

DA 22-0084

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 253

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BILLY LEE HENDERSON, III,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DV-2021-8  
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Mathew M. Stevenson, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant  
Attorney General, Helena, Montana

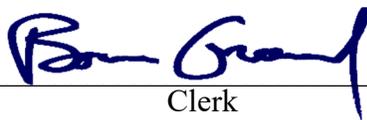
Matthew C. Jennings, Missoula County Attorney, Ryan Mickelson, Deputy  
County Attorney, Missoula, Montana

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Submitted on Briefs: November 16, 2022

Decided: November 6, 2024

Filed:

  
Clerk

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Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Billy Lee Henderson (Henderson) appeals the January 2022 judgment of the Montana Fourth Judicial District Court, Missoula County, denying and dismissing his petition for postconviction relief from his May 2019 conviction on the offense of Aggravated Sexual Intercourse Without Consent (F) (Aggravated SIWC). We address the following restated issue:

*Whether the District Court erroneously denied Henderson’s recantation-based newly discovered evidence of innocence claim for new trial based on erroneous evidentiary assessment standards under §§ 46-21-102(2) and -201(6), MCA?*

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 In November 2018, a jury found Henderson guilty of Aggravated SIWC and a multitude of other related felony and misdemeanor offenses<sup>1</sup> involving or related to his sexual and physical assaults of Jane Doe (Doe) over a period of five days in April 2018.<sup>2</sup> The jury also found him guilty on another eight counts of related Witness Tampering and Protective Order Violation based on his post-arrest attempts to persuade Doe to recant her incriminating pretrial statements to police detailing the occurrence and circumstances of

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<sup>1</sup> Assault with a Weapon, Partner/Family Member Strangulation, Partner/Family Member Assault (4 counts), Intimidation, Unlawful Restraint, and Criminal Mischief.

<sup>2</sup> See Judgment, *State v. Henderson*, Cause No. DC-32-18-276, Montana Fourth Judicial District Court (May 17, 2019).

the charged assaultive offenses.<sup>3</sup> The District Court ultimately sentenced Henderson to a net 75-year commitment to the Montana State Prison, with 25 years suspended, *inter alia*.

¶3 In 2018, Henderson had been living with Doe, and her three young children (ages 9, 6, and 2), since Fall 2017. Doe was five-months pregnant at the time of the events at issue. On appeal, the State summarized the pertinent trial evidence as follows:

In early 2018, Henderson began accusing Doe of cheating on him and monitored who she talked to and where she went. After returning from a trip on April 17, 2018, Henderson accused Doe of cheating on him with her ex-boyfriend while he was gone. Doe's two-year-old son was crying, and Henderson threatened to kill him if she did not make him be quiet. After Doe took her son upstairs to be with his sisters (ages 9 and 6), Henderson punched holes in the walls and broke a table. Henderson grabbed Doe around the face and squeezed while yelling that she had been unfaithful. Henderson also slapped Doe so hard he knocked her to the floor and her nose bled.

Henderson, who was a mixed martial arts fighter, continued to beat Doe and then strangled her repeatedly to just shy of the point of unconsciousness. After letting her up, Henderson shoved her onto the couch and punched her in the leg, leaving fist-sized bruises. Doe screamed for him to stop and asked why he was so angry. Henderson continued physically assaulting and strangling Doe for hours until early the next morning.

In the morning, when Doe's son began crying again, Henderson resumed his destruction of her apartment and furniture[,] and again beat and strangled her. Henderson dragged her by her hair, slammed her head into the wall, and again strangled her to the brink of unconsciousness. Doe continued asking Henderson what she did wrong and begged him to stop hurting her. Henderson did not allow Doe to leave his [presence]. . . . [W]hen she was allowed to sit on the couch, he took the safety clip off a can of bear spray and threatened to spray her. Henderson also pushed a BB gun to Doe's head and threatened to pistol-whip her. . . . Doe could not call for help because Henderson broke her landline and cell phones, and she was too scared to leave without her children.

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<sup>3</sup> *Id.*

Henderson pawed through Doe's laundry and bags looking for proof she was cheating on him[,] and [then] dragged her upstairs to look through her dresser. When he found nothing, Henderson ripped Doe's shirt and sweatshirt[,] and tried to rip off her bra[,] but . . . [left it] around her neck [when he was unable to rip the elastic]. Henderson [then removed] Doe's pants[,] . . . tr[ied] *to force her to give him oral sex*[,] and then subjected her to] *vaginal intercourse . . . without her consent*.

. . . .

Doe continued to try to convince Henderson she had not cheated on him and that he should get some sleep. Henderson rested most of April 21, but when he awoke the next day, he was still in a rage and screamed at Doe and punched more holes in the wall. Henderson poured milk over Doe's head . . . and then began choking her again and bent her fingers back until she screamed in pain. Henderson dumped hand sanitizer into Doe's eyes, and she curled up into a ball to protect her face. Henderson eventually went up to the bedroom[,] and [then] Doe convinced him she needed to get some food and she was able to leave.

Doe went to the police station and reported the physical assaults Henderson had committed against her. [She] initially told [officers] that Henderson had ripped her clothes off, [but] she stated he did not do anything further. Doe later [said] that *Henderson "had asked her for sex in a way that made it seem like, if she didn't provide him with sex, that he would harm her in some way."* A female officer documented and photographed Doe's injuries.

. . . .

[O]n April 23, 2018, [a police detective] arranged to meet with Doe the next day. That night, Doe wrote down the chronology of events, "because so much had happened over the course of those five days, and I wanted to keep my timeline accurate of what happened first, next, so forth." Doe detailed the sexual intercourse without consent in her handwritten notes. The next day, Doe verbally described the event to the detective and [a] victim advocate, including Henderson's sexual assault. Officers photographed the multiple injuries to Doe's face and body, documented the damage to her apartment, and collected Doe's ripped clothing, the bear spray, and the BB gun.

(Record citations omitted—emphasis added.) As summarized by the State, Henderson contrarily testified that:

[he and Doe] had consensual sex . . . on April 17, 2018, and [that] the only physical altercation that occurred happened the next night when . . . Doe became upset with him for texting other women. Henderson testified that Doe threw her cell phone at him, and it broke against the fireplace. [He] claimed Doe grabbed a knife from the kitchen and held it to her throat and [that] he [then] grabbed her wrist[,] . . . got the knife away[,] . . . pushed her against the wall, put his face close to hers, and yelled that she needed to stop. [He] said the back of her head hit the wall and his cheek hit her orbital bone, causing a bruise. Henderson had no answers for how Doe received all the other bruising observed by the officers and medical professionals. [He] further testified that all the damage to Doe’s apartment was done by someone else.

(Record citations omitted.) Henderson does not dispute the accuracy of the State’s trial evidence summaries on appeal.

¶4 On direct examination at trial, Doe described the circumstances of the sexual assault as follows:

[Doe]: Um, yeah. Um, he kind of was . . . going through my things. Like my garbage and . . . my laundry basket and dressers. Kind of, like, making a mess, looking through my stuff to see if he could find any evidence like a condom wrapper or anything of me cheating on him. So we ended up back upstairs in my bedroom because he was going through my things up there. And then he just, for some reason, decided to rip my clothes off. *And he grabbed my clothes down the middle of my front sweatshirt, and ripped both of my shirts all the way down, took my pants off.* And I—I had my bra still around because he couldn’t rip the elastic, so it was still around me at that time. And he *tried to basically force me to give him oral sex.* He was pushing my head, like, down to his genital area, and I wouldn’t cooperate. Obviously, I wasn’t in the mood for anything like that being what was going on. So *because I refused to do that,* he grabbed my bra to . . . take it off and he *choked me with my bra* and then kind of . . . tossed that off to the side. And *that’s when he had sex with me when we were on the floor;* like kind of in my hallway by my bedroom.

[State]: Did you verbalize that you did not want to have sexual intercourse at that point in time?

[Doe]: Yeah. *I told him no*, I didn't want to do this right now. That—

[State]: How did he respond to that?

[Doe]: *He didn't care*. He just said, I don't care, more or less. He was going to do what he wanted anyways.

(Emphasis added.) On cross-examination, Doe admitted she did not make any allegation of non-consensual intercourse in her initial report at the police station. When questioned about her subsequent statements to Henderson in pretrial jail phone calls, she acknowledged saying that she did not know why the State charged him with “rape,” but explained that, at the time, she “didn't understand” the difference between the definitions of sexual intercourse without consent and “rape.” On redirect, she further explained:

[State]: There was some discussion as well about what's been called the rape or sexual intercourse without consent. Were you in a relationship at the time with [Henderson]?

[Doe]: Yes.

[State]: How did you perceive the nonconsensual sexual encounter at the time?

[Doe]: Um, it doesn't feel like rape to me just because I was pregnant with his baby and we had been in a sexual relationship for quite some time, and even in the past when we were friends. I didn't really feel like it was rape. *But, then, I wasn't consenting to it*. I didn't want to do it at the time. So I guess it was just kind of a not clear definition of what it was, I guess, for me.

[State]: Did that affect your reporting . . . when you initially went in?

[Doe]: No. I just didn't think about it when I initially reported it. I was more worried about the fact that I was hurt, and just making my house safe again for my kids and me. I reported that when they came over to my

house because, once we started from the beginning, I was able to really think about everything that happened and then get all the evidence that reminded me of what had happened. Because I kind of had forgotten about that part until they came over and saw the clothes.

(Emphasis added.)

¶5 In July 2019, Henderson filed a notice of appeal of his May 2019 judgment of sentence and conviction. However, in January 2021, before filing a brief specifying the grounds for his still-pending appeal, Henderson filed a verified postconviction relief (PCR) petition in district court for a new trial pursuant to § 46-21-102(2), MCA (1997). The petition alleged newly discovered evidence that Doe had subsequently recanted key aspects of her incriminating trial testimony, instead asserting that the otherwise undisputed sexual intercourse at issue was in fact consensual. The petition sought judgment vacating his Aggravated SIWC conviction, and for retrial on that offense “if the State wishes.”

¶6 The alleged recantation occurred over a series of recorded post-sentencing prison telephone conversations between Henderson and Doe between August 11th and 14th, 2019, and similar unsworn statements later made by Doe to Henderson’s counsel in a recorded interview. The cited supporting documentary evidence included audio recordings of various prison telephone conversations between Doe and Henderson, and the subsequent recorded interview of Doe conducted by Henderson’s counsel. In pertinent part, the recordings included the following statements made by Doe:

**Prison Call No. 8688426**

[W.H.]: You never fucking told me “no” once . . . and you know that’s fucked up.

[Doe]: Yeah, that—that was never supposed to happen, there was never supposed to—I did not press charges on [the sexual intercourse], so I’m sure that can be overturned very easy.

[W.H.]: Why did you ever say that you said “no” to me, you never did. You never told me “no.”

[Doe]: Not that part, that’s where it gets misconstrued. It was when you were trying to force me to give you [oral sex] where I was like, “no.” You were being a fucking asshole. Seriously, though, I’m not going to be turned on by . . . being *beat up and getting choked* and shit.

**Prison Call No. 8695984**

[Doe]: Billy, *you ripped my clothes off. I did not willingly take them off.*

[W.H.]: You were fucking down with that though. You act like I did it forcefully. I did not do that forcefully.

[Doe]: Yeah, I was thinking about that last night. But, you were too busy being an asshole to listen. . . . I’m not [lying]. Like I said, I was thinking about it last night, and I don’t remember ever saying “no.” . . . *Maybe I didn’t say no.* But it still wasn’t the way you said it either.

[W.H.]: How would you not remember you saying that you said “no,” but like all of a sudden in the fucking police report, and up on the stand[,] that you said you said “no” several times.

[Doe]: I meant that I didn’t say that.

[W.H.]: Yes you did.

[Doe]: . . . But I also was confused about what they meant by that, and I told them that at the time, and they should have that too.

[W.H.]: No. You tried to lie your way out of it.

[Doe]: No I didn’t! I motherfucking told them I didn’t say “no,” but they asked how my clothes got ripped off and shit and I said, *obviously I didn’t want to do it in the middle of us fighting.* But I never said I vocalized that.

[W.H.]: . . . You’re trying to fucking take advantage of a situation because you were pissed at me.

[Doe]: Advantage of a situation? No, I fucking wasn't. *You actually made me afraid of you* which you should never fucking do to somebody. You understand that? When you are, like, basically a weapon in yourself you probably shouldn't make a female scared of you, ever.

**Prison Call No. 8701724**

[W.H.]: You have me in [prison] on something I didn't do, like, and that's the main thing.

[Doe]: No, I'm gonna talk to them, because I never said to press charges [regarding the *sexual* intercourse]. I never said that I said "no." I said I was pissed off at the time. . . . They forced me into things that I didn't want to do. . . . [T]hat ain't right to make me, . . . and then like, using my kids as a fucking way to scare me. . . . [T]hey really did that.

**Doe's Subsequent Recorded Interview Statements to Henderson's Counsel**

I told . . . investigators over and over that I never felt like I was raped. I think they kind of—I want to say it's more of a misunderstanding on what consent meant in Montana. . . . I asked several times what they meant by consent. And, I never told him "no." . . . [T]he only thing I think they're going off of is that he had ripped my clothes off. . . . [B]ut that doesn't prove that he raped me. Like there was no forcing. Like, I didn't fight back, or anything like that . . . and I was just wondering if there's any way for me to recant that, . . . since he's already been sentenced.

. . . [T]hat's the other thing, um, I'm really upset about, is I never wanted to testify and I felt like I didn't have a choice. They pretty much told me I had to do that. And if I would have known what I know now, I never would have testified. I would have just told them I didn't remember the whole time on the stand. . . . I still just felt so forced into the situation, to do that, and I just feel it was kind of traumatic on me. . . . I feel like, just, they just pressured me and kind of talked me into things that I don't think I would have said or done on my own. . . . I just don't know anything about courts or how anything goes so I just kind of trusted them and went with them and I feel like they took advantage of that, and my situation.

. . . .

This happened over days. . . . I have other older kids and they were—I was getting them ready for school, taking them to school, . . . so, I mean, I don't really feel that I was trapped, necessarily, because I could have left during those times that I went out of the house. But sometime during those days that we ended up having sex, and yeah he did rip my clothes off, but the rest of it wasn't forced. That was the only

part that was aggressive about it, was that he ripped my clothes, my sweater. It wasn't like the underneath, like my bra, my underwear, or my pants, it was just two shirts, a sweater, and then like a short sleeved shirt. He ripped my shirt. . . . But I did consent, because I was just like . . . mad at him at the time, yeah, because we were fighting, whatever, that's normal, but I still, like, love him and was with him. We were in a relationship, so I did have sex with him, and then, I don't know, I guess he kind of got better after that, and things calmed down.

. . . .

[I]t wasn't aggressive when, like, we had sex or anything, . . . he didn't hold me down, like, nothing like that.

. . . .

[T]here was a lot of confusion. I know if you listen to the recording you can hear me asking [police] several times like, "I don't understand what consent means, I'm confused, I don't know what you're meaning by that." And several times I said, "Oh, I don't feel like this was rape at all, not rape." . . . I definitely agreed to [the sexual intercourse].

. . . .

I think I misunderstood what they were saying, and misunderstood the severity of what they were talking about.

¶7 Upon review of Henderson's supported petition, the District Court ordered a State response and later conducted an evidentiary hearing pursuant to § 46-21-201(1)(a) and (5), MCA. At the subsequent August 2021 evidentiary hearing, Doe gave the following sworn account of the circumstances at issue:

About three or four hours [after the most recent assault], . . . we had went upstairs into my bedroom, and we were both . . . about to go to sleep. And I went . . . into the bathroom because I was going to take a shower and go get something to eat. And then [Henderson] came in there, and *he ripped my shirt*, my like sweatshirt, and then a tee shirt. And then I had a bra that was still on and pants underneath. . . . After *my clothes were ripped*, it was a few minutes before [any sexual contact] because we were talking for about ten minutes. . . . We weren't fighting anymore and [he] was being nice to me and saying I looked good and things like that. So, I had a change of heart

and went over by him to talk to him. And that's kind of where it kind of turned sexual. We started . . . we were kissing and stuff like that. And then *I am the one who took my clothes off myself*. And, sorry, it's embarrassing to talk about.

. . . .

I was going to get into the shower, so *I had taken my clothes off* to get into the shower. And then that's when he started talking to me again and saying I looked good. And I went back over to him and gave him a hug, and we started kissing and stuff. And it kind of led to the floor. And then once we were on the floor, he kind of like was hinting that he wanted me to perform oral sex. He kind of like pushed my head down. *And that's when I was saying no. That's the only time I said no.* I said, no, I don't want to do that because you don't deserve it right now. I'm mad at you still. I'm not going to do that right now. And then he asked, well, is it okay if I do it to you instead so you won't be mad at me anymore? And I said sure. And then that's when he started to perform oral sex on me. . . . [N]ot long after he started performing oral sex, *I was wanting* [intercourse] then and *I voiced that*, because I asked him to lay down and switch positions for me to get on top. . . . [The sexual activity continued for] [a]bout an hour and a half, I would say.

