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SHIRLEY E. FAUST Clerk
By__________ Deputy

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

CODY WILLIAM MARBLE,
Petitioner,

-vs-

STATE OF MONTANA,
Respondent,

Dept. No. 4
Cause No. DV-10-1670
The Hon. Edward P. McLean, Presiding

MOTION TO DISMISS JUDGMENT

COMES NOW KIRSTEN H. PABST, County Attorney of Missoula County, and respectfully moves the Court to dismiss the judgment in Cause No. DC-02-103, entered by the Court on January 9, 2004, in the interests of justice.

RELEVANT BACKGROUND

Cody Marble [Petitioner] was charged by Information in Cause No. DC-02-103 on March 21, 2002, with Sexual Intercourse Without Consent. The charging document alleged that on March 10, 2002, Petitioner, then 17, had

anal sexual intercourse with Robert Thomas, then 13, while both were temporary inmates in the juvenile side of the Missoula County Detention Facility [MCDF]. Both Petitioner and Robert Thomas were released from the detention facility on March 13, 2002.

Thomas did not report the offense, which is not unusual for victims of sexual assault. On March 16, 2002, almost a week after the offense, one of the other juveniles from the pod—Scott Kruse—contacted a guard to report the alleged attack. The Sheriff's Department began an investigation. During the course of the investigation, some juvenile inmates in Pod C told detention staff that a rape had occurred in the outer, partially visible area of the pod's shower room and involved two male inmates. In summary, the investigation and trial revealed the following information:[1]

I. JUVENILE POD-MATES

A. Scott Kruse

Scott Kruse, in custody for participating in a brutal homicide of a homeless man, was the first person to contact the guards and make a report. He said he witnessed Marble sexually assaulting Thomas and described it in detail. Kruse's homicide charge was later reduced to a misdemeanor and he

[1] This summary is by definition incomplete. It was compiled from review of thousands of pages of documentation and intentionally does not include all of the facts at issue since the case's inception in 2002. It does contain important, relevant facts that would be admissible at a subsequent trial.

was released. Immediately after his release, Kruse fled the jurisdiction. It was later determined at trial that Kruse lied about witnessing the assault. He could not have possibly witnessed any of it, as documentation established that Kruse had been confined to a cell with no visibility to the pod. When confronted with his lie prior to his departure, Kruse recanted his statement against Marble. He was not available to testify at Marble's trial and has since died.

B. **Gregory Van Mueller**

Gregory Van Mueller initially said that he saw nothing. He later provided inconsistent accounts, which partially mirrored Kruse's allegations of what happened. Van Mueller believed that Kruse was maneuvering to get a better deal on Kruse's own case. Van Mueller is currently on probation for abusing methamphetamine. Recent attempts to contact him were not successful.

C. **Nicholas Melton-Roberts**

Nicholas Melton-Roberts told interviewers that Van Mueller and Kruse could not have seen any part of the assault. Melton-Roberts also believed that Kruse was attempting to maneuver a better deal for himself. At trial, Melton-Roberts testified that he had said he wasn't sure it really happened at all. Corrina Marry, another inmate, testified at trial that Melton-Roberts told her that Marble had assaulted Thomas. Since the trial, Marry executed an

affidavit, stating her trial testimony was wrong and that Melton-Roberts had been adamant that the assault *never* happened. Melton-Roberts is now deceased and Marry stands by her affidavit, recanting her trial testimony.

D. **Timothy Ruthford**

Timothy Ruthford told a deputy that he witnessed ***oral*** sex between Marble and Thomas. He said he overheard discussions about "sucking off." At trial he testified that he believed the two had anal sex. A recantation letter surfaced, purportedly written by Ruthford, stating that the case against Marble was a set-up. Ruthford denies writing it and stands by his trial testimony. He is currently on parole for manufacturing methamphetamine.

