

No. DA 18-0394

STATE OF MONTANA

Plaintiff and Appellee,

V.

PERRY L. BURNETT, JR.,

Defendant and Appellant

FILED

JAN 16 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-Second Judicial
District Court, Carbon County, The Honorable Blair Jones,
Presiding

APPEARANCES:

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PRO SE DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUE

Did the district court properly deny the Appellant 'MOTION TO WITHDRAW A PLEA OF GUILTY' Under MONT. CODE ANN. 46-16-105, on his claim that he received assistance of counsel (IAC) during plea negotiations?

STATEMENT OF THE CASE AND FACTS

I. CRIMINAL PROCEEDING

On May 25, 2016, the State charged Appellant Perry Leonard Burnett, Jr. (Burnett) with one count of Felony: FAILURE TO REGISTER AS A SEXUAL OFFENDER. The penalty upon conviction was a maximum of Five (5) year's. State Public Defender Gregory E. Paskell Filed a Notice of Appearance on behalf of Burnett, (on 12-30-14).

II. MOTION TO WITHDRAW A PLEA OF GUILTY

Burnett filed a petition to withdraw a plea of guilty on April 23, 2018, Burnett alleged that Paskell was ineffective because counsel did not look into the supplied paperwork of the allegations brought forth; in addition counsel failed to advocate for defendant in a meaningful way which constituted a deficient performance, because the result's of this case would have been different if defendant's counsel would not have entered a plea of guilty; to further stipulate the facts above support this claim of misrepresentation by counsel (see: United States v. McCoy, 215 F.3d 102, 107 (9th Cir. 2000) quoting United States v. Taylor, 139 F.3d 924, 929-930 (D.C. Cir. 1988); Strickland v. Washington, 466 U.S. 668, 686 (1984) being ineffective for failure to raise, State v. Letasky, 2007 MT 51 paragraph 18; 336 MONT. 178 paragraph 18; 152 P.3d 1288, 1291, paragraph 18; (MONT. 2007), and Friedman v. Boucher, 580 F.3d 847, 854 (9th Cir. Sept. 8, 2009, Amended), Finally Burnett alleges that if Paskell

had adequately advised him, he would not have taken the plea offer from the State, Burnett argument was that the appropriate remedy would be for the district court to vacate this above named cause in the Interest of Freedom, Justice, and Equality as establish by caselaw and precedent case law that mandates that this Court do so, by immediately releasing defendant from incarceration that the result of a illegal conviction and Sentence, that was the result of ineffective assistance of counsel (IAC) and a VOI) judgment.

Burnett now appeals the district court denial of his request for motion to withdraw a plea of guilty.

SUMMARY OF THE ARGUMENT

This Court should consider any IAC claims that Burnett raises for the first time on appeal, additionally despite the advice of Public Defender Gregory E. Paskell, the Appellant Burnett saw this offer as the State's admission that they did not have a good strong case and he would have further maintained his innocence, if counsel would have been effective (see Strickland v. Washington, 466 U.S. 668, 686 (1984), United States v. Cronin, 466 U.S. 648, 660 (1984), Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), United States v. McCoy, 215 F.3d 102, 107 (9th Cir. 2000).

ARGUMENT

I. STANDARD OF REVIEW

Because counsel of Defendant did not look into the supplied documents of the allegations brought forth, in addition counsel failed to advocate for defendant in a meaningful way which constituted a deficient performance, because the results of this case would have been different if defendant's counsel would not have entered a plea of guilty; this plea of guilty was clearly influenced by counsels lack of effective assistance (see: St. V. Henderson, 2004 MT 173, 332 M69, 93 P.3d 1231 (2004), Hill v. Lockhart, U.S. 52, 59-60, (2)

106 S. Ct. 366, 371, 88 L. Ed. 2d 203, 210-11 (Ark. 1985),
United States v. McCoy, 215 F.3d 102, 107 (9th Cir. 2000) quoting
United States v. Taylor, 139 F.3d 924, 929-930 (D.C. Cir. 1988).

