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COUNSEL FOR DEFENDANT AND APPELLEE

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0051

RICHARD DALE PATTERSON,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

STATE'S OBJECTION TO PETITION FOR OUT-OF-TIME APPEAL

The Montana Attorney General's Office, on behalf of the State of Montana, hereby objects to the Petition for Out-of-Time Appeal (Petition) filed by Richard Dale Patterson (Patterson) on January 21, 2025.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In 2011 Patterson was convicted of sexual intercourse without consent against A.K., who was 11 years old at the time of the offense; sexual intercourse without consent against J.L.; and felony sexual assault against K.W., who was 11 years old at the time of the offense. *State v. Patterson* (Patterson I), 2012 MT 282, ¶¶ 5-8, 367 Mont. 186, 291 P.3d 556.

Patterson appealed his convictions asserting that the district court's application of the Montana rape shield statute in relation to the offense against A.K. violated his right to a fair trial under the Montana and United States Constitutions. *Id.* ¶¶ 10-20.

A.K. testified at trial that she and her mother were visiting Patterson in his home, and that all three of them were in his bed under the covers with the room light off. Patterson was in the middle, and A.K. thought her mother was sleeping. Patterson pulled up A.K.'s skirt and she felt him unbuttoning his own pants. A.K. testified that she was "too scared to move" when Patterson then moved her underwear to the side and began pushing his hips against her from behind. She felt something on her skin in her "private area" between her legs, and then she felt like that something was inside of her. After Patterson stopped pushing against her and went into the bathroom, A.K. got her mother's attention, and together they left Patterson's house and returned to their own home, where A.K. took a bath. A.K.'s mother called the police and took A.K. to the hospital emergency room, where A.K. was interviewed and examined.

Id. ¶ 11.

Prior to trial, the Montana State Crime Lab analyzed clothing worn by A.K. at the time of the offense. *Id.* ¶ 6. Patterson was excluded as a contributor to the DNA profile developed from a stain discovered on A.K.’s shirt. *Id.* The district court granted the State’s motion to exclude the DNA results at trial but permitted argument and evidence that none of Patterson’s DNA was discovered on A.K.’s clothing or on a vaginal swab taken from her person. *Id.*

At trial, Joseph Pasternak (Pasternak), a forensic scientist in the DNA section of the Montana State Crime Lab, testified regarding his work on items related to A.K.’s allegations. (App. A. at 599-601.)¹ Pasternak explained that he received A.K.’s reference standard, Patterson’s reference standard, and the stain from A.K.’s shirt. (*Id.* at 600-01.) The State asked Pasternak, “based on [his] analysis, was there any DNA which identified the Defendant?” (*Id.* at 601.) Pasternak replied, “Richard Patterson was excluded as a possible contributor to the profile from the shirt.” (*Id.*)

This Court held that the district court “did not err in prohibiting use at trial of the evidence that DNA from a male other than Patterson was found on A.K.’s shirt.” *Id.* ¶ 20. This Court noted that the State did not put the origin of the DNA on A.K.’s shirt at issue. *Id.* ¶ 18.

¹ The State has included a redacted portion of the trial transcript. The full trial transcript is available in *State v. Patterson*, DA 11-0496.

Further, evidence that the DNA stain on A.K.'s shirt was from a male other than Patterson, in and of itself, is of no probative value as to a 'specific instance[] of [A.K.'s] sexual activity,' as referenced under § 45-5-511(2) MCA, because the stain itself does not reveal how or when it got there. Patterson wanted to cross-examine A.K. on the origins of the stain on her shirt. But that would do nothing to demonstrate Patterson's innocence of the crime with which he was charged. Rather, such evidence would simply go towards turning the case into a trial of A.K., the victim.

Id.

On February 25, 2022, Patterson filed a pro se Petition for DNA Testing. (Pet., App. 2 at 1.) Several months later, through appointed counsel, Patterson filed an Amended Petition for DNA Testing. (*Id.*) Patterson also filed an Affidavit in Support of the Amended Petition for DNA Testing and an Amended Affidavit from Greg Hampikian (Hampikian). (*Id.*) Patterson asserted that Hampikian "opine[d] that further DNA testing could be accomplished and could result in exoneration" of Patterson for sexual intercourse without consent against A.K. (*Id.* at 4.) In the Amended Affidavit, Hampikian asserted that new "STR DNA testing from the stained area could produce a profile from the semen that could be used for comparison to any alternative suspects or uploaded to CODIS." (*Id.*) He further opined that new "SNP testing from the semen stain could be used for investigative forensic genealogy to identify the genealogical lineage of the male contributor" to the stain from A.K.'s shirt. (*Id.*)

The district court denied Patterson’s Amended Petition for DNA Testing on April 19, 2023. (*Id.* at 7.) The court found that the identification of the contributor to the stain on A.K.’s shirt would not exonerate Patterson. (*Id.*) The district court noted that the admissibility of the source of the DNA on A.K.’s clothing had already been extensively litigated in front of this Court and that this Court determined the DNA evidence from the stain had no probative value. (*Id.*) The district court found that Patterson was attempting to bring in the “same type of evidence with his Petition for DNA testing.” (*Id.* at 5.)