E. **Russell Miller**

Russell Miller, like Ruthford, told a deputy that he witnessed ***oral*** sex. At trial, he testified that he saw activity that led him to believe that Marble and Thomas had engaged in anal sex. Miller recently told County Attorney Investigator Mike Dominick that he stands by his testimony at trial. Miller is currently an inmate at the MCDF for parole violations after convictions of assault with a weapon, robbery, and tampering with witnesses, and is facing a new charge of failure to register as a violent offender.

F. **Justin Morin**

Justin Morin said that he wasn't sure what had happened. He said he

saw Marble crawl under a stall to get out of the shower room where Marble and Robert had been. Morin said that Thomas told him about the assault. However, Thomas denied telling Morin anything. Morin was not called as a witness at trial. Morin, now a Department of Corrections inmate for two felony theft convictions, recently told Investigator Dominick that he did not wish to participate in any future proceedings related to the Marble case.

G. **Corrina Marry**

After some conflicting testimony from the pod-mates, the State called Corrina Marry at trial. Ms. Marry testified that Melton-Roberts told her that Marble had assaulted Thomas. However, Marry, as previously mentioned, later executed an affidavit, stating her trial testimony was wrong and that Melton-Roberts had been adamant that the assault *never* happened. Melton-Roberts is now deceased and Marry still stands by her affidavit, recanting her trial testimony.

H. **Robert Thomas**

Missoula County Sheriff's Deputy Rob Taylor located and interviewed Robert Thomas who said Marble forced him to have anal sex. Robert Thomas told Taylor that he hadn't wanted to report what Petitioner did to him because he was afraid of retaliation. At trial, Thomas testified that Marble raped him. A security video partially corroborated Thomas's testimony by showing Marble

and him prior to and after the alleged assault. However, the video did not capture the assault itself and has been attacked by Marble on the grounds that it is incomplete and the timeline is inaccurate.

On August 28, 2006, Robert Thomas was charged and convicted of statutory rape for having sexual intercourse with an underage girl. After violating his probation, the Court sent Robert Thomas to the Montana State Prison on April 4, 2007.

In July 2010, Thomas recanted his trial testimony to the Montana Innocence Project, in writing, stating that the assault never happened. Thomas wrote:

> 8 or so years ago when I was 13 at Missoula County Juvenile Detention Facility I was sitting at a table in the dayroom. There were three other people at the table. They told me to say that Cody Marble raped me. But this did not happen. And now today I want to come out and let it be known. I'm coming forward now because I'm in prison on a sex crime and know what it is like. So I don't want him to be charged with one when innocent. When I was in jail, I was the youngest & smallest and I was pressured into going along with it.

Missoula County District Judge Harkin later made a finding that the recantation legally constituted substantive evidence for subsequent proceedings. Thomas later recanted the recantation during a post-conviction hearing after then Missoula County Attorney told Thomas if he strayed from his original testimony the prosecutor would try to have him charged with perjury. Thomas is now deceased.

II. DETENTION OFFICERS

A. Scott Newman

Chief Detention Officer Scott Newman testified that he did not believe there was an adequate window of opportunity between pod checks for Marble to have committed the assault as described.

B. Susan Latimer

Detention Officer Susan Latimer testified that she had a feeling that something "weird" was going on that night. She said a co-worker at the MCDF, now deceased, told her that Marble was being set-up. After the trial, Latimer contacted the Missoula Independent newspaper and told the reporter that she never believed Marble was guilty and that she was "not asked the right questions" at trial. Latimer no longer works at the MCDF and recently confirmed that she will testify she believes that Marble was "railroaded."

C. Gary Lancaster

Detention Officer Gary Lancaster had heard juvenile inmates discuss "setting up" other juveniles for wrongdoings they did not commit. Lancaster testified that Scott Kruse, the one who initiated the original disclosure, was lying about being a witness to the assault. Nick Melton-Roberts told Lancaster that neither he nor Kruse saw the assault happen.

D. Joanie Bigelow

Detention Officer Joanie Bigelow testified that she heard Gregory Van Mueller tell two other juveniles, including Corrina Marry that the assault never happened.

E. **Dee Jackson**

Detention Officer Dee Jackson testified that Gary Lancaster told her that Melton-Roberts said that this was a plot that they made up to frame Marble.