II. THIS COURT SHOULD CONSIDER ALL IAC CLAIMS BURNETT DID RAISE IN HIS MOTION TO WITHDRAW A PLEA OF GUILTY

Additionally a lack of effective counsel may impinge the fundamental fairness of the proceeding being challenged, And the right to counsel "means" the right to effective assistance of counsel (see: Strickland v. Washington, 466 U.S. 668, 686 (1984), United States v. Cronin, 466 U.S. 648, 660 (1984), Cayler v. Sullivan, 446 U.S. 335, 350 (1980), Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed. 2d 426 (1978))

III. THE DISTRICT COURT DID NOT PROPERLY DENY BURNETT MOTION TO WITHDRAW A PLEA OF GUILTY.

A. INTRODUCTION

Appellant alleges that his counsel was ineffective, The facts above support this claim of misrepresentation by counsel being ineffective for failure to raise State v. Letasky, 2007 paragraph 18; 336 MONT. 178 paragraph 18; 152 P.3d 1288, 1291, paragraph 18 (MONT. 2007), and Friedman v. Boucher, 580 F.3d 847, 854 (9th Cir., Sept 8, 2009, Amended).

The State of Montana also tried to prove a State of Tennessee violation with no jurisdiction to adjudicate Tennessee Laws; Additionally "[N]o state can officially legislate except with reference to it's own jurisdiction." Friedman v. Boucher, 580 F.3d 847, 854 (9th Cir., 2009, Amended) (reversed and remanded 1983 summary judgment that "Nevada State officials can take action which would

otherwise be prohibited in Nevada against a Nevada citizen in the State of Nevada simply by relying on a Montana Statue") (citing: "BMW of North America, Inc. v. Gore, 517 U.S. 559, 572 (1996), and N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 160-161 (1914)).

In my initial petition MOTION TO WITHDRAW A PLEA OF GUILTY to revoke Probation must also establish the elements of a crime, and may not be prosecuted based only on a breach of a condition itself. (see: State v. Letasky, 2007 MT 51 paragraph 18; 336 MONT. 178 paragraph 18; 152 P.3d 1288, 1291 paragraph 18; (MONT. 2007)).

It is said in the initial petition, in order to revoke Probation The Montana Twenty-Second District Court and Probation & Parole must establish the elements of a crime...

B. PRESIDING JUDGE BLAIR JONES OF TWENTY-SECOND JUDICIAL WAS BIAS TO THE MONTANA AND UNITED STATES CONSTITUTION BY VIOLATING DUE PROCESS LAW

1. STANDARD OF RELIEF

The Appellant hereby brings forth this STANDARD OF RELIEF, based on State Law as held in the Montana Codes Annotated (MCA), 46-22-101 through 46-22-307. This Courts jurisdiction is appropriate per Mont. Const. Art. VII § 4.

This Appellant meets the criteria of 46-22-101, in that that the Appellant is imprisoned at Montana State Prison, and believes that he is imprisoned illegally based on the Appellant's Fourteenth Amendment rights guaranteed

The Federal Courts, have ruled that a judge shall not be allowed to preside in any further proceeding, when that judge presided in any form of the accusatory process in a criminal case. That the judge must recuse himself from the further proceedings as a matter of Due Process of Law. The judge in the accusatory stage in this matter was the same judge who pronounced sentencing upon the Appellant, thus the sentence was illegal and void as well

The Appellant will prove through the Court Docket of this matter, DC-14-18 that this District Court violated the Appellants constitutional rights as are guaranteed and by the decisions of the following U.S. Supreme Court cases law.

II. STATEMENT OF RELIEF

The Appellant will address the substantial denial of constitutional rights as proven by the attached docket (Appellation of this Twenty-Second Judicial District Court.

Montana Legislature.

The Appellant meets all the criteria of 46-22-201, as is shown within. The Appellant claims that the Appellee violated his Due Process rights as are guaranteed by the above "Law of the Land" in both the Montana and United States Constitution, as well as by the statutes as written by Montana Legislature.

I, 9.

to him in the U.S. Constitution, and the rights guaranteed in the Montana State Constitution, Article II, § 17 - Due Process of Law. "No person shall be deprived of life, liberty, or property without the due process of law." The Appellant is also guaranteed by the Montana Constitution, Article II, § 17 - "This privilege of Standard of Relief shall never be suspended." This is also guaranteed in the U.S. Constitution under Article

be proven by the Following Federal rulings by the U.S. Supreme Court and the Ninth Circuit Court of Appeals. Both of these courts following decisions bind this court to abide by these decisions. The whole of the Appellants claim of his denial of constitutional rights are based on these ruling as follows that the presiding judge acts were Bias by Law.

III. CONSTITUTIONAL VIOLATION CLAIM
WITH SUPPORTING
MEMORANDUM OF LAW

CLAIM# 1 : This Montana Twenty-Second Judicial District Court violated the Appellants guaranteed Fourteenth Amendment rights of the U.S. Constitution and also his rights guaranteed by the Montana State Constitution under Art. II, §17, as mandated by the U.S. Supreme Court.

