MONTANA, TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

HOLLY ANN MATHIS, Petitioner, v. STATE OF MONTANA, Respondent.	CAUSE NO. DV-2023-69 Hon. Heather Perry **ORDER DISMISSING PETITION WITHOUT HEARING, ORDER DENYING MOTION FOR SUBPOENA DUCES TECUM, AND ORDER SEALING CAUSE**

Pending before the Court is a Petition for Post Conviction Relief and Memorandum (Dkt. # 1) filed by Holly Ann Mathis ("Petitioner") on September 25, 2023. The Court has reviewed all of the documents in the file and all exhibits either lodged or filed.

Procedural History

This matter arises as a result of the jury verdict (Dkt. # 181) and judgment and sentence (Dkt. # 208) imposed in Fergus County Cause No. DC-2018-56. Petitioner was convicted of Count I: Incest, a felony in violation of Mont. Code Ann. § 45-5-507(5) and was acquitted of Count II: Incest, a felony in violation of Mont. Code Ann. § 45-5-507(5) on January 30, 2020.

Petitioner appealed her conviction for Count I to the Montana Supreme Court, which issued its ruling affirming the conviction on August 9, 2022 in *State of Montana v. Holly Anne Mathis, a/k/a Holly Anne Norling,* DA 2020-409, 2022 MT 156, 409 Mont. 348, 515 P.3d 758.

Petitioner now seeks postconviction relief and her Petition was timely filed.

Applicable Law

This Court has reviewed *State v. Marble*, 2005 MT 208, ¶¶ 35-38, 328 Mont. 223, ¶¶ 35-38, 119 P.3d 88, ¶¶ 35-38. The following are the requirements for analyzing the contents of the Petition and exhibits filed or lodged in support thereof for claims based on Mont. Code Ann. § 46-21-201, as denoted in the heading of the Petition on page 1. Petitioner is silent with respect to her actual statutory reliance in the body of the Petition, but the Court gives her deference as a *pro se* litigant:

> ¶35. Section 46-21-102(2), MCA, provides that an allegation that 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 the petitioner was convicted" may be raised in a postconviction petition. The statute merely allows the filing of the petition; it does not in any way define or circumscribe whether the proof must be made to the district court, whether the petitioner must meet a certain threshold before the court can consider expanding the proceedings to include a hearing or a new trial, or whether such proof must be made on retrial. As noted, the implementing provisions set forth at § 46-21-201, MCA, likewise do not delineate how and to whom the proof must be made, and instead accord the court multiple options for how it may proceed."
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> ¶ 36. In construing a statute, it is incumbent upon the court to "declare what is in terms or in substance contained therein, not to insert what has been omitted . . . ." Section 1-2-101, MCA. The wide range of alternative proceedings set forth in § 46-21-201, MCA, reflect a legislative intent to place the method of resolving a petition for postconviction relief in the hands of the district court. We therefore conclude that a district court presented with a postconviction petition based upon newly discovered evidence shall utilize the very test set forth in § 46-21-102, MCA. It shall determine whether the "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. In making this determination, a district court may seek guidance from our case law addressing various forms of newly discovered evidence, such as our precedent with respect to recantations, whether set forth in a case involving a motion for new trial or one addressing a PCR petition. While we conclude herein that we erred in applying the fifth factor of the *Clark* new trial test to a PCR petition predicated upon newly discovered evidence, the first four factors of the *Clark* test also remain a viable resource when determining whether the newly discovered evidence should be considered.

The four factors discussed above are set forth in ¶ 22 of *Marble* as follows:

". . .we announced that the following test would be applied to motions for new trial predicated on newly discovered evidence:
To prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test:

(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;
(4) the evidence must be neither cumulative nor merely impeaching; and
(5) the evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome. (**not applicable here)"

¶ 37. It will be up to the district court to determine within the options provided in § 46-21-201, MCA, whether the proof and evidence will be weighed by the court itself, whether discovery and a hearing should be conducted, whether the matter should be remanded for a new trial, and even whether the defendant should be released on bail or discharged. And if the court finds for the prosecution, the petition may be dismissed. Section 46-21-201(4) through (6), MCA. On appeal, we will review the court's findings of fact for clear error and its conclusions of law for correctness, and will review discretionary rulings for an abuse of discretion. It will be incumbent upon the court—however it elects to conduct the postconviction proceedings—to issue an order setting forth the facts and legal rationale supporting its decision. (Internal citations omitted.)

