IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0615

CARESSA JILL HARDY, a/k/a GLENN LEE DIBLEY,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane A. Vannatta, Presiding

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2. If the claim is not barred, whether the postconviction court correctly denied Hardy's claim that the trial court lacked subject matter jurisdiction over his criminal case because the charges were not supported by probable cause.

3. If the claim is not barred, whether Hardy's convictions are supported by sufficient evidence.

4. If the claim is not barred, whether the jury was fully and fairly instructed.

5. Whether Hardy waived his claim that the court failed to enforce the court's subpoena powers and, if not, whether that occurred.

STATEMENT OF THE CASE

In August 2017, the State charged Appellant Caressa Jill Hardy, aka Glenn Dibley (Hardy), with two counts of deliberate homicide, alleging that he killed Thomas Korjack and Robert Orozco between March 26 and April 1, 2013.

(Trial Doc. 3.)[1] The State recounted the allegations of an eyewitness, Karen Jill Hardy (Karen), and law enforcement's corroboration of her claims through a search of Hardy's property. (Trial Doc. 1.)

The State later added two counts of solicitation to commit deliberate homicide based on statements Hardy made to other inmates while incarcerated in the Missoula County Detention Facility (MCDF). (Trial Doc. 41.) The State alleged that Hardy offered money to two inmates to kill Karen. (Trial Doc. 36 at 16-18.)

At trial, three inmates testified about Hardy's statements to them. The State did not call a fourth inmate, John Braunreiter, because he had indicated that he would not cooperate. The court prohibited Hardy from arguing about Braunreiter's absence because he was unwilling to be a witness. (Tr. at 2344-49.) After a nine-day trial, a jury convicted Hardy of two counts of deliberate homicide and two counts of solicitation to commit deliberate homicide. (Tr. at 2505.)

Hardy appealed his convictions raising four claims: (1) the State's use of incarcerated informants violated his right to counsel; (2) the court erred when it refused Hardy's instruction that would have directed the jury to view the testimony of the informants with caution; (3) the court violated Hardy's right to counsel and

[1] Documents from the underlying criminal case, DC-17-481, are cited as "Trial Doc." Documents from the postconviction case, DV-24-566, are cited as "PCR Doc." All of the transcripts are consecutively paginated, so they are cited as "Tr."

to present a defense when it prohibited him from commenting on Braunreiter's absence; and (4) the Court should exercise plain error review to consider whether prosecutorial misconduct deprived him of a fair trial. *State v. Hardy*, 2023 MT 110, ¶¶ 22, 42, 55, 64, 412 Mont. 383, 530 P.3d 814. This Court affirmed the convictions.

Hardy subsequently filed a petition for postconviction relief, followed by an amended petition for postconviction relief. (PCR Docs. 1, 6.) The district court issued an order denying the amended petition. (PCR Doc. 13, available at Appellee's App. A.)

STATEMENT OF THE FACTS

I. Facts presented at trial

The facts presented at trial are discussed in this Court's opinion in *Hardy*. *Hardy*, ¶¶ 4-17. Some of the significant facts presented in the nine-day trial are as follows.

Karen and Hardy entered a relationship in California in the 1990's. (Tr. at 832-34). They later moved to Wyoming where they became friends with Thomas Korjack. (Tr. at 846, 852-53.) Korjack was estranged from his family, and he began living with Hardy and Karen. (Tr. at 853, 1153-63.) Korjack had a PhD

and earned significant money working in the petroleum industry. (Tr. at 854-55, 1151, 1472.)

Karen ended her relationship with Hardy and moved away when he transitioned to a woman and changed his name from Glenn Dibley to Caressa Jill Karen Hardy. (Tr. at 847-50, 982-83, 1468.) Hardy and Karen's autistic and nonverbal child, Z.H., remained with Hardy. (Tr. at 851, 874, 946.)

Hardy convinced Karen to return to be with Z.H. (Tr. at 851, 983.) After Karen moved back in with Hardy and Korjack in Wyoming, she entered into a relationship with Robert Orozco, who also moved into the home. (Tr. at 861-63.) Hardy became jealous of Orozco. (Tr. at 865.)

Around 2012, Korjack, Hardy, Karen, Orozco, and Z.H. moved to a home Korjack had purchased outside of Frenchtown, Montana. (Tr. at 873-77, 2218.) Korjack placed Hardy's name on the deed. (Tr. at 875, 985.) Hardy, Karen, and Orozco all worked for Korjack running a home inspection business and were financially dependent on him. (Tr. at 877, 881-82, 987.) Karen and Orozco had a child named R.J. (Tr. at 870-71.)