F. **Tracy Addyman**

Detention Officer Tracy Addyman also testified about Melton-Roberts belief that this was a plot to frame Marble. She said that Marble was a leader who was disliked by his pod-mates.

III. <u>POST TRIAL</u>

On November 20-22, 2002, the case was tried by a jury, who found Marble guilty. The Court sentenced Marble to the Montana State Prison for 20 years, with 15 suspended, with credit given for all time in custody awaiting disposition. Written Judgment was entered by the Court on January 9, 2004.

During unrelated post-conviction proceedings, Dr. Michael Scolatti, Ph. D., who worked at the detention facility and was familiar with the pod, filed an affidavit stating that the assault would not have happened the way it was described. Additionally, Dr. Scolatti came to the conclusion through psychological testing of Marble, that Marble did not fit the profile of a sexual

offender who would commit that type of offense in that open setting. Additionally, Marble submitted to a polygraph examination and the polygrapher, Bob Stotts, concluded that Marble was being truthful in denying the assault on Thomas. Such opinion testimony and polygraph evidence is not allowed under Montana law and, consequently, was not considered in this case.

In July 2010, Robert Thomas made the handwritten recantation detailed above. He provided the statement to the Innocence Project. Thomas believed the Innocence Project would help him with his own legal case. Thomas was cautious not to swear to any of his statements.

On December 14, 2010, Petitioner filed the underlying Petition for Post Conviction Relief. On June 20, 2011, Robert Thomas's attorney, Brett Schandelson, wrote a letter to the Missoula County Attorney's Office and counsel for Petitioner informing the parties that Thomas no longer wanted to be involved in Petitioner's post conviction proceedings. He did not want to answer questions put to him by either party.

In October of 2011, the district court granted Thomas limited use immunity, over the then-County Attorney's objection, for statements made during the deposition and hearing. This meant that the statements made at the time of the hearing could not be used against Thomas. However, the

1 immunity was limited and Thomas could still be prosecuted for perjury if he
2 recanted his story.

3 Thomas was transported to the MCDF for his deposition scheduled for
4 January 26, 2012. He was still an inmate but was scheduled for a parole
5 hearing in the near future, and hopeful of being released soon. Prior to the
6 deposition, held inside of the jail, the then County Attorney made it clear that if
7 Thomas didn't recant his recantation, he would be charged with perjury,
8 forgoing any likely possibility of his parole or release. Specifically, the County
9 Attorney said:

> As part of his order in this matter the judge has granted you use immunity pursuant to section 46-15-331(1) of the Montana Code Annotated for any testimony given during the course of these two depositions that are taking place today.
>
> Essentially, what that means is that anything that you say in this proceeding could not be used in a potential prosecution of you in a future proceeding. ***However, that does not mean that you would get immunity from prosecution.*** And in fact, the essence of this entire matter comes down to whether you testified truthfully at Cody Marble's trial approximately 10 years ago. **And *I would advise you that if in fact I am able to establish sufficient evidence outside of what you say in this deposition, that you lied during that trial on the substance of the issue, and that is whether or not Cody Marble raped you, that I would in fact prosecute you for perjury for your actions in lying at that trial. So you know, that's something that you certainly need to be aware of.*** [2]

(emphasis added). Thomas then recanted his recantation and said that his

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[2] Deposition of Robert Thomas, January 26, 2012

trial testimony was true.

On October 24, 2012, the district court held a hearing on the Petition. The district court applied the *Beach II*[3] standard and ultimately denied the Petition. Petitioner appealed to the Montana Supreme Court.

Petitioner claimed on appeal that the district court applied the wrong standard. Instead of holding him to the *Beach II* standard, the Court should have applied the much lower *Clark* [4] test.

While the appeal was pending, Robert Thomas was paroled. On April 7, 2014, Thomas was involved in an encounter with the police in Havre, Montana. During the course of a 21-hour stand-off, Thomas shot himself in the head, tragically taking his own life.