¶ 38. The statutory test we announce today does not run afoul of our postconviction relief precedent. This Court has reviewed on appeal literally hundreds of district court dispositions of petitions for postconviction relief, many by way of memorandum opinion. While we have on occasion reversed the district court's denial of a petition for postconviction relief and remanded for an evidentiary hearing in which we remanded for a hearing in view of the "unique circumstances" occasioned by an IAC claim involving trial counsel who had since died), we have by and large declined to dictate to the district court which of the many statutory alternatives it should utilize when considering the merits of a postconviction petition. The constant in our decisions is the requirement that a postconviction petition 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." Section 46-21-104(1)(c), MCA. We have held that "[m]ere conclusory allegations are insufficient to support the petition." 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. Otherwise, a court is free to invoke any or all of the procedural tools at its disposal by virtue of the language of § 46-21-201, MCA, when determining the disposition of a petition for postconviction relief predicated upon newly discovered evidence. (Internal citations omitted.)

Petitioner, in substance, also appears to have also alleged an actual innocence claim based on the jury acquittal for Count II. That standard is set forth in *Beach v. State*, 2009 MT 398, ¶ 44, 353 Mont. 411, ¶ 44, 220 P.3d 667, ¶ 44, as follows:

> ¶ 44. A petitioner predicates a substantive "actual innocence" claim on the assertion that he did not commit the crime of which he has been convicted. A purely substantive claim warrants the application of an "extraordinarily high" standard of review. Beach's petition contains both substantive and procedural innocence claims. The higher standard of review would apply to Beach's substantive claims if he successfully has navigated the "procedural gateway." The analysis for Beach's substantive claims "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." We conclude that Beach must show by clear and convincing evidence that, but for a procedural error, no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim. (Internal citations omitted.)

The statutes at issue are:

> **Mont. Code Ann. § 46-21-201.** Proceedings on petition. (1)(a) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be sent to the county attorney in the county in which the conviction took place and to the attorney general and order that a responsive pleading be filed. The attorney general shall determine whether the attorney general will respond to the petition and, if so, whether the attorney general will respond in addition to or in place of the county attorney. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue.
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> (2) If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall order the office of state public defender, provided for in 2-15-1029, to assign counsel for a petitioner who qualifies for the assignment of counsel under Title 46, chapter 8, part 1, and the Montana Public Defender Act, Title 47, chapter 1.

Mont. Code Ann. § 46-21-102.

> (2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, 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.

Petitioner's Claims for Relief as Plead and Analysis

Petitioner has alleged the following twelve (12) claims for post-conviction relief. The Court notes that statutorily the claims must satisfy the four-factor conjunctive test for new evidence discovered since the 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." Those factors are: (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.

Or, for actual innocence claim(s), Petitioner must "show by clear and convincing evidence that, but for a procedural error, no reasonable juror would have found her guilty" of Count I.

I: Prosecution Suppressed/Withheld Exculpatory Evidence. This issue was the subject of both the majority opinion and dissent in *State v. Mathis* as Issue 2. 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. Petitioner also filed a "Motion Under § 46-21-201(4) + 46-15-106, 46-15-322, MCA for Subpoena Duces Tecum to obtain DPHHS records records [sic] requested in this Motion for In Camera Inspection by this Court" (Dkt. # 4). Petitioner requested "all the records [Lewistown DPHHS] has in its possession concerning Holly Mathis, aka Holly

Norling, Tim Norling Sr., Donald Mathis, Jessie Mathis (J.M.), [redacted] (T.N.), and [redacted] (N.M.), for the time period spanning June 29, 2015 through November 1, 2018." This motion is consistent with Petitioner's arguments that she is both actually innocent of Count I and her innocence can be proven through new evidence obtained through the requested DPHHS records.

As a preliminary matter, the Court notes that Petitioner—as a *pro se* litigant—has interspersed identifying information, confidential criminal justice information, and DN information throughout the extensive documentation submitted in this cause, such that the Court believes it has no other choice but to seal this case to protect the privacy of all parties.

Second, Petitioner never properly addresses how her right to prepare and defend her criminal case necessarily outweighs the privacy rights of all the other persons named who would otherwise benefit from the sealed DN case(s). Without a doubt, Petitioner already received a large amount of documentation from DPHHS pertaining to any issues even collaterally related to the two counts charged.

The Montana Supreme Court determined that although the actual video(s) were never produced to the District Court for in camera inspection, the State publicly conceded the April 2018 video interview of T.N. was exculpatory and there was no reversible error on that issue. Although Defendants have absolutely no obligation to defend, here Defendant had the benefit of arguing that T.N.'s April 2018 interview was exculpatory and T.N. was inconsistent with his reporting in a later interview. Petitioner knew this well in advance of her final pretrial motions and throughout her cross-examination of witnesses—including T.N. himself, who testified—and arguments made at trial. That the jury considered all of the evidence at trial, including all witness

testimony both direct and through cross-examination, exhibits, and arguments by counsel, and still unanimously concluded Petitioner was guilty of Count I fails to establish the requirements for a finding of actual innocence due to the lack of a procedural error, here, no in camera review. For these reasons the Motion for the Subpoena Duces Tecum (Dkt. # 4) is also denied.