Korjack's relationship with Hardy changed after Korjack discovered Hardy was in a homosexual relationship. (Tr. at 888-89.) Korjack began to treat Hardy differently and withdrew resources from Hardy, but Korjack still allowed Hardy to live there. (Tr. at 891-92.)

Korjack asked Hardy for the house deed because he wanted to remove Hardy's name. Hardy became stressed about Korjack wanting the deed and treating him differently. They began fighting often. (Tr. at 893-95.)

Around the same time, Korjack, Orozco, and Karen began looking for another home in a neighboring state where they were working. Hardy was afraid they were going to leave him. (Tr. at 894-95.)

One day in the spring of 2013, Korjack and Hardy argued upstairs about purchasing another home. (Tr. at 897.) Orozco, Karen, and Korjack went into a downstairs bedroom, where they discussed purchasing a new property and getting the deed from Hardy. (Tr. at 898, 902-03.)

Hardy entered the room and began arguing with Korjack. (Tr. at 903-04.) Hardy then pulled out a gun and fired several shots toward Korjack and Orozco. (Tr. at 904.) Karen huddled in the corner with her infant, R.J., and begged Hardy not to kill her and the children. (Tr. at 904, 908.) Hardy kicked and hit Karen. (Tr. at 908.) Hardy's demeanor then changed, and he told Karen he would never hurt the children. (Tr. at 909.)

Korjack's body was lying near the door, and Robert's body was on the bed. (Tr. at 910.) Karen noticed blood on the walls and a television and that the window had been broken. (Tr. at 906-07.)

Hardy led Karen upstairs. (Tr. at 909.) He pulled his bed into the living room and made Karen sleep on the couch. She remained terrified and shocked. (Tr. at 915-16.) The next day, Hardy escorted Karen back downstairs, while armed, to get clothes and supplies. Both bodies were still in the room. (Tr. at 916-17.)

Hardy made Karen sleep in the living room for several days. He placed locks on doors so they could not be opened, and screwed windows shut. One morning, he placed a bullet or bullet casing on her pillow. Hardy repeatedly told Karen she would be better off if she killed herself. He also took her phone. (Tr. at 918-20.)

Shortly after the shootings, Hardy wanted Karen to go driving with the bodies during the night. Karen was scared and panicked, and they did not go. Hardy began burning items in a fire pit outside of the house, including her bed. (Tr. at 920-21.) The fire burned for days. Karen believed Hardy burned the bodies. (Tr. at 923.) During the spring of 2013, neighbors noticed Hardy had a fire on his property for a week that smelled "absolutely rank," resembling the smell of a burning deer carcass. (Tr. at 1025-27, 1030, 1033, 1058, 1090.)

Karen did not think about seeking help when they went into town because she did not want him to kill her or hurt her children. (Tr. at 926-27.) When Hardy's sister, Rhonda, visited, Karen gave her a letter telling her what had

happened. Rhonda reported the letter to Hardy. Hardy was angry and acted like Karen was crazy. (Tr. at 935-37.)

Karen was looking for somewhere to go. (Tr. at 938.) Eventually, a woman invited Karen to live with her in eastern Montana. (Tr. at 939-40.) Hardy drove Karen and R.J. there. (Tr. at 940-41.) She talked to Hardy on the phone a few times, but never lived with him again. (Tr. at 944-45.)

Karen did not report the homicides at that time because she was afraid somebody would be harmed. Karen feared that if law enforcement went to arrest Hardy, he would draw his gun and Z.H. would get shot. (Tr. at 940-41.)

In July 2016, Karen was living in eastern Montana and believed she saw Hardy. She went to the police station trembling and crying and inquired about the witness protection program. She then reported the homicides for the first time. (Tr. at 1375-77.)

The State presented substantial evidence corroborating Karen's report at trial. Law enforcement did not find any evidence that Korjack or Orozco were alive after March 2013. (Tr. at 1407-20, 1447-63; *see also id.* at 1127-28, 1318-24, 1329, 1337, 1451-52, 1611-13.) Neighbors testified that they saw Hardy, two other men, a woman, and two children at the Frenchtown property in the winter of 2012, but after the spring of 2013, they never saw the other two men.

(Tr. at 1020, 1023-25, 1062-64.) Hardy installed a locked electric gate and surveillance cameras on the property. (Tr. at 1037, 1039-40, 1654.)

Leading up to March 2013, Korjack had removed more than $200,000 from his bank accounts. He had placed significant cash and valuables in a safe in the basement. (Tr. at 883-85, 927-28.) After the homicides, Karen heard Hardy using power tools downstairs at night. When she saw the safe again, it had been cut open and was empty. (Tr. at 929.) Bank and surveillance records indicated that Hardy was using Korjack's bank accounts, but Hardy spent money quickly and was running out of money in 2016. (Tr. at 1043-44, 1052, 1420-21, 1424, 1433, 1436-39, 1441-46, 1506-11, 1531-33, 1621-23, 1625.)