When asked whether, “at any point during that hour and half period,” she told Henderson, “no,” “stop,” “I don't like this,” “this needs to end now,” or said “anything whatsoever to discourage him from continuing in the sexual encounter,” Doe repeatedly answered that she did not, but rather, that she had encouraged Henderson to continue. Acknowledging the significant discrepancy between her contemporaneous account to police and her inconsistent postconviction hearing testimony, Doe explained that:

I think just my anger with [Henderson] and being so upset and feeling like if I did not cooperate with . . . convict[ing] [him], that I would lose custody of my children, [including] my baby that wasn't born yet. And that's what really scared me into saying things that weren't true.

. . . .

I didn't want to testify at all. I expressed that numerous times that I didn't want to testify and have him really convicted of it. . . . I guess just with the amount of them coming over and the reports that they were bringing, I felt intimidated that they would take my kids if we were back together and he was in the home.

As to the similar inconsistency between her incriminating trial testimony (i.e., "I told him no, I didn't want to do this right now," and "I wasn't consenting to it") and contrary testimony at postconviction hearing, Doe asserted that she was still experiencing postpartum distress and related "short-term amnesia" at trial, and was thus "confused" as to "the meaning of consent" and misunderstood the prosecutor's questions. Despite being confronted with her trial testimony, she further inconsistently equivocated that "I didn't say yes to consent, but I also didn't say no," so "that's where I got confused."

¶8 In addition to pointing out her directly contradictory trial testimony, the State further rebutted Doe's postconviction recantations with her recorded contemporaneous statements to police that Henderson "*forced [her] to have sex with him*"; "*when I told him no,*" it "*angered him to just basically force me into it*"; "[t]hat's when he just *tore my clothes in half* . . . [a]nd then he just *pulled my pants and bra off to force it*"; and "[h]e tried to get me to perform sexual acts on him first," and when "I wasn't . . . cooperative[,] . . . *he aggressively just forced me into it.*" (Emphasis added.) She further elaborated that:

I just stopped fighting back because I would rather not get hit or choked anymore. So I just figured it would be better to give in to protect that I'm pregnant. . . . *He just pretty much overpowered me. I wasn't strong enough[,] [s]o he just like forced my legs apart, and that was it. . . . I was trying to push him away . . . the best I could, but he was just too strong. . . . I told him to stop. The entire time I told him no. So he knew it was not consensual.*

(Emphasis added.)

¶9 In January 2022, the District Court issued a written order denying and dismissing Henderson’s petition on the stated summary grounds that Doe’s asserted recantations were not “new” evidence, of “minimal additional weight or credibility,” and in any event “insufficient” to warrant “the relief sought.” The court reasoned that Doe’s subsequent assertions that the sexual intercourse was consensual “may provide more specificity,” but were still largely consistent with her trial testimony. To the extent not, the District Court found that Doe’s asserted recantations were in any event of “minimal additional weight or credibility” in light of her “other inconsistent” testimony and Henderson’s “history of victim tampering” in this case. Henderson timely appealed.

#### STANDARD OF REVIEW

¶10 We review district court denials of petitions for postconviction relief under § 46-21-102(2), MCA (newly discovered evidence of innocence), for whether the court’s pertinent findings of fact were clearly erroneous, whether its conclusions and applications of law were correct, and whether any exercise of lawful discretion was an abuse of discretion. *Marble v. State*, 2015 MT 242, ¶¶ 13, 31, and 36, 380 Mont. 366, 355 P.3d 742; *Wilson v. State*, 2010 MT 278, ¶ 16, 358 Mont. 438, 249 P.3d 28; *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. An abuse of discretion occurs if a lower court exercises lawful discretion based on a clearly erroneous material finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991; *State v. Derbyshire*, 2009 MT

27, ¶ 19, 349 Mont. 114, 201 P.3d 811. Lower court findings of fact are clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, upon our independent record review, we are firmly convinced that the court was otherwise mistaken. *State v. Hoover*, 2017 MT 236, ¶ 12, 388 Mont. 533, 402 P.3d 1224. We review lower court conclusions and applications of law de novo for correctness. *State v. Christensen*, 265 Mont. 374, 375-76, 877 P.2d 468, 469 (1994).

### DISCUSSION

¶11 At issue is Henderson’s asserted claim under § 46-21-102(2), MCA (1997) (exception to 1-year period of limitations for postconviction claims alleging “newly discovered evidence that . . . would establish that the petitioner did not engage in the criminal conduct for which . . . convicted”), based on Doe’s asserted postconviction recantations of her incriminating trial testimony to the effect, *inter alia*, that she did not say “no” to the undisputed sexual intercourse, it “wasn’t forced,” it was consensual despite her anger with him “because [they] were fighting,” and that she was “pressured” to testify to the contrary. Citing *Crosby v. State*, 2006 MT 155, ¶ 21, 332 Mont. 460, 139 P.3d 832 (issue on recantation-based post-verdict motion for new trial under § 46-21-102(2), MCA (1997), is not whether “the recantation is true” but ultimately under the fifth “*Clark* factor” whether the new evidence establishes a “reasonable probability” that retrial would “result[] in a different outcome”), *overruled by Marble*, ¶¶ 29-31, Henderson petitioned for judgment vacating his Aggravated SIWC conviction for retrial. On appeal, Henderson acknowledges that *Marble* eliminated consideration of a reasonable probability of a

different outcome from the PCR claim analysis under § 46-21-102(2), MCA (1997), but nonetheless asserts that it left “new questions” regarding the “fundamental fairness” of our interpretation of § 46-21-102(2) by failing to identify the necessary “quantum of proof” for such claims, and leaving other analytical “ambiguities” as to “distinctions in claims” cognizable under § 46-21-102(2), and the “burdens of proof” applicable thereto.<sup>4</sup> Henderson asserts that, in context of that analytical uncertainty, the District Court erroneously made improper factual determinations regarding the ultimate credibility and probative weight of the asserted new evidence.

¶12 The State does not dispute Henderson’s assertion that *Marble* left significant analytical questions and ambiguities regarding newly discovered evidence of innocence claims asserted under § 46-21-102(2), MCA. It asserts, however, that the District Court in any event ultimately found and concluded correctly that Doe’s asserted post-trial recantations were insufficient to prove that Henderson “did not engage in the criminal conduct for which . . . convicted” as required by § 46-21-102(2), MCA. We agree with the State at bottom, but agree with Henderson that our jurisprudence regarding newly discovered evidence claims under § 46-21-102(2), MCA, remains uncertain, vague, and still-confusing in the wake of *Marble*. We further agree that, though ultimately correct at bottom, the District Court’s summary reasoning was hampered by the still-confusing state

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<sup>4</sup> Appellant’s Opening Brief, pp. 6-10 (citing *Marble*, ¶ 57 (McKinnon, J., concurring and dissenting)).

of our pertinent jurisprudence, and that further clarity is thus necessary for proper review here.<sup>5</sup>

A. Pre-1967 Remedies for Collateral Postconviction Review of State Criminal Convictions.

¶13 Before 1967, the common law writs of habeas corpus and error coram nobis were the exclusive Montana law remedies available for collateral postconviction review of new evidence based claims challenging the validity of Montana criminal convictions and sentences. *See Lott v. State*, 2006 MT 279, ¶¶ 9-10, 334 Mont. 270, 150 P.3d 337; *Butler v. State*, 139 Mont. 437, 438-39, 365 P.2d 822, 823 (1961); Jeffrey T. Renz, *Post-Conviction Relief in Montana*, 55 Mont. L. Rev. 331, 332 (1994) (hereinafter, Renz). Stemming from the English Magna Charta, the ancient writ of habeas corpus was well-established at common law in colonial America, and then later preserved without

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<sup>5</sup> We note, however, the manifest procedural irregularity of Henderson’s asserted claim under § 46-21-102(2), MCA, as pled and disposed of below. As a threshold matter, Henderson filed the petition through counsel while his direct appeal on the subject conviction was still pending, and with no express or implied assertion that he had “no adequate remedy of appeal” therefor. *Compare* § 46-21-101(1), MCA (authorizing postconviction review of convictions based on alleged illegality for which there is “no adequate remedy of appeal”). The petition asserted that it was nonetheless timely-filed by citation to the general principle recognized in *Davis v. State*, 2008 MT 226, ¶ 23, 344 Mont. 300, 187 P.3d 654, that the 1-year PCR claim limitation period specified by § 46-21-102(1), MCA (1997), “constitutes a rigid, categorical time prescription that governs post-conviction petitions,” but “does not circumscribe” district court “subject matter jurisdiction.” Nor did the petition indicate, much less explain, how or on what basis § 46-21-102(2), MCA (1997), was even applicable here given that, as a matter of law, it is no more than an express exception to the 1-year period of limitations specified by § 46-21-102(1), MCA (1997), for postconviction claims otherwise cognizable under § 46-21-101(1), MCA (authorizing postconviction review of convictions based on alleged illegality for which there is “no adequate remedy of appeal”). Those irregularities do not implicate a threshold lack of subject matter jurisdiction or justiciability, however. We will thus address the pertinent issues in context of the manner in which Henderson’s claim was pled and litigated below—as a timely-filed newly discovered evidence of innocence claim asserted under § 46-21-102(2), MCA (1997).

definition or limitation in both the United States Constitution and our subsequent 1889 and 1972 Montana Constitutions. *See* U.S. Const. art. I, § 9 (“privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it”—case altered); 1889 Mont. Const. art. III, § 21 (mirroring U.S. Const. art. I, § 9); 1972 Mont. Const. art. II, § 19 (“privilege of the writ of habeas corpus shall never be suspended”); *Lott*, ¶¶ 5-10 (noting common law, federal law, and pre-1967 Montana history of habeas writ); *Fay v. Noia*, 372 U.S. 391, 399-438, 83 S. Ct. 822, 827-48 (1963) (tracing common law and federal statutory evolution of habeas writ), *overruled and ultimately abrogated on other grounds by Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497 (1977), and *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991).<sup>6</sup> Confined to its traditional scope, common law habeas corpus was an independent remedy for review, and potential release, of a person alleged to be imprisoned or otherwise physically restrained by government action without or in excess of established legal authority. *See Fay*, 372 U.S. at 399-438, 83 S. Ct. at 827-48 (discussing original and

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<sup>6</sup> The Legislature has nonetheless long-endeavored to define and limit by statute the substantive and procedural essence of the constitutionally-preserved common law writ of habeas corpus. *See* Title 46, ch. 22, MCA (formerly Title 95, ch. 27, RCM (1947) (1967), as amended); §§ 94-101-1 through -33, RCM (1947); § 12348, et seq., RCM (1935); § 12348, et seq., RCM (1921); § 9630, et seq., RCM (1907); Title XII, §§ 2740-72, Penal Code (1895); Ch. XXVII, § 660, et seq., Rev. Territorial Statutes (1878). *Compare In re Hart*, 178 Mont. 235, 237-38, 583 P.2d 411, 412-13 (1978) (noting habeas corpus as “a prerogative common-law writ of ancient origin” the “provisions [of which] were not enacted[] in the first instance . . . but antedate” statutory enactment—citing *State ex rel. Brandegee v. Clements*, 52 Mont. 57, 59-61, 155 P. 271, 272-73 (1916) (noting nature of habeas claim as a collateral civil remedy rather than a special criminal proceeding regardless of Penal Code inclusion)); *see also* § 12348, RCM (1921), *History Note* (noting that first Montana codification of the common law writ of habeas corpus in §§ 1-36, Bannack Statutes (1871), was adopted from the then-existing California Penal Code).

expanded scope of writ in constitutional due process context). *Accord Lott*, ¶¶ 5-10 (citing *August v. Burns*, 79 Mont. 198, 213, 255 P. 737, 741 (1927) (*inter alia* citing § 12348, RCM (1921))).<sup>7</sup> Subject to various evolving jurisprudential and statutory procedural constraints, the scope of federal habeas review later expanded significantly to also serve as a broader remedy for collateral review of postconviction imprisonments for conformance with various due process and fair trial rights provided or protected by the United States Constitution. *See McCleskey v. Zant*, 499 U.S. 467, 477-96, 111 S. Ct. 1454, 1461-71 (1991) (“common-law limitations” on “scope” of habeas review were subject to various expansive” jurisprudential and statutory “forces” particularly post-1867 “when Congress extended federal habeas [review] to prisoners held in state custody”); *Fay*, 372 U.S. at 399-438, 83 S. Ct. at 827-48 (noting expansive evolution of scope of federal habeas review but also noting similarly broad purpose/scope of original medieval English common law writ). We have occasionally more broadly applied the Montana law habeas remedy in similar fashion when necessary to avoid a manifest miscarriage of justice. *See State v. Little Coyote*, 2023 MT 243, ¶¶ 4 and 10, 414 Mont. 299, 539 P.3d 1142; *Lott*, ¶¶ 7-22;

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<sup>7</sup> *See similarly Lott*, ¶ 20 (since “the Magna Charta” the purpose of the habeas writ is as a legal remedy to be “liberally employed” to “correct . . . extreme malfunctions” and resulting “grievous” “miscarriage[s] of justice” in the operation of legal “justice systems” in restraint of individual physical liberty—citations omitted); *Hart*, 178 Mont. at 237, 583 P.2d at 413 (habeas corpus “is the remedy . . . for the enforcement of the civil right of personal liberty” necessitated in the criminal context, “not to inquire into . . . the right of liberty notwithstanding” the “criminal act” at issue); *August*, 79 Mont. at 213, 255 P. at 741 (noting “purpose of . . . habeas corpus . . . to determine the legality or illegality of the restraint alleged to be exercised . . . independent of the legal proceeding under which the detention is sought to be justified”). *But see In re Lockhart*, 72 Mont. 136, 138, 232 P. 183, 184 (1924) (habeas writ unavailable for review of mere of procedural error—only for release of petitioner imprisoned in excess of jurisdiction or without “authority to render” imprisonment).

*State v. Perry*, 232 Mont. 455, 462-63, 758 P.2d 268, 272-73 (1988) (affording review of otherwise time-barred postconviction review claim “sound[ing] in the nature [of] habeas corpus” in re recantation-based newly discovered evidence of innocence claim), *overruled on other grounds by State v. Clark*, 2005 MT 330, ¶ 32, 330 Mont. 8, 125 P.3d 1099.

¶14 In contrast to the common law writ of habeas corpus, the common law writ of error coram nobis developed in the criminal law context as a narrow remedy for direct review, by the trial court that rendered the subject judgment of conviction, of an alleged *evidentiary error* not raised at trial but nonetheless “affect[ing] the validity and regularity of the proceeding” that resulted in the criminal conviction at issue. *Butler*, 139 Mont. at 438-39, 365 P.2d at 823. As of the mid-20th century, however, various state courts had further expanded the scope of coram nobis review beyond alleged evidentiary error for general postconviction review of alleged constitutional errors not amenable to review on direct appeal. Brian R. Means, *Postconviction Remedies* § 3:4 (Updated ed. 2024) (*inter alia* noting U.S. Supreme Court criticism of “snarl[ed]” Illinois “merry-go-round” patchwork of common law postconviction habeas and coram nobis remedies—citing *Marino v. Ragen*, 332 U.S. 561, 563-70, 68 S. Ct. 240, 241-45 (1947) (Rutledge, J., concurring) (decrying patchwork of Illinois habeas and coram nobis rules as an obstacle to federal adherence to exhaustion-of-state-remedies limitation on federal habeas review of state convictions)).<sup>8</sup>

#### B. 1967 Montana Post-Conviction Procedure and Habeas Corpus Acts.

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<sup>8</sup> Compare *In re Lindley*, 177 P.2d 918, 928 (Cal. 1947) (noting coram nobis review as “more narrowly restricted than . . . habeas corpus” and thus “not broad enough to reach every case in which there has been an erroneous or unjust judgment on the sole ground that no other remedy exists”).

¶15 In 1967, following the lead of various other federal, state, and proposed uniform state law efforts to reform and supersede the varying patchwork of common-law based postconviction review remedies with a uniform statutory PCR remedy intended to enhance the finality of criminal convictions, the Legislature enacted the Montana Post-Conviction Hearing Act (MPCHA), and an accompanying set of new habeas corpus statutes, as distinct subparts of the new Montana Code of Criminal Procedure. See Title 95, chs. 26-27, RCM (1947) (1967) (1967 Mont. Laws ch. 196, § 1) (now Title 46, chs. 21-22, MCA, as amended); *Lott*, ¶ 11.<sup>9</sup> The Legislature intended and attempted to provide that the MPCHA would thereafter be the exclusive state law remedy for collateral PCR of Montana criminal convictions to the exclusion of state habeas corpus review, common law coram nobis review, “or other common law or statutory remedy.” See § 95-2601, RCM (1947) (1967) (now § 46-21-101(1), MCA); *Lott*, ¶ 11; *In re McNair*, 189 Mont. 321, 323, 615 P.2d 916,

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<sup>9</sup> Though not designated as a distinct Act in the 1967 legislation, we have informally referred to Title 95, ch. 26, RCM (1947) (1967) (now Title 46, ch. 21, MCA, as amended), as the MPCHA because it was “derived from the Uniform Post-Conviction Procedure Act” (UPCPA) and a similar Illinois statutory PCR remedy, thus rendering it “essentially similar to” the distinct non-habeas PCR remedy provided to incarcerated federal convicts in 28 U.S.C. § 2255 (1948). See *Coleman v. State*, 194 Mont. 428, 432, 633 P.2d 624, 626 (1981). Accord *Renz* at 334-35. See similarly *Lott*, ¶ 11; *In re McNair*, 189 Mont. 321, 323-25, 615 P.2d 916, 917-18 (1980) (construing § 46-21-102, MCA, in accordance with “comparable federal statute” (28 U.S.C. § 2255), cited interpretive authority, and UPCPA); *In re Jones*, 176 Mont. 412, 414-15, 578 P.2d 1150, 1151-52 (1978) (noting “substantial conformity” of original Montana statutory PCR scheme with the 1955 UPCPA). See also *Davis v. United States*, 417 U.S. 333, 342-44, 94 S. Ct. 2298, 2303-04 (1974) (noting that 28 U.S.C. § 2255 federal PCR remedy “was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus” but with added benefit of minimizing certain practical “difficulties” while still “mirror[ing]” federal habeas remedy “in operative effect”).