The Appellant presents to the Court the Constitutional caselaw that substantiates this claim of Judicial Bias and partiality that is a matter of court record as proven in Appendix A, and the conviction, and the sentence pronounced are illegal and Void.

The Montana Constitution, Art. §20, covering 'Initiation of Proceeding' sets forth that "criminal cases within the jurisdiction of any court inferior to District Court shall be by complaint. All criminal actions in District Court shall be prosecuted either by information - after examination and commitment by a magistrate or after leave granted by the court - or by indictment."

The filing of a document in District Court seeking leave to file an "information" in the District Court, and the "information document itself, supports probable cause" with facts set forth as alleged by the State of Montana, demonstrating the probable cause to prosecute the accused. This stage of a criminal charge is called the accusatory stage in the process of charging a citizen with a criminal offense.

In Appendix A, it clearly shows who the presiding judge was who assumed the jurisdiction in this matter. The judge presided over the "Affidavit and leave to file information" concerning the probable cause in this matter, which in Montana is the accusatory stage during a criminal case matter. Appendix A also later shows the same judge presided over the sentencing stage in this present matter and that this same judge pronounced the judgement of guilt and sentence in this present case.

The United States Supreme Court has declared that the above acts, by this court and the presiding judge to be a violation of the Due Process of Law, as per the Fourteenth Amendment of the U.S. Constitution. The presiding Judge Blair Jones violated the fundamental rights of the Appellant, due to the fact that a judge who has taken part in the accusatory process of a criminal case of a accused person, ~~to~~ to preside over further proceedings violates the accused persons right against a bias judge. The U.S. Supreme Court has stated that "the possibility of actual bias on the part of the judge... is to high to be considered tolerable," Withrow v Larkin, 491 US 431, 2d 712, 95 S. Ct. 1456 (1975), (supporting, In re Murchinson, 349 US at 137, 75 S. Ct. 623 (1955)). "not only is a biased decision-maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness," quoting Murchinson at 136, and also Turney v Ohio, 273 US 510, 532, 71 L. Ed. 749, 47 S. Ct. 437, 50 ALR 1243 (1927).

The Precedents of the U.S. Supreme Court in regard to the issue of Judicial Conduct to prevent even the appearance of bias in criminal cases has been thoroughly explored, reviewed, defined and upheld by the Ninth Circuit Court of Appeal in cases such as the present matter also. See Crater v Galaza, 491 F.3d 1119, 1131 (2007) referencing Fundamental Fairness and accuracy of criminal procedures (citing Caspari v. Bechlen, 510 US 383 (1994)) of persons detained pursuant to a final judgement of a state court that lacked jurisdiction. In that case the Ninth Circuit explained that the "Supreme Court precedents reveal only three circumstances in which an appearance of bias-- as opposed to evidence of actual bias-- necessitates recusal of the judge," and one of the three, being mandated recusal "when the judge acted as part of the accusatory process," ref. In re Murchinson, 349 US at 137.

In Hurles v Ryan, 650 F.3d 1301 (2011), the Ninth Circuit Court of Appeals set forth the U.S. Supreme Court's intentions regarding judicial bias, "specifically the judges lack of authority to preside over further proceedings in a case after taking part in the accusatory process of that case, and the mandatory disqualification requiring the judges 'self-recusal'." Further stating therein, "The Burden is on a judge to disqualify [himself] herself, even if a party never seeks recusal," and "a claimant need not prove actual bias to make a due process violation. Indeed the United States Supreme Court has pointed out that it would be impossible for a litigant to prove actual bias on the part of the judge (Caperton v Massey Coal Company, 556 US 868, 129 S.Ct. 2252, 2263, 173 L.Ed. 1208 (2009))... It is for this reason that the Courts precedents on Judicial Bias focus on the appearance of and potential for [Judicial] bias, not actual bias," "Due Process thus mandates a stringent rule for judicial conduct, and requires recusal even

of judges who would do their best to weigh the scales of justice equally, if the risk of bias is high... Recusal is thus required if the judge acts as part of the accusatory process.", referencing In re Murchinson, 341 US at 137.

The disqualification of a judge under any of the three circumstances is not discretionary: any Judge who takes part in the accusatory process in a case, which in Montana includes the 'Information' process, must recuse himself from any further proceedings in the case. The Third circumstance is very explicit and has been the "LAW OF THE LAND" since the Murchinson Court decision in 1955: 63 years ago.