A search of the home corroborated Karen's report of the killings. Most significantly, officers discovered human bone fragments and a shell casing in the fire pit. (Tr. at 1501, 1625, 1663, 1682-85.) The bones were small, but an anthropologist was able to identify some bones and determined that they came from at least two different individuals. (Tr. at 1764, 1769-72, 1784, 1779-81.) Blood was located on a television, and the DNA had a high likelihood of being Korjack's. (Tr. at 2106, 2111-13, 2138.) Additionally, a receipt for a window and glass fragments corroborated Karen's report that Hardy replaced a window broken when he shot it. (Tr. at 924-25, 1191, 1494, 1674.) Law enforcement discovered a

safe that appeared to have been cut open, as Karen reported, and a bullet in the drywall in the bedroom. (Tr. at 1495, 1674.)

After Karen reported the homicides, Hardy was arrested and held in the MCDF. While he was there, other inmates reported his statements to them to law enforcement. One of the inmates, Anton Orth, recounted that Hardy said he killed Korjack because he was going to help Karen take Z.H., and they were "planning to move out so I stopped it." (Tr. at 1957.) Orth also said Hardy described the horrible smell of the bodies and how he moved them to the burn pit. (Tr. at 1959-60.)

Hardy told another inmate, Martin Hope, that he was worried about a television that had blood on it. (Tr. at 2048-49, 2070.) Hope's report led law enforcement to test the television and discover blood consistent with Korjack's DNA on the television. Hope testified that Hardy described the shooting to him and said he did it because they were talking about moving away and asked for the deed to the house. (Tr. at 2060-65.)

Orth testified that he heard Hardy offer Braunreiter $10,000 to kill Karen. (Tr. at 1954-56.) The State did not call Braunreiter to testify because he threatened to be disruptive if called and indicated that he would not testify. (Tr. at 503-04.) Another inmate, Bryan Palmer, testified that Hardy blamed Karen for his incarceration and offered Palmer about $10,000 to kill her. (Tr. at 2015-16, 2023.)

Hardy wrote "Death to the whore," and "Death to Karen," in his bible that he had in the jail. (Tr. at 2020, 2164.) Hardy also placed notes on his cell wall that named Karen and several other people next to stick figure drawings that were crossed out with red X's next to the word "DOOMED!" (Tr. at 2165-75.)

II. Postconviction proceedings

Hardy initiated this postconviction case by filing a petition for postconviction relief. (PCR Doc. 1.) He subsequently filed an amended petition for postconviction relief raising the following claims: (1) the State failed to prove each element in the charging document beyond a reasonable doubt; (2) the court lacked subject-matter jurisdiction due to the lack of probable cause for Counts III and IV (solicitation for deliberate homicide); (3) the State used false information from incarcerated informants; and (4) the jury instructions were improper. (PCR Doc. 6; Appellee's App. A at 2.)

Hardy's primary argument throughout his amended petition alleged that the incarcerated informants provided false statements and, because their statements were false, the State did not establish probable cause to support the filing of Counts III and IV or prove the elements of the offenses beyond a reasonable doubt. (PCR Doc. 6.) Hardy repeatedly argued that because the charges were allegedly not supported by probable cause, the court lacked subject matter jurisdiction and

the judgment was void. (*Id*.) Hardy argued that the judgment could be challenged at any time under Mont. R. Civ. P. 60(b)(4). (PCR Doc. 6 at 16-18.) Hardy also requested a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), about the allegedly false statements in the amended information. (PCR Doc. 6 at 16-17, 19.)

In addition, Hardy presented random criticisms of other evidence in the case. (PCR Doc. 6 at 7-12.) Hardy emphasized a letter that Braunreiter sent to the prosecution in which he refused to be a witness in the case and alleged that the State offered to "drop" his felony charges if he would make a statement against Hardy. (PCR Doc. 6 at 13-14; *see also* PCR Doc. 6, Ex. A.)[2] Braunreiter claimed that law enforcement offered Orth a lighter sentence in exchange for information, and Orth lied to them. (PCR Doc. 6, Ex. A at 1.)