Patterson subsequently filed a Petition for Writ of Habeas Corpus in this Court, asserting, among other things, that the DNA results exonerated Patterson of the crime against A.K. and that whoever left the stain on A.K.’s shirt was the real perpetrator. Petition for Writ of Habeas Corpus at 3-10, *Patterson v. Salmonsens*, 412 Mont. 554, 530 P.3d 1271 (2023) (No. OP 23-0296). This Court denied Patterson’s Petition for Writ of Habeas Corpus citing Mont. Code Ann. § 46-22-101(2) (“The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal.”); Mont. Code Ann. § 46-21-105(2) (“When a petitioner has been afforded the opportunity for a direct appeal of the petitioner’s convictions, grounds for relief that were or could

reasonably have been raised on direct appeal may not be raised, considered or decided” in a postconviction proceeding); and *State v. Huffine*, 2018 MT 175, ¶ 16, 392 Mont. 103, 422 P.3d 102 (collateral estoppel has wide application on its elements in various contexts including direct appeal, postconviction proceedings, and habeas corpus review to preclude relitigation of claims or issues previously addressed by this Court). *Patterson v. Salmonsens*, OP. 23-0296, 412 Mont. 554, 530 P.3d 1271, *2 (Mont. Sup. Ct. Jun. 13, 2023).

ARGUMENT

Appeals of an order issued in a postconviction matter must be taken within 60 days of the entry of the order. Mont. Code Ann. § 46-21-203. The district court issued an order denying Patterson’s petition for DNA testing on April 19, 2023. Patterson filed his Petition requesting an out-of-time appeal with this Court on January 21, 2025, more than a year and a half after his time to appeal expired.

Out-of-time appeals to this Court are governed by M. R. App. P. 4(6) which provides:

In the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice, the supreme court may grant an out-of-time appeal. An out of time appeal must be requested by verified petition supported by affidavits, records, and other evidence establishing the existence of the extraordinary circumstances

claimed. Extraordinary circumstances do not include mere mistake inadvertence, or excusable neglect.

Patterson asserts that this Court should grant his Petition for Out-of-Time Appeal because he asked counsel to appeal the district court's decision, but the Office of the State Public Defender's Office inexplicably failed to file a timely notice of appeal. (Pet. at 2.) However, Patterson made statements in a federal petition that contradict this assertion.

On July 14, 2023, Patterson filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Montana in which he asserted that he did not appeal the denial of any postconviction petition. (App. B at 4.) Patterson also asserted that he did not have any action or appeal pending in any court, state or federal, regarding his 2011 judgment. (*Id.* at 6.) Patterson described, at length, a previous attorney's failure to timely file a petition for postconviction relief and the district court's subsequent tolling of the statute of limitations which permitted him to file a petition in 2017. (*Id.* at 9.) However, Patterson did not claim any failure on the part of counsel to file an appeal of the district court's denial of either his petition for postconviction relief or his petition for DNA testing. (*Id.*)

Patterson's assertions in the instant Petition are contradicted by his own statements in his federal petition, statements he declared under penalty of perjury

to be true. (*Id.* at 7.) Thus, this Court should deny Patterson’s Petition for Out-of-Time Appeal.

Further, Patterson has not established any “extraordinary circumstances amounting to a gross miscarriage of justice” in this case. While Patterson’s claims about who left the stain A.K.’s shirt have changed over the years, the evidence Patterson seeks is the same type of evidence that was excluded under the Montana rape shield act at trial. This Court has upheld the exclusion of that evidence and Patterson’s Petition for an Out-of-Time Appeal is just another attempt to relitigate the same issue.

A.K.’s clothing was tested before trial which resulted in the development of a DNA profile for an unknown male. Even if more advanced testing methods were utilized, Patterson cannot establish that any of those tests would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the sexual intercourse without consent against A.K. *See* Mont. Code Ann. § 46-21-110(5)(e). As this Court noted in *Patterson I*, cross-examining A.K. on the origins of the stain on her shirt would do nothing to demonstrate Patterson’s innocence of the crime with which he was charged but would instead turn the case into a trial of A.K. *Patterson I*, ¶ 18.

There also is not a reasonable probability that Patterson would not have been convicted if favorable results had been obtained through DNA testing at the time of his trial. *See* Mont. Code Ann. § 46-21-110(5)(d). The jury learned, through Pasternak's testimony, that a profile was developed from the stain on A.K.'s shirt and that Patterson was excluded as a possible contributor to that profile. Even if the proposed testing led to favorable results, Patterson cannot establish that there is a reasonable probability that he would not have been convicted if those results were available at the time of trial.

The identity of the perpetrator of the sexual intercourse without consent against A.K. was not and should not have been a significant issue at trial. This was not a case of an unknown attacker. A.K. knew Patterson well. A.K.'s testimony was corroborated by her mother's testimony, testimony from medical providers, and the individual who conducted the forensic interview. Patterson's roommate's testimony also corroborated that A.K. and her mother were with Patterson at his house the night of the incident and that Patterson was in the bathroom for a portion of that time.

Patterson was convicted in 2011 and 14 years later he is trying to relitigate the exclusion of the DNA evidence from A.K.'s shirt at his trial. This Court has already determined that the type of evidence Patterson sought in his Petition for

DNA Testing has no probative value. This Court should deny Patterson's Petition for Out-of-Time Appeal,

Based on the foregoing the State respectfully requests that this Court deny Patterson's petition to grant an out-of-time appeal.

Respectfully submitted this 1st day of February, 2025.

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By: /s/ Christine Hutchison
CHRISTINE HUTCHISON
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,995 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ Christine Hutchison

CHRISTINE HUTCHISON

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APPENDICES

Redacted portion of trial transcript

9/22/2011, Custer County Cause No. DC 10-38App. A

Petition for Writ of Habeas Corpus

USDC, filed 07/14/23App. B

CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 01-31-2025:

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Electronically signed by Wendi Waterman on behalf of Christine M. Hutchison
Dated: 01-31-2025