After hearing oral argument on the case, the Montana Supreme Court reversed the district court's denial of the Petition and remanded the case back to district court with instructions to apply the statutory (lower) standard in Montana Code Annotated sec. 46-21-102(2) in deciding whether Petitioner should get a new trial.

SUMMARY

The Montana Supreme Court recently reversed this case, mandating

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[3] *State v. Beach*, 2013 Mt 130, 370 Mont. 163, 302 P.3d 47(*Beach II*)

[4] *State v. Clark*, 2005 Mt 330, 330 Mont. 8, 125 P.3d 1099.

that we take a more critical look at the foundation of Marble's conviction. The new standard is lower than the standard employed by the district court in dismissing Marble's Petition, and it also broadens the scope of evidence to be considered.

As sworn prosecutors, we will always search for the truth. In conducting the search for justice in this case, we have come to the conclusion that justice now dictates that the judgment be dismissed. We take this position after weighty consideration of our ethical obligation to do justice.

Our examination today looks back at the investigation, the trial, and what's happened since the trial. Since Marble's conviction, at least three witnesses—including the victim— have recanted their statements. Of the original pod-mates, three are dead. Of those alive, two initially said they witnessed *oral* (vs. anal) sex until they were corrected by an investigator. The first juvenile to disclose the crime and get the ball rolling was Scott Kruse, who lied about everything. It was determined he could not have seen anything from where he was at the time of the alleged assault. A host of law enforcement officers testified that the crime could not have happened; there was no adequate window of opportunity; that the other inmates concocted a "set-up"; and/or that Marble was railroaded.

Prior to his death, the victim recanted his trial testimony and his

recantation has been determined by the district court to constitute substantive evidence. At his deposition Thomas recanted his recantation, after the then Missoula County Attorney threatened to charge him with perjury should he stray from his trial testimony. A new charge of perjury would have foreclosed any possibility of his long-awaited release from prison.

The State is aware that this decision will not be without criticism. We are often called upon to make difficult and unpopular choices but decide matters based on the facts and the law—not on special interests, threats, or public pressure to act otherwise. For reasons explained in more detail below, we have concluded that Marble's judgment lacks integrity and in the interests of doing justice, it must be dismissed.

PROCESS

After the case was remanded back to the district court with instructions to apply the new statutory standard, counsel for the State reviewed thousands of pages of documents, including initial investigative reports and depositions, trial transcripts, appeal records and post-conviction litigation documents. The State additionally reviewed materials and documents that had not yet been submitted to the court which weigh on the validity of the sentence. Finally, counsel for the State and the County Attorney Investigator interviewed and/or attempted to interview several witnesses regarding subsequent developments

with the case.

MEMORANDUM

I. DOING JUSTICE—The State is Filing This Motion Under Its Ethical Duty to the Legal System and Under the Prosecutor's Solitary Objective to Pursue Justice

More than 70 years ago, the United State Supreme Court recognized that the responsibility of a prosecutor is not merely to win convictions, but rather to do justice.[5] The language in *Berger v. United States*,[6] quoted innumerable times by courts in many jurisdictions, sets the prosecutor apart from attorneys of every other practice of law.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that ***justice shall be done***. As such, he is in a peculiar and definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[7]

That sustaining principle is codified in the American Bar Association's Standards of Criminal Justice. "The duty of the prosecutor is to seek justice,

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[5] Doing Justice, National Center for Prosecution Ethics, 2nd Edition (2007.
[6] 295 U.S. 78, 55 S. Ct. 629 (1935.
[7] *Id.* (emphasis added)

not merely to convict."[8]

A recent respected publication, "*The Right Thing*," Ethical Guidelines for Prosecutors states: "A prosecutor's worst nightmare is not losing a major case or watching a dangerous criminal go free, it is convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice."[9] Further,

> The prosecutor . . . enters a courtroom to speak for the people and not just some of the people. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the people. That body of 'the People' includes the defendant and his family and those who care about him.[10]

II. DOING JUSTICE – The State is Fulfilling its Continuing Obligation to Do Justice After a conviction

A prosecutor's responsibility to do justice does not end after obtaining a conviction. The obligation extends through the appeals and post conviction proceedings and, in fact, never ends. The Ethical Guidelines elaborated,