Hardy argued that the court erroneously instructed the jury by stating "[t]hat he did so with the purpose that the crime of deliberate homicide be committed, whether or not it was actually committed." (PCR Doc. 6 at 14(i)-(iv)). Hardy argued that the instruction failed to require the jury to find every element of the

[2] The three-page letter written by Braunreiter, dated April 22, 2019, was in Hardy's possession when his direct appeal was pending. Pursuant to his request, his counsel supplemented the record on appeal with the letter written by Braunreiter and the transcript of the confidential conversation between him and his counsel during the trial. (*State v. Hardy*, DA 19-0471, Unopposed Motion to Unseal Confidential Transcript and Supplement the Record, 5/16/22, and Notice issued by this Court May 16, 2022.)

offenses in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), which held that a jury cannot be instructed to presume an element. (PCR Doc. 6 at 14(i)-(iv).)

Hardy also argued that the court erroneously instructed the jury that it could find him guilty if the elements were "provided," rather than "proved." (PCR Doc. 6 at 14(v) (citing Tr. at 2430).)

The court denied Hardy's amended petition without ordering a response from the State. (Appellee's App. A.) The court found that all of Hardy's claims were procedurally barred. (*Id.* at 5-13.) The court concluded that Hardy's argument that Orth gave inconsistent testimony was barred by collateral estoppel. (*Id.* at 7.) The court concluded that Hardy's claim that Braunreiter's refusal to testify prevented the State from proving every element beyond a reasonable doubt was already litigated in Hardy's direct appeal and could not be relitigated in postconviction. (*Id.* at 9-10.)

In addition to finding that Hardy's jury instruction claims were procedurally barred, the court concluded that they failed on the merits. The court explained that Hardy's claim that the court violated *Sandstrom* was incorrect. The court explained that "[u]nlike *Sandstrom*, the jury in Hardy's trial was not informed of a presumption of purpose or intent through one's voluntary actions. Instead, the jury was made aware of the element of purpose embedded in our statutory language." (Appellee's App. A at 11.) The court concluded that "Hardy did not make a

legally cognizable argument that the usage of the word 'purpose' during jury instructions violated her constitutional rights and resulted in a subsequent failure to focus on proving every element of the crime beyond a reasonable doubt." (*Id.* at 12.) The court found that the district court's use of the term "provided," rather than "proved," when reading the jury instructions on deliberate homicide was harmless because the jury was instructed elsewhere in the instructions that the State had to prove the elements beyond a reasonable doubt. (*Id*. at 12-13.) Finally, the court concluded that Hardy's claim of cumulative error was barred because he had not demonstrated any new errors since his direct appeal. (*Id.* at 14-15.)

SUMMARY OF THE ARGUMENT

Hardy refers to his amended petition as having been "deemed denied," but it was not. Montana Rule of Civil Procedure 59(f) does not apply to this postconviction proceeding, so it cannot be used to deem his amended petition denied. Instead, the court denied his amended petition in an order. (Appellee's App. A.) That order should be affirmed.

The district court correctly concluded that all of the claims raised in Hardy's amended petition were procedurally barred. All of the claims could have been raised on direct appeal, so they are barred from being raised in a postconviction

proceeding. As a result, it is unnecessary to review any of Hardy's claims on the merits. In the alternative, the claims can be denied on the merits.

Contrary to Hardy's assertion, a lack of probable cause does not deprive a court of subject matter jurisdiction. The court had subject matter jurisdiction over the proceeding because it has subject matter jurisdiction to hear criminal cases charging felony offenses. Also, the amended information contained overwhelming evidence that Hardy committed deliberate homicide and strong evidence establishing that he solicited two inmates to kill Karen. This evidence easily met the threshold to establish probable cause for the charged offenses. Braunreiter's subsequent change in his statement and his refusal to cooperate does not affect whether the State had probable cause when it filed the amended information. Further, Hardy's solicitation of Braunreiter to kill Karen was still established by Orth's statements.

Additionally, the State presented sufficient evidence to support Hardy's convictions. Overwhelming evidence established that Hardy killed Orozco and Korjack. Karen provided eyewitness testimony, and substantial evidence corroborated her account. Further, the testimony from Orth and Palmer, along with Hardy's statements about Karen, were sufficient to allow a rational trier of fact to find that Hardy solicited Braunreiter and Palmer to kill Karen.

The court correctly denied Hardy's jury instruction claims because, when the instructions are viewed as a whole, they fully and fairly instructed the jury on the elements of the offenses and the State's burden of proof.

Finally, the court did not fail to enforce its subpoena powers. The State chose not to call Braunreiter to testify after Braunreiter said he would be disruptive, and Hardy's counsel did not want to call Braunreiter to testify. Neither party tried to force Braunreiter to appear, so his absence cannot be faulted on the court.