917 (1980); *Renz* at 334.<sup>10</sup> The MPCHA thus provided for collateral PCR of criminal convictions allegedly “imposed in violation of” the United States Constitution, the Montana Constitution, or other provisions of Montana law for which the petitioner had “no adequate remedy of appeal.” Section 95-2601, RCM (1947) (1967) (now § 46-21-101(1), MCA).<sup>11</sup> As “appropriate” to the issue in a particular case, the range of ultimate PCR remedies included sentence correction or revision, resentencing, new trial, and exonerative release or “discharge as may be necessary and proper.” Section 95-2605, RCM (1947) (1967) (now § 46-21-201(6), MCA). The MPCHA originally imposed no procedural time-bar and required only that there have been no “adequate remedy of appeal” for the asserted postconviction claim,<sup>12</sup> but required that all available grounds of collateral attack

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<sup>10</sup> Unlike the habeas corpus remedy, the common law writ of error coram nobis was not constitutionally protected and was thus effectively abolished by MPCHA § 95-2601, RCM (1947) (1967) (now § 46-21-101(1), MCA). *See State v. Barrack*, 267 Mont. 154, 159-62, 882 P.2d 1028, 1031-32 (1994). *See also* M. R. Civ. P. 60(e) (Oct. 1, 2011) (abolishing common law “writs of coram nobis” pursuant to Mont. Const. art. VII, § 2(3)).

<sup>11</sup> MPCHA claims are independent civil claims for collateral review of a criminal conviction rather than an extension or form of criminal appeal. *State v. Boucher*, 2002 MT 114, ¶ 17, 309 Mont. 514, 48 P.3d 21 (citing *Coleman*, 194 Mont. at 433, 633 P.2d at 627).

<sup>12</sup> Though the “no adequate remedy of appeal” language of § 95-2601, RCM (1947) (1967) (now § 46-21-101(1), MCA), seemingly implied a statutory procedural waiver of PCR claims that either were, or reasonably could have been, earlier reviewed on direct appeal, application of equitable res judicata accomplished the same result by barring PCR claims that were previously raised, or could have been raised, on direct appeal absent a showing of a “fundamental miscarriage of justice.” *Rudolph v. Day*, 273 Mont. 309, 311-12, 902 P.2d 1007, 1008 (1995) (citing *State v. Baker*, 272 Mont. 273, 280-82, 901 P.2d 54, 58-59 (1995)); *Coleman*, 194 Mont. at 432 and 438-39, 633 P.2d at 626 and 630-31 (“provisions of § 46-21-101, et seq., MCA, are derived from the [UPCPA] and are essentially similar to” the PCR remedy provided to federal convicts in 28 U.S.C. § 2255—thus adopting *Sanders v. United States*, 373 U.S. 1, 15, 83 S. Ct. 1068, 1077 (1963), construction of 28 U.S.C. § 2255 to similarly hold that equitable res judicata is applicable to MPCHA PCR claims previously raised and dispensed with on the merits on direct appeal except where “ends of justice” demand otherwise).

be asserted in a petitioner’s first or amended MPCHA petition. Sections 95-2601, -2604, and -2607, RCM (1947) (1967) (later §§ 46-21-101, -102, and -105 MCA (1979)).<sup>13</sup>

¶16 As noted, *supra*, the Legislature attempted to correspondingly limit the scope of the state law habeas remedy to review of the threshold legality of government restraints of physical liberty not based on a criminal conviction. *See Lott*, ¶ 11; *McNair*, 189 Mont. at 323, 615 P.2d at 917; *Renz* at 354 (noting “express [MPCHA] intent” to “limit the scope of habeas corpus to its historical position in Montana”—quoting Montana Criminal Law Commission Foreword to Proposed Montana Code of Criminal Procedure (1966)).<sup>14</sup> We

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<sup>13</sup> By its express terms, the procedural waiver provision of § 95-2607, RCM (1947) (1967) (later § 46-21-105, MCA (1979)), did not apply to alleged constitutional errors, only alleged non-constitutional errors.

<sup>14</sup> Regardless of the Criminal Law Commission’s statement of intent to limit the scope of the new 1967 statutory habeas remedy to government restraints of liberty *not* based on criminal conviction, it is unclear to what extent the new 1967 statutory formulation materially differed in substance from the prior statutory formulation that had been codified since before statehood. *See* § 46-22-101(1), MCA (originally § 95-2701, RCM (1947) (1967) (“person imprisoned or otherwise restrained of liberty” may petition for “writ of habeas corpus to inquire into the cause of the imprisonment or restraint and . . . be delivered” therefrom “if illegal”)); *compare* § 94-101-1, RCM (1947) (1965) (formerly § 12348, et seq., RCM (1935); § 12348, et seq., RCM (1921); § 9630, et seq., RCM (1907); Title XII, § 2749, et seq., Penal Code 1895; Ch. XXVII, § 660, et seq., Rev. Territorial Statutes (1879)—“person *unlawfully imprisoned or restrained* of his liberty, under any pretense whatever, may [petition for] writ of habeas corpus, to inquire into the cause of such imprisonment or restraint”—emphasis added). *See also In re Wagner*, 145 Mont. 101, 102, 399 P.2d 761, 761 (1965) (construing § 94-101-1, RCM (1947) (1965), habeas standard in accordance with “[f]ederal law with respect to habeas corpus” review); *In re McCutcheon*, 10 Mont. 115, 123-24, 25 P. 97, 98-99 (1890) (“writ of habeas corpus cannot perform the office of a writ of error” for “review [of] the proceedings . . . to find whether or not [the record] shows that all the rights and privileges” guaranteed by law “to the prisoner were vouchsafed to him on the trial”).

In 1981, the Legislature thus amended § 46-22-101, MCA (1979) (originally § 95-2701, RCM (1947) (1967)), to specifically exclude criminal convictions and sentences from state habeas review. Section § 46-22-101(2), MCA (1981 Mont. Laws ch. 195, § 7). *But see Little Coyote*, ¶¶ 4 and 10 (granting habeas relief to void resentencing on revocation based on erroneous calculation of prior sentence on revocation that was not raised on direct appeal and thus

have consistently held, however, that the broader scope of federal and state habeas relief respectively enshrined in and guaranteed by the United States and Montana Constitutions prevents the Legislature from categorically eliminating or significantly restricting state habeas relief as a postconviction review remedy when necessary to prevent a manifest miscarriage of justice resulting from MPCHA procedural bars. *See, e.g., Little Coyote*, ¶¶ 4 and 10; *Lott*, ¶¶ 11-23; *Perry*, 232 Mont. at 462-63, 758 P.2d at 272-73; *Renz* at 354.

¶17 Procedurally, unless the petition and pertinent case “files and records . . . conclusively show[ed]” that the petitioner was not entitled to the requested relief, the MPCHA originally required a “prompt hearing” and for the reviewing court to then “determine the issue” based on supporting “findings of fact and conclusions” of law. Section § 95-2605, RCM (1947) (1967) (later § 46-21-201(1), MCA (1979)). On determination that a petitioner was entitled to relief, the MPCHA then as now required entry of “an appropriate order with respect to the [subject] judgment or sentence.” Section 95-2605, RCM (1947) (1967) (now § 46-21-201(6), MCA).

C. Enactment of More Restrictive MPCHA Procedural Bars and Corresponding Recognition of Federal Habeas-Derived Constitutional Exceptions for Newly Discovered Evidence of “Actual Innocence.”

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procedurally barred as a MPCHA PCR claim); *Lott*, ¶¶ 7-22 (holding that Mont. Const. art. II, § 19 (“writ of habeas corpus shall never be suspended”—mirroring 1889 Mont. Const. art. III, § 21) imposes “inherent limits on the Legislature’s ability to define or restrict the scope of the writ,” thus preserving then-prevailing scope of the writ for habeas review of otherwise procedurally barred MPCHA PCR claims where necessary to avoid or remedy manifest miscarriages of justice resulting from imprisonment based on constitutional or statutory error); *Perry*, 232 Mont. at 462-63, 758 P.2d at 72-73 (affording review of otherwise time-barred postconviction claim “sound[ing] in the nature [of] habeas corpus” in re alleged newly discovered evidence of innocence (i.e., prosecution witness recantation)).

¶18 In 1981, the Legislature amended the MPCHA to impose a restrictive 5-year time-bar (i.e., statute of limitations) and various other procedural revisions intended to further enhance the finality of criminal convictions by further restricting the availability of collateral postconviction review under the MPCHA. *See* 1981 Mont. Laws ch. 195, §§ 2 and 4-7 (amending §§ 46-21-102, -105, -201(1), -203, and 46-22-101, MCA (1979)). However, in the wake of the new 5-year time-bar and other more restrictive MPCHA procedurals bars, three subtypes of new evidence based *actual innocence* exceptions independently emerged as federal constitutional due process based “fundamental miscarriage of justice” (FMJ) exceptions to similar procedural bars to federal habeas review of state convictions, to wit:

(1) Actual Procedural/Legal Innocence of Guilt as recognized in *Schlup v. Delo*, 513 U.S. 298, 312-32, 115 S. Ct. 851, 860-69 (1995), building on the actual procedural/legal innocence standard recognized in *Murray v. Carrier*, 477 U.S. 478, 495-97, 106 S. Ct. 2639, 2649-50 (1986), and requiring a two-element showing of:

(a) reliable new evidence not previously considered at trial;

(b) an otherwise procedurally barred assertion of prejudicial constitutional trial error that resulted either in wrongfully admitted evidence or wrongfully excluded evidence,

in light of which it is “*more likely than not* that no reasonable juror would have found the petitioner guilty” of the subject crime “beyond a reasonable doubt” (emphasis added);<sup>15</sup>

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<sup>15</sup> The “probabilistic” reasonable doubt based *Schlup* actual procedural/legal innocence standard of proof evolved from a federal habeas FMJ *actual innocence* standard of proof that emerged over a series of cases in 1986. *See Schlup*, 513 U.S. at 320-32, 115 S. Ct. at 860-69 (*inter alia* citing *Carrier*, 477 U.S. at 495-97, 106 S. Ct. at 2650 (generally recognizing constitutional FMJ exception upon showing that an otherwise procedurally barred “constitutional violation has probably resulted in the conviction of one who is *actually innocent*” based on “Due Process Clause” protection from “conviction except upon proof *beyond a reasonable doubt*”—emphasis

- (2) Actual Innocence of Death Penalty Eligibility as recognized in *Sawyer v. Whitley*, 505 U.S. 333, 335-48 and 350, 112 S. Ct. 2514, 2517-23 and 2525 (1992), and requiring a higher showing by “*clear and convincing evidence*” that, “*but for*” exclusion or omission of the subject evidence from consideration at the *post-guilt death penalty phase* of a capital case due to an otherwise procedurally barred constitutional error, “no reasonable juror” would have found the petitioner “*eligible for the death penalty*” under governing state law aggravating circumstances criteria (emphasis added); and
- (3) Actual Substantive Innocence of Guilt as assumed cognizable in *Herrera v. Collins*, 506 U.S. 390, 404-05 and 417-19, 113 S. Ct. 853, 862-63 and 869-70 (1993), requiring a freestanding showing of new evidence sufficient to conclusively prove under an “extraordinarily high” and “truly persuasive,” but left undefined, standard of proof that the petitioner was *actually factually innocent* (i.e., in fact did not commit the crime) rather than merely procedurally or legally innocent.

¶19 While the Supreme Court generally analyzed each of those federal habeas FMJ exceptions in terms of new or previously unconsidered evidence of *actual innocence*, each had subtly but fundamentally distinct elements and standards largely derived from pertinent provisions or requirements of the Due Process Clause of U.S. Const. amend. XIV.<sup>16</sup> Thus,

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added); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17, 106 S. Ct. 2616, 2627 (1986) (alternatively referring to an “ends of justice” FMJ exception requiring showing of otherwise procedurally barred constitutional error and “a colorable showing of *factual innocence*” in the form of a showing of newly discovered evidence, and evidence not previously considered due to constitutional trial error, in light of which “a fair *probability*” exists that factfinder “would have” had “*reasonable doubt*” as to petitioner’s “guilt”—emphasis added and internal punctuation and citations omitted); *Smith v. Murray*, 477 U.S. 527, 529-32 and 537, 106 S. Ct. 2661, 2663-65 and 2668 (1986) (discussing probabilistic *Carrier* FMJ exception, 477 U.S. at 496, 106 S. Ct. at 2650, preliminary to addressing otherwise procedurally barred claim of constitutional error at post-guilt death penalty eligibility phase at sentencing—noting that *Carrier* actual innocence of *guilt* FMJ standard “does not translate easily” into death penalty eligibility phase)).

<sup>16</sup> See *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 1071-73 (1970) (recognizing federal due process requirement for proof beyond a reasonable doubt standard of proof for criminal conviction); *Schlup*, 513 U.S. at 328, 115 S. Ct. at 867-68 (noting that due process requirement for “proof beyond a reasonable doubt” is the “*legal* boundary between guilt and innocence”—

in a series of cases from 1999 through 2013, we recognized and attempted to distinctly apply the *Schlup* actual *procedural innocence* of guilt, and *Herrera* actual *substantive innocence* of guilt, FMJ exceptions as similar constitutional FMJ exceptions to post-1981 procedural bars to MPCHA claims. *See, e.g., State v. Redcrow*, 1999 MT 95, 294 Mont. 252, 980 P.2d 622; *State v. Pope*, 2003 MT 330, 318 Mont. 383, 80 P.3d 1232; *Beach v. State (Beach I)*, 2009 MT 398, 353 Mont. 411, 220 P.3d 667; and *State v. Beach (Beach II)*, 2013 MT 130, 370 Mont. 163, 302 P.3d 47.<sup>17</sup>

1. *Schlup* Actual Procedural Innocence of Guilt FMJ Exception.

¶20 In an attempt to balance the inherent tension between the constitutional due process safeguard provided by federal habeas review of postconviction claims asserting new

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emphasis added); *Herrera*, 506 U.S. at 400, 113 S. Ct. at 860 (noting central purpose of the federal habeas remedy “to ensure” that states are “not imprison[ing]” people “in violation of” federal constitutional rights).

<sup>17</sup> *Carrier*, *Sawyer*, *Schlup*, and other cited Supreme Court jurisprudence, often singularly referred to the actual procedural innocence standards at issue in those cases as “*the* manifest miscarriage of justice exception,” largely due to its origin and development as a due process based constitutional FMJ exception applicable when a federal habeas petitioner could not satisfy the jurisprudential “cause and prejudice” requirement for otherwise procedurally barred federal habeas claims. *See Schlup*, 513 U.S. at 313-14, 320-21, 323, and 326-28, 115 S. Ct. at 860, 863-65, and 867-68 (emphasis added); *Sawyer*, 505 U.S. at 339-40, 112 S. Ct. at 2518-20; *Carrier*, 477 U.S. at 493 and 495-96, 106 S. Ct. at 2648-49 (1986). Similar narrow nomenclature soon found its way into our MPCHA constitutional FMJ jurisprudence. *See, e.g., Lott*, ¶ 20; *Pope*, ¶¶ 34, 44, 52-53, and 69; *Redcrow*, ¶¶ 1-2, 31, 33, 35, and 37; *Beach v. Day*, 275 Mont. 370, 375, 913 P.2d 622, 625 (1996); *Rudolph*, 273 Mont. at 312, 902 P.2d at 1008; *Baker*, 272 Mont. at 281, 901 P.2d at 59; *Perry*, 232 Mont. at 462, 758 P.2d at 273. However, the freestanding actual substantive innocence claim assumed cognizable in *Herrera* as an exception to federal habeas bars was, in essence, a distinct constitutional FMJ exception to federal habeas bars based on U.S. Const. amends. VIII and XIV (cruel and unusual punishment prohibition and right to due process of law). *See Schlup*, 513 U.S. at 313-17 and 328, 115 S. Ct. at 860, 862, and 867-68 (discussing *Herrera* substantive and actual innocence claims); *Herrera*, 506 U.S. at 393, 400, and 405-07, 113 S. Ct. at 856, 860, and 863-64.

evidence of innocence, and competing state interests in the finality of criminal convictions and federal-state comity, the Supreme Court recognized a two-element actual procedural innocence FMJ exception requiring (1) a “gateway” showing of “new reliable evidence,”<sup>18</sup> and (2) an accompanying showing of an otherwise procedurally barred prejudicial constitutional error in the trial or pretrial process. *Schlup*, 513 U.S. at 314-21, 324, and 327-30, 115 S. Ct. at 860-65 and 867-70. On satisfaction of both of those required elements, the petitioner is then entitled to a new trial only if the newly discovered evidence, together with any evidence wrongfully excluded (and/or minus any wrongfully admitted) due to the accompanying constitutional trial error, is sufficient “in light of” all of the evidence (including the trial evidence) to prove that “it is *more likely than not* that no reasonable juror” upon proper legal instruction “would have found petitioner guilty *beyond a reasonable doubt.*” *Schlup*, 513 U.S. at 314-17, 324, and 327-30, 115 S. Ct. at 860-62, 865, and 867-70 (emphasis added).<sup>19</sup> Satisfaction of the newly discovered evidence of

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<sup>18</sup> The “new reliable evidence” may *inter alia* include “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence[] that was not presented” or available at trial. *Schlup*, 513 U.S. at 324, 115 S. Ct. at 865.