> "**Keep Doing Justice After a Conviction**. Our ethical duties don't end when a defendant is convicted. Prosecutors must act appropriately upon learning of new evidence indicating that an innocent person was convicted, keeping in mind that **no person or system is infallible and that exonerating the innocent is as important as convicting the**

[8] ABA Standards of Criminal Justice: The Prosecution Function, standard 3-1.2(c)(3rd Ed., ABA 1993).
[9] "The Right Thing," Ethical Guidelines for Prosecutors, District Attorneys Association of the State of New York, 3 (2016) Produced by the Ethics and Best Practices Subcommittees of the DAASNY Committee on the Fair and Ethical Administration of Justice.
[10] *Id.*, quoting *Lindsey v. State*, 725 P.2d 649 (WY 1986) (quoting Commentary On Prosecutorial Ethics, 13 Hastings Const LQ 537-539 (1986).

guilty. In July of 2011, the District Attorneys Association of the State of New York adopted the following Statement of Principle: "The fundamental core of a prosecutor's responsibility is to 'do justice'. It is an obligation that does not end with a conviction, regardless of whether the conviction is by verdict or plea. Whenever a credible claim of innocence is put forward we remain committed to pursuing the path that justice demands. Every case must be determined on its facts and its own merits…."[11]

In a federal post-conviction case, *Francois Holloway v. United States of America*,[12] Judge Gleeson elaborated on the role of the prosecutor. He wrote, "There are injustices in our criminal justice system, including in this district, and they often result from the misuse of prosecutorial power. . . But prosecutors also use their powers to *remedy* injustices. . . A prosecutor can do justice by the simple act of going back into court and agreeing that justice should be done."

Francoise Holloway was a black man who, in 1994, was convicted, along with an accomplice, of stealing 3 vehicles at gunpoint. Holloway rejected a plea offer that would have required nine years in prison and was then convicted at trial. Judge Gleeson sentenced him to the mandatory 57 years in prison, with a parole date of 2045—a significantly higher penalty than many of those convicted of murder in the federal system. Holloway's accomplice, who pled guilty and testified against Holloway, was released in

[11] *Id.* At 13.
[12] *Holloway v. US*, 68 F. Supp. 3rd 310, 311 (E.D.N.Y. 2014).

1997.[13]

In 2014, in an opinion that condemned federal sentencing guidelines but expounded on the special role of the prosecutor, Judge Gleeson noted that Holloway was 57 years old, had 5 children between the ages of 23-37 and 8 grandchildren. While in prison, Holloway made considerable efforts to better himself by completing many programs, including wellness, parenting, stress management, officiating, song writing, food certification, culinary arts, and others. By 2014, Judge Gleeson believed that Holloway had served enough time but lacked the authority to release him---unless the prosecutor would agree to dismiss some of the charges, years after the conviction was final.[14] After studying the case and Holloway's performance in prison, she did just that. Not because she had to but because it was the right thing to do.[15]

Judge Gleeson noted that the prosecutorial power at issue in *Holloway* had been exercised in other cases in his jurisdiction. He discussed another case in which the prosecutor agreed to an order vacating the sentence of a defendant whom no one, not even the defendant, knew was pregnant at the time of her original sentencing. The agreement of the prosecutor allowed the Judge to resentence the woman to a shorter prison term so that the infant

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[13] *Id.* at 313.
[14] *Id.* at 315.
[15] *Id.* At 316-317.

would not have to be placed into foster care.[16]

A prosecutor's obligation to do justice continues long after a case is closed, if circumstances warrant taking another look at the conviction's integrity.