II: Malicious Prosecution. In support of Petitioner's claim of new evidence here, Petitioner spends a considerable amount of time opining on the process and paperwork generated by a third-party report of possible child abuse or neglect to the DPHHS 1-800 line in Helena. Again, Petitioner's claim of new evidence is, in fact, not newly discovered since trial and thus fails the first factor. While the Court appreciates Petitioner's arguments and legal authority for how child and abuse cases are handled pursuant to statute, her legal analysis misses the mark to such an extent that it is nonsensical. Any third-party DN (abuse and neglect) initial reports were not germane to the jury's determination of guilt or innocence. The prosecutor(s) were not out of line. Petitioner was charged directly by an Information, which means a judge had to find probable cause based on the affidavit in support. The jury was limited to relying on the evidence properly presented at trial and, having done so, concluded the State proved Count I beyond a reasonable doubt. The Montana Supreme Court then affirmed. Likewise, the acquittal for Count II does not impact this analysis in the manner Petitioner asserts it does. A split verdict generally confirms the process works and that the jury has carefully considered all relevant facts and analyzed them in relation to the law provided by the Judge through jury instructions.

III: Witness Tampering, Part One. For this claim, Petitioner alleges that because the prosecutor followed the law as stated in the applicable statutes, the prosecutor engaged in witness tampering. Again, nothing included or argued here is new evidence since trial as shown

by Petitioner's inclusion of a partial transcript of her attorney's cross-examination of T.N., the victim at trial. The jury is tasked with determining the weight and credibility of witness testimony. As generally noted by the Supreme Court, the "[e]vidence the State offers in a criminal case is generally prejudicial to the defendant." (See *State v. Michelotti*, 2018 MT 158, ¶ 14, 392 Mont. 33, 420 P.3d 1020.)

IV: Civil Conspiracy Under 1983. This claim has again to do with events in the DN case(s) for the children who were, at the time, residing at least part-time with Petitioner. This Court notes that 1983 claims are federal claims, but Montana has similar remedies. Here, Petitioner takes issue with the children's counselor and alleges new evidence has been found. The counselor was known to all parties and subject to questioning and being called as a witness prior to trial. This also fails the first factor. Petitioner's issues with intake mistakes, limitations on how intake reports are taken, or mistakes in the counselor's written reports are and likely were best sorted out at the hearings in the DN matters. Anything relevant to the jury trial would have been handled through witness testimony and exhibits. Again, Petitioner's lack of understanding as to the differing procedures, purposes, and burdens of proof between DN cases and a felony criminal case does not constitute or create new evidence, nor does it support any finding of actual innocence. In addition, Petitioner has failed to allege any facts supporting her claim that her civil rights were wrongfully violated either pre- or post-trial.

V: Witness Tampering Part Two – Paula Sams and T.N. Similar to above, both of these witnesses were known to both parties well before trial. Petitioner again presents no new evidence here, as confirmed by the partial transcripts included. That Petitioner disagrees with

the outcome of her jury trial does not change this Court's analysis. There is also no procedural issue with these witnesses as far as an actual innocence claim.

VI: Prosecution Tampered with Public Record/Defendant Denied Pretrial Access to Witnesses. This was thoroughly analyzed by the Montana Supreme Court under Issue 1. Petitioner has not presented any new evidence that has arisen since trial, nor has any procedural issue arisen or been discovered since her conviction for Count I was affirmed that would support any claim of actual innocence under this heading.

VII: Prosecution Relied on False Written Statements/The Prosecution made false written statements to produce an indictment and uphold a conviction. Petitioner takes issue with the disparity in the facts presented at trial compared to those brief facts initially alleged by the prosecution prior to filing the Information. This is clearly not new evidence since trial and also does not constitute a procedural issue in support of any claim of actual innocence. The reason trials are scheduled out and continued is to ensure both parties are prepared to try the case on its merits and facts as they have been determined through the pretrial discovery process. Both the prosecution and defense thus often have notably different (and substantially more complete) understandings of the relevant facts at trial as compared to when a matter was originally charged.