<sup>19</sup> The *Schlup* procedural innocence standard of proof is higher than the reasonable doubt based standard of constitutional prejudice required by *Strickland v. Washington*, 466 U.S. 668, 694-95, 104 S. Ct. 2052, 2067-69 (1984) (“reasonable probability that . . . the factfinder would have had reasonable doubt” absent the subject constitutionally deficient performance), for a timely-raised ineffective assistance of counsel claim. *Schlup*, 513 U.S. at 327 n.45, 115 S. Ct. at 867. *Accord Schlup*, 513 U.S. at 332-33, 115 S. Ct. at 870 (O’Connor, J., concurring—citing *Strickland*). It is similarly “by no means equivalent to” the sufficiency of the trial evidence standard upon federal habeas due process review as recognized in *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789 (1979) (viewing trial evidence in “light most favorable to” state, whether “*any* rational” factfinder could have found “essential elements of the crime beyond a reasonable doubt”). *Schlup*, 513 U.S. at 330, 115 S. Ct. at 868-69. *Accord Schlup*, 513 U.S. at 332-33, 115 S. Ct. at 870 (O’Connor, J., concurring).

innocence element of the claim is thus the figurative “gateway” that overcomes the procedural bar to review of the otherwise procedurally barred assertion of constitutional error alleged under the second element of the claim. *See Schlup*, 513 U.S. at 315-16 and 324-26 n.42, 115 S. Ct. at 861-62 and 865-66 (citing *Herrera*, 506 U.S. at 419 and 426, 113 S. Ct. at 870 and 874 (O’Connor, J., concurring)). In turn, satisfaction of the second element of the claim, and ultimately the probabilistic *Schlup* procedural innocence standard of proof, is required to overcome the presumption of regularity and guilt that otherwise attaches upon a criminal conviction and exhaustion of other available remedies. *See Schlup*, 513 U.S. at 315-16 and 324-26 n.42, 115 S. Ct. at 861-62 and 865-66 (citing *Herrera*, 506 U.S. at 419 and 426, 113 S. Ct. at 870 and 874 (O’Connor, J., concurring)).

¶21 The Supreme Court held further that, “[i]n assessing the adequacy of” a petitioner’s postconviction evidentiary showing, the reviewing court “is not bound by the rules of admissibility” of evidence that would be applicable at trial, *Schlup*, 513 U.S. at 327, 115 S. Ct. at 867, and must assess the petitioner’s asserted procedural innocence in light of all pertinent evidence including the newly discovered evidence, any evidence excluded or not presented at trial due to the accompanying otherwise procedurally barred constitutional error, and all evidence previously considered at trial other than any wrongfully admitted due to the asserted constitutional error. *Schlup*, 513 U.S. at 327-32, 115 S. Ct. at 867-69 (reviewing “[c]ourt must assess” the relative “probative force” of the previously unconsidered evidence “in connection with the evidence of guilt adduced at trial”). If the previously unconsidered evidence could reasonably “call into question the credibility of

the witnesses presented at trial,” the reviewing court must necessarily make pertinent “credibility assessments.” *Schlup*, 513 U.S. at 330, 115 S. Ct. at 868-69. The reviewing court may thus consider “how the timing of the submission” of the new evidence and “the likely credibility” of the source witness(es) “bear on the *probable* reliability of that evidence.” *Schlup*, 513 U.S. at 332, 115 S. Ct. at 869 (emphasis added). However, the question is not whether the reviewing court may find the new evidence to be credible or not, but instead involves district court assessment of how an objectively reasonable juror would “likely” view it in context of the demanding *Schlup* probabilistic procedural innocence standard. *Schlup*, 513 U.S. at 330, 115 S. Ct. at 868-69.

2. *Herrera* Actual Substantive Innocence of Guilt FMJ Exception.

¶22 *Schlup* clearly distinguished its “probabilistic” procedural innocence of guilt FMJ standard of proof from the necessarily higher standard of proof that would be required for a freestanding FMJ claim of newly discovered evidence of actual “*substantive*” innocence as assumed cognizable in *Herrera*. *Schlup*, 513 U.S. at 313-17 and 321-32, 115 S. Ct. at 860-62 and 864-69 (emphasis added). In contrast to the lower standard of proof required for a two-element *Schlup* procedural innocence claim, the “freestanding” new evidence based *Herrera* actual *substantive innocence* of guilt claim is not based or dependent upon an accompanying showing of constitutional trial error—only asserted new evidence of actual factual innocence, i.e., substantive innocence. *See Herrera*, 506 U.S. at 404-05 and 417-19, 113 S. Ct. at 862-63 and 869-70; *Schlup*, 513 U.S. at 313-17, 115 S. Ct. at 860-62. The freestanding actual substantive innocence constitutional FMJ exception assumed

cognizable in *Herrera* is thus a claim for exonerative discharge, based on the assumption that the underlying conviction was error-free, with all attendant due process afforded to the petitioner, and the asserted new evidence must therefore be sufficient to affirmatively prove that the petitioner in fact did not commit the crime, i.e., is *actually factually innocent* rather than merely procedurally or legally innocent by operation of the beyond a reasonable doubt standard of proof and accompanying presumption of innocence until proven guilty. See *Herrera*, 506 U.S. at 404-05 and 417-19, 113 S. Ct. at 862-63 and 869-70; *Schlup*, 513 U.S. at 313-17, 115 S. Ct. at 860-62 (*inter alia* noting that accompanying constitutional error requirement for *Schlup* claim justifies lower reasonable doubt based procedural innocence standard due to “fundamentally different” “assumptions about the validity” of a conviction that apply depending on whether petitioner received “fully panoply” of guaranteed constitutional “protections” at trial). However, since the particular new evidence of actual factual innocence at issue in *Herrera* fell “far short” of the “extraordinarily high” and “truly persuasive” standard of proof necessary to overcome the presumption of error-free guilt with affirmative proof that the petitioner in fact did not commit the crime, the Supreme Court found no need to further specify the requisite standard of proof of the assumed cognizable freestanding actual substantive innocence claim. *Herrera*, 506 U.S. at 398-400, 404-05, and 416-19, 113 S. Ct. at 859-60, 862-63, and 869-70.<sup>20</sup>

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<sup>20</sup> The question remains open to this day for purposes of federal habeas review. See *McQuiggin v. Perkins*, 569 U.S. 383, 392-93, 133 S. Ct. 1924, 1931-32 (2013); *House v. Bell*, 547 U.S. 518, 554-55, 126 S. Ct. 2064, 2086-87 (2006). See also *Herrera*, 506 U.S. at 402-04, 113 S. Ct. at

### 3. *Sawyer* Procedural/Legal Innocence of Death Penalty Eligibility.

¶23 At issue in *Sawyer* was the proper constitutional FMJ exception standard for federal habeas review of an otherwise procedurally barred claim asserting that but for a constitutional error at the post-guilt death penalty eligibility stage of a capital criminal case, the jury would have found the petitioner “*actually innocent*” of *death penalty eligibility*. *Sawyer*, 505 U.S. at 336, 112 S. Ct. at 2517. The Supreme Court noted the *Carrier*-based procedural innocence of guilt standard, as later refined in *Schlup*, but found it inapposite because “[i]t is more difficult” to analogously apply a procedural innocence of *guilt* standard to the *post-guilt death penalty eligibility* determination, which thus requires a “*more expansive meaning of ‘actual innocence’*” in that distinct context. *Sawyer*, 505 U.S. at 340-41, 112 S. Ct. at 2519-20 (emphasis added). The Court thus adapted an “*amplif[ied]*” standard of proof for federal habeas FMJ claims alleging “actual innocence” of *death penalty eligibility*—“*clear and convincing evidence that but for constitutional error at [the] sentencing hearing, no reasonable juror would have found*” the petitioner *death penalty eligible*. *Sawyer*, 505 U.S. at 341-50, 112 S. Ct. at 2520-25 (emphasis added).<sup>21</sup> In *Schlup*, the Court later distinguished the single-element, non-gateway *Sawyer*

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861-62 (specifically rejecting Blackmun dissent-proposed “probably innocent” standard of proof for freestanding actual innocence claims).

<sup>21</sup> Providing even more fodder for analytical confusion, *Sawyer* also involved, *inter alia*, an apparent actual innocence of *guilt* claim based on an alleged prosecutorial *Brady* violation which the Court summarily rejected as merely “latterday evidence” having no value other than “to impeach” the “credibility” of a prosecution witness. *Sawyer*, 505 U.S. at 347-50, 112 S. Ct. at 2523-24. The Court later clarified that, though couched as a claim of innocence of guilt of the charged strain of murder, the claim at issue in *Sawyer* was in essence an innocence of death penalty

standard of actual innocence of death penalty eligibility as not only procedurally inapposite, but as a higher actual innocence standard than the *Carrier*-based actual procedural innocence of guilt standard as refined and recognized in *Schlup*. See *Schlup*, 513 U.S. at 323-32, 115 S. Ct. at 865-69; *Schlup*, 513 U.S. at 332-33, 115 S. Ct. at 869-70 (O'Connor, J., concurring). Accord *Sawyer*, 505 U.S. at 346-50, 112 S. Ct. at 2522-25. The Court ultimately held that the federal circuit court of appeals thus erroneously applied a variant of the post-guilt *Sawyer* actual innocence of death penalty eligibility standard (i.e., “clear and convincing evidence” that “but for” an otherwise procedurally barred “constitutional error no reasonable juror would have found the petitioner guilty”) as a new evidence based actual procedural innocence of guilt standard applicable to the two-element newly discovered evidence of procedural innocence of guilt claim at issue in *Schlup*. See *Schlup*, 513 U.S. at 301, 311-13, and 323-24, 115 S. Ct. at 854, 859-60, and 865-69 (internal punctuation omitted).

D. Erroneous Montana Conflation of Freestanding *Herrera* Substantive Innocence FMJ Standard With Clear and Convincing Evidence Standard Based on *Sawyer* Actual Innocence of Death Penalty Eligibility Standard.

¶24 In 1995, we recognized a general constitutional FMJ exception to the MPCHA procedural bars specified in §§ 46-21-102 and -105, MCA (1981) (5-year PCR claim time-bar and procedural bar of claims that could have been raised on direct appeal or in petitioner’s initial PCR petition). See *In re Gray*, 274 Mont. 1, 908 P.2d 1352 (1995),

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eligibility claim because the aggravating element of the offense “functioned . . . as a sentence enhancer.” *Schlup*, 513 U.S. at 326, 115 S. Ct. at 866-67.

overruled on other grounds by *Davis v. State*, 2008 MT 226, ¶¶ 23-34, 344 Mont. 300, 187 P.3d 654; *Rudolph v. Day*, 273 Mont. 309, 311-12, 902 P.2d 1007, 1008 (1995); *State v. Baker*, 272 Mont. 273, 281-82, 901 P.2d 54, 58-59 (1995) (“we will consistently apply the procedural bar” of § 46-21-105, MCA (1981), absent showing of “a fundamental miscarriage of justice”—*inter alia* citing *Coleman v. State*, 194 Mont. 428, 438, 633 P.2d 624, 630 (1981) (quoting *Sanders v. United States*, 373 U.S. 1, 15, 83 S. Ct. 1068, 1077 (1963) (in re similar fundamental miscarriage of justice exceptions to federal habeas and PCR procedural bars under 28 U.S.C. §§ 2244, 2254, and 2255))).<sup>22</sup> See also *Perry*, 232 Mont. at 462-63, 758 P.2d at 272-73 (affording review of otherwise time-barred postconviction review claim “sound[ing] in the nature [of] habeas corpus” in re

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<sup>22</sup> As pertinent here, *Sanders* noted: (1) the evolution of various jurisprudential and statutory procedural bars to federal habeas review of state criminal convictions under 28 U.S.C. §§ 2254 and 2244 (1948 as amended through 1963), and the separate statutory PCR remedy regarding federal criminal convictions under 28 U.S.C. § 2255 (1948 as amended through 1963); (2) that the statutory PCR remedy for federal criminal convictions (28 U.S.C. § 2255) “is the substantial equivalent of [the] federal habeas” remedy for review of state criminal convictions (28 U.S.C. §§ 2254 and 2244); and (3) that the procedural bars limiting the access and scope of PCR review under the federal habeas remedy (28 U.S.C. § 2244), and the similar statutory PCR remedy regarding federal criminal convictions (28 U.S.C. § 2255), were both subject to a constitutional “ends of justice” exception. See *Sanders*, 373 U.S. at 7-19, 83 S. Ct. at 1072-79 (emphasis added). Following elimination of the “ends of justice” exception language from federal habeas statutes in 1966, the Supreme Court later held that the former “ends of justice inquiry . . . remained appropriate” as a constitutional FMJ exception to federal habeas procedural bars “when a petitioner supplements” an otherwise procedurally barred “constitutional claim with a colorable showing of factual innocence” (i.e., a new evidence/reasonable doubt based showing that “a constitutional violation probably has caused the conviction of one innocent of the crime”), thereby “serv[ing] as an additional safeguard” against subjecting “an innocent man” to “an unconstitutional loss of liberty.” *McCleskey*, 499 U.S. at 494-96, 111 S. Ct. at 1470-71 (*inter alia* recognizing new evidence based probability of reasonable doubt *Carrier-Kuhlman procedural innocence* standard later refined in *Schlup* as an ongoing constitutional FMJ exception to federal habeas procedural bars under jurisprudential “cause and prejudice” doctrine—citing *Carrier*, *Kuhlman*, and *Sanders*—internal punctuation omitted).

recantation-based claim alleging new evidence of innocence).<sup>23</sup> We did not, however, reference or specify any particular parameters, requirements, or standards for the generally referenced constitutional FMJ exception. *See Gray*, 274 Mont. at 1, 908 P.2d at 1352; *Rudolph*, 273 Mont. at 311-12, 902 P.2d at 1008; *Baker*, 272 Mont. at 281-82, 901 P.2d at 58-59; *Perry*, 232 Mont. at 462-63, 758 P.2d at 272-73.

¶25 Four years later, in context of an alleged newly discovered evidence of actual innocence claim filed almost two years after expiration of the post-1981 5-year MPCHA time-bar, we held that the nature and requirements of the two-element *Schlup* new evidence of *actual procedural innocence of guilt* FMJ exception standard “comports with” the general constitutional FMJ exception to the 5-year MPCHA time-bar we previously recognized in *Gray* and *Rudolph*. *Redcrow*, ¶¶ 29-34 (*inter alia* citing *Schlup*, 513 U.S. at 327, 115 S. Ct. at 867, and *Perry*, 232 Mont. at 463, 758 P.2d at 273).<sup>24</sup> We ultimately held, however, that the claim was nonetheless procedurally barred by the 5-year MPCHA time-bar because the particular evidentiary showings at issue were insufficient to satisfy the two-element *Schlup* actual procedural innocence of guilt FMJ exception. *See Redcrow*,

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<sup>23</sup> Our reliance on *Sanders* in *Coleman* is significant here because we recognized that the “provisions of § 46-21-101, et seq., MCA” (MPCHA) “are essentially similar to” the provisions of the PCR remedy provided to federal convicts in 28 U.S.C. § 2255. *Coleman*, 194 Mont. at 432, 633 P.2d at 626. *See similarly McNair*, 189 Mont. at 323-25, 615 P.2d at 917-18 (construing § 46-21-102, MCA, in accordance with “comparable federal statute” (28 U.S.C. § 2255), cited interpretive authority, and UPCPA).

<sup>24</sup> *But see Beach*, 275 Mont. at 374, 913 P.2d at 624-25 (summarily rejecting asserted *Schlup* actual innocence exception as a similar constitutional FMJ exception to 5-year MPCHA time-bar because it was an FMJ exception to a federal habeas procedural bar of successive federal habeas petitions).

¶¶ 31-41 (noting that the claim was not based on any new evidence discovered postconviction and that the evidence not considered at trial due to the alleged constitutional error (ineffective assistance of counsel) was in any event insufficient in light of the incriminating trial evidence to render it probable that “no reasonable juror would have found the defendant guilty”—quoting *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868).