III. WORKING TOGETHER TO PRESERVE THE INTEGRITY OF THE CRIMINAL JUSTICE PROCESS.

In response in large part to the work of the Innocence Project and its utilization of modern technological tools such as DNA to prove that some inmates were innocent of the crimes for which they were serving time, several district attorneys' offices in larger jurisdictions have recently formed Conviction Integrity Units [CIUs].[17] These prosecution-based CIUs are set up to review convictions which may have resulted in an injustice and, more importantly, to identify where cases went wrong, fill procedural gaps and change policies to guard against future error. Though the structures of the CIUs vary by jurisdiction, these units often work cooperatively together with the Innocence Project and defense counsel to ensure that justice is done, while strengthening the criminal justice system to avoid the same pitfalls in current and future cases. It is truly the goal of all involved to perfect a system that convicts the guilty and protects the innocent.

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[16] *Id.* at 2, footnote 2.

[17] See for example, the CIU in the Dallas, Texas District Attorney's Office at www.dallascounty.org.

Though our sparser population in Montana may not warrant the financial requirements associated with operating its own CIUs, implementing a process for reviewing viable claims of innocence remains of utmost importance. Montana prosecutors are committed to prosecuting and incarcerating the guilty and equally bound to protecting the innocent. The Montana Supreme Court, in reversing the case at bar, has provided us with a unique and timely opportunity to take a more critical look at the integrity of the underlying conviction.

IV. THE LEGAL STANDARDS FOR EVALUATING POST-CONVICTION CLAIMS OF ACTUAL INNOCENCE.

A. Substantive Innocence Claims vs. Procedural Innocence Claims.

Post-conviction claims of actual innocence generally fall into two broad categories—substantive innocence claims, in which new evidence, like DNA, is available to definitively establish innocence—and procedural claims, in which new but less definitive evidence, such as a recantation by a witness, is available to warrant a new trial.

The first type, called a *Hererra*[18] claim, is seeking by way of definitive evidence, immediate dismissal and freedom. Under a successful *Herrera* claim, a defendant is considered truly innocent and is forever exonerated.

[18] *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993).

Because the relief is so extreme, the standard of proof is fairly high. A *Herrera* claim assumes that the trial was error-free, but that the new evidence is so compelling that it demonstrates innocence on its face. The standard a *Herrera* claimant must meet is "by clear and convincing evidence that no reasonable juror" would find him guilty, [19] meaning that if presented with the new evidence **all twelve jurors** would find the defendant not guilty.

The second kind of post conviction innocence theory is called a *Schlup* claim, where newly discovered evidence, usually something less definitive than DNA, such as a recantation, demonstrates that "a constitutional violation has probably resulted" in a wrongful conviction.[20] It must also show there was an error in the trial. If a defendant succeeds on a *Schlup*-type claim, he or she is entitled to a new trial, not instant exoneration. Unlike *Herrera*, a *Schlup* claimant must merely show that "it is likely or probable that no reasonable jury would find him guilty,"[21] meaning that if presented with the new evidence a single juror would probably find the defendant not guilty.

In Montana, the court has employed varying standards for claims of actual innocence that fall on the *Schlup* – *Herrera* continuum. At Marble's post-conviction hearing, the district court used the test it refers to as *Beach*

[19] *Id.*
[20] *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995).
[21] *Id.*

II,[22] which is very similar to the very-high *Herrera* standard. Specifically, the district court analyzed whether the petitioner "affirmatively and unquestionably established his innocence," based on reliable new evidence.[23]

Based on that standard, the district court found against the petitioner, ruling that although Thomas's recantation is substantive evidence, it was not reliable and does not *affirmatively and unquestionably established his innocence*.

On appeal, the Montana Supreme Court decided that the district court should have used the standard found at Montana Code Annotated sec. 46-21-102(2) and was in error to rely on the "extraordinarily high standard" discussed in *Beach II*.[24] The Montana Supreme Court noted that the *Beach II* standard, where a petitioner must affirmatively and unquestionably establish his innocence, is not appropriate for all types of new evidence. In fact, in discussing the *Marble* case, the Montana Supreme Court recognized that the standard, when applied to testimonial rather than scientific new evidence, would be impossible to meet.[25] Specifically, the Court reasoned,

> "While this test may be well-suited to exonerating evidence that is scientific and absolute in nature, such as DNA, it is not workable in situations in which the newly discovered evidence is of a different type,