VIII: Defendant's Right to a speedy trial violated. Defendant now claims her right to a speedy trial was violated under both the federal rules and the Montana rules. This Court notes that while Petitioner claims she never waived speedy trial, Dkt. No. 57 filed on February 26, 2019 in Fergus County DC-2018-56 contradicts that assertion. Speedy trial claims are not new evidence since trial and procedurally do support a claim of actual innocence.

IX: Unanimity Claim/Court Failure to Ask if Verdict was Unanimous. This issue too was addressed as Issue 3 by the Montana Supreme Court. The settling of jury instructions happens during trial, and Petitioner has provided no new evidence since trial on this claim. Likewise, this does not amount to a procedural error that supports her claim of actual innocence for Count I. As to whether the jury was polled after the verdict was published, that occurs following a request by either party. Petitioner takes issue with a split verdict, but that happens on a regular basis and is not a procedural issue.

X: Ineffective Trial Counsel. Petitioner spends a significant amount of time in parts of almost every claim denigrating and vehemently criticizing her trial counsel. Most relevant to this Court's analysis here is Petitioner's Ex. R, her trial counsel's detailed response to Petitioner's complaint to the Office of Disciplinary Counsel. Again, Petitioner is silent as to her counsel's representation for Count II, for which she was acquitted, but cannot cry "foul" loud enough as to her guilty conviction for Count I. While Petitioner strives to pin blame on her trial counsel (and the prosecutors, and DPHHS, and the children's counselors...), she still fails to offer any new evidence that has been obtained since trial and does not identify any procedural error supporting a claim of actual innocence for Count I. The Court notes that the appellate division did not even allege ineffective assistance of counsel as one of the issues on appeal. It was clear to this Court, through Exhibit R and the extensive citations to the transcripts recited by Petitioner, that this claim fails. Trial counsel represented Petitioner from the charges in August 2018 through trial in

January 2020. He[1] filed motions, interviewed witnesses, poured over documents, and vigorously cross-examined witnesses in an effort to discredit their testimony with the jury.

XI: Witness Tampering Part Three – Parental Alienation. Here, Petitioner realleges all of her history with both her first husband (the father of her daughters) and her second husband (the father of T.N., who was convicted of felonies in separate proceedings for molesting Petitioner's daughters). These arguments flow into her contorted claims that somehow both of these men, law enforcement, DPHHS, the children, the children's counselors, and the prosecutors all conspired together to create these claims out of thin air and separate her from her daughters. Petitioner, due to her lack of understanding of how criminal cases and DN cases proceed completely separately, spends an extensive amount of time criticizing that statutory scheme. Again, none of this is new evidence since trial and none of it raises any procedural issue with regard to an actual innocence claim. Petitioner further fails to realize that DPHHS and Child Protective Specialists are separate and distinct from the professional services provided to children by licensed counselors.

XII: Contradictory Witness Testimony = Perjury. This claim again goes to the determination by the fact finder (here, the jury) as to the weight and credibility of evidence admitted at trial. As Petitioner again references trial transcripts and information obtained from third-party sources in books or articles, there is no new evidence presented since trial with respect to any witness or exhibit. Petitioner's disagreement with the evidence presented is not

1. The Court also notes that while Petitioner's primary counsel throughout this matter was Mr. Larsen, Ms. LeCount also provided representation/assistance, particularly throughout the entirety of the jury trial in Petitioner's criminal case.

new evidence. Likewise, Petitioner fails to establish a procedural error not already addressed by the Montana Supreme Court that would support a claim of actual innocence.

Conclusion

In conclusion, this Court has determined the Petition and records supporting it conclusively show Petitioner is not entitled to relief on any of the grounds pled, either by statute or claims of actual innocence. The Court will thus not request a response from the State, nor will it hold a hearing.

IT IS HEREBY ORDERED:

1. *The Clerk of Court is directed to seal this matter pending further order of this Court. The Court may revisit this matter if/as requested to determine whether the public's right to know outweighs the individual privacy rights of the involved individuals. Petitioner did not properly redact, carefully sort and file, or lodge either personally identifying information for other persons or confidential criminal justice information.*
2. Petitioner's "Motion Under § 46-21-201(4) + 46-15-106, 46-15-322, MCA for Subpoena Duces Tecum to obtain DPHHS records records [sic] requested in this Motion for In Camera Inspection by this Court" (Dkt. # 4) is DENIED.
3. The Petition for Post Conviction Relief and Memorandum (Dkt. # 1) is DISMISSED with prejudice.

ELECTRONICALLY SIGNED AND DATED BELOW.

cc: Petitioner, *pro se*
Kent Sipe and Jean Adams, Fergus County Attorneys
Montana Attorney General's Office

Electronically Signed By:
Hon. Judge Heather Perry
Tue, Jan 16 2024 03:20:00 PM