This Judicial Court and judge disregarded this Federal mandate routinely. The Judges of this Judicial District have thus denied the Appellant and others of their guaranteed Fourteenth Amendment Right to the DUE PROCESS OF LAW. Any Judge in Montana or in any other jurisdiction of the United States, who takes part in the 'Information' process of the prosecution of a criminal case is disqualified by the DUE PROCESS OF LAW from taking part in any further proceedings. For a judge to disregard the law and go forward from the accusatory process to preside has generated a situation wherein "The Court lacks Jurisdiction" over the subject matter and party, because the judge had no authority to proceed. The proceedings in such a situation would be illegal and VOID. All proceedings, whether a trial by jury or before the bench, plea hearings, judgements, punishments, and appeal proceedings are thus void. Unless addressing the specific issue of the 'Nullity' of these proceedings in which the defendant was unlawfully denied DUE PROCESS and has been imprisoned under a void judgement and sentence, the appeal proceedings "founded upon [Void Proceedings] are worthless", having been based upon a void judgement which is in legal effect, No judgement at all.

An "illegal or void proceeding is a legal nullity, which occurs when a court has no equity jurisdiction over a matter or persons. A void judgment is in legal effect no judgment. From it no rights can be obtained or lost. Being worthless in itself, proceedings founded upon it are equally worthless. It neither binds, nor bars anyone. All acts performed under it and all claims flowing out of it are void." Freeman, on Judgments (2d Ed.) Vol. 1 at 320-321, "although the term describes a result, rather than the condition, that renders a judgment [as void] unenforceable it suffices to say that a void judgment is one so affected by the fundamental infirmity, that the "Infirmity may be raised even after the judgment became final," citing United States v Morgan, 346 US 502, (1953-54).

The Murchinson Court in their 1955 decision and other supporting decisions since, mandate the disqualification, and the self recusal for any judge, from presiding over any further proceedings in the prosecution of a criminal case wherein the judge took part in the state's accusatory process. This is routinely and unlawfully done in the present of Montana judicial court. The elected officials including judges, disregard this within the judicial Branch and by the Executive Branch through the office of the Attorney General. This unconstitutional procedure by the Montana District Court Judges, (under the scrutiny of both the Justices of the Montana Supreme Court and the Montana Attorney General, who is supposedly the people of Montana's 'watchdog' concerning our constitutional rights), is a blatant disregard to the citizens of Montana and their protected civil rights, of persons accused of a criminal offense. Being accused does not mean guilty, per our rights.

District Court judges are not allowed to assume the roll of both the accuser and the adjudicator, thus in doing so (like in this present matter), violate the accused (like the Appellant) Due Process of Law as held by the Fourteenth Amendment, the Eighth Amendment Mandate against

involuntary servitude without being 'Duly Convicted', and the Sixth Amendment right to "a fair trial before a fair judge." This ²² Twenty-Second Judicial District Court denied the Appellant of his above rights as guaranteed all Americans.

IV. CONCLUSION

The Appellant requests that this Honorable Court vacate this above named cause in the 'Interest of Freedom, Justice and Equality as established by case-law and precedent caselaw that mandates that this Court do so. The Appellant do request that this Honorable Court immediately release the Appellant from incarceration at the Montana State Prison in Deer Lodge, Montana, which is the result of a illegal conviction and sentence, that was the result of a VOID judgement.

RELIEF

wherefore, the Appellant requests that this Supreme Court vacate this above named cause in the Interest of Justice as established by caselaw and precedent caselaw that mandates that this Court do so. The Appellant requests that this Supreme Court immediately release the Appellant from incarceration that is the result of a illegal conviction and sentence, that was the result of a VOID judgement.

Respectfully Submitted this 8th day of Jan, 2019.

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By: /s/ Perry L. Burnett, Jr.
PERRY L. BURNETT, JR.,
APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this 'principal opening brief' is legibly handwritten...

15/ Perry Leonard Burnett, Jr.,

PERRY LEONARD BURNETT, JR.,
APPELLANT

CERTIFICATE OF SERVICE

I, PERRY LEONARD BURNETT, JR., hereby certify that I have served true and accurate copies of the foregoing Appellant's 'opening brief' to the following:

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IN THE SUPREME COURT OF THE STATE OF MONTANA
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APPENDIX

Carbon County District Court
Case Register Report
Twenty Second District Court Case No. DC 14-48 Appendix A