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[22] *State v. Beach*, Supra.
[23] *Marble v State*, 2015 Mt. 242, 380 Mont. 366, 355 P.3d 742.
[24] *Id.* at para 32.
[25] *Id.*

> such as perjured or new alibi evidence, a confession by a third-party, or—as here—recantation evidence. Powerful new evidence of this type could certainly establish that the defendant did not commit the crime of which he was convicted, but it will not, standing alone, 'unquestionably establish his innocence.'"[26]

The Montana Supreme Court pointed to the "exacting" language of the statute in solidifying the new standard to employ when evaluating claims of newly discovered evidence.[27] It held that the new standard is, **if newly discovered evidence, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, he or she is entitled to post-conviction relief.**[28]

The new standard is more akin to the *Schlup* test than a *Herrera* or *Beach II* test. Additionally, the Montana Supreme Court suggested that the district court use parts of the *Clark* test as guidance.[29] Those factors are:

1. The evidence must have been discovered since the defendant's trial,
2. The failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part,
3. The evidence must be material to the issues at trial, and
4. The evidence must be neither cumulative nor merely impeaching.[30]

At Marble's district court hearing on the post-conviction petition, the State urged the Court to hold Marble to the highest standard, the *Beach*

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[26] *Id.*
[27] *Id.* at 15
[28] *Id.*at para. 36, citing *Clark*, Supra.
[29] *Id.*
[30] Id. At para. 22, citing *Clark* at para. 34.

II/Herrera standard, requiring him to "unquestionably establish his innocence."[31] The District Court agreed and dismissed Marble's Petition on grounds that he failed to meet that standard. Marble, on the other hand, had asked the Court to utilize the lower *Clark* standard. Interestingly, the Montana Supreme Court rejected both arguments, and crafted a new standard that falls between the two extremes.

V. EXAMINING THE FACTS OF PETITIONER'S CASE UNDER A NEW LIGHT--THE STANDARD ESTABLISHED BY THE MONTANA SUPREME COURT

Now, the legal standard for newly discovered evidence in Montana is if newly discovered evidence is proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, he or she is entitled to post conviction relief.[32]

This new statutory standard not only lowers the standard that the district court employed in dismissing Marble's Petition, it also broadens the scope of evidence that should be considered to include "the evidence as whole." It mandates that we take a more critical look at the foundation of Marble's conviction. It provides an opportunity to look at the integrity of this conviction in light of a new standard and in light of new evidence.

[31] Id. at para. 18.
[32] Mont. Code Ann. sec. 46-21-102(2).

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As sworn prosecutors, we will always search for the truth. In conducting the search for justice in this case, we have come to the conclusion that justice now dictates that the judgment be dismissed. We take this position after weighty consideration of our ethical obligation to do justice.

The Montana Supreme Court's new opinion expanded the scope of what we are required to consider and mandated an examination the bricks—the facts and evidence—that make up the foundation this case was built upon. While the prior examination was limited, by law, to the metaphorical roof, we now have been ordered to take a closer look at the bricks, at the foundation, at the beginning.

Our examination today looks back at the investigation, the trial, and what's happened since the trial. Since Marble's conviction, at least three witnesses—including the victim— have recanted their statements. Of the original pod-mates, three are dead. Of those alive, two initially said they witnessed *oral* (vs. anal) sex until they were corrected by an investigator. The first juvenile to disclose the crime and get the ball rolling was Scott Kruse, who lied about everything. It was determined he could not have seen anything from where he was at the time of the alleged assault. A host of law enforcement officers testified that the crime could not have happened; there was no adequate window of opportunity; that the other inmates concocted a

"set-up"; and/or that Marble was railroaded.

Prior to his death, the victim recanted his allegation and his recantation has been determined by the district court to constitute substantive evidence. At his deposition Thomas recanted his recantation, after the prosecutor threatened to charge him with perjury should he stray from his trial testimony. A new charge of perjury would have foreclosed any possibility of his long-awaited release from prison.