ARGUMENT

I. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on

ineffective assistance of counsel claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

The question of whether the facts alleged in the charging documents are sufficient to establish probable cause is a mixed question of law and fact that this Court reviews de novo. *State v. Giffin*, 2021 MT 190, ¶ 11, 405 Mont. 78, 491 P.3d 1288. Likewise, whether sufficient evidence exists to convict a defendant is an application of the law to the facts, which is reviewed de novo. *City of Helena v. Strobel*, 2017 MT 55, ¶ 8, 387 Mont. 17, 390 P.3d 921.

This Court reviews jury instructions given by a district court for abuse of discretion. *State v. Deveraux*, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198. This Court reviews instructions to determine whether, taken as a whole, the instructions fully and fairly instruct the jury as to the applicable law. *Id.* "If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error." *State v. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866.

II. Hardy's complaints that are unrelated to the denial of his postconviction petition should be disregarded.

Hardy spends the first eight pages of his appellate brief complaining that the Clerk of the Supreme Court, Bowen Greenwood, did not give him notice that the district court record had been filed, triggering the briefing deadline, and that the

Attorney General should not be involved in his case based on ethics allegations that have been filed against him. Both claims are without merit.

Hardy faults Greenwood for not notifying him that the Missoula County Clerk of the District Court sent the record in October 2024. (Appellant's Br. at 4-5.) But Greenwood issued a notice on November 15, 2024, informing the parties that the district court record had been received, and the opening brief was due in 30 days if the record was complete. (*Hardy v. State*, DA 24-0615, Notice of Filing, dated 11/15/24.) If Hardy did not receive that notice, it is possible that the notice was lost in the mail. But there is no indication that Mr. Greenwood engaged in willful concealment of the briefing schedule, as Hardy asserts. Hardy clearly learned of his deadline and filed a brief before the deadline passed. There is no indication any error occurred.

Further, Hardy's complaints about Attorney General Austin Knudsen are irrelevant to his case. Attorney General Knudsen's name appears on Hardy's case because the Attorney General's name appears on all criminal cases involving the State of Montana. Contrary to Hardy's claim, Attorney General Knudsen has not been suspended from the practice of law. Further, Attorney General Knudsen is not directly involved in Hardy's case in any way, so any allegations about Attorney General Knudsen are irrelevant to this case.

III. Hardy incorrectly relies on the Montana Rules of Civil Procedure to erroneously conclude that his amended petition was "deemed denied" under Rule 59(f).

Hardy filed his amended petition on August 2, 2024. (PCR Doc. 6.) He filed a notice of appeal in this court on October 15, 2024, before the postconviction court ruled on his amended petition. (PCR Doc. 8.) The court issued the order denying Hardy's amended petition on December 4, 2024. (Appellee's App. A.)

Hardy filed his brief on January 27, 2025, after the postconviction court denied his amended petition. Nevertheless, Hardy refers to his amended petition as having been deemed denied under Rule 59 of the Montana Rules of Civil Procedure. Rule 59 sets forth grounds for a new trial in a civil proceeding, Rule 59(a)(1), sets forth the time to file a motion for a new trial, Rule 59(b), and sets forth the time to file a motion to alter or amend a judgment, Rule 59(e). Those rules are followed by Rule 59(f), which provides that "[i]f the court does not address in a written order a motion for a new trial properly filed according to Rule 59(b), or a motion to alter or amend a judgment properly filed according to Rule 59(e), within 60 days from its filing date, the motion must be deemed denied."

The plain language of Rule 59(f) demonstrates that it applies to motions for a new trial filed in civil cases pursuant to Rule 59. Hardy instead filed a petition for postconviction relief pursuant to the postconviction statutes in Mont. Code Ann.

title 46, chapter 21. Montana Rule of Civil Procedure 59(f) does not apply to a petition for postconviction relief and has no applicability to these proceedings. This Court has explained that "the Rules of Civil Procedure apply in a post-conviction relief proceeding *only* when they are applicable and not inconsistent with post-conviction statutes[.]" *State v. Garner*, 1999 MT 295, ¶ 26, 297 Mont. 89, 990 P.2d 175 (emphasis in original); *accord* Mont. Code Ann. § 46-21-201(1)(c). The language of Rule 59(f) demonstrates that it applies to motions brought under Rule 59 and does not apply in postconviction proceedings. As a result, Hardy's postconviction petition was not deemed denied after 60 days. Instead, the amended petition was denied when the court issued an order denying it on December 4, 2024.

Further, a motion for a new trial under Rule 59 would not be a valid way to challenge a criminal conviction. This Court has held that a defendant "cannot utilize the Montana Rules of Civil Procedure to reopen his criminal case." *State v. Pierce*, No. DA 24-0390, 2025 Mont. LEXIS 11, * 3 (Mont. Sup. Ct. Jan. 7, 2025). Hardy's amended petition is instead governed by Mont. Code Ann. title 46, chapter 21.