¶26 Though we generally referred to it as a two-element constitutional standard for newly discovered evidence of *actual innocence* of guilt, rather than a two-element *actual procedural innocence* of guilt exception as more particularly recognized in *Schlup*, *Redcrow* clearly recognized the two-element *Schlup procedural innocence* of guilt exception as a similar constitutional FMJ exception to the 5-year MPCCHA procedural bar. See *Redcrow*, ¶¶ 31-41 (citing *Schlup*, 513 U.S. at 324, 327, and 329, 115 S. Ct. at 865-68); compare *Schlup*, 513 U.S. at 314 and 316, 115 S. Ct. at 860-62 (distinguishing two-element *Carrier*-based procedural innocence FMJ exception from freestanding substantive innocence exception assumed cognizable in *Herrera*). Unfortunately, however, we planted the seed for future analytical error and conflation by citing *Sawyer*, 505 U.S. at 339-40, 112 S. Ct. at 2519, out of its actual innocence of *death penalty eligibility* context for the overly-broad categorical statement that new evidence based actual innocence constitutional FMJ exceptions are “concerned with actual innocence and *not legal innocence*.” *Redcrow*, ¶ 33 (emphasis added); compare *Sawyer*, 505 U.S. at 335-48 and 350, 112 S. Ct. at 2517-23 and 2525 (noting that constitutional FMJ standard for previously unconsidered evidence of post-guilt death penalty eligibility distinctly required

a “more expansive” and “amplif[ied]” standard than an actual innocence of *guilt* FMJ exception—thus recognizing non-probabilistic single-element actual innocence of death penalty FMJ exception).<sup>25</sup> *Redcrow* is therefore partially overruled to the narrow extent that it categorically asserts, by out-of-context citation to *Sawyer*, that the due process based *Schlup* constitutional FMJ exception for newly discovered evidence of actual innocence of *guilt* “is concerned” only “with actual innocence and not legal innocence.”

¶27 In *Pope*, we again considered an asserted two-element *Schlup* procedural innocence of guilt claim as a constitutional FMJ exception to the 5-year MPCHA procedural bar. See *Pope*, ¶¶ 24, 26-35, and 38. In response to lingering party and district court confusion as to whether the DNA-based claim was a non-exonerative two-element *Schlup* actual procedural innocence claim for new trial or a freestanding *Herrera* actual substantive innocence claim for exonerative discharge, see *Pope*, ¶¶ 34-35 and 38-39, we distinguished the distinct legal elements and attributes of each of those constitutional FMJ claims. See *Pope*, ¶¶ 40-50. Upon recognition that the claim at issue was, as pled, a two-element *Schlup* procedural innocence claim for new trial, *Pope*, ¶¶ 54-57, we held that the supporting evidentiary and legal showings satisfied the essential elements of the *Schlup* actual procedural innocence FMJ exception to the 5-year MPCHA time-bar, and thus remanded for a new trial. *Pope*, ¶¶ 57-70. As in *Redcrow*, ¶¶ 29-41, we thus again

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<sup>25</sup> The *Redcrow*-cited *Sawyer* snippet in turn referred to *Smith*, 477 U.S. at 529-37, 106 S. Ct. at 2663-68 (similarly noting *Carrier* procedural innocence of guilt FMJ exception standard but that it “does not translate easily” as an FMJ standard for previously unconsidered evidence of sentencing phase death penalty eligibility). See *Sawyer*, 505 U.S. at 335-48 and 350, 112 S. Ct. at 2517-23 and 2525.

recognized the two-element *Schlup* procedural innocence exception to federal habeas procedural bars as a similar constitutional FMJ exception to the 5-year MPCCHA time-bar. *See Pope*, ¶¶ 51-53 and 57-70.<sup>26</sup>

¶28 In contrast, we further recognized that the exonerative *Herrera* actual substantive innocence constitutional FMJ exception is *not* similarly based in part on a required showing of an accompanying constitutional trial error, and thus requires an “extraordinarily high” freestanding showing of reliable new evidence sufficient to affirmatively prove that the petitioner *in fact* “*did not commit the crime*” at issue. *Pope*, ¶¶ 41-49 (distinguishing lesser *Schlup* actual procedural innocence standard of proof, i.e., new and previously unconsidered evidence showing that it is “more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt”). However, plagued by our earlier out-of-context *Sawyer* citation in *Redcrow*, ¶ 33 (“the fundamental miscarriage of justice exception is concerned with actual and not legal innocence”), we endorsed the parties’ erroneous assertion that we “adopted the more demanding *Herrera*” actual substantive innocence “standard in *Redcrow*.” *See Pope*, ¶ 53 (noting that the *Sawyer*-derived procedural innocence standard rejected in *Schlup* “imposes a higher burden” than the *Schlup* procedural innocence standard); *compare Redcrow*, ¶¶ 29-41

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<sup>26</sup> We further recognized that *Schlup* rejected a procedural innocence standard (i.e., clear and convincing evidence that but for an otherwise procedurally barred constitutional error no reasonable juror would have found the petitioner guilty) derived from the *Sawyer* actual innocence of *death penalty eligibility* standard as inappositely higher than the probabilistic *Schlup* procedural innocence standard. *See Pope*, ¶¶ 43-45 and 57 (thus concurring that the higher *Sawyer*-based standard did not apply to the *Schlup* procedural innocence claim at issue).

(recognizing two-element *Schlup* procedural innocence exception to federal habeas procedural bars as a similar constitutional FMJ exception to the 5-year MPCCHA time-bar). To the extent that we erroneously conflated and equated the higher out-of-context *Sawyer*-based actual innocence of guilt standard rejected in *Schlup* with “the more demanding *Herrera* type standard” that we “adopted in *Redcrow*,” we hereby partially repudiate and overrule *Pope*, ¶¶ 53-54 (citing *Redcrow*, ¶ 33 (inconsistently quoting *Schlup*, 513 U.S. at 329, 115 S. Ct. at 320), vis-à-vis *Sawyer*, 505 U.S. at 339-40, 112 S. Ct. at 2519)).

¶29 Then came *Beach I*. Based on the 1979 beating death of a young woman, Beach was convicted of deliberate homicide in 1984. *State v. Beach*, 217 Mont. 132, 705 P.2d 94 (1985) (affirming 1984 conviction on direct appeal). Later, during the continued pendency of a temporarily stayed federal habeas petition, Beach filed his first MPCCHA petition which was ultimately dismissed on the grounds that the predicate assertions of constitutional trial error (involuntary pretrial confession and ineffective assistance of trial counsel) were procedurally barred by equitable claim preclusion and the 5-year time-bar of § 46-21-102, MCA (1981). *Beach v. Day*, 275 Mont. 370, 913 P.2d 622 (1996). After the subsequent denial of his 1992 federal habeas petition in 1998, and later denial of a Montana executive clemency petition, Beach filed a second MPCCHA petition in 2008 alleging that various items of recently discovered evidence proved that he was actually innocent of the 1979 homicide. *Beach I*, ¶¶ 6-13 and 17-19.<sup>27</sup> Without elaboration, the district court cursorily

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<sup>27</sup> In affirming dismissal of Beach’s 1995 PCR petition, we referred to our prior 1985 affirmation of his 1984 conviction as “*Beach I*.” *Beach*, 275 Mont. at 371-74, 913 P.2d at 622-24. Apparently

dismissed the petition as procedurally barred due to failure to demonstrate “actual innocence” under “*the* fundamental miscarriage of justice exception.” *Beach I*, ¶¶ 13 and 16 (emphasis added).

¶30 At issue under Beach’s second MPCCHA petition were a number of distinctly pled, but somewhat substantively overlapping or amorphous new evidence based procedural innocence claims for non-exonerative new trial. *See Beach I*, ¶¶ 13, 17, 19, 25, and 36; Appellant’s Opening Brief, *Beach v. State*, Cause No. 08-0244 (July 10, 2008).<sup>28</sup> Contrary to the district court ruling, we held that § 46-21-102(1) and (2), MCA (1997) (new 1-year MPCCHA time-bar, and accompanying statutory newly discovered evidence of innocence exception), did not retroactively apply to Beach’s 2008 challenges to his 1984 conviction. *Beach I*, ¶¶ 21-24. We held that Beach’s new evidence based procedural innocence claims for new trial must instead be analyzed on remand for conformance to “*the* fundamental miscarriage of justice exception” to § 46-21-102, MCA (1981) (5-year MPCCHA time-bar), i.e., the two-element *Schlup* procedural innocence claim standards. *Beach I*, ¶¶ 23-24 and 51 (citing *Pope*, ¶¶ 58-68, and *Redcrow*, ¶ 33—emphasis added). We again attempted to distinguish the analytical elements and standards applicable to two-element *Schlup* actual procedural innocence claims from those applicable to freestanding *Herrera* actual

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overlooking both of those decisions, we later inaccurately referred to our successive decisions regarding his 2008 petition as *Beach I* and *Beach II*. *See Marble*, ¶¶ 3-4, 11-21, 32-33, and 39; *State v. Beach (Beach II)*, 2013 MT 130, ¶¶ 5 and 9-17, 370 Mont. 163, 302 P.3d 47. For analytical clarity, we continue with our 2008-13 nomenclature here.

<sup>28</sup> *See similarly Beach II* (McKinnon, J., concurring).

substantive innocence constitutional FMJ claims, but then, contrary to our earlier characterization, inconsistently characterized Beach’s asserted claims for new trial as a mixture of “both substantive and procedural [innocence] claims.” *See Beach I*, ¶¶ 36 and 43-45. We thus instructed that Beach’s claims would be cognizable MPCCHA claims on remand only to the extent that they could satisfy the elements of either a two-element *Schlup* procedural innocence claim, or a freestanding *Herrera*-based actual substantive innocence claim. *See Beach I*, ¶¶ 43-48. In retrospect, our *Beach I* analysis was correct to the extent that we recognized that:

- (1) a successful *Schlup* actual procedural innocence of guilt claim “results in a new trial”;
- (2) a successful *Herrera*-based freestanding substantive innocence of guilt claim results in exonerative release or discharge; and
- (3) a *Schlup* procedural innocence constitutional FMJ exception claim has two required elements, a “gateway” showing of reliable new evidence and an accompanying showing of other evidence either prejudicially admitted or not previously considered due to an otherwise procedurally barred constitutional trial error, in light of which it is more likely than not that “no juror acting reasonably would have” found petitioner “guilty beyond a reasonable doubt.”

*See Beach I*, ¶¶ 29-30, 33-35, 43, 45, and 48 (citing *Schlup*, 513 U.S. at 316, 322, and 327-29, 115 S. Ct. at 861, 864, and 867-68, as applied in *Redcrow* and *Pope*).

¶31 Again plagued, however, by our out-of-context citation to *Sawyer* in *Redcrow*, and our resulting mischaracterization of *Redcrow* in *Pope*, we again erroneously conflated a *Sawyer*-derived actual procedural innocence of guilt standard with the freestanding *Herrera* actual substantive innocence of guilt FMJ exception standard to erroneously hold that a *Herrera* substantive innocence claim requires “clear and convincing evidence that,

but for a procedural [trial] error, no reasonable juror would have found” the petitioner guilty. *See Beach I*, ¶¶ 31-32, 44, and 48 (citing *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868); *compare Schlup*, 513 U.S. at 301, 311-13, and 323-24, 115 S. Ct. at 854, 859-60, and 865-69. We thus erroneously mischaracterized the freestanding *Herrera* actual substantive innocence of guilt standard to include a “procedural gateway” element like a two-element *Schlup* procedural innocence of guilt claim. *See Beach I*, ¶¶ 31-32, 44, and 48 (citing *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868); *compare Herrera*, 506 U.S. at 404-05 and 417-19, 113 S. Ct. at 862-63 and 869-70 (noting that constitutional FMJ exception for newly discovered evidence of actual substantive innocence is a “freestanding” non-gateway claim based on the assumption that the underlying criminal conviction was error free, thus requiring an “extraordinarily high” and “truly persuasive” affirmative showing that petitioner in fact did not commit the crime); *Herrera*, 506 U.S. at 442 n.6, 113 S. Ct. at 882 (Blackmun, J. dissenting) (noting that a *Sawyer*-derived “clear and convincing evidence”/“but for a constitutional error” standard would be inconsistent with “a substantive claim of actual innocence” of guilt); *Schlup*, 513 U.S. at 315-16, 115 S. Ct. at 861 (distinguishing *Herrera* actual substantive innocence FMJ claim as a non-gateway claim “evaluated on the assumption that the trial that resulted in conviction” was “fair” and “error free” with the petitioner afforded “the fully panoply of [constitutional] protections” afforded to criminal defendants). *Beach I* is therefore prospectively overruled to the extent that we asserted that the single-element freestanding *Herrera* actual substantive innocence of guilt constitutional FMJ exception to MPCJA procedural/time-bars either depends on

or includes a procedural gateway showing, or requires clear and convincing evidence that *but for* a constitutional trial error no reasonable juror would have found the petitioner guilty.<sup>29</sup>

¶32 *Beach I* was further analytically unsound to the extent that we injected foreign evaluative criteria (i.e., whether the asserted new evidence was discovered post-verdict, not earlier-discovered due to lack of reasonable diligence, material to the issues at trial, “neither cumulative nor merely impeaching,” and sufficient to establish “a reasonable probability” of a “different outcome”) into the analysis of postconviction two-element *Schlup* constitutional FMJ procedural innocence claims. *See Beach I*, ¶¶ 37-42 and 45-47 (citing *Clark*, ¶ 34, in re five-part “*Clark* test” for evaluation of recantation-based *post-verdict/pre-conviction* motions for new trial in the interests of justice under § 46-16-702(1), MCA.). Our analysis was unsound because we did not mention the particular scope and reliability standards already prescribed for such claims in *Schlup*, 513 U.S. at 324 and 327-32, 115 S. Ct. at 865 and 867-69, much less reconcile the imported *Clark* test criteria for congruence therewith. *See Beach I*, ¶¶ 37-42 and 45-47 (citing *Clark*, ¶ 34).<sup>30</sup> We

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<sup>29</sup> *See similarly Beach II*, ¶¶ 13-14, 16, and 26 n.4 (implicitly recognizing that our *Beach I* characterization of freestanding *Herrera* substantive innocence claim as two-element gateway-type claim was erroneous—“*Herrera* claim assumes” an “error free” trial and thus has “no ‘gateway’” element for review of an otherwise procedurally barred trial error); *Beach II*, ¶¶ 81 and 104 (McKinnon, J., concurring) (four-justice concurrence that “*Beach I* confused the law governing postconviction ‘innocence’ claims” and “did not set forth the correct legal standard” for assessment thereof), *repudiated on other grounds by Marble*, ¶ 32.

<sup>30</sup> We did, however, recognize the incongruent incompatibility of the fifth *Clark* test standard—“reasonable probability” of a different outcome—with the manifestly higher *Schlup* constitutional FMJ procedural innocence standard—probability that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *See Beach I*, ¶¶ 39 and 48 (adopting a “modified”

further based our injection of the foreign *Clark* criteria into the pre-1997 *Schlup* constitutional FMJ procedural innocence claim analysis on our:

- (1) unsupported assumption that § 46-21-102(2), MCA (1997) (claims alleging newly discovered evidence establishing that the petitioner “did not engage in the criminal conduct for which . . . convicted”), encompassed both non-exonerative procedural innocence claims for new trial (like two-element *Schlup* procedural innocence claims) and exonerative freestanding claims of actual substantive innocence (like freestanding *Herrera* substantive innocence claims); see *Beach I*, ¶¶ 37-51; and
- (2) resulting conclusion that we “must consider Beach’s” two-element *Schlup* constitutional FMJ procedural innocence claim “under the miscarriage of justice exception to the 1997 amendments,” i.e., § 46-21-102(2), MCA (1997); *Beach I*, ¶¶ 36-42 and 45-47 (citing *Clark*, ¶ 34, and *Crosby*, ¶¶ 6, 19, and 21).

¶33 As a preliminary matter, however, our reasoning was internally inconsistent with our earlier holding that the “1997 amendments” were not applicable to what we ultimately deemed was Beach’s two-element *Schlup* procedural innocence claim. See *Beach I*, ¶¶ 22-24 (“[w]e must evaluate” the asserted claim(s) under the “pre-1997” state of § 46-21-102, MCA (1981)). Even though we attempted to equate, albeit erroneously, the fifth *Clark* test criteria with the probabilistic *Schlup* procedural innocence standard, our injection of the other four *Clark* criteria into the two-element *Schlup* procedural innocence claim analysis was further problematic because the first two were patently incongruent with, and the other two were merely cumulative to, the evidentiary standards specifically prescribed for such claims in *Schlup*. See *Schlup*, 513 U.S. at 324 and 327-32, 115 S. Ct.

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fifth *Clark* test “element” incongruously equated with the *Schlup* constitutional “miscarriage of justice” exception for newly discovered evidence of procedural innocence).

at 865 and 867-69; compare *Clark*, ¶ 34.<sup>31</sup> *Beach I* is therefore further prospectively overruled to the extent that it injected the foreign *Clark* test criteria into the two-element *Schlup* constitutional FMJ procedural innocence claim analysis.

E. Clarified Affirmation of *Schlup* Procedural Innocence and *Herrera* Substantive Innocence Claims as FMJ Exceptions to MPCCHA Procedural Bars.

