¶ 40, 411 Mont. 250, 263, 525 P.3d 1214 (petitioner failed to “demonstrate ‘errors so serious’ that [defense counsel’s representation] fell below the constitutional standard of assistance identified by the first prong of *Strickland*”). Instead, Mathis must “demonstrate prejudice by showing a reasonable probability that the result of the proceeding would have been different but for counsel’s deficient performance.” *State v. Walter*, 2018 MT 292, ¶ 14, 393 Mont. 390, 431 P.3d 22 (citations omitted). Because she fails to do so, her claim that counsel rendered ineffective assistance must fail.

Mathis also makes an argument in passing that Larsen failed to poll the jury to ensure that the verdict was unanimous. However, this claim also fails because nothing in the record established that a juror was unsure or uncertain of the verdict, and Mathis fails to show that a reasonable possibility exists that polling the jury would have changed the outcome of trial. *Mederos*, ¶ 25; *see also United States v. Costa*, 691 F.2d 1358, 1363-64 (11th Cir. 1982) (“Since there is nothing in the record to indicate any juror was uncertain of the verdict, counsel’s failure to request a poll does not fall outside the range of competence expected of attorneys in criminal cases.”).

Furthermore, although Mathis argued on direct appeal that her defense counsel was ineffective at trial for not requesting a specific-act unanimity instruction, she appears to abandon the claim in her opening brief. Consequently, the Court should find that she has abandoned the claim. *See Ford*, ¶ 35 (finding that the Court has “no occasion to review the District Court’s decision” when the appellant abandoned certain contentions on appeal); *Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359 (noting that a party did not brief certain issues on appeal and “[t]hose issues, therefore, have been abandoned on appeal, and we do not address them”).

Nevertheless, even if the Court considered the question, Mathis still cannot show that failing to request an instruction satisfies the *Strickland* standard for

ineffective assistance. Critically, Mathis is unable to show that defense counsel's failure to object at trial and request a specific-act unanimity instruction constituted deficient performance because Mathis's actions could have been considered by the jury as a single course of conduct. *Mathis*, ¶ 47; *State v. Wells*, 2021 MT 103, ¶ 22, 404 Mont. 105, 485 P.3d 1220 (district court did not abuse its discretion by declining to give a specific-act unanimity instruction because the alleged acts could be merged into a single course of conduct); *see also State v. Gallagher*, 2005 MT 336, ¶ 28, 330 Mont. 65, 125 P.3d 1141 (denying claim of IAC because the Court could not conclude "that the outcome of the trial was prejudiced due to the lack of a specific unanimity instruction"). Thus, even if Mathis would have raised the claim in her brief, it would fail because she was not prejudiced by counsel's actions.

Additionally, Mathis further asserts that Larsen was ineffective at sentencing because he failed to argue that she should be sentenced to less than the mandatory minimum because the crime was not violent and because Larsen did not call Michael Sullivan to testify about Mathis's ability to be treated in the community, as reflected in the psychosexual report he authored. (Br. at 55-56.) Again, Mathis's contention that Larsen was ineffective during sentencing is contradicted by the record.

For example, Larsen successfully moved the district court to hold a hearing and consider the exception to the mandatory minimum contained in the 2015 version

of Mont. Code Ann. § 46-18-222(6). (D.C. Docs. 186, 197 at 3 (“Again, in this particular case, the legislative change in the sentencing statute caused the Defendant to ask the Court to rule on whether the § 46-18-222(6) exception applies in advance of sentencing and the Court has agreed to do so.”).) At the hearing, the court heard testimony from Shawn Abbot on behalf of Mathis, who testified that her “treatment needs can be accomplished in a community setting.” (D.C. Doc. 197 at 3.)

Thus, although the court declined to apply the 2015 exception after thoroughly considering the question, Mathis still benefited from the 2017 statute’s more lenient provisions regarding the length of the parole restriction and the maximum amount of time that could be suspended from her sentence. (*Id.*) Mathis cannot show that Larsen’s representation was deficient, nor prejudicial, and she fails to satisfy her burden under both prongs of the *Strickland* test. Consequently, the district court correctly dismissed her claims of IAC.

**IV. The district court did not abuse its discretion when it denied Mathis’s motion for in camera review of the child forensic interviews because postconviction proceedings are not vehicles to reargue issues raised on direct appeal.**

Mathis’s fourth “issue” argues that the district court erred, and failed to “do its duty,” by failing to conduct an in camera review of the children’s forensic

interviews “in 2019, and continues to refuse to do its duty by denying her request in 2024.” (Br. at 56.) Mathis raises similar arguments throughout her brief.

However, the district court did not abuse its discretion by denying Mathis’s motion for a subpoena duces tecum and in camera review, or because it declined to order further discovery, such as an evidentiary hearing.

“Postconviction relief proceedings are not a discovery device in which a petitioner, through broad allegations in a verified pleading, may establish the right to an evidentiary hearing.” *Smith v. State*, 2000 MT 327, ¶ 28, 303 Mont. 47, 15 P.3d 395 (petitioner’s request for a hearing on his “new evidence” was “nothing more than a request for a fishing expedition”). Nevertheless, district courts have wide discretion during postconviction proceedings when considering whether to order further discovery. *See Marble v. State*, 2015 MT 242, ¶ 30, 380 Mont. 366, 355 P.3d 742. “If the court determines that a hearing is required, or if the interests of justice require, it can order the office of the state public defender to assign counsel for a qualifying petitioner.” *Marble*, ¶ 30 (citing Mont. Code Ann. § 46-21-201(2)). “Thereafter, the court may for good cause grant either party leave to use discovery procedures; it may also receive proof of affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before the court for hearing.” *Marble*, ¶ 30 (citing Mont. Code Ann. § 46-21-201(4)-(5)).