Cases involving informants—those in trouble seeking to provide information on other defendants—are particularly concerning. When informants are seeking rewards for their information or testimony, there arises an "unacceptable temptation to commit perjury."[33] According to Jim and Nancy Petro, authors of False Justice, "if the mind-set of police and prosecutors is to pursue truth rather than to just obtain a conviction, the use of likely unreliable informant testimony is at least reduced."[34] Scott Kruse and Nick Melton-Roberts both exemplified concerns about informant testimony in this case.

The State is aware that this decision will not be without criticism. We are often called upon to make difficult and unpopular choices but decide matters

[33] False Justice, Jim and Nancy Petro, Kaplan Publishing (2010, 120

[34] *Id.* at 121

based on the facts and the law—not on special interests, threats, or public pressure to act otherwise.

Judge Gleeson, in the *Holloway* case, eloquently concluded,

> It is easy to be a tough prosecutor. Prosecutors are almost never criticized for being aggressive, or for fighting hard to obtain the maximum sentence, or for saying 'there's nothing we can do' about an excessive sentence after all avenues of judicial relief have been exhausted. Doing justice can be much harder. It takes time and involves work, including careful consideration of the circumstances of particular crimes, defendants, and victims—and often the relevant events occurred in the distant past. It requires a willingness to make hard decisions, including some that will be criticized. . .
>
> This is a significant case, and not just for Francois Holloway. It demonstrates the difference between a Department of Prosecutions and a Department of *Justice*.[35]

When we began this lengthy review in Marble's case, we expected to find substantial reliable evidence that the Petitioner had been rightfully convicted. To the contrary, numerous faults undermining the integrity of the original conviction have developed in the years since and were brought to a head by virtue of the Montana Supreme Court's recent reversal. Compounding the problems with the facts and fighting further in the hopes of keeping Marble jailed, is not the proper legacy for our community. We recognize that there may be people who will always insist that Marble is guilty, including people who are respected and informed members of our community.

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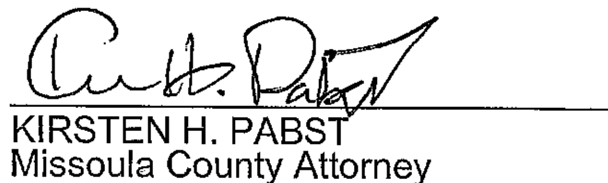
[35] *Holloway*, at 8, 10.

But we cannot allow personal opinions to sway us from our sworn duty to seek justice, not merely to convict. This judgment lacks integrity and in the interests of doing justice, it must be dismissed.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court dismiss the Judgment in Cause No. DC-02-103, entered by the Court on January 9, 2004. When the Court dismisses the underlying Judgement, the State respectfully requests the Court to dismiss the above-entitled Petition for Post-Conviction Relief for the reason that it is moot.

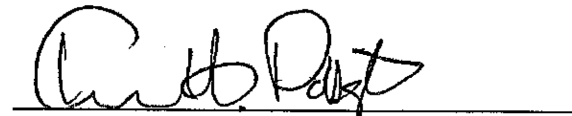
DATED this April 19, 2016.



KIRSTEN H. PABST
Missoula County Attorney

CERTIFICATE OF SERVICE

I certify that on April 19, 2016 I mailed a true and accurate copy of the foregoing Motion to Colin Stephens, via e-mail.



The Hon. Edward P. McLean, Presiding
Department No. 4
Fourth Judicial District
Missoula County Courthouse
Missoula MT 59802
(406) 258-4774

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

CODY WILLIAM MARBLE,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent,

Dept. No. 4

Cause No. DV-10-1670

ORDER

Upon considering the State's Motion to Dismiss the Judgment in Cause No. DC-02-103, entered by the Court on January 9, 2004, and good cause appearing, the judgment is hereby dismissed. Correspondingly, Petitioner's above-entitled Petition for Post Conviction Relief in this matter is moot and is hereby dismissed.

DATED this ______ day of April, 2016.

The Hon. Edward P. McLean
District Court Judge, Presiding

cc: K. Pabst, Missoula County Attorney
Colin Stephens
Montana State Prison records