¶34 In *Beach II*, we largely reaffirmed our prior recognition of the two-element *Schlup* actual procedural innocence exception to federal habeas bars as a similar constitutional FMJ exception to MPCCHA procedural bars. See *Beach II*, ¶¶ 8-9, 11, 14-17, and 19 (citing *Pope*, ¶¶ 40-53, 63, and 68-69; *Redcrow*, ¶ 37); compare similarly *House v. Bell*, 547 U.S. 518, 538-40, 126 S. Ct. 2064, 2077-78 (2006); *Schlup*, 513 U.S. at 313-16 and 324-32, 115 S. Ct. at 860-62 and 866-69. As to the *Schlup* actual procedural innocence FMJ exception, we again recognized, *inter alia*, that the ultimate standard of proof and determination is whether, in light of all of the pertinent evidence (including reliable new evidence, any wrongfully excluded due to constitutional trial error, and excluding any wrongfully

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<sup>31</sup> The first and second *Clark* factors (i.e., the new evidence was newly discovered postconviction upon reasonable diligence) are more restrictive requirements than the “gateway” element of the *Schlup* procedural innocence claim which merely requires that the new evidence was not previously considered at trial. Moreover, while certainly relevant evidentiary considerations, the third and fourth *Clark* test criteria (i.e., that the asserted new evidence be material to the trial issues, non-cumulative, and not merely impeaching new evidence), are essentially already subsumed in the “new reliable evidence” standards prescribed in *Schlup* for consideration in light of the pertinent evidence as a whole under the probabilistic *Schlup* procedural innocence standard (i.e., more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt). The first four *Clark* factors are similarly incongruous or, to the extent not, cumulative for application to freestanding *Herrera*-based constitutional FMJ claims alleging new evidence of actual substantive innocence. See *Herrera*, 506 U.S. at 417-18, 113 S. Ct. at 869-70 (“probative value” of the new evidence “must be considered in light of the proof of petitioner’s guilt at trial,” any “inconsistencies” therewith, and the lack of any “satisfactory explanation” as to the timing of assertion of the new evidence).

admitted due to constitutional trial error), it is *more likely than not* that “*no reasonable juror*” upon proper legal instruction would have found the petitioner *guilty beyond a reasonable doubt*. See *Beach II*, ¶¶ 8, 14-15, and 26 (emphasis added); accord *Schlup*, 513 U.S. at 312-32, 115 S. Ct. at 860-69.

¶35 *Beach II* also reaffirmed our recognition of a *Herrera*-based freestanding newly discovered evidence of actual substantive innocence claim for exonerative release as a similar constitutional FMJ exception to MPCCHA procedural bars. See *Beach II*, ¶¶ 11-12, 14, 16, 22-23, and 26 n.4 (citing *Beach I*, ¶ 44 (citing *Schlup*, 513 U.S. at 315-16, 115 S. Ct. at 861 (quoting *Herrera*, 506 U.S. at 426, 113 S. Ct. at 874) (O’Connor, J., concurring—citing *Herrera*, 506 U.S. at 417, 113 S. Ct. at 869))); *Schlup*, 513 U.S. at 315-16, 324, and 327-28, 115 S. Ct. at 861-62, 865, and 867 (re *Herrera* substantive innocence claim); *Herrera*, 506 U.S. at 399-400 and 417-19, 113 S. Ct. at 860 and 869-70. In distinguishing it from the probabilistic two-element *Schlup* procedural innocence claim standard, we again recognized that the freestanding *Herrera*-based actual substantive innocence of guilt FMJ exception is neither based on nor involves an accompanying assertion of constitutional trial error, and thus necessitates a higher standard of proof than a mere *probabilistic* showing of procedural innocence. See *Beach II*, ¶¶ 12-14 and 16 (citing *Herrera*, 506 U.S. at 399 and 417, 113 S. Ct. at 860 and 869). We recognized that an “extraordinarily high” showing of new evidence proving that the petitioner is “truly innocent” is necessary to overcome the presumption of guilt that attaches to an error-free conviction, and thus justifying exonerative release on collateral review. See *Beach II*,

¶¶ 12-13 (citing *Beach I*, ¶ 44 (citing *Schlup*, 513 U.S. at 315-16, 115 S. Ct. at 861 (quoting *Herrera*, 506 U.S. at 426, 113 S. Ct. at 874))).

¶36 However, in the void left by the fact that the Supreme Court had yet to define a precise standard of proof for the assumed-cognizable freestanding *Herrera* new evidence of actual substantive innocence constitutional FMJ exception to federal habeas procedural bars, a significant analytical incongruity left unresolved was our *Beach II* holding which adopted a standard of proof for such claims as a similar constitutional FMJ exception to MPCHA procedural bars (i.e., “clear and convincing evidence that no reasonable juror would have found the petitioner guilty” beyond a reasonable doubt) that was an amalgam of elements of the reasonable doubt based procedural innocence of guilt and death penalty eligibility standards at issue in *Schlup* and *Sawyer*. See *Beach II*, ¶¶ 13, 16, and 26 n.4 (citing *Beach I*, ¶ 44 (citing *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868 (referring to the “meaning of actual innocence as formulated by *Sawyer* and *Carrier*”))). Quoting *Herrera*, however, the concurring four-justice *Beach II* majority contrarily held that, *going forward*, the correct standard of proof for a freestanding *Herrera* new evidence of substantive innocence claim as a similar constitutional FMJ exception to MPCHA procedural bars is the higher standard foreshadowed in *Herrera*—“reliable new evidence” that “affirmatively[] and unquestionably” proves that the petitioner is actually innocent, i.e., in fact did not commit the crime. *Beach II*, ¶¶ 104, 106-19, 127, and 131 (McKinnon, J., concurring) (noting incongruence of a *Sawyer/Schlup*-derived reasonable doubt based

procedural innocence standard as standard of proof for exonerative *Herrera*-based freestanding substantive innocence claims).

¶37 *Beach II* also reaffirmed our prior recognition that, based on the distinct nature and underlying due process justifications for each type of claim, a successful two-element *Schlup* procedural innocence claim warrants a new trial, while a successful *Herrera* substantive innocence claim entitles the petitioner to a complete and unconditional final judgment of exoneration and release. *Beach II*, ¶¶ 12-14 and 16. *Beach II* further correctly recognized that both types of constitutional FMJ actual innocence of guilt exceptions to MPCHA procedural bars necessarily require a showing of reliable new evidence—evidence not previously considered at trial, and not merely redundant or cumulative in substance thereto—sufficient to satisfy, as applicable to the claim at issue (i.e., whether the probabilistic standard of proof for two-element *Schlup* procedural innocence claims for new trial, or the affirmative and unquestionable standard of proof for *Herrera*-based freestanding substantive innocence claims for exonerative discharge). See *Beach II*, ¶¶ 8, 20, and 22-27; *Schlup*, 513 U.S. at 324 and 327-32, 115 S. Ct. at 865 and 867-69 (evaluative evidentiary scope and reliability standards prescribed for “gateway” element of two-element constitutional FMJ procedural innocence exception claims); *Herrera*, 506 U.S. at 417-18, 113 S. Ct. at 869-70 (“probative value” of the new evidence “must be considered in light of the proof of petitioner’s guilt at trial,” any “inconsistencies” therewith, and the lack of any “satisfactory explanation” as to the timing of assertion of the new evidence). Thus, except for *Beach II*’s application of the foreign *Clark* test criteria to *Beach*’s

two-element *Schlup* procedural innocence claim analysis under the law of the case established in *Beach I*,<sup>32</sup> and application of a *Sawyer*-derived standard of proof regarding freestanding

*Herrera*-based substantive innocence claims as then prospectively abandoned in the four-justice concurrence, the prospective analytical import of *Beach II*, in conjunction with its prospective four-justice concurrence, is its largely correct statement of the distinct standards of proof, and common evaluative evidentiary scope and reliability standards, for two-element *Schlup* actual procedural innocence of guilt claims, and freestanding *Herrera* actual substantive innocence of guilt claims, as due process based constitutional FMJ exceptions to MPCHA procedural bars.<sup>33</sup>

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<sup>32</sup> Having now repudiated and reversed that aspect of *Beach I*, *supra*, we in turn similarly repudiate *Beach II*, ¶¶ 10 and 78-80, to the extent that it implicitly perpetuated our prior *Beach I* injection of the foreign *Clark* test criteria (i.e., whether the asserted new evidence was discovered post-verdict, not earlier-discovered due to lack of reasonable diligence, material to the issues at trial, and “neither cumulative nor merely impeaching”) into the analysis of postconviction two-element *Schlup* constitutional FMJ procedural innocence claims. *See similarly Beach II*, ¶¶ 104, 106-19, 127, and 131 (McKinnon, J., concurring) (four-justice concurrence that *Beach I* erroneously “confused the law” by adopting a conflated amalgam of the *Sawyer* actual innocence of death penalty eligibility standard, the two-element *Schlup* procedural innocence of guilt FMJ exception standard, and the *Clark* “test” for new evidence based post-verdict/pre-conviction statutory motions for new trial—internal punctuation omitted).

<sup>33</sup> Note, however, that *Beach II* erroneously cited Justice O’Connor’s concurrence for the proposition that “a freestanding” *Herrera* substantive innocence claim “is successful only if the [reviewing] court believes that *none* of twelve potential jurors would find the petitioner guilty[,] whereas, for a gateway claim, the petitioner is successful if the court believes that *any one* of twelve potential jurors would find [him or her] not guilty.” *Beach II*, ¶ 16 n.2 (emphasis added); compare *Schlup*, 513 U.S. at 332-33, 115 S. Ct. at 870 (O’Connor, J., concurring) (merely distinguishing the *Schlup/Carrier* procedural innocence standard of proof from the lower sufficiency of the trial evidence for conviction standard recognized in *Jackson*, by noting that a *Carrier*-based *Schlup* actual procedural innocence claim would fail upon a reviewing court finding that it “is more likely than not” that “any juror[] acting reasonably would[] have found the petitioner guilty beyond a reasonable doubt”—refuting dissent equation of *Schlup* procedural

F. 1997 Imposition of More Restrictive 1-Year MPCHA Time-Bar and Enactment of Statutory Exception for Newly Discovered Evidence of Actual Substantive Innocence.

¶38 Included, *inter alia*, in the larger federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were several measures intended by Congress to enhance the finality of state criminal convictions by further restricting the availability of the federal habeas and PCR remedies under 28 U.S.C. §§ 2244, 2254, and 2255. *See* Pub. L. No. 104-32, §§ 101-08, 110 Stat. 1214, 1217-21 (1996). In 1997, the Legislature accordingly revised the MPCHA to conform to pertinent provisions of the AEDPA, and thereby similarly enhance the finality of Montana criminal convictions by similarly restricting the availability of MPCHA review and relief regarding postconviction claims asserting new evidence of innocence. *See* 1997 Mont. Laws ch. 378 (“An Act Adopting Standards Established by the Federal [AEDPA]” and “Generally Revising” Montana “Postconviction Proceedings”—amending §§ 46-21-101, -102, -105, and -201, MCA (1995), *inter alia*);

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innocence standard with *Jackson* “rationality standard” of sufficiency of the trial evidence for conviction). *See also Schlup*, 513 U.S. at 326-32, 115 S. Ct. at 867-69 (*inter alia* holding that reviewing court must apply probabilistic “no reasonable juror would have found” guilt “beyond a reasonable doubt” standard “in light of all” of the pertinent evidence including the newly discovered evidence, any wrongly excluded due to non-harmless constitutional trial error, and the trial evidence excluding any wrongfully admitted due to constitutional trial error); *Herrera*, 506 U.S. at 401-02, 113 S. Ct. at 861 (noting that *Jackson* sufficiency of the evidence “inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it [was] a *rational* decision” based on the evidence). Contrary to our assertion in *Beach II*, ¶ 16 n.2, the probabilistic *Schlup* standard, and the higher “clear and convincing evidence”/“no reasonable juror” standard asserted in *Beach II* as the standard of proof for the freestanding *Herrera*-based substantive innocence FMJ exception to MPCHA procedural bars, are distinct variants of a reasonable doubt based procedural innocence. *See Schlup*, 513 U.S. at 326-32, 115 S. Ct. at 867-69 (probabilistic *Carrier/Schlup* procedural innocence of guilt standard); *Beach II*, ¶¶ 13, 16, and 26 n.4.

H.R. 222, 55th Leg., Reg. Sess. (1997) (hereinafter, HB 222); *House Judiciary Committee Hearing Minutes re HB 222 and Verbatim Recording*, Tape 1, Side B, 55th Leg. Sess. (Feb. 4, 1997) (Rep. Shiell Anderson and Proponents AG Joe Mazurek and Asst. AG Chris Tweeten); *Senate Judiciary Committee Hearing Minutes re HB 222 and Verbatim Recording*, Tape 1, Side B, 55th Leg. Sess. (Mar. 5, 1997) (Anderson, Mazurek, Tweeten, and Asst. AG Beth Baker). In addition to various other new provisions,<sup>34</sup> the new, more restrictive AEDPA-modeled MPCHA procedural bars included a new 1-year MPCHA time-bar replacing the prior 5-year time-bar, an express exhaustion of state remedies requirement, preclusion from second or subsequent MPCHA petitions of ineffective assistance of counsel claims and claims that could reasonably have been raised earlier in the petitioner's initial MPCHA petition, and elimination of the original express MPCHA requirement for reviewing court findings of fact and conclusions of law. *See* §§ 46-21-101(2), -102(1), -105, and -201, MCA (1997 Mont. Laws ch. 378, §§ 3-6).<sup>35</sup>

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<sup>34</sup> *See* 1997 Mont. Laws ch. 378, §§ 2 and 6-7 (re court-appointed counsel and various death penalty case provisions).

<sup>35</sup> *Compare* 28 U.S.C. § 2255(f)(4) (1996) (AEDPA-imposed 1-year time-bar on federal PCR claims subject to not earlier discoverable upon due diligence exception); 28 U.S.C. § 2254(b)(1), (e)(1), and (i) (1996) (AEDPA-imposed procedural bar of federal habeas review of state convictions before exhaustion of all available and effective state remedies, rendering prior state court factual determinations presumed correct except as rebutted by “clear and convincing evidence,” and precluding ineffective assistance of counsel claims in second or subsequent petitions); 28 U.S.C. § 2244(b) and (d)(1) (1996) (habeas procedural bar of second/subsequent petitions raising earlier-raisable claims and AEDPA-imposed 1-year time-bar of habeas claims re state court claims subject to not earlier discoverable upon due diligence exception).

¶39 Added as an afterthought in conjunction with the new AEDPA-inspired MPCHA restrictions was an express statutory exception to the new 1-year MPCHA time-bar for “*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 . . . convicted.” Section 46-21-102(1)-(2), MCA (1997 Mont. Laws ch. 378, § 4—emphasis added). Conspicuously missing from the language of the new provision, however, was the applicable standard of proof for the new statutory claim. Nor did the scant legislative history regarding § 46-21-102(2), MCA (1997), indicate either the origin of its language, or the underlying rationale for adding a new statutory newly discovered evidence exception to the new 1-year MPCHA time bar vis-à-vis the two-element *Schlup* actual procedural innocence and freestanding *Herrera*-based substantive innocence constitutional FMJ claims that were already independently cognizable under preexisting §§ 46-21-101(1) and -201(6), MCA.<sup>36</sup> However, the source and metamorphosis of the

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<sup>36</sup> 1997 Mont. Laws ch. 378, § 4, was added into HB 222 on the voice motion of Rep. Duane Grimes and later moved “do pass as amended” by Sponsor Anderson at an executive session of the House Judiciary Committee. *House Judiciary Committee Executive Action Session Minutes re HB 222*, 55th Leg. Sess. (Feb. 10, 1997). The only indicia of source or intent in the available legislative records are the following audible tape-recorded responses of Asst. Attorney General Chris Tweeten to questions posed in the February 10, 1997, executive session by Rep. William Boharski:

We drafted the amendment . . . [due to] concerns expressed about situations created where evidence of actual innocence becomes available after the statute of limitations. . . . [I]t’s *designed specifically to address* the concern raised about a *newly discovered factual basis that tends to indicate that this person is not the person who engaged in the conduct* that gave rise to the criminal charge. . . . [O]ur intention . . . is to make clear to inmates that they are going to get one bite at the apple unless . . . they come up with some *evidence that really tends to suggest that they’re not the person who committed this crime*. . . . [W]e’re not going to give them multiple opportunities to go back and challenge the same conviction again

language of § 46-21-102(2), MCA (1997), is manifestly apparent upon comparison to the language of the new evidence based *Schlup* and *Herrera* constitutional FMJ exceptions, the AEDPA attempt to further reign-in new evidence based postconviction procedural innocence claims in second or subsequent federal PCR and habeas petitions,<sup>37</sup> and the similar general explanations offered to the Legislature, *see supra*, in support of the other MPCHA amendments.

¶40 Similar to the AEDPA newly discovered evidence exception to federal PCR procedural bars, the MPCHA newly discovered evidence exception includes an express “reasonable” diligence requirement not required under the two-element *Schlup* procedural

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and again and again. And that’s obviously a judgment call for the Legislature . . . [as] to whether that’s good public policy or not, but that is the intention [and] purpose of this bill.