IV. The claims raised in Hardy's amended petition are all procedurally barred under Mont. Code Ann. § 46-21-105(2).

Record-based claims that could have been raised on direct appeal are procedurally barred by Mont. Code Ann. § 46-21-105(2). *Chyatte v. State*, 2015 MT 343, ¶ 14, 381 Mont. 534, 362 P.3d 854. Montana Code Annotated

§ 46-21-105(2) provides that "[w]hen a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter." *Accord State v. Evert*, 2007 MT 30, ¶¶ 15-18, 336 Mont. 36, 152 P.3d 713. This Court has construed this statute to bar issues that could have been, but were not, properly preserved for appeal during trial. *Chyatte*, ¶ 14. "Thus, errors evident on the trial record are generally not grounds for postconviction relief because they could have been preserved, and then raised on appeal." *Chyatte*, ¶ 14.

In Hardy's amended petition, he argued that: (1) the State failed to prove each element in the charging document beyond a reasonable doubt; (2) the court lacked subject-matter jurisdiction due to the lack of probable cause for Counts III and IV (solicitation for deliberate homicide); (3) the State used false information by incarcerated informants; and (4) the jury instructions were improper. All of these claims could have been raised in Hardy's direct appeal. Indeed, some of the claims Hardy raised on direct appeal were very similar to the claims he raised in his amended petition. And Hardy supplemented the record on appeal with the letter from Braunreiter and the transcript of the interview with his counsel, which he also attached to his postconviction petition and amended petition. (*Supra,* footnote 1.)

Because the claims Hardy raised in his amended petition could have been raised on appeal, they may not be raised, considered, or decided in his postconviction proceeding. *See* Mont. Code Ann. § 46-21-105(2). The district court correctly denied Hardy's amended petition on the ground that his claims were procedurally barred. (*See* Appellee's App. A.)

V. Hardy's assertion that the court lacked subject matter jurisdiction is incorrect both because the charges were supported by probable cause and because a lack of probable cause would not deprive the court of jurisdiction.

Hardy appears to argue that the inmates' statements were false, so there was not probable cause to support Counts III and IV and, as a result, the court did not have subject matter jurisdiction over the case. That argument fails because this Court has held, "that whether the information included allegations establishing probable cause to support the charge against [the defendant] is not a jurisdictional issue." *State v. Spreadbury*, 2011 MT 176, ¶ 10, 361 Mont. 253, 257 P.3d 392. This Court relied on *United States v. Cotton*, 535 U.S. 625 (2002), in which the Supreme Court rejected the argument that defects in a charging document may deprive a court of its power to adjudicate a case. *Spreadbury*, ¶¶ 8-10.

"Jurisdiction is 'the court's fundamental authority to hear and adjudicate cases or proceedings.'" *In re E.G.*, 2014 MT 148, ¶ 11, 375 Mont. 252, 326 P.3d 1092. A provision is "'jurisdictional' if it 'delineat[es] the classes of cases (subject-matter

jurisdiction) . . . falling within a court's adjudicatory authority.'" *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 43, 337 Mont. 488, 162 P.3d 121 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)); *see also In re E.G.*, ¶ 11.

The jurisdiction of a district court over criminal cases is governed by the Montana Constitution and Mont. Code Ann. § 3-5-302(1) and (1)(a), which provide that district courts in Montana have original jurisdiction in "all criminal cases amounting to felony[.]" Mont. Const. art. VII, § 4(1); Mont. Code Ann. § 3-5-302(1), (1)(a). Because this was a criminal case, the district court had subject matter jurisdiction to adjudicate the case.

Hardy's argument that the amended information lacked probable cause is also meritless. "The sufficiency of charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information." *Giffin*, ¶ 15 (quotation marks and citation omitted). The charging documents need to establish "a probability that the defendant committed the offense." *Id*. That does not require the State to make out a prima facie case that the defendant committed the offense. *Id*.

The charging documents in this case easily met that standard by establishing a probability that Hardy committed two counts of homicide and two counts of solicitation to commit homicide. The affidavit filed in support of the amended information was 18 pages long. It recounted Karen's report that Hardy had shot

and killed Orozco and Korjack. (Doc. 36 at 7.) The affidavit provided six pages of detailed facts that corroborated Karen's report and demonstrated that Hardy had been collecting Korjack' and Orozco's mail and had spent money from Korjack's bank account. (*Id*. at 10-15.) The affidavit also set forth evidence that had been located at the home, which corroborated Karen's report. (*Id*. at 16.) Those facts overwhelmingly established a probability that Hardy committed two counts of deliberate homicide under Mont. Code Ann. § 45-5-102(1).