“A court may dismiss a petition for post-conviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in § 46-21-104(1)(c), MCA.” *Heath*, ¶ 16 (citing *Herman*, ¶ 15); *see also Marble*, ¶ 30 (“If the court finds for the prosecution, the petition must be dismissed.”) (citing Mont. Code Ann. § 46-21-201(6)); *see also Cobell*, ¶ 12 (“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.”).

Here, the district court specifically considered all 12 of the identified claims raised in Mathis’s petition, and concluded that she was “not entitled to relief on any of the grounds pled, either by statute or claims of actual innocence.” (Doc. 9 at 12.) As a result, the district court decided that it would “not request a response from the State, nor w[ould] it hold a hearing.” (*Id.*) Thus, because the court found that Mathis had failed to state a viable claim for relief, it utilized its discretion by denying her requests to reopen the case and proceed with postconviction discovery proceedings, including granting her motion for in camera review of the forensic interviews. (*Id.* at 5, 12.)

As this Court has continually recognized, the decision not to order further discovery when dismissing a petition during postconviction proceedings is well within the discretion of the district court. *See Marble*, ¶ 38 (“We have also

reaffirmed the statutory right of the district court to 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, and the court’s right to dismiss a petition without holding a hearing if the petition fails to satisfy the procedural threshold set forth in § 46-21-104(1)(c), MCA.”). Because Mathis failed to satisfy her statutory burden, or present newly discovered evidence establishing that she did not engage in the criminal conduct forming her conviction, the district court was not required to continue to entertain Mathis’s request for a “fishing expedition” and order that the interviews be produced for in camera review. *See Smith*, ¶ 28. Mathis fails to show that the district court abused its discretion by denying her motion, or that the interests of justice required the court to grant her motion and conduct further discovery in the case.

**V. The district court correctly denied Mathis’s claim of actual innocence because the evidence she presented in support of her claim was not newly discovered.**

Mathis’s fourth issue asserts a secondary claim and contends that the district court erred by misapplying *Marble* and Mont. Code Ann. § 46-21-102 in denying her petition for postconviction relief. Mathis is mistaken as the district court correctly dismissed her petition because it failed to allege *any* new evidence.

As this court explained in *Marble*, “a timely filed PCR petition based upon newly discovered evidence must nonetheless undergo examination by the court to determine if the evidence is actually ‘newly discovered.’” *Garding v. State*, 2020 MT 163, ¶ 39, 400 Mont. 296, 466 P.3d 501 (citing *Marble*, ¶¶ 34, 36). “While not subject to the more rigorous actual innocence thresholds applied to untimely petitions, district courts may examine timely filed petitions alleging newly discovered evidence with a broad array of tools.” *Garding*, ¶ 39. A district court presented with a petition asserting a claim under Mont. Code Ann. § 46-21-102(2) may consider the “factors set out in *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099: ‘(1) the evidence must have been discovered since the defendant’s trial; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant’s part; (3) the evidence must be material to the issues at trial; and (4) the evidence must be neither cumulative nor merely impeaching.’” *Crabtree v. State*, 2022 MT 133, ¶ 20, 409 Mont. 211, 512 P.3d 1187; *Marble*, ¶ 36.

Critically, Mont. Code Ann. § 46-21-102(2) first requires a petitioner to allege “the existence of newly discovered evidence.” *Id.* If it is not newly discovered, it does not meet the statutory terms. *Id.*; *see also Marble*, ¶ 36 (incorporating the *Clark* factors); *Clark*, ¶ 34 (evidence must be “discovered since

the defendant’s trial”). If it is newly discovered, it must also meet the statutory standard of actual innocence. Mont. Code Ann. § 46-21-102(2); *Marble*, ¶ 36.

Here, the district court correctly concluded that Mathis failed to “satisfy the four-factor conjunctive test for new evidence discovered since trial, namely, ‘newly discovered evidence if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which he or she was convicted.’” (Doc. 9 at 5 (quoting Mont. Code Ann. § 46-21-102(2); *Marble*, ¶ 35); *see also id.* at 12 (concluding that Mathis was “not entitled to relief on any of the grounds pled, either by statute or claims of actual innocence”).

The district court found, at multiple points, that Mathis failed to provide any new evidence in her postconviction petition. (Doc. 9 at 5 (“After diligent review of all Petitioner’s filings in this matter, the Court concludes that nothing provided in this record is ‘new’ evidence discovered since trial.”), 7-12 (repeatedly finding that Mathis failed to present “new evidence”).) This included Mathis’s Ex. A. (Doc. 9 at 7 (“Again, Petitioner’s claim of new evidence is, in fact, not newly discovered since trial and thus fails the first factor.”).)

As discussed, Mathis fails to show that Ex. A is new evidence as bates numbering is clearly visible on the face of the document. Furthermore, the date on the document, July 24, 2019, which Mathis contends corresponds with the day it

was printed, is the day after the subpoena for the children's records was served to DPHHS's representative. (*Compare* Doc. 1.50 at 10 *with* D.C. Doc. 76.) Based on these facts, Mathis cannot dispute that the district court correctly concluded that this evidence was not newly discovered. *Marble*, ¶ 36; *Clark*, ¶ 34; *see also Kenfield v. State*, 2016 MT 197, ¶ 15, 384 Mont. 322, 377 P.3d 1207. Thus, her arguments that the district court misapplied *Marble* and Mont. Code Ann. § 46-21-102(2) are incorrect, and her claim fails.

### **CONCLUSION**

The State respectfully requests this Court affirm the district court's order denying and dismissing Mathis's petition for postconviction relief and the denial of her motion for subpoena duces tecum.

Respectfully submitted this 7th day of October, 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 9,928 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Michael P. Dougherty*  
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## CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-07-2024:

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