*House Judiciary Committee Executive Action Session Minutes re HB 222 (including Exhibit 13) and Verbatim Recording, Tape 3, Side B, 55th Leg. Sess. (Feb. 10, 1997) (emphasis added). The proposed amendment carried 11-8 on first reading on continuation of executive session the next day. House Judiciary Committee Executive Action Session Minutes re HB 222, 55th Leg. Sess. (Feb. 11, 1997).*

<sup>37</sup> See 28 U.S.C. § 2255 (h)(1) and (f)(4) (1996) (AEDPA limitations on second or subsequent federal PCR petitions alleging newly discovered evidence of procedural innocence); 28 U.S.C. § 2244(b)(2)(B) and 2254(e)(2)(B) (1996) (AEDPA limitations on second or subsequent federal habeas review of state convictions based on alleged newly discovered evidence of procedural innocence). See also *Charboneau v. Davis*, 87 F.4th 443, 452-53 (9th Cir. 2023) (noting that “[i]n enacting AEDPA, Congress took direct aim at [the] *Schlup* [”] procedural innocence “standard for allowing merits consideration of second or successive” federal habeas petitions and that “AEDPA requirements for a second or successive” petition “are stricter than the *Schlup*” procedural innocence standard—citation omitted). Due to the essential similarity of the pre-1997 MPCHA (Title 46, ch. 21, MCA (1967)) to the pre-1996 28 U.S.C. § 2255, we have long recognized that federal interpretation of 28 U.S.C. § 2255 is a helpful interpretive guide to similar provisions of the MPCHA. *Coleman*, 194 Mont. at 432 and 438-39, 633 P.2d at 626 and 630-31; *McNair*, 189 Mont. at 323-25, 615 P.2d at 917-18.

innocence standard. *See* § 46-21-102(2), MCA (1997) (requiring assertion of the statutory claim “within 1 year of the date on which the [subject] conviction becomes final or . . . the petitioner discovers or reasonably should have discovered . . . the evidence”); 28 U.S.C. § 2255 (h)(1) and (f)(4) (1996) (statutory exception to AEDPA time and procedural bars for federal PCR procedural innocence claims based on newly discovered evidence which “could [not] have been discovered [earlier] through the exercise of due diligence”);<sup>38</sup> *compare Schlup*, 513 U.S. at 314-17, 324, and 327-31, 115 S. Ct. at 860-62, 865, and 867-70 (merely requiring assertion of “new reliable evidence” not previously available at trial). Moreover, while the *Schlup* constitutional FMJ exception is a two-element claim with a lower standard of proof, and the AEDPA federal PCR newly discovered evidence exception is a freestanding claim with a higher standard of proof, both are reasonable doubt based, and thus non-exonerative, newly discovered evidence of *procedural* innocence claims for a new trial. *See Schlup*, 513 U.S. at 314-17, 324, and 327-31, 115 S. Ct. at 860-62, 865, and 867-70 (requiring showing of “new reliable evidence,” and accompanying non-harmless constitutional trial error, “in light of which” “it is more likely than not that *no reasonable juror would have found petitioner guilty beyond a reasonable doubt*”—emphasis added);<sup>39</sup> *compare* 28 U.S.C. § 2255 (h)(1) and (f)(4) (1996)

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<sup>38</sup> *See similarly* 28 U.S.C. §§ 2244(b)(2)(B), 2254(e)(2)(A)(ii), and (B) (AEDPA procedural innocence exception to AEDPA procedural bar for federal habeas review of state conviction procedural innocence claims based on a “factual predicate” that “could not have been previously discovered through the exercise of due diligence”).

<sup>39</sup> *See similarly Beach II*, ¶¶ 8, 14-15, and 26 (reaffirming *Schlup* actual procedural innocence claims as constitutional FMJ exception to MPCHA procedural bars).

(freestanding procedural innocence exception to AEDPA procedural bars (1-year time-bar and second/subsequent petition bar) for federal PCR claims asserting “*newly discovered evidence* that, if proven and viewed *in light of the evidence as a whole*, would be sufficient to establish by *clear and convincing evidence* that *no reasonable factfinder would have found the movant guilty*”—emphasis added).<sup>40</sup>

¶41 In contrast, however, the substantive element of proof for the MPCHA newly discovered evidence exception—“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 . . . convicted*”—is plainly *not* a reasonable doubt based *procedural* innocence claim standard. See § 46-21-102(2), MCA (1997) (emphasis added). Rather, while the evidentiary standard of proof required to “establish that the petitioner *did not engage in the criminal conduct*” is neither express nor manifestly implicit in § 46-21-102(2), MCA (1997) (emphasis added), the clear and unambiguous language of that substantive element of proof plainly states and describes an exonerative freestanding actual factual innocence claim standard, akin to the *Herrera*-based freestanding new evidence of actual substantive innocence claim standard of proof clarified in *Beach II*, and its prospective four-justice majority concurrence, as a similar constitutional FMJ exception to MPCHA procedural bars. Compare *Schlup*, 513 U.S. at 313-17, 115 S. Ct. at 860-62

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<sup>40</sup> See similarly 28 U.S.C. §§ 2244(b)(2)(B) and 2254(e)(2)(B) (two-element AEDPA procedural innocence exception to federal habeas bars for claims based on *previously unrepresented facts* that, “if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, *but for constitutional error, no reasonable factfinder would have found the applicant guilty*”—emphasis added).

(describing *Herrera* FMJ exception as a freestanding actual substantive innocence exception, rather than an actual procedural innocence exception, based on assumption that the conviction process was “entirely fair and error-free” and thus requiring an unspecified but “extraordinarily high standard” of proof sufficient to “unquestionably establish” the petitioner’s “innocence”—internal punctuation omitted); *Herrera*, 506 U.S. at 404-05 and 417-19, 113 S. Ct. at 862-63 and 869-70 (recognizing assumed cognizable “freestanding” “newly discovered” reliable evidence of “actual innocence” claim based on assumption of error-free conviction process, thus requiring an undefined but “truly persuasive” showing of “actual innocence” that “would necessarily [have to] be extraordinarily high”). On side-by-side comparison of the language of § 46-21-102(2), MCA (1997), with the language of 28 U.S.C. § 2255(h)(1) and (f)(4) (1996), the significant difference is that the AEDPA claim standard is a freestanding reasonable doubt based procedural innocence standard, with an express clear and convincing evidence standard of proof, while the § 46-21-102(2) claim standard is an express actual factual innocence (i.e., actual substantive innocence) standard, with no express standard of evidentiary proof. It is thus evident that, in the on-the-fly ad hoc drafting of the new § 46-21-102(2) between legislative hearings,<sup>41</sup> the proponent/drafter Asst. Attorney General started with the freestanding non-exonerative procedural innocence standard specified in 28 U.S.C. § 2255(h)(1) and (f)(4) (1996), and then modified it to the distinctly higher exonerative actual substantive innocence standard

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<sup>41</sup> See *House Judiciary Committee Executive Action Session Minutes re HB 222 and Verbatim Recording*, Tape 3, Side B, 55th Leg. Sess. (Feb. 10, 1997).

stated in § 46-21-102(2), MCA. *See* 28 U.S.C. § 2255(h)(1) and (f)(4) (1996); *compare* § 46-21-102(2), MCA (1997).

¶42 Consequently, as a threshold matter of law based on its clear and unambiguous language and discernable legislative history, § 46-21-102(2), MCA (1997), narrowly applies, in conjunction with § 46-21-201(6), MCA, *only to* postconviction claims for exonerative release based on newly discovered evidence of actual substantive innocence of guilt, i.e., claims “alleg[ing] . . . 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” at issue. (Emphasis added.) In turn, § 46-21-102(2), MCA (1997), conversely does *not* apply as a threshold matter of law to freestanding non-exonerative MPCHA claims for new trial based on alleged newly discovered evidence of reasonable doubt based procedural innocence. However, without recognition of the limited scope of § 46-21-102(2), MCA (1997), as a narrow new evidence based *Herrera*-like freestanding substantive innocence claim exception to the 1-year MPCHA time-bar specified by § 46-21-102(1), MCA (1997), we have undiscerningly assumed, erroneously, that § 46-21-102(2), MCA (1997), is sufficiently broad in scope to also encompass and provide for freestanding newly discovered evidence of reasonable doubt based *procedural* innocence claims for non-exonerative new trial. *See Marble*, ¶¶ 17-39; *Crosby*, ¶¶ 15 and 17-25.

¶43 At issue in *Marble* was a dispute regarding the proper standard of proof of an MPCHA newly discovered evidence of innocence claim asserted under § 46-21-102(2), MCA (1997), as distinct from the two-element *Schlup* actual procedural innocence and

freestanding *Herrera* actual substantive innocence constitutional FMJ exceptions to MPCCHA procedural bars. See *Marble*, ¶¶ 2-4, 9-11, and 17-39. The dispute arose from the petitioner’s § 46-21-102(2) claim that recently discovered evidence, in the form of the recanted trial testimony of the victim/primary prosecution witness, established that the petitioner “did not engage in” the subject sexual intercourse without consent as convicted. *Marble*, ¶¶ 5-11 and 15. Following formal pretrial discovery and an evidentiary hearing, the district court summarily denied the petition as insufficient under the high *Herrera*-based standard of proof—reliable new evidence “affirmatively and unquestionably” proving that the petitioner in fact “did not commit the crime”—prospectively endorsed by the concurring four-justice majority in *Beach II*, ¶ 131 (McKinnon, J., concurring), for *Herrera*-like claims alleging newly discovered evidence of substantive innocence under § 46-21-102(2), MCA (1997). *Marble*, ¶¶ 11, 17-18, 20, and 32 (noting, *inter alia*, that the claim was a recantation-based claim for new trial but that district court “adopted the State’s argument” that it was an actual substantive innocence claim and that the new evidence thus “must affirmatively and unquestionably establish his innocence” “in accordance with” the corresponding “analysis set forth” by the concurring four-justice majority in *Beach II*, ¶ 131 (McKinnon, J., concurring)).

¶44 On appeal, we held that the district court erroneously applied the high *Herrera*-based standard of proof for freestanding substantive innocence claims under § 46-21-102(2), MCA (1997), because the claim at issue was a recantation-based

non-exonerative claim for a new trial, a remedy authorized by § 46-21-201(6), MCA,<sup>42</sup> for which the higher standard of proof for an actual substantive innocence based exonerative discharge “is not workable” and “fails to . . . account.” *See Marble*, ¶¶ 32-33 (noting that new evidence of prosecution witness perjury, recantation, alibi, or third-party confession is typically insufficient to affirmatively and unquestionably exonerate a convicted petitioner to the same extent as reliable scientific evidence that is “absolute in nature” like DNA evidence, for example). We further noted that Marble’s new evidence based claim for new trial was also not based on an accompanying allegation of trial error, and was therefore not cognizable as a two-element *Schlup* constitutional FMJ procedural innocence claim. *Marble*, ¶¶ 32-33. In different language, we thus essentially held that the district court erroneously applied the higher *Herrera*-based standard of proof for freestanding new evidence based actual substantive innocence claims to Marble’s freestanding procedural innocence claim for non-exonerative new trial. *See Marble*, ¶¶ 32-33 and 39 (“repudiat[ing]” *Beach II*, ¶ 131 (McKinnon, J., concurring) (in re higher *Herrera*-based standard of proof for freestanding actual substantive innocence claims), as “not suited to the quantum of proof required” for postconviction claims “seeking relief under § 46-21-102(2), MCA”).

¶45 While we correctly recognized that the higher *Herrera*-based standard of proof endorsed by the four-justice *Beach II* concurrence is not compatible with a new evidence

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<sup>42</sup> Section 46-21-201(6), MCA (specifying various MPCCHA remedies including “retrial” and exonerative “discharge” or “release”), was enacted as part of the original MPCCHA long before § 46-21-102(2), MCA (1997). *See* § 95-2605, RCM (1947) (1967).

based non-exonerative procedural innocence claim, our repudiation of *Beach II*, ¶ 131 (McKinnon, J., concurring), for all postconviction claims “under § 46-21-102(2)” was erroneously overbroad because we overlooked that the concurring four-justice majority prospectively did not endorse the higher *Herrera*-based standard of proof for application to new evidence based *procedural* innocence claims—only for *Herrera*-like freestanding substantive innocence claims, whether asserted under § 46-21-102(2), MCA (1997), or independently as a *Herrera*-based constitutional FMJ exception to MPCCHA procedural bars as recognized cognizable in the majority *and* concurring majority opinions in *Beach II*. See *Beach II*, ¶¶ 117, 119, 127-28, and 131 (McKinnon, J., concurring).

¶46 In retrospect, our erroneously broad repudiation of *Beach II*, ¶ 131 (McKinnon, J., concurring) (concurring four-justice majority recognition of *Herrera*-based standard of “affirmativ[e] and unquestionabl[e]” proof for new evidence based substantive innocence claims), manifestly stemmed from our failure to recognize the narrow application and scope of § 46-21-102(2), MCA, to statutorily compliant freestanding *Herrera*-derived substantive innocence claims. See *Marble*, ¶ 32. But for that analytical oversight, we would have recognized that *Marble*’s freestanding procedural innocence claim was not even cognizable under § 46-21-102(2), MCA, and that there was thus no need for remand for further proceedings. Our critical oversight then led to our confusing inability to articulate a particular analytical framework and standard of proof for district court analysis on remand of *Marble*’s claim—a non-exonerative freestanding *procedural* innocence claim which was not, as pled, time-barred under § 46-21-102(1)-(2), MCA (1997) (period of

limitations for MPCHA claims—one year from date conviction is final or date of reasonably diligent discovery of the asserted new evidence “whichever is later”), even if assumed cognizable *arguendo* under the restrictive § 46-21-102(2) claim standard. *See Marble*, ¶¶ 34-39.

¶47 Stymied by our failure to recognize, much less address, those fundamental threshold questions of law, we instead noted the broad scope of procedural “tools” and “option[al]” remedies available to district courts under the MPCHA, *Marble*, ¶¶ 30-31 and 38-39 (citing and referring to § 46-21-201(1)-(2) and (4)-(6), MCA), and then simply reversed and remanded for further consideration of the claim under “the very test set forth in § 46-21-102[(2)], MCA.” *Marble*, ¶¶ 35-39. We instructed the district court to thus “determine within [those] options,” whether the claim should be “dismissed” due to facial insufficiency, “whether discovery and a hearing should be” afforded, and, if so, the appropriate remedy on the merits, whether dismissal, “a new trial,” or exonerative “discharge.” *Marble*, ¶¶ 35-39. Other than stating the obvious, i.e., that the “discretionary rulings” of the district court on remand would be subject to appellate review for clear factual error, correct legal conclusions, and “an abuse of discretion,” we provided no analytical guidance to aid the district court on remand. *See Marble*, ¶¶ 38-39.

¶48 The ultimate optional MPCHA remedies upon which our non-specific analysis and remand instruction relied were and are specified in pertinent part by § 46-21-201(6), MCA (petition dismissal “[i]f the court finds for the prosecution” but, upon finding “in favor of the petitioner,” entry of “an appropriate order” regarding the conviction with “any

supplementary orders as to” bail, custody, “retrial, . . . or discharge that may be necessary and proper”). However, those ultimate remedial “options” have been part of the MPCHA from the outset and have remained unchanged since. *See* § 95-2605, RCM (1947) (1967) (now § 46-21-201(6), MCA). Without some express or manifestly implicit tie-in or coordination in the language of the AEDPA-modeled legislative revisions enacted 30 years later, the ultimate remedial “options” generally provided in the 1967 MPCHA for applicable claims asserted under § 46-21-101(1), MCA (1967-2019), could not and cannot be interpreted to define, much less expand, the substantive elements or scope of the expressly limited application of the exonerative claim (i.e., newly discovered evidence of *actual substantive innocence*) provided by § 46-21-102(2), MCA (1997), as a narrow exception to the 1-year MPCHA period of limitations specified in § 46-21-102(1), MCA (1997). Our analytical assumption in *Marble* that freestanding newly discovered evidence of reasonable doubt based *procedural* innocence claims for non-exonerative new trial are encompassed in and cognizable under § 46-21-102(2), MCA (1997), was thus patently erroneous.

¶49 Aside from erroneous injection of the *Clark* “reasonable probability” of a “different outcome” criteria into the analysis of newly discovered evidence of innocence claims asserted under § 46-21-102(2), MCA (1997),<sup>43</sup> our application of § 46-21-102(2), MCA (1997), in *Crosby* further suffered from the same erroneous analytical assumption that plagued our analysis in *Marble*. The pertinent issue in *Crosby* was whether the district

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<sup>43</sup> *See Marble*, ¶¶ 29-31 (overruling *Crosby*, ¶¶ 19-20 and 24-25).

court applied “the proper [evaluative] standard” in denying the subject recantation-based 2003 MPCHA claim for non-exonerative new trial regarding a 1996 SIWC conviction. *See Crosby*, ¶¶ 3, 5-6, and 11-25. Though we did not specifically characterize it as such, the claim at issue was in substantive essence a *freestanding* claim for non-exonerative new trial based on asserted new evidence of reasonable doubt based *procedural* innocence. *See Crosby*, ¶¶ 5-7, 11-12, and 17-24 (focusing on narrow issue of whether the recanting postconviction testimony of the child victim/witness was sufficiently credible under the fifth *Clark* test criteria to establish a reasonable possibility of a different outcome on retrial). On appeal, based on its isolated characterization of the claim as an asserted “clear miscarriage of justice exception,” the State first asserted that the claim was procedurally barred by § 46-21-102(1), MCA (1997) (1-year MPCHA time-bar). *Crosby*, ¶¶ 13-14. We rejected that assertion based on our cursory conclusion that the State’s “position wholly ignore[d]” that the claim fell “squarely within the exception” provided in § 46-21-102(2), MCA (1997). *Crosby*, ¶ 15. We then proceeded to address the “proper” evaluative “test” of the claim on remand. *See Crosby*, ¶¶ 17-25. We thus assumed, erroneously, that such *freestanding* newly discovered evidence of reasonable doubt based *procedural* innocence claims for *non-exonerative new trial* are encompassed in and cognizable under § 46-21-102(2), MCA (1997).