The affidavit contained two pages of facts alleging that Hardy solicited two inmates to kill Karen. (*Id*. at 16-18.) According to the affidavit, Orth told law enforcement that he heard Hardy solicit Braunreiter to kill Karen. (*Id*. at 17.) Law enforcement spoke to Braunreiter, and he confirmed that Hardy solicited him to kill Karen. (*Id*.) Palmer also told law enforcement that Hardy solicited him to kill Karen. (*Id*. at 18.) Those allegations established a probability that Hardy committed two counts of solicitation to commit deliberate homicide under Mont. Code Ann. §§ 45-4-101 and 45-5-102(1).

Hardy's request for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), was properly denied. First, the hearing was clearly barred because it was not requested at trial and cannot be requested for the first time in a postconviction appeal. *See Chyatte*, ¶ 14; Mont. Code Ann. § 46-21-105(2). Second, Hardy has not met the standard for a *Franks* hearing. In *Franks*, the Supreme Court held that

"where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held." 438 U.S. at 155-56. Hardy cannot meet that standard because he has not put forth any evidence demonstrating that the State knowingly, intentionally, or with reckless disregard for the truth included false statements. Braunreiter's letter recanting his statement to law enforcement that Hardy solicited him to kill Karen was not written until a year after the affidavit was filed. Further, Braunreiter's recantation does not establish that the solicitation did not occur when another witness, Orth, maintained that it did. The postconviction court did not err in declining to hold a *Franks* hearing.

VI. The State presented sufficient evidence to support Hardy's convictions.

This Court reviews the sufficiency of the evidence in a criminal matter to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Strobel*, ¶ 8. The trier of fact retains the function of determining the credibility of the witnesses and the weight to be given to their testimony. *Id.*

The State presented overwhelming evidence to support the jury's conclusion that Hardy committed deliberate homicide. Karen's eyewitness testimony was corroborated by substantial evidence, including the discovery of human bones in the burn pit, Korjack's blood on a television, and a bullet in the wall in the downstairs bedroom; the observations of neighbors recounting that the two males were no longer present after the spring of 2013 and there was a long, horrible-smelling fire on the property around that time; financial and surveillance records demonstrating that Hardy was spending Korjack's money; and the incriminating statements Hardy made to inmates.

The solicitation charges were also supported by sufficient evidence from which a rational trier of fact could find that Hardy committed both counts. The solicitation charges in Counts III and IV were based on Hardy soliciting Braunreiter and Palmer to kill Karen. (Doc. 36 at 17-18.)

Although Braunreiter did not testify, Orth testified that he heard Hardy solicit Braunreiter to kill Karen. As this Court recounted in *Hardy*,

> Orth testified that he overheard a conversation between Hardy and Braunreiter that took place in Braunreiter's jail cell on October 23, 2017. Orth testified that he walked in on the conversation where Hardy solicited Braunreiter to 'hit' Karen or 'take her out,' and recalled that Hardy said he would pay Braunreiter $10,000, through Hardy's sister, and then another $10,000 when it was done. Orth also heard a second conversation with similar substance the next day where Hardy was negotiating with Braunreiter, offering to post Braunreiter's bond so he could get out of jail to kill Karen, and once again said he would pay Braunreiter $10,000 up front and another

> $10,000 after, through his sister. While Hardy did not use the word 'kill,' Orth testified that everyone knew a 'hit' referred to murder, and that he 'absolutely' believed Hardy was serious when he solicited Braunreiter to kill Karen. Orth further testified that he witnessed Hardy talking to Braunreiter about tracking down Hardy's friend in California to 'beat[] him down for the money that he took from Hardy and finding out where his mom lives . . . and getting whatever's left in payment for the hit on Karen.'

Hardy, ¶ 60.

An officer testified that Hardy made a call from the detention center to the mother of his California friend, and he told her that the friend had stolen a large amount of money from him. (Tr. at 2154.)

Orth testified that Hardy told him he could pay Orth to make sure Karen did not testify, but then said he was kidding. (Tr. at 1953.) Orth did not believe he was. (*Id*.)

Palmer testified that Hardy blamed Karen for his incarceration and offered Palmer about $10,000 to kill her. (Tr. at 2015-16, 2023.) Hardy told Palmer he wanted Karen to be shot in the head and be unrecognizable. (Tr. at 2019.) Palmer believed Hardy was "very, very serious." (Tr. at 2020.) Palmer told law enforcement because he wanted to protect Karen. (Tr. at 2023-24.) Palmer also provided law enforcement with Hardy's Bible, in which Hardy had written, "Death to the whore" and "Death to Karen." (Tr. at 2020, 2164.)