¶50 Based on the foregoing analysis, we hold that § 46-21-102(2), MCA (1997), narrowly applies, in conjunction with § 46-21-201(6), MCA, *only to* postconviction claims for exonerative release based on newly discovered evidence of actual substantive

innocence of guilt, i.e., claims “alleg[ing] . . . 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*” at issue. (Emphasis added.) We conversely hold, in turn, that § 46-21-102(2), MCA (1997), does *not* apply as a threshold matter of law to *freestanding non-exonerative* MPCHA claims for *new trial* based on alleged newly discovered evidence of reasonable doubt based *procedural innocence*.<sup>44</sup> We hold further that the evidentiary standard of proof for freestanding substantive innocence claims under § 46-21-102(2), MCA (1997), is reliable “newly discovered evidence that, if proved and viewed in the light of the evidence as whole[,] would” be sufficient to *affirmatively and unquestionably* “establish that the petitioner did not engage in the criminal conduct” at issue. See *Marble*, ¶ 32 (“repudiat[ing]” *Beach II* concurrence endorsement of *Herrera*-based standard of proof for freestanding procedural innocence claims but acknowledging it as “well-suited to” freestanding substantive innocence claims based on “exonerating evidence that is . . . absolute in nature”); *Beach II*, ¶¶ 81, 117, 119, and 131 (McKinnon, J., concurring) (prospective four-justice majority concurrence). To the extent inconsistent with these holdings, *Marble*, ¶¶ 32-39, and *Crosby*, ¶¶ 15, 20, and 25, are

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<sup>44</sup> Even if otherwise cognizable under the MPCHA, *arguendo*, a freestanding newly discovered evidence of procedural innocence claim for new trial would thus necessarily have to be cognizable, like *Schlup* and *Herrera* constitutional FMJ claims, under the general provisions of §§ 46-21-101(1) and -201(6), MCA, as a new evidence based claim that the subject conviction was unlawful “in violation of the” state or federal “constitution” or state law, and for which there is “no adequate remedy of appeal.” See § 46-21-101(1), MCA; see also note 47, *infra*.

prospectively overruled.<sup>45</sup> In contrast, two-element *Schlup* gateway procedural innocence claims for new trial,<sup>46</sup> and freestanding *Herrera*-based actual substantive innocence claims for exonerative release,<sup>47</sup> remain independently cognizable under §§ 46-21-101(1) and -201(6), MCA, as limited constitutional FMJ exceptions to MPCCHA procedural bars independent of § 46-21-102(2), MCA (1997). *See* § 46-21-101(1), MCA (re postconviction claims alleging unlawful conviction “in violation of” federal or state constitution); *Marble*, ¶ 33 (distinguishing § 46-21-102(2), MCA (1997), claim at issue from two-element *Schlup* constitutional FMJ procedural innocence claim).<sup>48</sup>

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<sup>45</sup> The remaining four *Clark* test criteria (“material” new evidence, discovered since trial, not earlier discovered due to lack of reasonable diligence, and “neither cumulative nor merely impeaching”) are necessarily subsumed in the express language of § 46-21-102(2), MCA (“newly discovered evidence,” discovered within one year of date conviction becomes final or “on which” discovered or “reasonably should have [been] discovered,” and “in light of the evidence as a whole would establish that petitioner did not engage in the criminal conduct for which . . . convicted”). *Crosby*, ¶¶ 19-24, and *Marble*, ¶¶ 21-24 and 36, are therefore prospectively overruled to the extent that they injected the remaining four *Clark* test criteria into the newly discovered evidence of innocence claim analysis under § 46-21-102(2), MCA (1997).

<sup>46</sup> *See* Opinion, ¶¶ 18, 20-21, 34, and 36-37, *supra*; *Beach II*, ¶¶ 81, 117, 119, and 131 (McKinnon, J., concurring) (prospective four-justice majority concurrence).

<sup>47</sup> *See* Opinion, ¶¶ 18, 22, 35, and 37, *supra*. We reiterate for clarity that the standard of proof for *Herrera*-based freestanding constitutional FMJ claims alleging actual substantive innocence for exonerative discharge is reliable new evidence sufficient to “affirmatively and unquestionably establish” that the claimant in fact did not commit the crime at issue. *See Marble*, ¶ 32; *Beach II*, ¶¶ 81, 117, 119, and 131 (McKinnon, J., concurring) (prospective four-justice majority concurrence).

<sup>48</sup> *See similarly McQuiggin*, 569 U.S. at 392-97, 133 S. Ct. at 1931-34 (noting that constitutional FMJ exception for newly discovered evidence of innocence “survived” 1996 enactment of AEDPA procedural bars for federal habeas and PCR claims); *House*, 547 U.S. at 539, 126 S. Ct. at 2078 (rejecting state assertion that more stringent AEDPA procedural bars and claim standards “replaced” *Schlup* constitutional FMJ exception to federal habeas procedural bars); *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 1610-11 (1998) (constitutional FMJ actual innocence exception may overcome 28 U.S.C. § 2255 federal PCR claim procedural bar requiring assertion of constitutional objection “on direct review”); *Herrera*, 506 U.S. at 404, 113 S. Ct. at

G. Henderson’s Freestanding Recantation-Based Newly Discovered Evidence of Procedural Innocence Claim for Non-Exonerative New Trial.

¶51 As pled and litigated below, Henderson’s petition asserts in essence a recantation-based freestanding claim of reasonable doubt based *procedural* innocence for non-exonerative new trial under §§ 46-21-102(2) and -201(6), MCA. *See Marble*, ¶ 32 (noting that recantation-based newly discovered evidence of innocence is insufficient alone to “unquestionably” exonerate a petitioner like new evidence that is “scientific [or] absolute in nature” and thus sufficient alone to “certainly establish that the [petitioner] did not commit the crime”). As we have now specifically recognized *supra*, however, such *freestanding procedural innocence* claims are not cognizable as a threshold matter of law under § 46-21-102(2), MCA (1997).<sup>49</sup> Thus, even if not plagued by procedural irregularity,<sup>50</sup> Henderson’s asserted MPCCHA claim is not a cognizable claim for relief under §§ 46-21-102(2) and -201(6), MCA, as a threshold matter of law.

¶52 Nor has Henderson asserted, much less shown, that his freestanding procedural innocence claim for non-exonerative new trial is independently cognizable as matter of law

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862 (noting rationale underlying the miscarriage of justice exception is to ensure “that federal constitutional errors do not result in the incarceration of innocent persons”); *Fay*, 372 U.S. at 440-41, 83 S. Ct. at 850 (federal habeas writ remains available to redress fundamental miscarriages of justice “[i]f States withhold effective remedy” for redress of imprisonment in violation of federal due process guarantee).

<sup>49</sup> Nor is Henderson’s freestanding procedural innocence claim independently cognizable, as pled, under §§ 46-21-101(1) and -201(6), MCA, as either a two-element *Schlup* procedural innocence claim for new trial, or a *Herrera*-based freestanding actual substantive innocence claim for exonerative release, as recognized as constitutional FMJ exception claims in the majority and concurring four-justice majority opinions in *Beach II*.

<sup>50</sup> See note 5, *supra*.

under §§ 46-21-101(1) and -201(6), MCA. In the absence of an accompanying prejudicial trial error, the implicated gravamen of such a claim would have to be that he was duly convicted at an error-free trial, but which conviction has been retroactively rendered constitutionally or statutorily unlawful by his subsequent discovery of recantation-based evidence which at most would support the argument he makes here—that Doe’s asserted recantation of her trial testimony establishes a reasonable probability of a different outcome on retrial. Such a freestanding procedural innocence claim would upset the delicate constitutional balance between the compelling state interest in the finality of error-free convictions vis-à-vis the rare circumstances where a petitioner can make a compelling showing of new evidence based actual substantive innocence (i.e., that the petitioner actually did not engage in or commit the criminal conduct for which convicted), thus implicating a fundamental due process concern.<sup>51</sup> In the absence of a contributing prejudicial trial error, as required for example under the two-element *Schlup* constitutional

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<sup>51</sup> See *Schlup*, 513 U.S. at 313-26, 115 S. Ct. at 860-66 (noting inherent tension between the constitutional due process safeguard provided by collateral federal habeas review of postconviction claims asserting new evidence of innocence and compelling state interest in the finality of criminal convictions—thus noting resultant differences in underlying justifications and standards for two-element *Schlup* constitutional FMJ procedural innocence exception and freestanding substantive innocence constitutional FMJ exception assumed cognizable in *Herrera*); *Herrera*, 506 U.S. at 398-400, 407-09, and 417, 113 S. Ct. at 859-60, 864-65, and 869 (noting constitutional due process justification for collateral federal habeas review of postconviction claims asserting new evidence of actual substantive innocence and that “the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition,” and that the Court has thus “exercised substantial deference to legislative judgments in th[at] area” and “found [the] criminal process lacking only where it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”—internal punctuation and citations omitted); see similarly *Herrera*, 506 U.S. at 419 and 426-27, 113 S. Ct. at 870 and 874 (O’Connor, J., concurring).

FMJ procedural innocence exception, the necessary balance between Henderson’s due process rights, and the compelling state interest in the finality of convictions, would necessarily subject his freestanding procedural innocence claim to a standard of proof significantly *higher than* the probabilistic standard (more probable than not that no reasonable juror would have found the claimant guilty beyond a reasonable doubt in light of all of the evidence new and old) applicable to two-element *Schlup* procedural innocence claims. However, as manifest *infra* regarding the even lower standard of proof for new evidence based post-verdict motions for new trial under the five-part *Clark* test, Henderson’s asserted new evidence would not satisfy the higher probabilistic *Schlup* procedural innocence standard that is justified as a matter of due process only when the underlying conviction was *not* error-free.

¶53 For comparative illustration, Henderson’s freestanding newly discovered evidence of procedural innocence claim would still fail even if it could be liberally construed as a post-verdict motion for new trial in the interests of justice under § 46-16-702(1), MCA, and *State v. Morse*, 2015 MT 51, ¶¶ 20-30, 378 Mont. 249, 343 P.3d 1196 (discretionary grant of new trial in interests of justice pursuant to § 46-16-702(1), MCA, based on post-verdict assertion of new evidence not precluded by 30-day filing deadline specified by § 46-16-702(2), MCA).<sup>52</sup> A district court may grant a new trial post-verdict in the

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<sup>52</sup> The recantation-based freestanding newly discovered evidence of innocence motion at issue in *Morse* was filed over five months post-verdict, but two months before sentencing and entry of judgment of conviction. *Morse*, ¶¶ 11 and 14; Sentence and Judgment, *State v. Morse*, Cause No. DC-12-45, Montana Third Judicial District Court (Dec. 3, 2013). Our reference to *Morse* for illustrative purposes here is neither an endorsement, nor critique, of the noted *Morse* holding.

interests of justice under § 46-16-702(1), MCA, based on new evidence only if the evidence:

- (1) was discovered post-verdict or judgment of guilt;
- (2) would not have been earlier discovered upon reasonable diligence;
- (3) is “material to” the matters at issue at trial;
- (4) is “neither cumulative or merely impeaching”; and
- (5) is sufficient to establish a “reasonable probability” that a new trial would “result[] in a different outcome.”

*Morse*, ¶ 31 (citing *Clark*, ¶ 34 (recognizing five-part *Berry* test for evaluation of new evidence based post-verdict motions for new trial under § 46-16-702(1), MCA)). Upon application of the five-part *Clark* test to recantation-based newly discovered evidence motions under § 46-16-702(1), MCA, the district court does not consider and assess “the ultimate truthfulness” or relative weight or credibility of the newly discovered evidence, but only whether the asserted new evidence satisfies the first four *Clark* test criteria and then, if so, whether the new evidence is sufficient to establish a “reasonable probability” that a new trial would “result[] in a different outcome.” See *Morse*, ¶ 31 (quoting *Crosby*, ¶ 21, and noting that “the ultimate truthfulness” and relative credibility and weight of the new evidence are matters for factfinder determination “on retrial” if warranted under the *Clark* test).

¶54 Here, for purposes of § 46-16-702(1), MCA, and the *Clark* test, the record manifests that the asserted new evidence was discovered post-verdict, and the State further concedes that it was discovered and asserted upon reasonable diligence. The record further reflects

that the asserted new evidence would be material to Henderson’s guilt or innocence on retrial, depending on how the finder of fact might view it on retrial in light of the evidence as a whole. Close comparison of Doe’s trial and post-trial statements manifests, moreover, that not all of her asserted post-verdict statements and testimony were cumulative to her trial testimony. See, for example, Doe’s recorded post-verdict statement that, regardless of Henderson’s earlier violent and aggressive conduct, and her resulting anger towards him, she “did consent” to the ultimate act of sexual intercourse at issue, as distinct from an earlier coerced oral sex act. Henderson further correctly points out that the District Court finding, that the new evidence was of “minimal additional weight or credibility” in light of Doe’s “other inconsistent” testimony and Henderson’s “history of victim tampering,” arguably would have been improper under the *Clark* test as a finding on the ultimate relative credibility and weight of the asserted recantations.

¶55 However, on appeal, we must view the evidentiary record, and pertinent lower court findings of fact, in the light most favorable to the judgment at issue. *State v. Johnson*, 2023 MT 167, ¶ 11, 413 Mont. 202, 534 P.3d 676 (citing *State v. Talksabout*, 2017 MT 79, ¶ 8, 387 Mont. 166, 392 P.3d 574); *In re Jones*, 176 Mont. 412, 415, 578 P.2d 1150, 1152 (1978).<sup>53</sup> Moreover, we will similarly affirm a lower court judgment if it reaches a correct result even if based on incorrect or incomplete reasoning. *State v. Marcial*, 2013 MT 242,

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<sup>53</sup> See similarly *Peschel Family Trust v. Colonna*, 2003 MT 216, ¶ 19, 317 Mont. 127, 75 P.3d 793; *In re Marriage of McMahon*, 2002 MT 198, ¶ 7, 311 Mont. 175, 53 P.3d 1266; *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870; *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 459, 507 P.2d 523, 525 (1973).

¶ 10, 371 Mont. 348, 308 P.3d 69; *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646; *State v. Shepard*, 2010 MT 20, ¶ 9, 355 Mont. 114, 225 P.3d 1217; *State v. Hendershot*, 2009 MT 292, ¶ 33, 352 Mont. 271, 216 P.3d 754.

¶56 Construing the District Court’s summary findings in the light most favorable to the judgment for comparative illustration here, the summary finding that Doe’s asserted post-verdict statements and testimony were largely not “new,” and were thus cumulative to her trial testimony, was not clearly erroneous. Nor was the court’s related recognition that, to the extent not cumulative to her trial testimony, Doe’s asserted recantations were internally inconsistent, both with her other post-verdict statements, and her prior trial testimony. Likewise the court’s recognition, based on the underlying trial record, that Henderson had a “history of victim tampering” with Doe regarding the very subject matter at issue at trial on postconviction review.

¶57 As pertinent to the fifth *Clark* factor, the District Court thus essentially found and concluded in sum that the asserted new evidence was ultimately insufficient to establish a reasonable probability that a new trial would result in a different outcome.<sup>54</sup> Viewed in the light most favorable to the judgment, and the pertinent evidentiary record, the District Court’s summary findings of fact were not clearly erroneous, and would have comported with the fourth and fifth *Clark* test criteria for purposes of a post-verdict motion for new

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<sup>54</sup> See similarly *Crosby*, ¶¶ 31-39 (Warner, J., dissenting) (elaborating on proper application of *Clark* test criteria when applicable); accord *Crosby*, ¶¶ 23-24 (noting “subtle yet important distinctions” noted by the dissent regarding proper *Clark* test assessment of “the weight and credibility” of recanted testimony “versus” improper “district court determin[ation]” of its “ultimate” credibility, veracity, and weight).

trial in the interests of justice under § 46-16-702(1), MCA, and *Morse*. Thus, even if Henderson’s petition could be liberally construed, *arguendo*, as a post-verdict motion for new trial in the interests of justice under § 46-16-702(1), MCA, his freestanding procedural innocence claim would still not prevail even under the lower *Clark* test standard—reasonable probability of a different outcome—applicable to such claims, much less the significantly higher standard of proof that would necessarily apply even if cognizable *arguendo* as a MPCHA claim under § 46-21-101(1), MCA. We thus hold that the District Court did not erroneously deny Henderson’s freestanding claim of newly discovered evidence of procedural innocence under § 46-21-102(2), MCA (1997).

### CONCLUSION

¶58 We hold that the District Court did not erroneously deny Henderson’s freestanding MPCHA claim alleging newly discovered evidence of non-exonerative procedural innocence. The January 2022 judgment of the District Court denying and dismissing Henderson’s petition for postconviction relief from his May 2019 Aggravated SIWC conviction is hereby AFFIRMED.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ JIM RICE  
/S/ BETH BAKER  
/S/ INGRID GUSTAFSON  
/S/ LAURIE McKINNON