The State also admitted the notes from Hardy's cell in which he wrote Karen's name and the names of other people he disliked, placed red X's over stick-figure drawings, and wrote, "DOOMED!." (Tr. at 2165-75.)

This evidence was sufficient to allow a rational trier of fact to conclude that Hardy solicited Braunreiter and Palmer to kill Karen.

VII. The court fully and fairly instructed the jury.

The court correctly concluded that, in addition to being procedurally barred, Hardy's jury instruction claims fail on the merits. Hardy argues that the court erred because it instructed the jury that he could be convicted of deliberate homicide if the State "provided" the elements of the offense, rather than "proved." (Appellant's Br. at 25.) He also argues that the court violated *Sandstrom* by instructing the jury "[t]hat the Defendant acted purposely or knowingly." (Appellant's Br. at 26.) Both claims are belied by the record.

Jury Instruction No. 21 instructed the jurors on the issues in deliberate homicide. (Trial Doc. 368, Instr. No. 21.) After setting out the elements, the instruction stated,

> If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

> If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

(*Id*.)

When the court read the instruction, the court misspoke, using the word "provided," but then immediately corrected itself. The court stated, "If you find from your consideration of the evidence that all of these elements have been *provided—proved* beyond a reasonable doubt, then you should find the defendant guilty." (Tr. at 2430 (emphasis added).) When read in context, it is clear that the court instructed the jury that the elements had to be proved beyond a reasonable doubt.

Further, as the postconviction court noted, the jury was informed that the "State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt[,]" and that the presumption of innocence "is not overcome unless from all the evidence in the case you're convinced beyond a reasonable doubt that the Defendant is guilty. . . ." (Trial Doc. 368, Instr. No. 4; Tr. at 770; Appellee's App. A at 12-13.)

The court correctly concluded that the jury was fully and fairly instructed on the State's burden of proof.

Hardy's challenge to the phrase "That the Defendant acted purposely or knowingly," is similarly baseless. The Court instructed the jury that:

> To convict the Defendant of [Counts I and II], deliberate homicide, the State must prove the following elements:
>
> 1. That the Defendant caused the death of [Thomas Korjack and] Robert Orozco, [] human being[s];
>
> **AND**
>
> 2. That the Defendant acted purposely and knowingly.

(Trial Doc. 368, Instr. Nos. 21, 22.)

Instructions 21 and 22 set out the elements that the jury would need to find to convict Hardy of deliberate homicide and did not instruct the jury that Hardy acted purposely and knowingly. As a result, *Sandstrom*, which held that it is error to instruct the jury to presume a mental state, is inapplicable. *See Sandstrom*, 442 U.S. 510. The instructions on deliberate homicide, which were consistent with Montana Model Criminal Jury Instruction 5-101(a), fully and fairly instructed the jury.

VIII. Hardy's claim that the trial court failed to enforce the court's subpoena powers is waived because Hardy did not raise it in his amended petition. It is also factually incorrect.

Hardy waived his claim that the trial court failed to enforce the court's subpoena powers by failing to raise it in the postconviction court. Montana Code Annotated § 46-21-105(1)(a) requires all grounds for relief to be raised in the original or amended petitions for postconviction relief. *See Ford v. State*, 2005 MT 151, ¶ 20, 327 Mont. 378, 114 P.3d 244. "A postconviction claim that is

not raised in an original or amended original petition cannot be raised for the first time on appeal." *Sanders v. State*, 2004 MT 374, ¶ 14, 325 Mont. 59, 103 P.3d 1053. Hardy did not raise this claim in either his original petition or his amended petition.[3] (PCR Docs. 1, 6.) This claim should not be considered because he cannot raise it for the first time on appeal.

The claim is also factually incorrect. Hardy did not attempt to bring Braunreiter to trial by subpoenaing him. Instead, the State obtained a subpoena for Braunreiter but then failed to call him to testify because he indicated that he would not cooperate. (Tr. at 2343-44; *see also id*. at 2344-52.) Hardy's counsel indicated that Hardy wanted him to call Braunreiter to testify, but counsel stated, "I do not want to do it. I don't think it's in his best interests." (Tr. at 2344.) The court did not fail to enforce its subpoena powers when both parties chose not to bring Braunreiter to trial.

[3] Because the amended petition replaces the original petition, rather than supplements it, it is only the amended petition that matters, but Hardy did not raise the claim in either petition.

CONCLUSION

The district court's order denying Hardy's amended petition should be affirmed.

Respectfully submitted this 8th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,976 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-08-2025:

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